

LABOR RELATIONS LAW

Thirteenth Edition

2020 CUMULATIVE SUPPLEMENT

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Preface

This Supplement updates the thirteenth edition through the end of the 2019-20 Supreme Court term and includes relevant Labor Board and lower court decisions through June, 2020. We thank our students and Casebook users for their helpful suggestions. The bold page numbers indicate the place in the Casebook affected by the supplemental materials.

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Part One

INTRODUCTION AND HISTORICAL BACKGROUND

SECTION I. HISTORICAL BACKGROUND

C. THE PERIOD SINCE 1933

6. Organized Labor from the 1970s to the Present

Page 18.

Steven Greenhouse, *Beaten Down, Worked Up: The Past, Present, and Future of American Labor* xi-xii, 328 (Alfred A. Knopf 2019)

Now . . . labor unions are far weaker. The decline of unions, and of worker bargaining power in general, has taken a toll on our nation. It has contributed to many of the country's major problems: increased income inequality, wage stagnation, declining mobility, the high number of low-wage jobs, and the skewing of our politics in favor of corporations and wealthy campaign donors.

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Labor unions and their ability to create a powerful collective voice for workers, played a huge role in building the world's largest, richest middleclass. The success of American business of course played a major part as well, but it was unions' strikes, and the millions of workers who took to the streets, that pressured companies to share their profits more fairly after World War II.

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[J]ust 6.4 percent of private-sector workers are union members, and just 10.5 percent of the workforce overall. By far the biggest obstacle to unions' growth is fierce employer opposition, which is encouraged by the extraordinarily weak penalties that companies face when they break the law battling unions. . . [T]he main penalty that employers often face for such lawbreaking is having to post a notice on the bulletin board admitting they broke the law and promising not to do it again. Researchers have found that nearly 20 percent of rank-and-file union activists are fired during organizing drives, a percentage that is so high because the punishment is so puny. It is almost foolhardy for antiunion companies not to fire the two or three workers heading an organizing drive.

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ROBERT B. REICH, SAVING CAPITALISM 126-127 (Alfred A. Knopf 2015).

A third driving force behind the declining power of the middle class has been the demise of unions. Fifty years ago, when General Motors was the largest employer in America, the typical worker earned \$35.00 an hour in today's dollars. By 2014, America's largest employer was Walmart, and the average hourly wage of Walmart workers was \$11.22. This does not mean that the typical GM employee was "worth" more than three times what the typical Walmart employee in 2014 was worth. The GM worker was not better educated or more motivated than the Walmart worker. The real difference was that GM workers a half century ago had a strong union behind them that summoned the collective bargaining power of all autoworkers to get a substantial share of company revenues for its members. And because more than a third of workers across American belonged to a labor union, the bargains those unions struck with employers raised the wages and benefits of nonunionized workers as well. Nonunion firms knew they would be unionized if they did not come close to matching the union contracts.

Another significant factor with respect to the decline of union membership concerns the impact of technology on traditional unionized jobs. See generally Daniel Susskind, *A World Without Work* (2020). Many manufacturing jobs have been automated, many service positions are being replaced by robots, and within the next few years several million truck driver and taxi/Uber/Lift driver jobs will be taken over by autonomous vehicles. If unions are to expand in future years, they will have to determine how to organize individuals working in positions that have not been entirely taken over by artificial intelligence. See also Robert Reich, *The System* (2020).

SECTION II. INTRODUCTORY MATERIALS

A. COVERAGE OF THE NATIONAL LABOR RELATIONS ACT

2. NLRB Exercise of Its Jurisdiction

3. Exclusions From Coverage

a. Independent Contractors

NOTES

1. In *FedEx Home Delivery*, 361 N.L.R.B. No. 55, 201 L.R.R.M. 1050 (2014), the Board found that single-route truck drivers in Connecticut were employees, reiterating its commitment to a multi-factored test and focusing on the right of control exercised by the master over the details of the work. The Board rejected evidence that the drivers had a “theoretical” opportunity for financial gain or loss, finding that only “actual” entrepreneurial opportunity was relevant in distinguishing an employee from an independent contractor, and then only as a single factor to be weighed in the analysis. In *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), the D.C. Court of Appeals chastised the Board for finding that single-route truck drivers were employees on a factual record the court characterized as “materially indistinguishable” from the record in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) [cited in the text on Page 25], save that the drivers in the earlier case were located in Delaware. Accordingly, the court vacated the Board’s decision and reaffirmed the significance of an entrepreneurial opportunity for gain or loss as a lens through which the common law factors comprising the right of control analysis must be viewed.

In *SuperShuttle DFW*, 367 N.L.R.B. No. 75, 2019 L.R.R.M. 24595 (2019), the Labor Board overturned the 2014 *FedEx Home Delivery* decision in a case involving the status of SuperShuttle van drivers at the Dallas-Fort Worth Airport. The Board majority emphasized the need to apply the common-law standards set forth in the Restatement of Agency, especially those concerning the level of control a business exercises over workers, the method of payment, and the amount of supervision involved. Applying these standards, the three-member Board majority found that the SuperShuttle van drivers were independent contractors.

2. In *Lancaster Symphony Orch. v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), the court enforced the Board’s finding described on Page 25, that musicians working for a small orchestra were employees rather than independent contractors, given the fact the orchestra controlled the manner and means of the musicians’ work, they were paid by the hour for their work, and they were part of the regular business of the orchestra.

3. In *Crew One Productions v. NLRB*, 811 F.3d 1305 (11th Cir. 2016), the court reversed a Labor Board finding that stagehands sent to work for concert producers by a referral service were employees, finding that the lack of control exercised by the referral service over the work of the stagehands was insufficient to render such persons employees instead of independent contractors.

4. Might an employer’s misclassification of workers as independent contractors rather than employees itself violate the NLRA where it is designed to block union organizing efforts? Although the NLRB’s General Counsel previously suggested that it could be a violation in *Pac. 9 Transp., Inc.*, NLRB Div. of Advice, No. 21-CA-150875 (released Aug. 26, 2016), the Labor Board rejected this perspective in *Velox Express, Inc.*, 368 N.L.R.B. No. 61, 2019 NLRB Lexis 488 (2019). The Board found that such a misclassification does not communicate to workers that organizing or other protected activities would be futile, nor does it threaten workers for reprisal if they engage in such activities.

5. See Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. LAW REVIEW 1673 (2016) (discussing how many employers have been working to classify many workers as independent contractors or as employees of outside entities, and predicting that by 2020 up to 40% of workers will fall into one of these categories and lose their protection under various labor and employment laws, unless courts adopt a modern approach to determining which party really controls and benefits from the work of such persons).

b. Supervisory and Managerial Employees

Page 27.

NOTE

In *Pac. Tell. Group, Inc. v. NLRB*, 817 F.3d 85 (4th Cir. 2016), the court sustained a Labor Board finding that putative supervisors whose work assignments did not require the use of independent judgment precluded them from being classified as “supervisors.”

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NOTES

1. In *United Nurses Assn. of Calif. v. NLRB*, 871 F.3d 767 (9th Cir. 2017), the court held that a hospital violated the NLRA when it promoted a pro-union employee to a supervisory position and then terminated him because of his prior union organizing activities.

2. In *University of Southern Calif.*, 365 N.L.R.B. No. 89, 208 L.R.R.M. 1202 (2016), the Board held that non-tenure track faculty members are not “managerial” employees and are thus

eligible to vote in a representational election, due to their lack of meaningful control over academic programs, finances, and other areas of university governance. On appeal, the D.C. Circuit upheld the general rule applied by the Labor Board to determine whether faculty members constituted “managerial” personnel, but held that the Board had focused too rigidly on the number of faculty members on basic university committees. The Court indicated that whether a particular faculty subgroup is in the majority or minority of university committees is a relevant issue, but one which should not be applied in a determinative manner. The Board had to consider other factors that might be relevant to the degree to which the academics in question influence basic university policies. *University of Southern Calif. v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019).

c. Other Exclusions

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NOTES

In *Columbia University*, 364 N.L.R.B. No. 90, 207 L.R.R.M. 1089 (2016), the Labor Board overturned the *Brown Univ.* decision and held that graduate teaching assistants and research assistants are “employees” under the NLRA who can unionize for bargaining purposes. How far could this be extended? Should undergraduate resident advisers be considered “employees” for purposes of union representation and bargaining? In September of 2019, the Labor Board proposed a new rule that would expressly preclude college teaching and research assistants from forming unions on the ground their activities are primarily educational rather than economic.

In *Berger v. Natl. Collegiate Athletic Ass’n.*, 843 F.3d 285 (7th Cir. 2016), the court held that college student athletes are not “employees” covered by the Fair Labor Standards Act, and this decision would presumably exclude such individuals from coverage under the NLRA.

Page 30.

NOTE

In *Saint Xavier University*, 13-RC-092296, 208 L.R.R.M. 2029 (2017), the Labor Board ruled that it could hold a representation election for a unit of housekeeping employees employed by a private, nonprofit religious university, since such housekeepers provide wholly secular services, and there was no indication that they were expected to perform a role furthering the religious mission of the university.

In 2018, the Labor Board ordered Duquesne University of the Holy Spirit to bargain with a union that represented adjunct faculty members even though the college is a religious entity, on the ground the adjunct teachers did not carry out any religious functions. Nonetheless, on appeal the D.C Circuit Court vacated the Board's decision. It held that under the Supreme Court's *NLRB v. Catholic Bishop of Chicago* decision, the Board could not assert jurisdiction over even lay teachers at religious schools since such action would create a "significant risk" of a First Amendment violation. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020).

1. ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD

Page 31, Note.

In *S. Ocean Med. Ctr.*, 22-CA-223734, 2020 NLRB Lexis 8 (2020), the Labor Board held that if one member of a three-member panel decides to recuse himself, the panel still has a quorum which enables the remaining two members to decide the case.

Page 32.

NOTES

1. In *NLRB v. Bluefield Hosp. Co., LLC*, 821 F.3d 534 (4th Cir.2016), the court held that the Labor Board's interpretation of the NLRA as authorizing it to delegate to Regional Directors the authority to resolve representation election objections during the period in which the NLRB lacked a quorum was reasonable and thus entitled to *Chevron* deference. As a result, Regional Directors could resolve such cases even after the Board's quorum had been lost.

2. The 1998 Federal Vacancies Reform Act requires almost all persons serving in an acting capacity to step aside once they have been nominated for the permanent position in question while the Senate is deciding whether to confirm their permanent appointment. 5 U.S.C. § 3345(b)(1). In 2010, President Obama put Lafe Solomon in the position of Acting General Counsel to the Labor Board, and seven months later nominated him for a four-year term as General Counsel. Although the Senate never acted on his nomination, he continued to serve as Acting General Counsel until November of 2013. In *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), the Supreme Court held that this action violated § 3345(b)(1) and was thus invalid.

Part Two

ORGANIZATION AND REPRESENTATION OF EMPLOYEES

SECTION I. THE RIGHT OF SELF-ORGANIZATION: PROTECTION AGAINST EMPLOYER UNFAIR LABOR PRACTICES

A. EMPLOYER INTERFERENCE, RESTRAINT OR COERCION

1. Limiting Organizational Activities on Employer's Premises

Page 52.

NOTES

1. In *North Memorial Health Care v. NLRB*, 860 F.3d 639 (8th Cir. 2017), the court affirmed a decision by the Labor Board finding that an employer violated the NLRA when it refused to allow nonemployee union representatives access to the facility cafeteria that was open to the general public.

