



OUTLINE OF SIGNIFICANT NLRB CASES

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Noel Canning

Durham School Services, LP, 361 NLRB No. 66 (2014)

A Board panel (**Pearce, Miscimarra** and **Schiffer**) denied an employer's motion for reconsideration of an earlier decision in which the same panel had adopted a regional director's recommendation to overrule an election objection filed by the employer. The employer had alleged in the objection that the regional director lacked the authority to process the petition because the Board lacked a quorum at that time, and when the Board itself is without authority to act, any delegated authority to its regional directors is terminated during the period of incapacity. The employer argued that reconsideration was warranted in light of the Supreme Court's decision in *Noel Canning* that the challenged appointments to the Board were not valid. The case did not raise a quorum issue regarding the Board panel that certified the union, because it consisted entirely of confirmed members.

The panel stated that even though the Board lacked a quorum at the time the regional director conducted the election, the Board's rules provide that during any period when the Board lacks a quorum, normal agency operations should continue to the greatest extent permitted by law. In addition, in 1961, the Board delegated decisional authority in representation cases to Regional Directors pursuant to a 1959 amendment of Section 3(b) of the Act expressly authorizing such a delegation. This delegation occurred when the Board had a quorum and has never been revoked. Further, in *New Process Steel*, the Supreme Court declined to adopt the D.C. Circuit's view regarding the effect that the lack of a Board quorum has on previous delegations of authority to nonmembers, such as regional directors. The panel stated that since *New Process Steel*, every court of appeals that has considered this issue has held that prior Board delegations of authority to nonmembers do not lapse during a loss of quorum by the Board.

Note: In the aftermath of *Noel Canning*, the Board has reconsidered numerous cases de novo. This has been a simple rubber-stamping process in the vast majority of the cases, and those decisions are not reflected in this outline. In one case the result was changed, and in a small number of cases the rationale was restated in varying degrees; some of these cases are discussed in this outline.

Acting General Counsel

Benjamin H. Realty Corp., 361 NLRB No. 103 (2014)

A Board panel (**Pearce, Miscimarra** and **Hirozawa**) rejected an argument that a complaint should be dismissed because the Acting General Counsel was not validly designated and therefore lacked the authority to issue the complaint. The employer asserted that the Federal Vacancies Reform Act does not apply to the office of the General Counsel because there is a specific procedure under the NLRA for filling the vacancy. The panel stated that the express terms of the Vacancies Act make it applicable to all executive agencies, with one specific exception inapplicable here, and to all offices within those agencies, such as the office of the General Counsel, that are filled by presidential appointment with Senate confirmation. The employer's assertion was also contrary to Section 3347 of the Vacancies Act, which makes that statute the exclusive means for designating an acting official for a covered position except when another statutory provision, such as Section 3(d) of the NLRA, provides for such designation. In

that event, the Vacancies Act provides a valid alternative procedure. Finally, the enforcement provision of the Vacancies Act is expressly inapplicable to the office of the Board's General Counsel.

Jurisdiction

Pacific Lutheran University, 361 NLRB No. 157 (2014)

A 3-2 Board majority (**Pearce, Hirozawa** and **Schiffer**) decided to change the standard for determining when the Board should decline to exercise jurisdiction over faculty members at religious colleges and universities under the Supreme Court's decision in *Catholic Bishop of Chicago*. The majority decided that the Board should not decline to exercise jurisdiction unless the college or university first demonstrates that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing that it holds out those faculty members as performing a specific role in creating or maintaining a religious educational environment.

The majority concluded that, although Pacific Lutheran University satisfied the threshold requirement, it failed to establish that it holds out its contingent (non-tenure track) faculty members as performing a religious function. Specifically, the majority found that the university did not hold them out as performing a specific role in creating or maintaining a religious educational environment in its public representations to current or potential students and faculty members or to the community at large. In this regard, the majority found that there was nothing in the university's governing documents, faculty handbook, website pages or other material that would suggest to faculty, students or the community that its contingent faculty members perform any religious function. Thus the majority decided to assert jurisdiction over the petitioned-for unit of contingent faculty members.

Miscimarra and **Johnson** dissented.

Statutory Supervisors

Modesto Radiology Imaging, Inc., 361 NLRB No. 84 (2014)

A Board panel (**Miscimarra, Hirozawa** and **Schiffer**) rejected a union's challenge to the ballots of five team leaders in an election at a radiology imaging facility because the union failed to establish that they were statutory supervisors under the Board's precedent in *Oakwood Healthcare*. Each of the team leaders was in charge of a department and reported to the highest level manager of the facility.

The team leaders had the authority to create and adjust work schedules, which constitutes the authority to assign employees. However, the union failed to present evidence as to how four of the team leaders created or adjusted the schedules or what information they considered, and thus it failed to establish that they used independent judgment. The remaining team leader created a schedule assigning employees to machines in the facility's MRI/CT department, but she did so using a regular weekly rotation, sometimes altering the schedule to accommodate leave requests. The panel stated that there is a lack of independent judgment where a team leader assigns work using a rotational system; and to the extent that the team

leader made adjustments to the assignments, the union presented no evidence regarding frequency, how the adjustments were carried out, or that she used independent judgment.

The team leaders prepared an annual performance evaluation of each employee and presented it to the employee in a meeting. The panel stated that the Board analyzes the evaluation of employees to determine whether it is an effective recommendation of promotion, wage increase or discipline, but in this case there was no direct correlation between the evaluation scores and increased wages.

The panel found that one team leader who approved overtime was only acting in a routine manner by authorizing overtime consistent with blanket approval to do so, and thus the use of independent judgment was not established. Further, a single incident of counseling an employee for refusing to work overtime to finish a call was insufficient to establish the exercise of supervisory authority to require employees to take overtime on a regular basis.

The panel also found that reassigning an employee to a different machine did not require the exercise of independent judgment and that an occasional shifting of such tasks did not establish supervisory status. Regarding the reassignment of work among team members to cover absences, the union presented no evidence of the procedures used or the factors taken into account in doing so, and thus the panel was unable to conclude that it involved independent judgment or how often it occurred.

Sub-Acute Rehabilitation Center at Kearny, LLC, 361 NLRB No. 118 (2014)

A Board panel (**Pearce, Hirozawa and Schiffer**) reaffirmed a decision that was invalidated by the Supreme Court in *Noel Canning*, but restated the rationale for the decision. The panel found that a rehabilitation facility failed to establish that LPNs were statutory supervisors based on their authority to assign employees. The panel stated that, even assuming the LPNs had the authority to assign CNAs, the employer failed to show that they exercised independent judgment in making such assignments. Also, in finding that the employer failed to establish that the LPNs had the authority to adjust grievances, the regional director pointed to the minor character of the grievances resolved by the LPNs, some of which involved patient complaints. However, the panel found it unnecessary to characterize the grievances, or to address whether the resolution of patient complaints is relevant to the grievance adjustment indicia of Section 2(11) authority, because the evidence failed to show that LPNs used independent judgment in resolving them.

Managerial Employees

Pacific Lutheran University, 361 NLRB No. 157 (2014)

A 3-member Board majority (**Pearce, Hirozawa and Schiffer**) decided to change the Board's standard for determining when faculty members are managerial employees under the Supreme Court's precedent in *Yeshiva University*. Applying the new standard to this case, the majority concluded that a university failed to demonstrate that full-time contingent faculty members were managerial employees. Therefore, the majority found that the faculty members were properly included in a petitioned-for unit.

The majority stated that the question is whether the members of the faculty at a university actually or effectively exercise control over decision-making pertaining to central

policies of the university so that they are aligned with management. The majority concluded that in this case the university failed to prove that its full-time contingent faculty were substantially involved in decision-making affecting the key areas of academic programs, enrollment management and finances. Even in the secondary areas of academic policy and personnel policy or decisions, their decision-making authority was limited to matters concerning their own classrooms or departments. To the extent that the contingent faculty did have opportunities to participate in those areas of decision-making, their involvement was found to be short of actual control or effective recommendation.

Miscimarra and **Johnson** concurred in the decision.

Independent Contractors

Porter Drywall, Inc., 362 NLRB No. 6 (2015)

A Board panel (**Pearce**, **Hirozawa** and **Johnson**) found that crew leaders who installed drywall for a company in the drywall installation business were independent contractors and not employees of the company. In addition, the panel found that drywall installers hired by the crew leaders were employees of the crew leaders and not of the company, and thus they were excluded from a petitioned-for unit of the company's employees.

A 2-1 majority (**Pearce** and **Hirozawa**) analyzed the case under the Board's recent decision in *FedEx Home Delivery*, which restated the analysis for evaluating whether individuals are employees or independent contractors. The majority found that the crew leaders operated their own drywall installation businesses and accepted work on a project basis; their work was not controlled by the company or performed under its direction; they practiced a skilled trade using their own tools and supplies; and they paid their own crews and carried their own insurance. Further, the crew leaders had opportunities for gain by turning down work that did not pay enough, setting crew sizes on jobs, splitting crews among jobs, and determining pay for their crews. Thus, they rendered services as part of an independent business. The factors favoring employee status—the work was a part of the regular business of the drywall installation company, the crew leaders and the company were in the same business, and the method of payment—did not outweigh the many factors supporting the finding that the crew leaders were independent contractors. **Johnson** concurred in the decision but adhered to his criticism of the majority's independent contractor analysis in the *FedEx Home Delivery* decision.

In addition, the panel found that the drywall installers were employees of the crew leaders because the crew leaders determined whom they were going to hire or whether to hire anyone and did not report this information to the company; set all terms and conditions of employment for their crews; exclusively directed the work of the crews; carried insurance for the crews; and handled all aspects of their own payroll.

The panel also found that the company's service technicians, who performed some drywall hanging and finishing work, should be included in a bargaining unit and therefore an election was directed in a unit limited to those employees.