In *UMPC*, 368 N.L.R.B. No. 2, __ L.R.R.M. __ (2019), the Board overturned a number of prior decisions and held that employers may ban union representatives from promoting union issues in public space within employer facilities if they are not employees of the firms involved. “[A]n employer may prohibit nonemployee union representatives from engaging in promotional activity, including solicitation or distribution, in its public cafeteria so long as it applies the practice in a nondiscriminatory manner by prohibiting other nonemployees from engaging in similar activity.” In *Bexar County Performing Arts Foundation*, __ N.L.R.B. No. __ 2019 NLRB Lexis 468 (2019), the Board further limited union access to employer premises when it held that the Bexar County Performing Arts Center Foundation lawfully prevented union musicians who worked for a symphony that leases space and performs at the auditorium from protesting a ballet company’s use of recorded music inside the arts center. This decision overturned a number of prior decisions that had recognized the right of off-duty workers to handbill in support of other persons working on the same premises.

Although the Labor Board had previously held that stores which allowed charitable organizations to solicit on their property could not discriminatorily prohibit non-employee union organizers from soliciting on their open parking lots, in *Kroger*, 368 N.L.R.B. No. 64, 2019 L.R.R.M. 334848 (2019), the Board overruled those prior decisions and held that a store that

allowed several charitable entities to solicit on its property had the right to prohibit solicitation in its parking lots by nonemployee union organizers.

2. In *Image FIRST Uniform Rental Service, Inc.*, 365 N.L.R.B. No. 132, 209 L.R.R.M. 2017 (2017), the Board held that an employer unlawfully prohibited union representatives from distributing union literature on a road adjacent to the firm's facility, tried to remove them, and summoned the police, where the distributors were standing on the shoulder and not on the employer's property.

3. How important is the *Lechmere* ruling in a world where individuals are increasingly connected on the web? UnionizeMe.Org is a website designed to make it easier for workers to organize themselves without the aid of union organizers. Once 30 percent of workers employed by the same employer in a geographic area sign electronic authorization cards, UnionizeMe will submit the cards to the Board to trigger a representation election. See *UnionizeMe.Org Aims to Cut Out Organizing Middle Man*, Daily Lab. Rep. (BNA) No. 232, Dec. 2, 2016. Would this strategy eliminate the need for face-to-face contact with union organizers?

4. In *Cott Beverages Inc.*, 16-CA-181144 (2020), the Labor Board held that a manufacturing employer did not violate the NLRA when it barred employees from having cell phones at their workstations or on the production floor based upon the fact the company's "legitimate business interests outweigh[ed] the relatively slight risk" to protected concerted activities. The restriction only applied to work areas, thus allowing employees to use their cell phones during nonwork time in nonwork areas. "We find that the broad prohibition of personal items including cell phones from work areas is a reasonable, lawful effort to ensure the integrity of the respondent's beverage production process ..."

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Note 5.a. Solicitation

(1) During Working Time. The Eighth Circuit refused to enforce the Board's order in *ConAgra Foods, Inc.* [cited in the main text at page 54], explaining that because the employee's brief mention of union cards was part of her ongoing effort to secure signatures for the union, it was solicitation covered by the employer's lawful no-solicitation rule, and thus the employer was justified in imposing discipline on her for violating the rule. *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079 (8th Cir. 2016). The court noted that its ruling did not necessarily categorize isolated mention of union authorization cards or providing information as solicitation, distinguishing the case before it where the discussion was "part of a concerted series of interactions."

In *Wynn Las Vegas, LLC*, 28-CA-155984 (2020), the Labor Board held that “solicitation” is not limited to situations where one worker asks another to sign an authorization card. “Solicitation for or against a union also encompasses the act of encouraging employees to vote for or against union representation.” Employers may lawfully ban such activity by employees during work time and in work areas.

Note 5.b. *Distribution of Literature*
(2) During Nonworking Time.

In *Casino Pauma*, 363 N.L.R.B. No. 60, 205 L.R.R.M. 1591 (2015), the Labor Board held that a casino violated the NLRA when it maintained a rule banning employees from distributing literature in “guest areas,” where the term was ambiguous and apparently applied to areas beyond traditional or normal working areas. See also *DHL Express, Inc. v. NLRB*, 813 F.3d 365 (D.C. Cir. 2016), finding that an employer violated the Act by banning employee distribution of literature in “mixed-use area” that was merely incidental, but not integral, to employer’s main function.

Page 55.

NOTE

The Labor Board held that an employer that owns a nationwide chain of fast-food restaurants unlawfully maintained a rule prohibiting employees from wearing a small “Fight for \$15” button supporting a campaign to increase the minimum wage to \$15/hr., where the firm failed to establish special circumstances showing that such activity would negatively affect its public image, and the Court of Appeals upheld the Board’s decision. *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1259 (2019). In *Wal-Mart Stores, Inc.* 368 N.L.R.B. No. 146, 2019 L.R.R.M. 490408 (2019), the Board sustained a store policy that only allowed store workers to wear “small, non-distracting” insignia no larger than the size of employee name badges, due to the store’s interest in enhancing customer shopping experiences, although it found unlawful application of the same limitation on individuals who worked in non-selling areas of the store. The Board held that since the policy’s infringement on union rights was not severe, the employer need only demonstrate a legitimate justification, and not proof of any special circumstances. Compare *North Memorial Hospital v. NLRB*, 860 F.3d 639 (8th Cir. 2017) (finding that hospital violated the NLRA when it prohibited employee from wearing union insignia in hospital atrium where it did not criticize hospital and was not in area of immediate patient care).

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Note 5.c. *Employee Use of Company E-Mail Systems:*

In *Caesars Entertainment Inc.*, 368 N.L.R.B. No. 143, 2019 L.R.R.M. 481636 (2019), the Labor Board overturned *Purple Communications* and held that employers may lawfully ban employees from using company email systems during organizing campaigns. Workers “do not have a statutory right to use employers’ email and other information-technology (IT) resources to engage in non-work relate communications . . . Rather, employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in doing so, they do not discriminate” against union-related communications.

2. Anti-Union Speeches and Publications

Page 68, Note 1.

In *Neises Constr. Corp.*, 365 N.L.R.B. No. 129, 209 L.R.R.M. 1897 (2017) the Labor Board found that an employer unlawfully threatened employees when it told an employee that electing a union would financially “crush” the construction company. Even though the employer never specifically threatened to close its business, the employees would not miss the implication that a “crushed” company could not pay wages and would have to lay off employees. Since the employer did not provide any substantive support for its predictions, and merely assumed that the union would seek higher wages that the company could not afford, the statement lacked the “objective factual basis” required by *Gissel*. Similarly, a trucking company president’s “opinion” that a major customer might withdraw its business if drivers unionized, placing the business in jeopardy, constituted an unlawful threat of closure. Even though the president told his employees that the customer always asked about unionization before selecting a motor carrier, suggesting that it did not wish to operate in a union environment, the Board majority found the statement to be mere speculation about what the customer might do in response to unionization which did not satisfy the *Gissel* standard. *Hogan Transports, Inc.*, 363 N.L.R.B. No. 196, 206 L.R.R.M. 1701 (2016). In *Stern Produce Co.*, 368 NLRB No. 31, 2019 L.R.R.M. 285052 (2019), however, a divided Board held that an employer did not violate the NLRA when a consultant told workers prior to a certification election that the company president “can lock the door on all or you” as a pressure tactic to force the union to agree to terms at the bargaining table, despite the fact that the employer had engaged in other “extensive” and “egregious” violations, since these actions were separate from the lockout statement.

In *Hendrickson USA, LLC*, 366 N.L.R.B. No. 7, 210 L.R.R.M. 1698 (2018), the Labor Board held that an employer violated the NLRA when it indicated to employees that “the

culture will definitely change,” “relationships will suffer,” and “flexibility is replaced by inefficiency” if they were to elect a union representative. The Board found that employees would reasonably interpret the challenged statements as conveying a threat that the employer would retaliate by changing their easy-going culture and adopting a less flexible management approach if the workers chose a union. On appeal, the Sixth Circuit reversed the Board, holding that these statements did not constitute coercive employer conduct. *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465 (6th Cir. 2019).

Page 73.

NOTE

Should the Labor Board engage in rulemaking to require that an employer conducting a captive audience meeting of employees prior to a union election provide the union an equivalent opportunity to address the workers? A group of more than 100 law professors petitioned the Board to this end, arguing that an imbalance in organizational communication undermines the “laboratory conditions” necessary for a fair election. The professors urged the Board to adopt a rule setting aside a union election loss where the employer has banned union solicitation during working time and held a captive audience meeting to express opposition to union representation. *Professors Urge Action on Captive Meetings, Seek NLRB Rule for Equivalent Union Rights*, Daily Lab. Rep. (BNA) No. 10, Jan. 15, 2016.

3. Interrogation

Page 78.

NOTES

1. In *UNF West, Inc. v. NLRB*, 844 F.3d 451 (5th Cir. 2016), the court held that an employer violated the NLRA when an anti-union labor consultant employed by the firm interrogated an employee regarding his view of a current organizing campaign and suggested that negative consequences would result from a union victory.

2. In *Novato Healthcare Center*, 365 N.L.R.B. No. 137, 209 L.R.R.M. 2049 (2017), the Labor Board held that an employer violated the NLRA when the director of staff development asked an employee how he intended to vote in the upcoming Board election, even though the employee had favorably discussed the union with coworkers and wore pro union pins, where the director was a high-level management official with no regular working relationship with the employee. See also *Bristol Indus. Corp.*, 366 N.L.R.B. No. 101, 211 L.R.R.M. 1661 (2018)

(construction contractor violated NLRA when he asked one of two carpenters employed at time whether he had signed union card, since under “totality of circumstances” question had coercive impact).

In *RHCG Safety Corp.*, 365 N.L.R.B. No. 88, 209 L.R.R.M. 1321 (2017), the Labor Board found that an employer engaged in unlawful interrogation when a supervisor sent a text message to an employee asking “U working for [employer] or u working in the union?” where the employee had never told the supervisor that he had signed a union card or supported the union, and he was not an open union supporter, and the supervisor did not communicate any legitimate reason for the question posed.

In *Bozzuto’s Inc. v. NLRB*, 927 F.3d 672 (2d Cir. 2019), the Court reversed a Labor Board decision and held that an employer did not violate the NLRA when a supervisor asked an employee union organizer at a casual meeting near the restroom “what’s going on with this union stuff?” The court noted that supervisors and employees work closely together and can be expected to discuss many things. As a result, to hold that every casual question regarding union sympathies violates the NLRA would ignore the realities of such relationships. Despite this finding, however, the court sustained the Board’s finding that the employer’s subsequent discharge of the employee involved constituted an 8(a)(3) violation since it was in retaliation of his other actions in support of the union involved.

3. In *Durham School Services, L.P.*, 364 N.L.R.B. No. 107, 207 L.R.R.M. 1868 (2016), the Labor Board held that an employer violated the Act when it interrogated an employee about whether the union was compensating her for attending a meeting of the firm’s parent organization and threatened to deny her leave to attend that meeting if the union was compensating her for doing so. Although the employer had a rule precluding outside employment, the employer’s actions with respect to this pro-union activity were found to chill the exercise of her Section 7 right to support a labor organization.

4. Economic Coercion and Inducement

Page 81, Note 2.

When a unionized employer told its employees it was terminating their short-term disability benefits because of their union representation, and continued to provide such benefits at non-union facilities, and it solicited, encouraged, and assisted workers to sign a petition seeking the decertification of their bargaining representative, a violation of § 8(a)(1) was found. *Enterprise Leasing Co. of Florida v. NLRB*, 831 F.3d 534 (D.C. Cir. 2016). See also *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351 (D.C. Cir. 2016) (employer violated NLRA when a

few days prior to Board representation election it announced a one-time system-wide reinstatement of a valued healthcare benefit and offered the pendency of the election as the sole reason for the change).

5. Violence, Intimidation, Espionage, and Surveillance

Page 84.

NOTES

1. See *Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859 (7th Cir. 2016) (employer acts creating the impression of surveillance of protected activities is unlawful). Accord, *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536 (6th Cir. 2016).

2. Where a parent firm engages in surveillance of the protected activities carried out by the employees of a subsidiary, both entities may be held liable under the NLRA if the Labor Board can establish a single employer situation through the application of four factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. See *Alcoa, Inc. v. NLRB*, 849 F.3d 250 (5th Cir. 2017).

B. EMPLOYER DOMINATION OR SUPPORT

Page 94, Note 4.

In *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018), the court held that where a construction industry employer enters into a § 8(f) pre-hire agreement with a labor organization, that agreement cannot be converted into a traditional union-employer bargaining relationship without clear evidence that a majority of current employees support such a relationship. “The Board must demand clear evidence that the employees – not the union and not the employer – have independently chosen to transition away from a Section 8(f) pre-hire arrangement by affirmatively choosing a union as their Section 9(a) representative.”

C. EMPLOYER DISCRIMINATION

1. General Considerations; Problems of Proof

Page 96, Note 2.

An employer who fired a union activist for alleged dishonesty violated § 8(a)(3) where it had been inconsistent in punishing other employees, retaining some in situations more egregious than the one at issue. The Board found the employer's explanation for discharge pretextual where it was well aware of the employee's organizing activities. *Cellco Partnership*, 365 N.L.R.B. No. 93, 209 L.R.R.M. 1265 (2017).

Page 97, Note 2.

Southcoast Hospitals Group, Inc. v. NLRB, 846 F.3d 448 (1st Cir. 2017), involved an employer created through the merger of two nonunion hospitals and one union hospital. In accordance with established practice at the union hospital, the employer granted union members a preference when it filled union positions. At the nonunion hospitals, however, it granted nonunion individuals a preference when filling nonunion positions at those institutions. Although the Labor Board found the employer's policy at the nonunion hospitals unlawful due to the discrimination against union members, the First Circuit overturned that decision since the evidence showed that this challenged policy actually covered more union positions than nonunion positions, demonstrating the lack of a discriminatory impact on union members.

Page 99, Note 7.

When the general counsel prosecutes a discriminatory treatment case, it is not enough to simply produce some circumstantial evidence indicating employer anti-union animus. They must instead demonstrate that the bulk of evidence indicates that a worker's protected activities were a motivating factor. At that point, the employer can only avoid liability if it can prove that it would have taken the same action even if it had not considered the employee's protected activity. *Tschiggfrie Properties*, 368 N.L.R.B. No. 120, 2019 L.R.R.M. 451002 (2019).

Page 100, Note 8.

If an employer promotes a regular employee to a supervisory position to enable it to discharge that person for protected union activities engaged in while a regular employee, the Labor Board may still find a § 8(a)(3) termination, since this action was based upon protected activities carried out while he was an employee. See *United Nurses Associations of CA v. NLRB*, 871 F.3d 767 (9th Cir. 2017).

For a good discussion of how labor organizations recruit individuals to serve as union “salts” during organizing campaigns, see J.D. WALSH, *PLAYING AGAINST THE HOUSE: THE DRAMATIC WORLD OF AN UNDERCOVER UNION ORGANIZER* (2016).

2. Discrimination to Encourage Union Membership

a. Hiring Halls and Other Practices

Page 108, Note 5.

Laborers Local 91 (Scrufari Constr. Co.), 368 N.L.R.B. No. 40, __ L.R.R.M. __ (2019), involved a union operating a nonexclusive hiring hall that removed an individual from its out-of-work employment list due to the fact he had posted statements on social media criticizing the union business manager for failing to comply with union policies when it provided a political candidate for mayor with a copy of the journeyman’s book. The Labor Board found this action unlawful, since it adversely affected the employment rights of that person due to the fact he had engaged in protected concerted activity.

c. Union Security Under Federal Legislation

Page 117, Note 1.

Where a labor organization had a policy requiring individuals who wished to opt out of union membership to show up at the union office in person with photo identifications and provide written requests specifically indicating their intent to opt out, the Labor Board found such rigid procedures unreasonably limited the right of members to resign. Although the union claimed that these were merely procedural rules, the D.C. Circuit agreed with the Board that they unreasonably burdened the right of members to resign. *Local 58, Intl. Broth. of Elect. Workers v. NLRB*, 888 F.3d 1313 (D.C. Cir. 2018).

An employer gave unlawful assistance to a labor organization when it told new employees that they had to join the representative union “that day” if they wanted to keep their jobs, and the union violated the Act by failing to notify employees of their right to decline full membership and seek dues reductions for money spent on activities not germane to collective bargaining. *Raymond Interior Systems, Inc. v. NLRB*, 812 F.3d 168 (D.C. Cir. 2016).

In *Ruisi v. NLRB*, 856 F.3d 1031 (D.C. Cir. 2017), the court had to evaluate the legality of a union policy of providing regular members with anniversary membership dates, which began fifteen-day periods during which members could revoke their

memberships, only after it received written requests for such notices from members. The union refused to provide two members with such information when they requested it over the phone. Since the court found that this policy was based on legitimate union concerns over member privacy and administrative efficiency and was not discriminatory or adopted in bad faith, no fair representation breach was found and the policy was sustained.

Page 118, Note 5.

In *Valley Hospital Medical Ctr.*, 368 N.L.R.B. No. 139, 2019 L.R.R.M. 479740 (2019), the Labor Board overturned an Obama-era decision and held that employers have the right to unilaterally cease deducting union dues from employee pay checks once the existing bargaining agreement has expired.

In *International Assn. of Machinists v. Allen*, 904 F.3d 490 (7th Cir. 2018), *writ of cert.* dismissed, 139 S. Ct. 1599 (2019), the court held that a provision in the Wisconsin right-to-work law that allowed employees to revoke dues checkoff agreements with just thirty days notice was preempted by Section 302(c)(4) of the LMRA which allows such agreements to continue in force for up to one year.

Page 130, Note 1.

The Labor Board has ruled that private sector unions may not spend “agency fees” paid by nonmembers to fund lobbying efforts, since they may only charge nonmembers such fees for collective bargaining expenses and other non-political activities. *United Nurses & Allied Professionals*, 367 N.L.R.B. No. 94, 2019 L.R.R.M. 69236 (2019).

Page 131, Note 2.

The public sector agency fee arrangements authorized by the Court in *Abood v. Detroit Bd. Of Education*, 431 U.S. 209 (1977) were overruled in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), in which the Supreme Court held that a state law requiring public sector employees who were not members of representative labor organizations to subsidize union representation activities violated the First Amendment free speech rights of those persons.

c. State “Right-to-Work” Legislation

Page 135.

NOTE

Kentucky (2017) and West Virginia (2016) have joined the group of right-to-work states since the main text was published. See Daily Lab. Rep. (BNA) No. 5, Jan. 9, 2017, at A-5; Daily Lab. Rep. (BNA) No. 29, Feb. 12, 2016, at A-11. Missouri has also enacted a right to work statute, but its effective date was delayed by a petition to repeal the law, which will likely come before voters in the form of a proposition on the November 2018 ballot. Jason Hancock, *Unions Turn in 310,000 Signatures to Repeal Missouri Right-to-Work Law*, KANSAS CITY STAR, Aug. 18, 2017.

The significance of right-to-work legislation is hotly debated. Advocates of the legislation argue that they create a more hospitable environment for business and help to draw new companies to the state. Opponents argue that they weaken labor organizations by cutting off revenue and allowing employees to “free-ride,” gaining the benefits of union membership without bearing the costs. When the union threat effect is reduced, unions argue that downward pressure on wages increases. The spurt of new right-to-work laws has prompted additional research on the effects of the laws on job growth, wages and other economic outcomes.

In *Operating Engrs. Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017), the court sustained the right of Wisconsin to enact a right-to-work law that both forbade employers and labor organizations from requiring union membership or requiring non-members to pay representation fees. The court found that such requirements were not preempted by the NLRA due to the 14(b) exception for such right-to-work laws.

Although labor organizations argue that only state legislatures may enact right-to-work laws under 14(b), in *Auto Workers Local 3047 v. Hardin County*, 842 F.3d 407 (6th Cir. 2016), cert. denied, 138 S. Ct. 130 (2017), the court held that states and *state subdivisions*, including counties and municipalities, may enact such laws pertaining to their jurisdictions.

3. Protected Concerted Activities and Employer Response

Page 139.

NOTES

1. An employee engaged in protected concerted activity when he communicated his dissatisfaction about shared working conditions and executive salaries to members of management during a “team building” lunch designed to provide a group forum within which employees could relay to management complaints shared by other employees about working conditions they wished to see improved. See *MCPC Inc. v. NLRB*, 813 F.3d 475 (3d Cir. 2016). In *UniQue Personnel Consultants, Inc.*, 364 N.L.R.B. No. 112, 207 L.R.R.M. 1702 (2016), the Labor Board found that an employer violated the NLRA when it discharged an employee after she sought advice from a coworker about how to respond to the employer’s enforcement of a dress code against her and mentioned the fact she was thinking about complaining about her disciplinary warning to higher management officials at an upcoming company picnic, where the employee thought the dress code was disparately enforced and it affected all employees. See also *Component Bar Prods., Inc.*, 364 N.L.R.B. No. 140, 208 L.R.R.M. 1298 (2016) (employer violated NLRA when it maintained handbook rule prohibiting “disrespectful conduct” or “other disruptive activity in the workplace,” where it applied rule to discharge employee who called coworker to warn him that his job was in jeopardy since classic protected concerted activity). Compare *Good Samaritan Med. Ctr. v. NLRB*, 858 F.3d 617 (1st Cir. 2017) (employer did not violate the NLRA when it discharged a worker complaining about a union security policy, where the termination was based upon the employee’s overt rudeness rather than the substance of his complaint).

2. The Fifth Circuit Court found that while T-Mobile did not commit an unfair labor practice when it maintained an employee handbook rule requiring employees to maintain a “positive work environment,” it did violate the NLRA when it prohibited them from recording people or confidential information in the workplace, since this recording prohibition could have been reasonably interpreted to unlawfully curb protected employee activity. See *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017). Quicken Loans committed a similar violation when it prohibited employees from sharing information contained in personnel files and barred workers from publicly criticizing or disparaging the firm. *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542 (D.C. Cir. 2016).

In *Costco Wholesale Corp.*, 366 N.L.R.B. No. 9, 210 L.R.R.M. 1783 (2018), the Board held that an employer violated § 8(a)(1) when it directed an employee being investigated for

possible misconduct not to speak to anyone about that incident without showing that its need for confidentiality outweighed the employee's § 7 rights.

3. The Labor Board found that an employer violated the NLRA when it issued a written warning to two employees for encouraging a coworker to support the union, despite the employer's contention that it had a good faith belief for thinking that the employees in question had engaged in misconduct, since it appeared that no such misconduct had occurred. *Aqua-Aston Hospitality, LLC*, 365 N.L.R.B. No. 53, 208 L.R.R.M. 2203 (2017), *enforced*, 2018 U.S. App. Lexis 7068 (D.C. Cir. 2018).

4. In *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017), the court held that an employer violated the NLRA when it discharged an employee for engaging in picketing during a lockout, despite the firm's claim that the employee had made unprotected racially offensive comments to black replacement workers, including statements about "fried chicken and watermelon," where it was clear that the comments did not create an unlawfully hostile work environment.