Single Employers

Lederach Electric, Inc., 362 NLRB No. 14 (2015)

In a compliance proceeding, a Board panel (**Pearce, Hirozawa** and **Johnson**) held that an electrical contractor organized as a corporation and a limited liability company that owned an office building constituted a single employer, rendering them jointly and severally liable for remedying unfair labor practices in an underlying case. Both of the entities were owned by the same individuals, a husband and wife. The contractor leased office space in the building owned by the LLC. The ALJ found there was only limited evidence of interrelated operations because the two entities were not in the same business, but the panel found that this factor did not weigh against a single-employer finding. In addition, the panel found that the two companies shared a post office box; the contractor received rent payments from the building's tenants; the contractor's phones were used to conduct the building's business; and the building allowed the contractor to forego many rent payments required under the terms of the lease. The panel found that these business arrangements demonstrated that the two entities lacked an arm's-length relationship and that their operations were substantially interrelated. In addition, the panel stated that, notwithstanding the different business purposes between two nominally separate entities, a single employer relationship can be found where there is evidence of a lack of an arm's-length relationship between the entities. Finally, the panel found that common management and common ownership and financial control were established by the evidence. Although there was no evidence of centralized control of labor relations, that factor was given less significance because one of the entities had no employees.

Unit Clarification

AT Wall Company, 361 NLRB No. 62 (2014)

A Board panel (**Hirozawa, Johnson** and **Schiffer**) decided not to clarify a bargaining unit at a manufacturing plant to include new classifications established after the employer acquired the operations of another company and moved its production to the plant.

The panel decided not to follow the Board's *Premcor* precedent, under which a new classification is regarded as already belonging in a bargaining unit—rather than being added by accretion—if the employees in the classification perform the same basic work functions that were historically performed by unit employees. Instead, the panel found that the new classifications should not be added to the unit because the new employees had retained their separate group identity and did not share an overwhelming community of interest with the employees in the existing unit. The panel explained that when the *Premcor* test is not satisfied, the Board will accrete new classifications to the unit only when the employees sought to be added have little or no separate identity and share an overwhelming community of interest with the preexisting unit.

The panel found that the employees in the new classifications did not perform the same basic functions as employees in the existing unit and thus they should not be treated as being part of the unit. The collective bargaining agreement contained a narrow unit description that defined the unit by listing 21 specific job classifications that were labeled by department and sometimes by product. Given this restrictive definition of the unit, the function of producing an entirely different product, using different processes under different working conditions, was not

sufficiently related to the functions of employees in the other departments to qualify the new employees to be part of the unit.

NV Energy, Inc., 362 NLRB No. 5 (2015)

A Board panel (**Pearce, Miscimarra** and **Hirozawa**) denied a union's request to clarify an existing unit of employees at six power generating plants in southern Nevada to include 14 employees at a recently-acquired plant in the same geographical area. The panel stated that the Board finds a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when they share an overwhelming community of interest with the preexisting unit. In this case, the panel found that the employees in the acquired plant were a sufficiently distinct, readily identifiable group that did not share an overwhelming community of interest with the employees in the existing bargaining unit.

The panel found that certain factors favored an accretion, including integration of operations, similarity of terms and conditions of employment, centralized control of management and labor relations, and similarity of skills. However, the panel found that these factors were clearly outweighed by two critical factors that disfavored accretion. First, there had been no permanent or temporary interchange between the acquired plant employees and the bargaining unit employees, which was in contrast to the other six facilities, where there had been some temporary and permanent interchange. Second, there was no common day-to-day supervision.

In addition, the panel found that there was little contact between the acquired plant and unit employees; there was no history of collective bargaining at the acquired plant; although the employees at the acquired plant had similar skills and performed similar functions as comparable unit employees, they had some additional duties and worked under slightly different expectations; and the closest plant in the existing unit to the acquired plant was about 45 miles away.

The panel also found that the Board's preference for systemwide units in the public utility industry did not warrant a different result. The panel stated that, to the extent the systemwide preference is relevant in unit clarification cases, it was merely one more factor to consider in the traditional accretion analysis.

Bottling Group LLC d/b/a Pepsi Beverage Company, 362 NLRB No. 25 (2015)

A Board panel (**Pearce, Hirozawa** and **Johnson**) denied a union's request to clarify a bargaining unit at a beverage distribution facility in Grand Rapids, Michigan, to include four delivery and installation employees after they were assigned to pick up loads at a parking lot at that facility instead of at a facility 113 miles away in Flint, Michigan. The employees delivered vending, cooler and fountain equipment to customers and installed the equipment.

The panel found that for 12 years the four disputed employees had been part of an operation that was eventually based in Flint and not part of the Grand Rapids facility. When the delivery and installation operations became centralized in Flint, the company assigned the four disputed employees to operate out of the Grand Rapids parking lot purely for convenience and efficiency purposes. They remained part of the Flint operations; kept the same supervisor, seniority, wages and benefits; continued to receive assignments from Flint; and attended

meetings as needed at the Flint location. Under these circumstances, the panel found that the employees did not become part of the Grand Rapids operation when they were assigned to pick up their loads at the parking lot of that facility.