5. In *Medco Health Solutions of Las Vegas, Inc.*, 28-CA-022914, 207 L.R.R.M. 1601 (2016), the Labor Board held that an employer operating an automated pharmacy and call center violated § 8(a)(1) when it banned the wearing of a shirt by employees which said "I don't need a WOW to do my job," where the employer's WOW program featured weekly events at which employees received WOW awards in recognition of their achievements. The Board found that the employer failed to demonstrate that this appearance rule was implemented to meet its business objective of attracting and retaining customers where employees were allowed to wear a variety of non-branded apparel and were not required to wear uniforms. See also *Boch Imps., Inc. v. NLRB*, 826 F.3d 558 (1st Cir. 2016)(enforcing the Board's ruling that employer dress code banning union pins, insignia and message clothing on uniforms and for employees permitted to choose their attire was unlawful where the ban was not narrowly tailored to strike a balance between the company's legitimate business interests and its employees' rights to organize; company's contention that pins could damage vehicles' internal components was not persuasive where ban also applied to office staff who never came into contact with vehicles).

a. Concerted Activity on Social Media

Page 141.

In *Boch Imps., Inc. v. NLRB*, 826 F.3d 558 (1st Cir. 2016), the court enforced the Board's ruling [discussed in the main text on page 141], finding that even though the employer altered its

employee handbook in the interim to remove the offending unlawful policies, it failed to repudiate the policies.

In *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017), the court enforced the Board's ruling [discussed in the main text on page 141], concluding that the Board's decision was supported by substantial evidence in the record, particularly the company's prior tolerance of profanity. See also *Butler Medical Transport, LLC*, 365 N.L.R.B. No. 112, 209 L.R.R.M. 1609 (2017) (finding that provider of ambulance services unlawfully terminated driver who engaged in social media conversation with fellow employees regarding the recent firing of coworker).

In an unpublished summary order, the court in *Three D LLC v. NLRB*, 629 Fed. Appx. 33 (2nd Cir. 2015) enforced the Board's ruling in *Triple Play Sports Bar & Grille* [cited on page 141], concluding that employees who clicked "like" on a Facebook post by an ex-employee who made disparaging comments about their employer were engaged in protected concerted activity. The case is significant because it was the first time that the Board had addressed the issue whether Facebook "likes" amounted to sufficient concerted activity to trigger protection under the NLRA.

Page 142.

NOTE

In *G4S Secure Solutions (USA) Inc.*, 364 N.L.R.B. No. 92, 207 L.R.R.M. 2101 (2016), enforced, 707 Fed. Appx. 610 (11th Cir. 2017), the Labor Board held that a security services firm violated § 8(a)(1) when it prohibited employees from posting on any social networking site "photographs, images, and videos" of employees in work uniform or at their places of work. Although the employer asserted that the rule was designed to protect customer privacy, the Board found that the rule was overbroad, since it did not only prohibit the posting of images that identified the names of clients receiving security services.

In *Novelis Corp. v. NLRB*, 885 F.3d 100 (2nd Cir. 2018), the court held that an employer violated the NLRA when it demoted an employee who posted comments on his social networking website complaining about his salary and castigating coworkers who had voted against union representation.

a. **Employer Work Rules and Policies Potentially Restricting § 7 Activity**

Page 143.

NOTE

In *The Boeing Co., Inc.*, 365 N.L.R.B. No. 154, 210 L.R.R.M. 1433 (2017), the Trump Board overruled *Lutheran Heritage Village-Livonia* [cited in the main text on page 143] and established a new test applicable to employer work rules that are facially neutral but which may, reasonably interpreted, potentially interfere with section 7 rights. The new test gives more weight to business needs than the prior test, which the Board said gave too little consideration to employer interests. Under the new test, when a facially neutral rule potentially interferes with section 7 rights, the Board will consider (1) the nature and extent of the potential impact on NLRA rights from the employees' perspective, and (2) legitimate business justifications associated with the rule's requirements, and strike the proper balance between them. Applying this test, the Board upheld the employer's "no-camera" rule banning workers from using devices to take photos or videos on job sites without permission.

The Board went on to explain that in future cases it would endeavor to provide greater clarity by establishing three categories of employment policies, rules and handbook provisions. Category 1 would include rules that the Board designates as lawful, such as general civility policies requiring workplace harmony, since the policies would have minimal impact on workers' rights to engage in protected activity. (Such rules could, however, be unlawfully applied, for example in a discriminatory fashion). Category 2 would include rules that warrant individualized scrutiny and balancing by the Board. Category 3 would include rules that the Board designates as unlawful, such as a rule that prohibits employees from discussing wages or benefits.

In 2020, the Labor Board held that Baylor University Medical Center did not violate the NLRA when it offered a severance agreement to a discharged worker that required that person to keep quiet about the company, to refrain from employer disparagement, and to forgo the right to sue that employer. *Baylor Univ. Medical Center*, 369 N.L.R.B. No. 43, 2020 NLRB Lexis 116 (2020). The Board distinguished the *Boeing Company* situation since severance agreements differ from regular work rules due to the fact they are not mandatory and no longer affect the terminated worker's conditions of employment.

Page 144.

NOTES

1. An employer's confidentiality rule which precluded employees from sharing information regarding their salaries and discipline was found to violate § 8(a)(1) due to the fact it chilled the exercise of protected concerted activity. *Banner Health System v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017). Accord, *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017); see also *NLRB v. Long Island Ass'n for AIDS Care, Inc.*, 870 F.3d 82 (2nd Cir. 2017) (prohibition contract terms was unlawful).

2. An employer did not violate the NLRA when it enforced a confidentiality rule prohibiting employees from releasing customer social security or credit card numbers, since the employer had the right to protect the confidentiality of such sensitive customer information. *Macy's Inc.*, 365 N.L.R.B. No. 116, 209 L.R.R.M. 1725 (2017).

Page 145, Note.

In *Apogee Retail LLC, dba Unique Thrift Store*, 368 N.L.R.B. No. 144, 2019 L.R.R.M. 481637 (2019), the Labor Board overturned the *Banner Health Sys.* decision, and held that employers can lawfully ban employees from discussing on-going workplace investigations to protect the interests of the persons involved in such investigations. The Board found that the impact of such rules on employees is "comparatively slight", so long as they are limited to on-going investigations. If such a rule was not limited to on-going activities, it would likely be found improper.

c. Arbitration Clauses Prohibiting Class Actions

Page 147.

NOTES

1. The Labor Board continued to find that employer arbitration policies requiring employees to waive their right to pursue class claims violate the NLRA. See, e.g., *Flyte Tyme Worldwide*, 363 N.L.R.B. No. 107, 205 L.R.R.M. 1794 (2016); *Fuji Food Products, Inc.*, 363 N.L.R.B. No. 118, 205 L.R.R.M. 1801 (2016).

In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), a five-Justice majority overruled the Seventh Circuit and held that employment contracts requiring employees to resolve all employment disputes through private arbitration procedures on an individual basis and which

preclude class action cases are enforceable under the Federal Arbitration Act and are not contrary to the collective action provision in the NLRA. The Court found that Congress intended the Arbitration Act to permit the enforcement of agreements requiring persons to arbitrate employment disputes on an individual basis. The Court also found that the general language set forth in Section 7 of the NLRA did not indicate a Congressional intention to modify the express language set forth in the Arbitration Act. This case involved claims arising under the Fair Labor Standards Act, and the Court did not have to decide whether such arbitration provisions could prevent groups of employees from raising unfair labor practice issues before the Labor Board. The four dissenting Justices strongly disagreed with the majority opinion, pointing out that such arbitration provisions precluding class claims would significantly reduce the number of small value claims affecting many employees that would traditionally be handled through class action law suits.

As a result of the *Epic Systems Corp.* decision, the Labor Board has held that employers do not violate the NLRA when they require employees to waive their right to pursue class actions through judicial or arbitral proceedings. *Arise Virtual Solutions, Inc.*, 366 N.L.R.B. No. 163 (2018).

In *Cordua Restaurants*, 368 N.L.R.B. No. 43, 2019 L.R.R.M. 302942 (2019), the Labor Board held that an employer violated the NLRA when it discharged an employee who filed a collective action with two other workers under the Fair Labor Standards Act, since their action was clearly concerted and they had no contractual obligation to take such claims to arbitration. Nonetheless, the Board held that employers may warn workers that they may be discharged if they fail or refuse to sign mandatory arbitration agreements requiring them to resolve all of their future legal claims through that mechanism as allowed under *Epic Systems Corp.*

In another five-four decision, the Supreme Court held that courts should not allow class arbitrations unless the agreement language expressly authorizes arbitrators to conduct such group proceedings. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

2. In *Prime Healthcare*, 368 N.L.R.B. No. 10, 2019 L.R.R.M. 223840 (2019), *review dismissed*, 2019 U.S. App. Lexis 38937 (D.C. Cir. 2019), a unanimous Labor Board held that despite the *Epic Systems Corp.* decision, it would be an unfair labor practice for an employer to require employees to sign an arbitration agreement that would preclude access to the NLRB. “No legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act.” Accord, *Beena Beauty Holding, Inc.*, ___ N.L.R.B. No. ___ 2019 L.R.R.M. 386501 (2019). In *California Commerce Club, Inc.*, 21-CA-149699 (2020), however, the Board held that an employer did not violate the NLRA when it established an arbitration provision that required employees to conduct such proceedings on a confidential basis and to maintain the confidentiality of those proceedings and any resulting awards.

b. Constructive Concerted Activity

Page 155, Note 3.

Applying *City Disposal*, the Labor Board concluded that an employee was protected when he asserted a right to higher pay under his collective bargaining agreement where his belief that the contract covered him was mistaken, but honest and reasonable. *Omni Commercial Lighting, Inc.*, 364 N.L.R.B. No. 54, 206 L.R.R.M. 2073 (2016).

c. Weingarten Rights

Page 157.

NOTE

Bellagio called an employee suspected of misconduct into an investigatory meeting. The employee requested the presence of a union representative, and Bellagio invited him to contact the union agent himself. When he was unable to contact that person, two managers left the room and sought help from the employee relations department. They then gave the employee the option of filling out a written statement before the interview ended or leaving without such a result. No violation of his *Weingarten* rights was found, since Bellagio had effectively offered him the option of filling out the statement without a union representative present or ending the interview. *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017). See also *Midwest Division—MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017) (employer does not have to grant employee request to have union representative attend investigatory interview that might result in discipline where employer offers employee choice of attending alone or of having no interview at all).

The Labor Board has ruled that an employer violated Section 8(a)(1) when it refused to allow the representative union’s attorney to act as a *Weingarten* representative at a disciplinary meeting. *PAE Applied Technologies, LLC*, 367 N.L.R.B. No. 105 (2019).

d. Loss of Protection Due to Unlawful Objective or Unlawful Means

Page 159.

NOTES

1. In *Wal-Mart Stores, Inc.*, 364 N.L.R.B. No. 118, 207 L.R.R.M. 1333 (2016), the Labor Board applied *Quietflex Mfg. Co.* [cited in the main text at page 159] to a protest on company property by nonunion employees. Six employees who had received “disciplinary coachings” after engaging in an earlier work stoppage ceased work and gathered in the customer service area

near the store entrance about 30 minutes before the store opened to the public at 6:00 a.m. They were joined by four nonemployee protesters when the store opened, and the group displayed an 8 by 10 foot banner reading “Stand Up, Live Better, ForRespect.org, OUR Walmart, Organization United for Respect at Walmart.” The sign was initially held in front of the customer service desk, and later moved behind the desk. The protesters complied with requests to move the protest and all left the store by 6:52 a.m. The Labor Board found that nearly every factor of the *Quietflex* analysis favored a finding that the work stoppage was protected, since it was initiated in response to pressing problems including abusive treatment by a supervisor, caused little or no disruption to the company’s ability to serve customers (no customers attempted to access the customer service area during the protest), the protest was brief, and the protest group left immediately when asked to do so by police. Although the employer did offer to meet with employees through its open door policy to address concerns, it was willing to do so only individually and group grievances were barred. The Board majority rejected the dissent’s argument that *Quietflex* should not apply to retail settings where the potential for business disruption is greater and employers are more likely to suffer economic harm, reasoning that a permissible purpose of concerted activity is to exert economic pressure on the employer.

2. In *Local 702, Int’l. Union of Electrical Wkrs. v. NLRB*, 215 F.3d 11 (7th Cir. 2000), *cert. denied*, 531 U.S. 1051 (2000), the court sustained a Board decision which found that two striking workers engaged in unprotected activity during a work stoppage when they came upon a firm truck on the highway and moved their vehicles in front of the truck, blocked ordinary traffic flow, and prevented the truck from passing them.

Page 161, Note.

In *Meyer Tool, Inc.*, 366 N.L.R.B. No. 32, 210 L.R.R.M. 1949 (2018), *enforced*, 363 Fed. Appx. 5 (2nd Cir. 2019), the Board found that an employer violated the NLRA when it indefinitely suspended an employee who refused to leave the company premises after being ordered to do so, where the employee and two coworkers went to the human resources department to complain about harassment by managers regarding protected activity. The court found that the individual had not forfeit his NLRA protection by refusing to leave the premises and was entitled to greater latitude due to the seriousness of the issues being raised by the employees involved.

Page 164, Note 1.

Yale graduate students have continued to utilize concerted activity that attracts newspaper headlines. See Jennifer Klein, *Why Yale Graduate Students Are on a Hunger Strike*, N.Y. TIMES, May 9, 2017 (describing efforts of students to press university to recognize and bargain with the union over wages, health care, grievance processes and sexual harassment policies).

Page 165, Note 3.

The D.C. Circuit agreed with the Labor Board and enforced the decision cited in the main text. See *DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 92 (2017). The court emphasized that the on-air comments of the installers related to their pay dispute, and were not flagrantly disloyal, maliciously untruthful, or “wholly incommensurate with any employment-related grievance.” The dissenting judge argued that the requirement of subjective intent effectively overruled *Jefferson Standard*, immunizing disloyal activity from discipline as long as it is connected to an ongoing labor dispute.

Page 166, Note 4.

Otherwise protected employee postings challenging employer conduct can still lose their protected status if they contain inappropriate disparagement of company products or services. In *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017)(*en banc*), the court ruled that a Jimmy John’s franchisee was justified in firing workers who were pressing for paid sick days by posting fliers near the restaurant that pictured identical sandwiches side-by-side with the caption “Can’t Tell the Difference?” The flier labeled one sandwich as made by a healthy worker and the other by a sick worker. The court refused to enforce the Board’s ruling that the workers were protected, finding the fliers “calculated, devastating attacks upon an employer’s reputation and products” and disagreeing with the D.C. Circuit’s approach in *DirecTV, Inc. v. NLRB, supra*. An objective assessment of the means used is necessary. Even though the connection between the protest and the labor dispute was clear, the protest’s focus on the franchisee’s product made it likely that the damage would outlive the labor dispute.

e. Use of Replacement Workers During Strikes

Page 176, Note 1.

American Baptist Homes of the West, 364 N.L.R.B. No. 13, 206 L.R.R.M. 1501 (2016), involved a continuing care facility that hired permanent replacement workers for economic strikers. The two member majority found that the firm hired the replacements for an “independent unlawful purpose” – punishing the strikers in retaliation for their engagement in protected strike activity – rendering the *MacKay Radio* doctrine inapplicable. These Board members indicated that permanent replacements could only be hired for economic strikers when used for the legitimate purpose of maintaining operations, but not to retaliate against the workers for striking. Dissenting member Miscimarra strongly disagreed, indicating that employers may

always hire permanent replacements for economic strikers, even if partially motivated by a desire to punish the strikers. He said that the “independent unlawful purpose” doctrine, which had been applied in *Hot Shoppes Inc.*, 146 N.L.R.B. 802 (1964), should only be applied to situations where the hiring of the replacements is linked to an unlawful purpose that is “unrelated to or extraneous to the strike itself.”

What must employers do under *American Baptist Homes* to hire permanent replacements for economic strikers if they hope to avoid a claim that they are partially motivated by a desire to punish the individuals for striking?

Page 178, Note 3.

In *Spurlino Materials, LLC. v. NLRB*, 805 F.3d 1131(D.C. Cir. 2015), the D.C. Circuit enforced the Labor Board’s ruling requiring reinstatement of striking workers, finding that the strike was properly characterized as an unfair labor practice strike because it was at least partially motivated by the company’s refusal to reinstate a union supporter that the Labor Board had determined was unlawfully discharged; even though the company demonstrated that the strikers also had economic motivations, the employer’s unfair labor practice need only be a contributing factor to result in categorization as an unfair labor practice strike with appropriate remedies of reinstatement, back pay and benefits.

Page 179, Note 5.

Alaris Health Care at Castle Hill, 367 N.L.R.B. No. 52, 2018 L.R.R.M. 274577 (2018), involved employees engaged in an unfair labor practice strike generated by their employer’s failure to bargain in good faith with their representative union. The employer entered into an arrangement with an outside contractor to provide temporary replacement workers for several weeks. When the striking employees unconditionally applied for reinstatement shortly after the stoppage began, the employer denied their request based upon the fact its temporary replacement agreement still had some time to run. Nonetheless, the Labor Board found a § 8(a)(1) violation since the employer was obliged to reinstate the unfair labor practice strikers as soon as they unconditionally offered to return to work.

In *Brown & Root, Inc.*, 99 N.L.R.B. 1031 (1952), the Labor Board held that employees of the same company who honor the unfair labor practice strike picket line of coworkers from another department that had been adversely affected by the employer’s unfair labor practices must be treated as economic sympathy strikers instead of unfair labor practice sympathy strikers, due to the fact the firm’s NLRA violations had no direct effect on their employment. They could thus be permanently replaced, unlike the unfair labor practice strikers involved.

Page 190.

NOTE

Dresser-Rand Co. v. NLRB, 838 F.3d 512 (5th Cir. 2016), concerned a company and a labor organization that had a difficult time reaching a new collective contract. The union began a four month strike, during which time the firm hired some permanent replacements and had some unit employees cross over and return to work. When the union declared the strike over, even though bargaining continued, Dresser-Rand engaged in an offensive lockout to advance its bargaining interests. When the lockout ended, the firm refused to allow the former strikers to return to the positions that had been filled by permanent replacements or crossovers, on the ground those positions were not currently vacant. Although the Labor Board had found this to violate the NLRA, the court rejected this position. Since the positions held by permanent replacements and crossovers were not then available, the firm had the right to reject the request of former strikers to return to those positions.

1. Lockouts, Plant Closings and “Runaway Shops”

Page 209, Note 4.

When an employer locks out bargaining unit employees “without providing the employees with a timely, clear, and complete offer setting forth the conditions necessary to avoid the lockout,” the lockout will be found unlawful due to the failure of the bargaining parties to reach an impasse prior to the lockout. See *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159 (D.C. Cir. 2016).

Page 210, Note 5.

Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017), concerned the discharge of a locked out employee who made comments to African-American replacement workers about fried chicken and watermelons. The employer refused to reinstate this person based upon the claim that his conduct had constituted unprotected racial harassment in violation of Title VII. The Labor Board found that the stray remarks in question failed to establish the type of hostile environment required for hostile environment claims, and ordered the employer to reinstate that person. The Court of Appeals agreed with the Board’s interpretation of Title VII, and held that due to the absence of any “cause” for termination the

discharged worker's rights under the NLRA had been violated, thus supporting the Board's order that he be reinstated.

Page 219, Note 2.

In *Amglo Kemlite Laboratories, Inc. v. NLRB*, 833 F.3d 824 (7th Cir. 2016), the court agreed with the Labor Board that an employer violated the NLRA when it transferred work to Mexico after the employees at its Illinois plant went on strike, since it found that the employer's decision had been motivated by the work stoppage. The firm president had told the Illinois employees shortly after the stoppage had begun that it was moving the work to Mexico "because of the situation" at the Illinois plant. The court also sustained the Board order requiring the firm to offer reinstatement to the workers who had been adversely affected by the transfer of their work to Mexico, and directing it to make them whole for the economic losses they had sustained.

2. Remedial Problems

Page 227, Note 1.

In *King Soopers, Inc. v. NLRB*, 859 F.3d 23 (D.C. Cir. 2017) the court enforced the Labor Board's ruling that job search expenses incurred by unlawfully discharged employees shouldn't be offset from interim earnings, permitting the Board to order the employer to pay for job search expenses in order to make the employee whole where the employee struggles to find new work but doesn't generate any interim earnings.

SECTION II. REPRESENTATION QUESTIONS

A. ESTABLISHING REPRESENTATIVE STATUS THROUGH NLRB ELECTIONS

2. Defining the Appropriate Unit

Page 236, Note 1.

In *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017), [on appeal from the Board's decision, cited at page 237 in the main text], the court held that the Labor Board has broad discretion when determining the scope of bargaining units, and it sustained the Board's application of its *Specialty Healthcare* test [described in the text on page

237]. The Board’s certification of a unit of cosmetics and fragrances employees and its rejection of a “wall-to-wall” unit of all employees in the store or alternatively all selling employees was thus appropriate. There was little evidence of interchange between the cosmetics and fragrances employees and other selling employees at the department store in question, and the department was organized as a separate department supervised by a separate sales manager and located in a distinct area of the store. Seven other circuit courts subsequently upheld the Board’s *Specialty Healthcare* test, which came to be known as the “micro unit” test. See *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017)(approving the test as a reasonable formulation drawn from Board precedent and citing decisions to the same effect from the Second, Third, Fourth, Sixth, Seventh, and Eighth circuits). The test was also used to justify organizing of graduate students department-by-department rather than university-wide. See *Yale Univ.*, N.L.R.B. No. 01-RC-183014, Jan. 17, 2017 (election order permitting graduate students in nine academic departments to organize as individual bargaining units). There remain, of course, limits on the Board’s discretion. See, e.g., *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017) (setting aside Board’s certification of company-wide unit where the business comprised two discrete halves, consisting of a labor side and a recycling side, and Board failed to consider the lack of interchange between the two groups and significant differences regarding the wages, hours, and working conditions between the two groups).

However, in *PCC Structural, Inc.*, 365 N.L.R.B. No. 160, 210 L.R.R.M. 1325 (2017), the Trump Board overruled *Specialty Healthcare*, setting aside a regional director’s decision to allow a union to limit an election to 100 welding employees at a manufacturing company with a workforce of more than 2,500. On remand, the regional director was instructed to apply the traditional community-of-interest test utilized prior to 2011, which entails considering the interests of all employees, within and without the proposed unit, without regard for whether they possess an overwhelming community of interests. See *United Operations, Inc.*, 338 N.L.R.B. 123 (2002). The Board also made clear that *Specialty Healthcare* is overruled as it applied to non-acute healthcare facilities.

When the Labor Board determines whether a proposed unit is appropriate, it need not decide whether this group would constitute the most appropriate unit, but only whether the included employees share a sufficient “community of interest” to render this “an appropriate unit.” See *Cargill, Inc. v. NLRB*, 851 F.3d 841 (8th Cir. 2017).

Page 237, Note 2.

For a number of years, the Labor Board has struggled with the question regarding when it should allow multi-employer bargaining units where the employees from one firm are sent to work for another firm. Earlier Board decisions had held that such multi-employer units would

only be appropriate if both employers consented to the arrangement. In *Miller & Anderson, Inc.*, 364 N.L.R.B. No. 39, 206 L.R.R.M. 1885 (2016), a divided Labor Board held that such joint-employer units would be acceptable, despite objections from either employer, where the employees in question share a community of interest.