The panel stated that the Board does not entertain a unit clarification petition seeking to accrete a historically-excluded classification into a unit unless the classification has undergone recent and substantial changes. In addition, the panel found that accretion was not warranted under a traditional accretion analysis. Under the Board's accretion standard, a valid accretion has been found only when the employees in dispute have little or no separate group identity and thus cannot be considered to be a separate appropriate unit, and when they share an overwhelming community of interest with the preexisting unit. In this case, the panel found that the disputed employees retained a separate group identity and did not share an overwhelming community of interest with the preexisting unit.

Appropriate Units

Bread of Life, LLC d/b/a Panera Bread, 361 NLRB No. 142 (2014)

A Board panel (**Pearce, Hirozawa** and **Schiffer**) reaffirmed a decision that was invalidated by the Supreme Court in *Noel Canning*, but the panel restated the rationale for the decision. The union sought to represent bakers working at six cafes in the employer's I-94 Corridor district, while the employer contended that the unit should also include bakers working at stores in two other districts. The panel found that bakers at the I-94 Corridor cafes shared a community of interest that was distinct from bakers in the other districts and sufficient to constitute an appropriate unit, without reaching the question of whether the Board's test in *Specialty Healthcare* applied. The I-94 Corridor was geographically coherent and distinct from the other districts; vacancy postings for baker positions did not overlap between the I-94 Corridor and the other districts; there was little interdistrict interaction among the bakers; the employer grouped bakers at the I-94 cafes on one schedule and bakers at the other cafes on another; the lead baker at an I-94 cafe performed attendance checks only for cafes in the I-94 Corridor; one baker training specialist was devoted to the other districts and another devoted to the I-94 district; and split shifts were only available within a district.

Election Issues

Y-Tech Services, Inc., 362 NLRB No. 7 (2015)

A Board panel (**Pearce, Johnson** and **McFerran**) decided to set aside an election because five eligible voters, a determinative number, were prevented from casting ballots by their work assignments. The employer contended that four ballot challenges should first be resolved because that could potentially determine whether the five disenfranchised voters affected the election result, but the panel declined to remand the case for a second hearing on the challenges. The panel stated that the fact that a potentially determinative number of eligible employees could not cast ballots due to their work assignments away from the polling location required setting aside the election. The panel explained that the Board's procedure for the conduct of elections requires that all eligible employees be given the opportunity to vote, and such a procedure was not maintained here.

Union Access

Caterpillar Inc., 361 NLRB No. 77 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) reaffirmed a decision that was invalidated by the Supreme Court in *Noel Canning*, but the panel restated the rationale. In the earlier decision, the Board found that a manufacturing company violated the Act by refusing to grant a union access to its facility to conduct a health and safety inspection after a fatal accident. In this decision, the panel found that the employer gave tours to customers, dealers, technical groups and students; that tour groups went through the plant while work was in progress, including the area where the accident occurred; and that the employer did not require the visitors to sign nondisclosure agreements. In these circumstances, the panel found that the employer failed to meet its burden of establishing a confidentiality interest that would outweigh the union's right to conduct a reasonably limited health and safety inspection. **Miscimarra** concurred in the decision but he dissented from the remedy because it failed to recognize the employer's confidentiality interest in its manufacturing processes.

Off-Duty Employee Access

Sodexo America LLC, 361 NLRB No. 97 (2014)

A Board panel (**Hirozawa, Johnson** and **Schiffer**) reaffirmed in part a decision that was invalidated by the Supreme Court in *Noel Canning*. In the previous decision, the Board ruled on the legality of exceptions to a hospital's no-access policy under the *Tri-County* rule, upholding exceptions for off-duty employees who were visiting a patient or receiving medical treatment, but finding unlawful an exception for off-duty employees who returned to conduct hospital-related business.

In this decision, the panel reaffirmed that the exceptions allowing off-duty employees to visit patients or receive medical care were lawful under *Tri-County*. Off-duty employees entering the hospital under these circumstances were required to use public entrances and to sign in like any other visitor or undergo the admitting process like any other patient. Their purposes for entering the hospital were unrelated to their employment; they sought access not as employees but as members of the public; and access was granted or denied on the same basis and under the same procedures as for the public. The panel declined as a matter of policy to require that health care employers limit employee access to medical care, or to friends and family members receiving medical care, in order to comply with the *Tri-County* requirements.

However, the panel also found, contrary to the earlier decision, that the exception for conducting hospital-related business did not render the policy unlawful under *Tri-County*. The panel explained that the policy defined hospital-related business narrowly, as the pursuit of the employee's normal duties or duties as specifically directed by management. The most natural reading of the policy was that this was not really an exception at all, but a clarification that employees who were not on their regular shifts, but were performing duties as employees under the direction of management, could access the facility. Although these employees would be off duty by the policy's definition, they were on duty under the term's ordinary meaning and within the meaning of *Tri-County*.

The panel found that the hospital had adopted the policy to make clear that employees were not permitted to work after their shifts. The hospital was attempting to avoid a situation in which employees who were not authorized to work beyond their shifts claimed after-shift work under California wage and hour laws. The panel stated that the policy as written was a reasonable attempt to address those concerns without violating the requirements of *Tri-County*.