In *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156, 210 L.R.R.M. 1261 (2017), the Trump Board overturned *Browning-Ferris Indus. of Calif.*, 362 N.L.R.B. No. 186 (2015), returning to the principles governing joint employer status determinations that existed previously: a requirement of direct and immediate control. In 2018, the Labor Board reconsidered its 2017 *Hy-Brand Industrial Contractors, Ltd.* decision. It overturned its previous approach, and decided not to overturn *Browning-Ferris Indus. of Calif. Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26, 210 LRRM 1869 (2018). In late 2018, a divided D.C. Circuit upheld the Board's *Browning-Ferris Industries of Calif.* approach, but found that the Board had failed to apply those standards properly. The court held that the Board did not properly distinguish between forms of indirect control that affect "workers' essential terms and conditions" and those that are "intrinsic to ordinary third-party contracting relationships." *Brown-Ferris Industries of Calif. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). On remand, the Board held that Browning-Ferris was not a joint employer with the staffing firm where it did not exercise significant control over their job functions. *Browning-Ferris Industries*, 32-CA-160759 (2020). In *McDonald's USA LLC*, 368 N.L.R.B. No. 134, 2019 L.R.R.M. 476336 (2019), a closely divided Labor Board held that McDonald's USA could not be held jointly liable with several of its franchises for violations committed by those franchises, since there was no evidence that McDonald's USA exercised any "direct and immediate control" over the franchise employees. In February of 2020, the Labor Board issued a new joint employer rule requiring a firm to exercise "substantial, direct, and immediate" control over the important elements of a worker's job, like hiring, firing, and discipline, before it can be considered a joint employer with the primary company involved. *Bloomberg Daily Labor Report* (Feb. 25, 2020).

Page 238, Note 4.

In *Loomis Armored US, Inc.*, 364 N.L.R.B. No. 23, 206 L.R.R.M. 1605 (2016), the Labor Board overruled the prior *Wells Fargo Armored Service Corp.* decision and held that an employer that voluntarily recognizes a "mixed guard union" must continue to recognize and bargain with that union until it has evidence the labor organization has lost its majority support. The Board majority indicated that the *Wells Fargo* decision had created an "unwarranted exception" from the general rule that once an employer grants voluntary recognition to a union, it must continue to recognize that organization until the union has actually lost its majority support.

In *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), the court held that an employer that operates a hotel and casino did not unlawfully refuse to bargain with a union certified by the Labor Board as the representative of surveillance technicians in a unit that included non-guard employees. Since the surveillance technicians maintain comprehensive camera footage of resorts and control access to all sensitive areas of casinos, they constitute “guards” under Section 9(b)(3) of the NLRA and cannot be included in units with non-guard employees.

3. The Conduct of Representation Elections

Page 244, Note.

NP Lake Mead d/b/a Fiesta Henderson Casino Hotel, __ N.L.R.B. No. __ 2020 NLRB Lexis 69 (2020), involved the validity of a representation election won by the union during which a Board agent told a pro-union voter to remove a union button while they voted. Although the regional director decided that a new election should be conducted, the Board held that the prior election should only be overturned if it is clear that the Board agent’s conduct caused actual harm to the election process.

Although the Labor Board endeavors to require “laboratory conditions” surrounding representation elections, the fact that perfect conditions were not maintained does not ipso facto result in the setting aside of election results, so long as no coercive conduct poisoned the fair and free choice which employees are entitled to make. See *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592 (3rd Cir. 2016).

Page 246.

NOTE

In *Guardsmark, LLC*, 363 N.L.R.B. No. 103, 205 L.R.R.M. 1513 (2016), the Labor Board modified the rules applicable to mail ballot elections, which had allowed employers to conduct “captive audience” meetings with employees up to twenty-four hours prior to the time ballots were actually mailed to potential voters, and held that the prohibition begins twenty-four hours prior to the time ballots are *scheduled* to be mailed to potential voters.

Page 246, Note 1.

In *Associated Builders & Contractors of Texas v. NLRB*, 826 F.3d 215 (5th Cir. 2016), the court sustained the authority of the Labor Board to expedite the scheduling of

representation elections by conducting such elections before considering the validity of employer objections to those elections.

Although the Labor Board’s “quickie election rules” sped up union organization drives from a median of 39 days to election in 2014-15 to a median of 24 days in 2016-17, union win rates overall remained nearly unchanged. Only in the most rapid election—those lasting two weeks or less—was a significant advantage for unions apparent. *Labor Board Rule to Speed Up Union Elections Shows Mixed Results*, Daily Lab. Rep. (BNA) No. 83, at AA-3, May 2, 2017. In late 2019, the Labor Board modified its procedures for representation elections by extending the deadlines that had been established during the Obama administration. The Board will now suspend the holding of an election until it can resolve disputes over whether a proposed bargaining unit is appropriate and a determination regarding the individuals qualified to vote in the proposed election. *Union Elections Slower, More Complex, Under NLRB Change*, Daily Lab. Rep. (BNA) Dec. 13, 2019.

Page 249, Note 8.

In *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351 (D.C. Cir. 2016), the court found that an employer violated the NLRA when a few days prior to a representation election it used a video tape depicting several union-eligible healthcare employees’ images to convey the message that these employees opposed union representation, where the employees pictured had not consented to the inclusion of their smiling faces on that anti-union video.

Page 250, Note 9.

When pro-union employees threatened physical harm to workers who did not vote for the union in a representation election and possible damage to their vehicles, that would be the basis for setting aside the union’s election victory where the threats were heard by a number of employees shortly prior to the election and the union won by only two votes. *Manorcare of Kingston PA, LLC v. NLRB*, 823 F.3d 81 (D.C. Cir. 2016). On the other hand, where one of six sales associates threatened to slash the tires of a fellow worker if she did not vote for the union in a Labor Board election, the Board and the Eighth Circuit refused to overturn the election in favor of union representation since the employee who made the threat was not acting as a union agent when he allegedly made the threat. *Dolgenercorp LLC v. NLRB*, 950 F.3d 540 (8th Cir. 2020).

Page 258, Note 3.

The Ninth Circuit recently reaffirmed the narrow applicability of the *Leedom v. Kyne* exception, finding that the party seeking judicial review must not only establish that the NLRB exceeded its statutory authority, but also that the party would be “wholly deprived” of a means to vindicate its statutory rights if a court did not review the order. Where intervention in the pending unfair labor practice proceeding was a possible alternative path to challenge the Board’s determination under section 10(k) resolving a dispute between rival unions over whose members should perform particular work, the Board’s order was not a final decision subject to judicial review. *Pac. Mar. Ass’n v. NLRB*, 827 F.3d 1203 (9th Cir. 2016).

B. ESTABLISHING REPRESENTATION STATUS THROUGH UNFAIR LABOR PRACTICE PROCEEDINGS

Page 269, Note 2.

When a repair shop with two employees discharged those persons after they openly supported a union, it was ordered to reinstate the two workers and to recognize their union. The Board’s decision to skip a representation election was based upon the egregious anti-union behavior by the employer that would have made it extremely difficult to conduct a fair election. *RAV Truck & Trailer Repairs, Inc.*, __ N.L.R.B. No. __ 2020 NLRB Lexis 96 (2020).

Page 269 Note 4.

In *Novelis Corp. v. NLRB*, 885 F.3d 100 (2d Cir. 2018), the court refused to enforce a *Gissel* bargaining order despite significant employer unfair labor practices committed prior to the Board election, where the company had complied with a § 10(j) injunction, there had been a substantial lapse of time between the representation election and the final Board order, and there had been a significant degree of employee turnover since the prior election,

C. DURATION OF THE DUTY TO BARGAIN

Page 281, Note 2.

Pinnacle Foods Group, LLC, 368 N.L.R.B. No. 100, 2019 L.R.R.M. 401589 (2019), involved a labor organization that had been certified but had failed to achieve a bargaining agreement within the following twelve months. While negotiations continued, a unit member filed a decertification petition fifteen months following the initial certification. Shortly thereafter, the union filed a charge alleging that the employer had violated the NLRA by not making itself regularly available for bargaining during the certification year. The employer and the union

settled this charge by agreeing to extend the certification bar for seven months, without the employer admitting any wrongdoing. A divided Labor Board held that since the individual who filed the decertification petition had not consented to the employer-union agreement extending the certification period, his decertification petition was timely, allowing the Board to conduct an immediate decertification election.

Page 281, Note 3.

In March of 2020 the Labor Board adopted a new rule applicable to voluntary recognition situations which rejected the *Lamons Gasket* approach and reinstated the *Dana Corp.* approach that would allow employees or rival labor organizations to challenge the validity of voluntary recognitions forty-five days following such recognitions. *Employment Law 360* (March 31, 2020).

Page 282, Note 5.

In *NLRB v. Lily Transportation Corp.*, 853 F.3d 31 (1st Cir. 2017), the court sustained the Labor Board's rule providing unions recognized by successor employers with a "reasonable period of time" before anyone could challenge the majority support of the unions involved.

Page 287, Note 1.

In *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321 (D.C. Cir. 2015), the court offered insight on the extent of the employer's burden to prove that the union has in fact lost majority support in order to justify unilateral withdrawal of recognition from an incumbent union. The employer withdrew support from a union that it had recognized as the representative of its 15 drivers and material handlers for nearly 50 years, relying on brief written statements from eight employees who expressed a desire to leave the union. The statements were written in English, although five of the employees testified that they spoke or wrote only limited English. Further, at least four of the statements could be interpreted as requests to leave union membership rather than to drop the union as their bargaining representative. The court upheld the Board's determination that the employer had failed to show that all eight statements unambiguously indicated lack of support for the union as bargaining representative, and that unilateral withdrawal of recognition therefore violated section 8(a)(5).

Page 287, Note 2.

When an employer receives a petition signed by a majority of bargaining unit members that might indicate that they no longer wish to be represented by the incumbent union, but which includes ambiguous language that does not clearly state that the signers no longer wish to be represented, the employer's withdrawal of recognition is likely to be found a § 8(a)(5) violation. See *Liberty Bakery Kitchen, Inc.*, 366 N.L.R.B. No. 19, 210 L.R.R.M. 1845 (2018).

Page 287, Note 3.

Polycon Indus., Inc. v. NLRB, 821 F.3d 905 (7th Cir. 2016), concerned an employer that withdrew recognition from the incumbent labor organization based upon a decertification petition signed by a majority of employees which it received after an oral agreement for a new collective contract had been reached but before a formal written agreement had been executed. The court sustained the Labor Board's finding of an 8(a)(5) violation, based upon the fact the recognition withdrawal had taken place after the bargaining parties had reached an oral agreement for the new contract. In *Silvan Industries*, 367 N.L.R.B. No. 28, 212 L.R.R.M. 1756 (2018), however, the Labor Board held that an employer did not act improperly when it filed a representation election petition challenging the majority status of a labor organization that had won a Board election a year earlier and had finally negotiated a bargaining agreement with the employer where unit employees had petitioned the employer asking it to terminate union representation after the parties had reached an agreement but before the date the agreement was to take effect.

Part Three

UNION COLLECTIVE ACTION

SECTION III. ORGANIZATIONAL AND RECOGNITIONAL PICKETING

SECTION IV. SECONDARY PRESSURE

B. COMMON SITUS PROBLEMS

Page 371, Note 3.

NLRB v. IAB Local 229, 941 F.3d 902 (9th Cir. 2019), involved a wage dispute between Local 229 of the International Association of Bridge and Iron Workers and Western Concrete Pumping (WCP) over a parking lot construction which generated a work stoppage by the union. When Local 229 encouraged employees of Commercial Metals Company, which worked with WCP, to also stop work on the construction project, the Labor Board found a § 8(b)(4)(B) violation. Local 229 appealed the Board’s decision, claiming that application of § 8(b)(4)(B) to such appeals to the employees of secondary firms violated the Free Speech section of the First Amendment, and the § 8(c) free speech section of the NLRA. The Ninth Circuit rejected these claims, finding that the NLRA ban “carries no unconstitutional abridgement of free speech” since even peaceful picketing can violate that ban.

D. CONSUMER PICKETING

F. HOT CARGO AGREEMENTS

Page 408.

NOTE

To find a violation of § 8(e), there must be evidence of an express or implied agreement between a labor organization and an employer. If an employer unilaterally decides to sever a relationship with a nonunion party, no violation may be found, even if the employer’s decision was induced by the union’s use of coercive measures. See *Am Steel Erectors v. Local Union No. 7*, 815 F.3d 43 (1st Cir. 2016).

SECTION V. JURISDICTIONAL DISPUTES

SECTION VII. NATIONAL LABOR RELATIONS ACT PREEMPTION

Part Four

COLLECTIVE BARGAINING

SECTION I: THE DUTY TO BARGAIN COLLECTIVELY

A. EXCLUSIVE REPRESENTATION AND MAJORITY RULE

B. THE NATURE OF THE DUTY TO BARGAIN

1. Good Faith

2. Bargaining Remedies

Page 537, Note 6.

In *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016), the court reaffirmed the rule enunciated in *Unbelievable*, and held that the Labor Board lacks the statutory authority to require even pervasive NLRA violators to pay charging party and NLRB attorney fees, since the statute does not authorize the imposition of such monetary penalties. Similarly, in *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016), while the court enforced part of the Labor Board's decision [cited in the main text on page 538] ordering employers to pay a union's bargaining expenses as a remedy for serious unfair labor practices, the court refused to enforce the portion of the Board's order requiring payment of litigation costs, citing *HTH Corp.*

On the other hand, in *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016), the D.C. Circuit ordered the Labor Board to reimburse an employer for attorneys' fees it incurred in successfully challenging the Board's unfair labor practice ruling in a situation where the NLRB had followed its policy of nonacquiescence and resisted a result that it knew would follow as a result of circuit precedent, amounting to bad faith litigation. The court faulted the Board for allowing the employers to file for judicial review in a circuit with adverse precedent rather than seeking enforcement of its own order in another circuit where its preferred policy had been accepted.

3. , 22-CA Unilateral Action

Page 543, Note 1.

In *Parsons Elec., LLC v. NLRB*, 812 F.3d 716 (8th Cir. 2016), the court found that an employer unlawfully changed its policy on employee breaks without giving the union notice or an opportunity to bargain, deferring to the Labor Board's conclusion that the employer made significant changes that were material to employees. The break policy was contained in an employee handbook maintained pursuant to the management rights clause in the collective agreement.

Although the Labor Board had previously held that employers could only make unilateral changes to working conditions during the life of collective bargaining agreements where the contract provided the employer with a "clear and unmistakable waiver," in *Huber Specialty Hydrates*, 369 N.L.R.B. No. 32, 2020 NLRB Lexis 78 (2020), it decided that such changes could be made so long as they seem to fall within the scope of a contractual provision giving the employer the right to act unilaterally.

In *Dixie Elec. Membership Corp. v. NLRB*, 814 F.3d 752 (5th Cir. 2016), the court held that an employer violated the duty to bargain when it unilaterally altered the scope of the established bargaining unit during the term of the existing contract by reclassifying chief systems operators and systems operators as "supervisors" and removing those persons from the unit. On the other hand, in *Phillips 66*, 369 N.L.R.B. No. 13, 2020 NLRB Lexis 39 (2020), the Board held that Phillips 66 did not violate the duty to bargain when after five health and safety shift specialists voted to join the existing United Steelworkers bargaining unit it unilaterally demoted them to lower-paid positions. Phillips 66 insisted that since such persons became "incident commanders" during safety emergencies they constituted supervisory personnel who were ineligible for union representation. Phillips 66 insisted on having these persons demoted to nonsupervisory positions, and only carried out their demotions after the parties had reached a good faith impasse which gave the firm the right to unilaterally implement its plan.

Page 547, Note 7.

In *E.I. du Pont de Nemours*, 364 N.L.R.B. No. 113, 207 L.R.R.M. 1356 (2016), the Obama Board ruled that actions consistent with past practice constitute a change requiring the employer to bargain with the union if the past practice was created under a management rights clause in a collective agreement that has expired, or where the disputed actions involved employer discretion. The Trump Board overruled *DuPont* and restored pre-*DuPont* precedent in *Raytheon Centric Network Systems*, 365 N.L.R.B. No. 161, 210 L.R.R.M. 1327 (2017), finding that the

employer's changes to employee healthcare benefits were a continuation of a past practice of unilateral changes every year for the preceding 12 years. Because the changes were similar in kind and in degree to the previous established practice, notice to the union and an opportunity to bargain were not required prior to implementation. Further, the Board noted that the principle will apply even where no collective agreement containing a management rights clause authorizing unilateral action was in effect at the point when the past practice was created or when the disputed actions were taken.

Page 548, Note 8.

In *800 River Road Operating Co.*, 22-CA-204545 (2020), the Labor Board held that an employer did not violate the NLRA when it decided to impose serious discipline on a worker after a new union had been recognized without bargaining over the matter with the labor organization.

Page 548, Note 9

In *Mike-sell's Potato Chip Co. v. NLRB*, 807 F.3d 318 (D.C. Cir. 2015), the court explained that the mere expiration of a contract does not authorize an employer to unilaterally impose terms unless and until good faith talks with the union have reached a genuine deadlock. The contract's terms and conditions continue post-expiration until either the parties agree to change the terms or an impasse is reached. See also *Prime Healthcare Services—Encino LLC v. NLRB*, 890 F.3d 286 (D.C. Cir. 2018).

Where a collective bargaining agreement providing for pay increases during the term of that agreement expired, and it did not provide for any periodic increases beyond those specified, the employer did not violate the NLRA when it declined to increase wages after that bargaining agreement expired. *Finley Hospital v. NLRB*, 827 F.3d 720 (8th Cir. 2016).

Page 549, Note 10.

Barton v. Constellium Rolled Products, 856 F.3d 348 (4th Cir. 2017), concerned the legality of an employer's unilateral reduction in health care benefits for retired workers following the expiration of the existing bargaining agreement. Although the bargaining agreement made it clear that the employer could not reduce the pension benefits of retired workers even after the expiration of bargaining agreements, the health care provision contained no such language. As a result, the court held that the employer's unilateral reduction in retiree health care coverage following the expiration of the collective contract did not violate the NLRA.

4. Supplying Information

Page 555, Note 2.

The Labor Board continues to maintain the dubious distinction between claims of financial inability and claims of refusal to pay. In *Wayron, LLC*, 364 N.L.R.B. No. 60, 207 L.R.R.M. 1542 (2016), the employer insisted in bargaining that it needed concessions from the union in order to remain “competitive.” When the union sought review of the company’s financial records to assess the truthfulness of the claim, the employer refused, arguing that it had not been claiming an inability to pay. The Labor Board found that the claim of competitive disadvantage was made in a context in which the employer stated that it had been unprofitable with existing labor costs for several years, that it had no corporate parent able to sustain losses, and that the bank providing its line of credit would no longer fund its losses without significant cost reductions. In effect, the employer signaled that absent labor concessions, it would not be able to comply with its compensation obligations for the life of the expiring contract, let alone the new wages the union sought in the next one. Even absent express assertions of an inability to pay, the employer incurred a duty to furnish information in support of its claims upon request. See also *IATSE Local 15 v. NLRB*, 2020 U.S. App. Lexis 13739 (9th Cir. 2020) (employer that initially claimed inability to afford union demands but which quickly switched to unwillingness to do so did not have to disclose its financial data).

Page 558, Note 5.

In *Public Service Co. of New Mexico v. NLRB*, 843 F.3d 999 (D.C. Cir. 2016), the court sustained a Labor Board finding that an employer violated the NLRA when it failed to provide the representative labor organization with information it requested about non-bargaining-unit employees which the union sought in connection with grievances alleging disparate treatment of bargaining unit and non-bargaining unit employees under company-wide policies.

Page 559, Note 5.

Where a union seeks information from an employer related to allegations of misconduct investigated by the firm’s nursing peer review committee and the union’s interest in obtaining that information outweighs the employer’s confidentiality interest as defined by a state law privilege applicable to documents created by such committees, the Board may direct the employer to provide the information in question to enable the labor organization to fulfill its

representative function. See *Midwest Division—MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017).

C. THE SUBJECT MATTER OF COLLECTIVE BARGAINING

Page 567, Note 3.

The D.C. Circuit Court sustained a Labor Board ruling that an employer violated the NLRA when it unilaterally imposed a non-compete clause and a confidentiality obligation on bargaining unit employees without providing the representative union with notice and an opportunity to bargain over these issues, since they would have a significant impact upon unit employees. *Minteq International, Inc. v. NLRB*, 855 F.3d 329 (D.C. Cir. 2017).

Page 568, Note 3.

In *Total Security Management Illinois I, LLC*, 364 N.L.R.B. No. 106, 207 L.R.R.M. 1282 (2016), a properly constituted quorum of the Labor Board reaffirmed its earlier decision in *Alan Ritchey, Inc.* [cited in the main text at page 568], requiring employers to bargain over discretionary discipline taken with respect to newly organized workers prior to contract negotiations. Absent exigent circumstances where the employer reasonably believes that an employee's presence at work would pose a significant legal or safety risk, the employer must give the union notice and opportunity to bargain prior to imposing serious disciplinary action with an immediate impact on an employee's tenure, status or earnings, including suspension, demotion or discharge. Remedies available for violations include make-whole remedial relief (reinstatement and back-pay) as well as traditional cease and desist orders, notice posting, and orders to bargain. Make-whole relief, however, is subject to an affirmative defense that the discipline was for cause, with the employer bearing the burden to establish that the employee engaged in misconduct and that the conduct was the reason for the discipline; the burden then shifts to the General Counsel to challenge the employer's showing (on grounds of disparate discipline or other bases for leniency), with the employer then having the opportunity to rebut that evidence with proof that the employee would have received the same discipline regardless.

Page 577, Note 4.

In *Gallo v. Moen, Inc.*, 813 F.3d 265 (2016), *cert. denied*, 137 S. Ct. 375 (2016), the Sixth Circuit applied the ordinary contract principles required by the Supreme Court in *M & G Polymers* [cited in the main text at page 578] and found that retirees' "lifetime" health care benefits were not vested. The collective bargaining agreements under which the retirees claimed

entitlement did not explicitly guarantee lifetime benefits; the use of future tense (e.g., that the benefits would continue as indicated under the 2005 collective bargaining agreement) without more did not suffice to guarantee the benefits beyond the three year term of the contract. *Accord, Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017). The inquiry is fact-specific and dependent on the language of particular collective agreements and side letters, however, and extrinsic evidence may be considered to resolve ambiguities in language. See, e.g., *Reese v. CNH Industrial N.V.*, 854 F.2d 877 (6th Cir. 2017)(finding that extrinsic evidence supported district court’s conclusion that retirees’ lifetime health benefits had vested under ambiguous collective bargaining agreement provision)[note: the district court in *Reese* changed its mind less than two months after issuing the decision cited in the main text at page 578, which had found the benefits not vested].

D. THE DUTY TO BARGAIN DURING A CONTRACT’S TERM

Page 612, Note 4.

In *Lenawee Stamping Corp.*, 365 N.L.R.B. No. 97, 209 L.R.R.M. 1455 (2017), the Labor Board held that an employer violated the NLRA when it unilaterally raised the wages of employees during the term of an existing contract due to a shortage of skilled and semi-skilled workers it needed where the management rights clause did not provide a clear union waiver of the right to bargain over such changes and the employer did not have a sound basis for making such mid-contract changes without the union’s consent.

Page 613, Note 5.