The panel added that the policy was significantly different from the policy found unlawful in *Saint John's Health Center*. The policy in that case allowed access for hospital-sponsored events, such as retirement parties and baby showers, and gave no indication that employees would be paid or considered to be working during these events. In effect, it gave the employer unlimited discretion to permit off-duty employee access simply by sponsoring an event.

Johnson agreed that the policy at issue in this case was significantly different from the policy found unlawful in *Saint John's Health Care Center*, and he found no need to address whether the issue in that case was correctly decided.

Lytton Rancheria of California d/b/a Casino San Pablo, 361 NLRB No. 148 (2014)

A 2-1 Board majority (**Pearce** and **Schiffer**) held that a casino operator violated the Act by maintaining this rule:

Team Members are not permitted in the back of the house areas more than 30 minutes prior to the beginning of their shift or longer than 30 minutes following the end of their shift, except under the following circumstances:

1. To conduct business with Human Resources; pre-arranged training sessions or orientations;
2. With the approval of a director, manager, or supervisor.

The majority stated that the employer's rule was unlawful under the third prong of the Board's *Tri-County* test, as applied in *Saint John's Health Center*, because it did not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose. Outside the 30-minute preshift and postshift periods, the rule specifically permitted off-duty access for business with the human resources department and training and orientation sessions, and it provided for any additional access solely with management's approval. The majority stated that the last exception effectively vested management with unlimited discretion to expand or deny off-duty employees access for any reason it chooses.

Johnson dissented, stating that the rule provided off-duty employees with plenty of time to engage in protected concerted activity before off-duty access is denied, and that once an employer has provided enough time to employees for such activity in between shifts within the facility, then business-related or supervisory-approval-related limitations on additional time do not fall afoul of the *Tri-County* test.

Campaign Conduct

Sequel of New Mexico LLC, d/b/a Bernalillo Academy, 361 NLRB No. 127 (2014)

A Board panel (**Pearce, Miscimarra** and **Johnson**) held that an employer did not engage in objectionable conduct by holding a staff holiday party at a restaurant on the first day of a decertification election. The panel stated that campaign parties are legitimate campaign devices absent special circumstances, although the Board will examine whether particular events involve benefits sufficiently large to interfere with laboratory conditions for a fair election, which can result in setting aside the election.

The panel found that the union failed to present any evidence regarding the cost of the food and drinks provided by the employer. Thus, there was no basis to find that the party was like the lavish brunch found objectionable in an earlier Board decision in which an election was set aside. Moreover, the panel found that the evidence did not establish anything about the party that amounted to special circumstances. In this regard, all company employees, unit and nonunit, were invited to attend; attendance was voluntary; employees were not paid for the time spent; and there was no mention of the union or the election.

Although the party was held in close proximity to the election, the panel found that where free food and drink are otherwise unobjectionable, proximity to the election is insufficient to create special circumstances warranting a new election. In addition, the party was announced before the election date was scheduled.

Flamingo Las Vegas Operating Company, LLC, 361 NLRB No. 130 (2014)

A 2-1 Board majority (**Pearce** and **Hirozawa**) reaffirmed an earlier decision that was invalidated by the Supreme Court in *Noel Canning*, but restated the rationale for the decision. The majority stated that the employer unlawfully created an impression among its employees that their union activities were under surveillance when it gave them a flyer depicting a blank union authorization card and a written admonition against signing it. The majority found that employees who signed cards had not done so openly, nor was there evidence that they wanted the employer to be aware of their involvement in the campaign; and thus by presenting them with the flyer without explaining how the authorization card had been obtained, they reasonably could conclude that their union activities were being monitored. The majority also found that the employer's posting and distribution of an antiunion flyer that included a thinly veiled barb at a specific employee likewise created an impression of surveillance, because employees reasonably would conclude from the flyer that the employer was monitoring his union activities and their activities likewise might be under surveillance. **Johnson** dissented.

Print Fulfillment Services LLC, 361 NLRB No. 144 (2014)

A 2-1 Board majority (**Hirozawa** and **Schiffer**) found that a manager unlawfully threatened an employee with reprisals by stating that he was "disappointed" by the employee's support for a union. The majority stated that a reasonable employee would interpret that remark as a threat of reprisals as a result of supporting the union. **Miscimarra** dissented.

The majority also found that a manager unlawfully blamed the union for the employer's asserted inability to give an employee a requested raise shortly after an election. The manager stated that the employer could not give the employee a raise "because of the union proceedings." The majority stated that an employer violates the Act when it tells employees that it is withholding pay raises because of union activity. **Miscimarra** dissented.

The full panel found that the employer unlawfully refused to hire a temporary employee as a permanent employee because it believed he would support the union if he were part of the unit. When the employee asked about converting his status to permanent, a manager responded that "I can't right now because of all the negotiations, and things that was going on with the union."

Care One at Madison Avenue, LLC, 361 NLRB No. 159 (2014)

A Board panel (**Pearce, Johnson** and **Schiffer**) affirmed an ALJ's decision finding that the operator of a nursing and rehabilitation facility violated Section 8(a)(1) of the Act prior to a representation election by distributing a leaflet that stated: "Do you want to give outsiders the power to jeopardize your job by putting you out on strike?" The ALJ found that the question in the leaflet implied that job loss was a consequence of a strike and failed to notify employees of any reinstatement rights and that it also failed to distinguish between economic and unfair labor practice strikes.