In *M.V. Transportation*, 368 N.L.R.B. No. 66, 2019 L.R.R.M. 338544 (2019), the Labor Board abandoned the “clear and unmistakable waiver” standard which only allowed unilateral changes in employment conditions if the applicable contract specifically and unequivocally waived the union’s statutory right to bargain over those particular issues, and adopted the “contract coverage” test to determine whether mid-contract unilateral changes violate an employer’s duty to bargain. Under the “contract coverage” approach, the Board will examine the plain language of bargaining agreements to determine whether applicable provisions allow employers to make changes in employment terms without bargaining with the representative unions.

SECTION II. THE ENFORCEMENT OF THE COLLECTIVE AGREEMENT

B. THE ENFORCEMENT OF THE COLLECTIVE AGREEMENT THROUGH THE GRIEVANCE PROCEDURE AND ARBITRATION

2. Voluntary Arbitration

a. Interest Arbitration

b. Grievance Arbitration

C. JUDICIAL ENFORCEMENT OF THE COLLECTIVE AGREEMENT

1. The Enforcement of Voluntary Arbitration Agreements

c. Section 301 of the Labor Management Relations Act

Page 656, Note 2.

In *Wiregrass Metal Trades Council v. Shaw Env'tl. & Infrastructure, Inc.*, 837 F.3d 1083 (11th Cir. 2016), the court enforced an arbitration award reinstating a government contractor's employee who had been terminated for taking property without permission. The arbitrator found that although the just cause clause in the collective agreement authorized termination for possession of government-owned property without property authority, the employee wasn't aware of the government's ownership of the property. The employer argued that the arbitrator had modified the collective agreement by reading into it a requirement of knowledge. The court found, however, that since it was equally plausible that the arbitrator had engaged in permissible interpretation of contract terms, *Enterprise Wheel* required enforcement of the award.

2. The Enforcement of Strike Bans and the Effect of Norris-LaGuardia

D. CONTRACT RIGHTS AND STATUTORY RIGHTS—OVERLAPPING LAW AND FORUMS

1. Within the Federal System

a. Unilateral Contract Modification Cases

b. Contract Rejection in Bankruptcy

Page 712, Note 2.

In *In re Trump Entertainment Resorts*, 810 F.3d 161 (3d Cir. 2016), *cert. denied*, 136 S. Ct. 2396 (2016), the court ruled that section 1113 of the federal bankruptcy code authorizes a bankruptcy court to permit a Chapter 11 debtor-employer to reject or modify continuing labor obligations established in a collective agreement even where the agreement expired before the bankruptcy filing. The court reasoned that the bankruptcy court should conduct the proper balancing under section 1113 whether the labor agreement is still in effect or has expired, since it is better to preserve jobs through a rejection of the labor contract than to lose them permanently by requiring the debtor to continue to comply with the terms of a labor contract.

c. Deference to Arbitration

Page 714, Note.

In *UPS*, 369 N.L.R.B. No. 1, 2019 L.R.R.M. 491513 (2019), the Labor Board made it easier for employers to have unfair labor practice cases deferred to grievance-arbitration proceedings, as it held that such deferrals will be appropriate so long as the results of such contractual procedures are not clearly repugnant to NLRA policies.

Page 722, Note.

In *Part Time Faculty Ass'n. at Columbia Coll. Chicago v. Columbia Coll.*, 892 F.3d 860 (7th Cir. 2018), the court refused to enforce an arbitrator's award determining the scope of an existing bargaining agreement which directly conflicted with a prior unit determination which had been made by the Regional Director of the NLRB. Since the arbitration award "directly conflicts" with the Regional Director's decision, "it is unenforceable as a matter of law."

Page 725, Note.

In *Verizon New England Inc. v. NLRB*, 826 F.3d 480 (D.C. Cir. 2016), the court held that the NLRB had acted unreasonably when it rejected an arbitration decision that had sustained an employer policy banning employees from displaying pro-union signs in their private vehicles, since the court found that the Board should have deferred to the arbitral determination that such signs were a form of “picketing” banned in the collective contract.

d. Union Waiver of Individual Statutory Forum Rights

2. Section 301 Preemption and State Claims

Page 760, Note 3.

In *Figueroa v. Foster*, 864 F.3d 222 (2d Cir. 2017), the court ruled that the duty of fair representation imposed on unions by the NLRA does not preempt the New York State Human Rights Law’s prohibition on discrimination by unions, since the Act’s imposition of a duty of fair representation doesn’t amount to total field preemption or pose a conflict so incompatible with federal labor law that all of its provisions must fall.

E. SUCCESSOR EMPLOYERS’ CONTRACTUAL AND BARGAINING OBLIGATIONS

Page 773, Note.

International Longshore & Warehouse Union v. NLRB, 890 F.3d 1100 (D.C. Cir. 2018), concerned an employer with shipping employees represented by the Longshore Union and a subsidiary firm which employed maintenance workers employed by the Machinists Union. When the shipping company decided to merge the maintenance subsidiary into the shipping company, the Longshore Union claimed the right to represent the maintenance employees. The Labor Board held that the shipping company had to continue to bargain with the Machinists Union with respect to the group of maintenance employees, since they continued to be a separate bargaining unit where the workers continued to perform the same work at the same location and with the same tools and equipment as they had when they were employed by the subsidiary firm. The Court of Appeals agreed with this assessment.

Page 781, Note 1.

Even when a company acquires the assets of a bankrupt firm through a public sale, it may be considered a successor employer that must recognize and bargain with the union that represented the prior firm's employees if a majority of its workforce used to work for the predecessor company. See *Publi-Inversiones de P.R., Inc. v. NLRB*, 886 F.3d 142 (D.C. Cir. 2018).

Page 782, Note 2.

The Labor Board found that a purchasing employer was a successor with an obligation to bargain with the incumbent union before making changes where the purchasing agreement contained a provision promising to offer all the employees new jobs, and the predecessor employer communicated the successor's intent to employees in an e-mail. Since the successor had the authority to review the predecessor's communications and failed to disavow the message, it had ratified those statements. As a "perfectly clear" successor under *Burns*, the new employer was ordered to restore the terms and conditions established by its predecessor and to rescind unilateral changes made. *Nexeo Solutions, LLC*, 364 N.L.R.B. No. 44, 206 L.R.R.M. 1958 (2016).

When it is apparent that a successor firm plans to retain most of the predecessor firm's employees, it becomes a "perfectly clear" successor and is obliged to recognize the predecessor union and bargain with it over the terms of the successor firm's employees. *NLRB v. First Student, Inc.*, 935 F.3d 604 (D.C. Cir. 2019).

Page 783, Note 3.

It is not only an unfair labor practice for successor employers to refuse to hire predecessor firm employees to avoid the obligation to recognize unions that represented predecessor workers, but it can also constitute a separate unfair labor practice for successor employer representatives to tell individuals hired by their companies that they would not have any union representation at their firms. Such statements would be likely to chill union support among the persons hired by the successor firms. *NLRB v. CNN America*, 865 F.3d 740 (D.C. Cir. 2017).

In *Ridgewood Health Care Ctr., Inc.*, 367 N.L.R.B. No. 110, 2019 L.R.R.M. 116178 (2019), the Board held that an employer violated § 8(a)(3) when it declined to hire four predecessor employer applicants to avoid having to recognize the predecessor employer union. Since the hiring of those four persons would have resulted in 53 of the 101 persons hired by

Ridgewood Health Care coming from the predecessor entity, Ridgewood violated § 8(a)(5) when it refused to recognize that labor organization as the representative of its own employees. Nevertheless, the Board overturned several prior decisions which had held that successor employers in such situations also violated § 8(a)(5) by failing to bargain with predecessor unions over the initial terms of employment. It held that only where it is clear that successor firms would have hired the vast majority of its work forces from predatory entities but for discriminatory hiring practices would such successor firms be obliged to negotiate the initial employment terms for the individuals being hired.

SECTION III. FAIR REPRESENTATION AND INDIVIDUAL CONTRACT RIGHTS

A. JUDICIAL ENFORCEMENT OF FAIR REPRESENTATION

1. Defining the Duty

Page 815, Note 2.

Blesedell v. Chillicothe Telephone Co., 811 F.3d 211 (6th Cir. 2016), involved an employee who had been terminated by his employer. He filed a grievance challenging his discharge, and the union investigated his claim and processed it through several stages of the grievance process. It ultimately decided that the worker's claim lacked merit and decided not to take the case to arbitration. Since the court found that the union had not acted in an arbitrary manner, no breach of its fair representation duty was found. The court noted that a union only acts arbitrarily when its conduct is so far outside a wide range of reasonableness that it can be considered to be irrational. See also *Saunders v. Ford Motor Co.*, 879 F.3d 742 (6th Cir. 2018) (claimant must prove that union's action was arbitrary, discriminatory, or in bad faith).

In *Int'l. Union, United Automobile v. NLRB*, 844 F.3d 590 (6th Cir. 2016), the court held that a labor organization did not violate the duty of fair representation when the shop steward who was processing a terminated employee's grievance failed to notify the grievant that he had given a statement to the employer stating that he had been present when that person had threatened a coworker in a manner that resulted in his discharge.

On the other hand, the court in *Rupcich v. Food & Commercial Workers Local 881*, 833 F.3d 847 (7th Cir. 2016) allowed a 25-year employee with a good work record who had been fired for theft after what turned out to be an inadvertent work mistake (taking a bag of birdseed in a cart past the supermarket's last checkout point) to proceed with a duty of fair representation claim to proceed against a union that declined to arbitrate. The union had failed to complete the first three steps of a grievance procedure which was mandatory by the collective

agreement, and the employee demonstrated that its decision not to press her grievance was arbitrary because the union had taken other substantively similar claims to arbitration.

Page 820, Note 4.

The court in *Flight Attendants in Reunion v. Am. Airlines, Inc.*, 813 F.3d 468 (2d Cir. 2016), cert. denied, 137 S. Ct. 313 (2016), found no breach of the duty of fair representation where a union negotiated and implemented an integrated seniority list of flight attendants following the merger of American Airlines with US Airways. Even though the union did not reorder the existing American Airlines seniority list to give American flight attendants credit for time worked at Trans World Airlines, thus keeping them near the bottom of the merged seniority list, the decision was not arbitrary, irrational or discriminatory.

B. UNFAIR REPRESENTATION AS AN UNFAIR LABOR PRACTICE

C. UNION REPRESENTATION AND ANTIDISCRIMINATION LAW

4. Areas of Tension Between Labor Law and Antidiscrimination Law

a. Sexual and Racial Harassment by Coworkers

Page 538, Note.

Although it may be easier for an employee to establish a discrimination claim against her union under the civil rights laws where she can also show that the union has breached its duty of fair representation, it is not always essential. The Seventh and Ninth Circuits permit employees to proceed directly against their unions in cases under Title VII or the ADA even if they are unable to establish a breach of the duty of fair representation. See *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848 (9th Cir. 2016)(ADA claim); *Green v. Am. Fed'n of Teachers/Ill. Fed. Of Teachers Local 604*, 740 F.3d 1104 (7th Cir. 2014) (Title VII).

Part Five

INTERNAL UNION AFFAIRS

A. THE BILL OF RIGHTS

B. REPORTING AND DISCLOSURE PROVISIONS

Part Six

CRITIQUES AND PROPOSALS FOR LABOR LAW REFORM

SECTION I. LAW'S ROLE IN LABOR'S DECLINE

SECTION II. EMPLOYER RESISTANCE TO UNIONIZATION AND COLLECTIVE BARGAINING

SECTION IV. THE REPRESENTATION GAP AND EMPLOYEE VOICE AT WORK

B. THE EXCLUSIVITY AND MAJORITY RULE DOCTRINES AS BARRIERS TO VOICE