The panel also agreed with the ALJ that the employer violated Sections 8(a)(1) and (3) of the Act by implementing a reduction in healthcare premiums and copays for all employees at facilities in New Jersey managed by the employer except those who were eligible to vote in the election. The ALJ stated that withholding benefits from employees involved in a union representation proceeding, while granting the same benefits systemwide to employees not involved in the proceeding, violates Section the Act. The ALJ also stated that there is an exception that allows an employer to postpone a wage or benefit adjustment if it makes clear to the employees that the adjustment would occur whether or not they select a union and the sole purpose of the postponement is to avoid the appearance of influencing the election outcome, but the employer did not give this assurance to the employees.

The panel also held that the employer violated Section 8(a)(1) of the Act during a campaign meeting by presenting a video displaying photographs of employees, which were taken for other purposes and used without their consent, and lacking any disclaimer that the video was not intended to reflect their views. The ALJ stated that under the Board's precedent in *Allegheny Ludlum*, an employer may include images of nonconsenting employees only if the videotape, viewed as a whole, does not convey the message that the employees either support or oppose union representation. In addition, the evidence must establish that (1) the employees were not misled about the use of their images at the time of the filming; (2) the video contained a prominent disclaimer stating the video was not intended to reflect the views of the employees appearing in it; and (3) nothing in the video contradicted the disclaimer.

Corliss Resources, Inc., 362 NLRB No. 21 (2015)

A Board panel (**Miscimarra, Hirozawa** and **McFerran**) held that a concrete supply company violated Section 8(a)(1) of the Act when its dispatcher called truck drivers "a bunch of backstabbers" for supporting a union. The panel stated that this reference would have been

understood to characterize all supporters of the union as disloyal and to threaten them with retaliation.

Company Email

Purple Communications, Inc., 361 NLRB No. 126 (2014)

A 3-2 Board majority (**Pearce, Hirozawa** and **Schiffer**) held that employee use of company email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. The Board's decision in *Register Guard* was overruled to the extent it holds that employees have no statutory right to use an employer's email system for Section 7 purposes. The majority stated that the *Register Guard* analysis was incorrect because, by focusing too much on an employer's property rights and too little on the importance of email as a means of workplace communication, the Board had failed to adequately protect employee rights and abdicated its responsibility to adapt the Act to the changing patterns of industrial life.

The majority also stated that the decision is limited and seeks to accommodate Section 7 rights to communicate and the legitimate interests of employers. The decision applies only to employees who have been granted access to an employer's email system in the course of their work and does not require employers to provide such access. Moreover, an employer may justify a total ban on nonwork use of email by demonstrating that special circumstances make it necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent necessary to maintain production and discipline. For example, an employer can prohibit large attachments or audio/video segments if they would interfere with the system's efficient functioning. In addition, the majority explained that the decision did not address email access by nonemployees or any other type of electronic communications systems, and that the decision did not reach *Register Guard's* definition of discrimination.

The majority asserted that email systems are different in material respects from the types of workplace equipment the Board has considered in the past and the *Register Guard* majority erred when it disregarded these differences. The majority also questioned the Board's broad pronouncements in the equipment cases and stated they are best understood as dicta. In addition, the majority stated that when employees seek to engage in Section 7 activity on an employer's land it's property rights must yield to some extent to accommodate Section 7 rights; logically the same must be true of the employer's property rights with regard to equipment; and its rights regarding personal property are relatively weaker as against competing Section 7 rights.

The majority acknowledged that employers who choose to impose a working-time limitation will have concerns about the extent to which they may monitor employee email use to enforce that limitation. In that regard, the majority stated that the decision does not prevent employers from continuing to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing use for purposes of harassment or other activities that could give rise to employer liability.

Miscimarra and **Johnson** dissented.

Solicitation/Distribution Rules

Conagra Foods, Inc., 361 NLRB No. 113 (2014)

A 2-1 Board majority (**Pearce** and **Schiffer**) held that an employer violated the Act by warning an employee for violating a no-solicitation policy because her conduct did not constitute "solicitation" under the majority's narrow definition of that term. The employee walked past two other employees on the production floor of a plant and informed them she had placed authorization cards in their locker. She did not ask them to sign cards and had no cards on her person. At the time of the discussion one of the employees was waiting for the production line to start, the other was cleaning and stopped momentarily, and the interaction lasted a few seconds.

The majority acknowledged the principle that working time is for work, and thus employers are permitted to enforce rules prohibiting solicitation during working time, absent evidence that a rule was adopted for a discriminatory purpose. However, the majority stated that the Board has consistently held that solicitation for a union usually means asking someone to join the union by signing an authorization card at that time. The majority also stated that presentation of an authorization card is an integral and important part of the solicitation process, and drawing the solicitation line at the presentation of a card for signature makes sense because it is that act which prompts an immediate response from the individual being solicited and therefore presents a greater potential for interference with productivity. In addition, the majority emphasized that there was no request of the other employees to sign cards during the brief interaction; no cards were presented for signature; and the employees were simply informed that the cards they had already agreed to sign were in their locker. Thus, the majority concluded that the comment was not a request to take any action and posed no reasonable risk of interfering with production because it did not call for a response of any kind and the information was conveyed in a few seconds.

The majority also stated that merely providing information to coworkers does not constitute solicitation; a momentary interruption in work, or even a risk of interruption, does not subject employees to discipline; the Act allows employees to make union-related statements that do not occupy enough time to be treated as a work interruption; and the balance thus struck is more faithful to the principles in *Republic Aviation* than one that turns an informative statement about cards into a solicitation.

In addition, the majority found that the employer also violated the Act by posting a letter stating: "We also wish to remind employees that discussions about unions are covered by our company's solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to nonworking times." The majority stated that the letter was unlawful because employees would reasonably construe it to prohibit all discussions about unions during working time, and the employer allowed employees to discuss other nonwork-related matters on working time.

Miscimarra dissented, explaining that under this decision solicitation is prohibited and permitted at the same time and nobody would reasonably interpret solicitation policies in this manner.

Mercedes-Benz U.S. International, Inc., 361 NLRB No. 120 (2014)

A Board panel (**Pearce, Hirozawa** and **Johnson**) affirmed an ALJ's finding that an atrium and several team centers in a manufacturing plant were mixed-use areas, and that the employer violated Section 8(a)(1) of the Act by telling employees they could not distribute union literature in the atrium and one of the team centers. The ALJ stated that an employer may lawfully prohibit employees from distributing literature in work areas, but this rule does not apply to a mixed-use area.

Each of the team centers in the plant had a refrigerator, microwave oven and picnic table, which were used by employees during their lunch and break times. However, the team centers also served as offices for group leaders and included filing cabinets, computers and related equipment. In addition, managers and HR representatives used the centers when they came to the production areas to confer with employees. The ALJ found that the employer did not meet the burden of proving the existence of special circumstances at the team center where an employee distributed the union-related materials, which was the only one relevant to the complaint.

The room called the atrium was roughly 60 by 100 feet and mostly open space. When employees entered and left the plant each workday, they went through the atrium. Bulletin boards displayed notices about work on the walls of the room, and it also included a store that sold merchandise to visitors and employees, a security officer kiosk, a medical and safety office, and a desk where employees could sign up for vehicle leases. When the production employees traversed the atrium for egress or ingress, they were not on working time, either having clocked out or not yet clocked in. The ALJ concluded that the atrium was at most a mixed-use area.

An HR executive told employees they could not pass out union literature in the atrium, but a couple of hours later he stated that management had decided to allow distribution in that area. However, the majority found no merit in the employer's contention that it corrected the unlawful prohibition by subsequently permitting the distribution. The panel stated that the employer did not take the steps required to effectively repudiate its unlawful conduct under Board precedent.

Johnson agreed that the team center in question was a mixed-use area and the employer did not show special circumstances to justify the prohibition of distribution, but he found it unnecessary to pass on the status of team centers that were adjacent to the production line.

The panel also adopted the ALJ's conclusion that a rule was unlawful that prohibited "solicitation and/or distribution of non-work related materials by team members during work time or in working areas." The ALJ explained that, absent special circumstances, employers may ban solicitation in working areas during working time, but may not extend such bans to working areas during nonworking time.

Lytton Rancheria of California d/b/a Casino San Pablo, 361 NLRB No. 148 (2014)

A Board panel (**Pearce, Johnson** and **Schiffer**) held that a casino operator violated the Act by maintaining this rule: "Team Members may not solicit or distribute literature in the workplace at any time, for any purpose."

The panel stated that generally an employer's ban on solicitation that is not limited to working time, or on distribution of literature that is not limited to working time and working areas, is presumptively invalid. In addition, the Board has held that gambling establishments are analogous to retail stores for the purpose of no-solicitation and no-distribution rules, and thus an employer may lawfully prohibit all such activity in the gambling area, which the Board equates to selling floor areas in retail stores. However, the employer's rule in this case prohibited solicitation and distribution in the workplace at any time for any purpose.

Rules of Conduct

Good Samaritan Medical Center, 361 NLRB No. 145 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) held that a hospital's workplace civility policy was unlawful because it was used to justify the unlawful discharge of a new employee who had stated at an orientation meeting that employees were not required to be union members. The union had caused the hospital to discharge the employee. The panel relied solely on the third prong of the Board's decision in *Lutheran Heritage Village*, under which the application of a rule or policy to restrict the exercise of Section 7 rights makes the maintenance of that rule unlawful.

Miscimarra and **Johnson** disagreed that the unlawful application of a lawful rule should make it unlawful to maintain that rule, or that rescission is an appropriate remedy when a lawful rule is unlawfully applied. The proper remedy would be an order that the employer cease and desist from applying the rule in a manner that restricts the exercise of protected employee rights. However, they recognized that Board precedent is to the contrary, and therefore for institutional reasons they applied the existing precedent to this case.

Lytton Rancheria of California d/b/a Casino San Pablo, 361 NLRB No. 148 (2014)

An unusual 2-1 Board majority (**Johnson** and **Schiffer**) held that a casino operator did not violate the Act by maintaining a rule that prohibited "gossiping about other Team Members (including supervisors, managers, directors)." The majority distinguished an earlier decision where the Board found that a rule prohibiting "negative conversations about associates and/or managers" violated the Act. That rule concerned employee conversations generally, which was found to include protected concerted activity, while the rule in this case specifically prohibited gossip, which the majority defined as chatty talk, rumors or reports of an intimate nature. **Pearce** dissented, stating that "gossip" is subject to different meanings, including a belief that it would include protected activity. Further, he found that ambiguity was even more readily apparent here than in the *Hyundai America* decision, where the employer's prohibition was against "harmful gossip" rather than "gossip."

A different majority (**Pearce** and **Schiffer**) found unlawful a rule that prohibited "insubordination or other disrespectful conduct (including failure to cooperate fully with security, supervisors and managers)." The majority stated that if the prohibition were limited to insubordination, which connotes defiance of a superior's job-related directive, the rule would be lawful, but given the ambiguity of "disrespectful conduct," employees would reasonably construe it to prohibit activities protected by Section 7. They asserted that employees would reasonably understand this phrase as encompassing activity that is insufficiently deferential to a person in authority—in other words, less than actual insubordination. **Johnson** dissented.

The full panel found unlawful a rule that prohibited “making false, fraudulent or malicious statements to or about a team member, a guest or San Pablo Lytton Casino.” The panel relied on precedent establishing that prohibiting false statements, as opposed to maliciously false statements, was overbroad and had the tendency to chill protected activity, and found that the rule failed to define the areas of permissible conduct in a manner clear to employees.

The employer contended that the allegations were moot because it had issued a new handbook that did not contain any of the contested rules. However, the panel stated that in order for a repudiation to serve as a defense it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. In addition, there must be adequate publication of the repudiation to the employees and it must assure them that in the future the employer will not interfere with the exercise of their Section 7 rights.

Care One at Madison Avenue, LLC, 361 NLRB No. 159 (2014)

A 2-1 Board majority (**Pearce** and **Schiffer**) a that the operator of a nursing and rehabilitation facility violated Section 8(a)(1) of the Act by posting a memorandum on a bulletin board three days after a union election. The memorandum, entitled “Teamwork and Dignity and Respect,” was accompanied by a preexisting workplace violence prevention policy. The majority found that the memorandum was promulgated in response to union activity and employees would reasonably read it to restrict Section 7 activity.

The majority stated that the Board does not accept an employer’s claims of violence at face value when Section 7 rights are implicated; the employer had the burden to demonstrate that such concerns apart from the campaign actually motivated it to issue the memorandum; and there was no evidence that the employer attempted to investigate alleged threats or that any actually occurred. In addition, the majority stated that the employees would understand the references to the recent union election and their purported failure to treat each other with dignity and respect during the campaign as an extension of the policy to target protected activity in support of the union. The majority also found that the memorandum served as an authoritative indication to employees that the employer would construe the policy to include protected campaigning activity and they should do so as well.

The majority disregarded the fact that the memorandum was posted alongside the existing policy and repeated language from the policy by using the words threats, intimidation and harassment. They found that this did nothing to lessen the coerciveness of the memorandum, and the invocation of the policy’s general rules against harassment was more than offset by language specifically targeting union activity. In addition, they stated that the memorandum’s acknowledgement of Section 7 rights did not negate its earlier intrusion on those rights.

Johnson dissented.

Nelson Tree Service, Inc., 361 NLRB No. 161 (2014)

A Board panel (**Pearce**, **Miscimarra** and **Hirozawa**) adopted a Regional Director’s recommendation to overrule a union’s election objections. However, the panel concluded that the Regional Director should have considered evidence of additional objectionable conduct that was unalleged in the objections but uncovered during the investigation of an unfair labor

practice charge. The Regional Director had discovered that the employer maintained potentially unlawful work rules in its employee handbook and so informed the union. The union then filed charges alleging that the rules violated the Act and also requested that the Regional Director set aside the election based on the maintenance of the rules. The case was remanded to the Regional Director for further investigation, and a hearing if necessary, with respect to whether the rules warranted setting aside the election. The panel stated that if a Regional Director discovers evidence during an investigation that shows an election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election.

Battle's Transportation, Inc., 362 NLRB No. 17 (2015)

A 2-1 Board majority (**Pearce** and **McFerran**) held that a medical patient transportation company violated the Act by requiring employees to sign this confidentiality agreement:

The employee acknowledges that, in the course of employment by the employer, the employee has, and may in the future come into the possession of, certain confidential information belonging to the employer, including but not limited to human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/worker's compensation, customer lists (address, telephone number, medical/health related), investigations by outside agencies (formal and informal), financial, supplier lists and prices, fee/pricing schedules, methods, processes or marketing plans.

The employee hereby covenants and agrees that he or she will at no time, during or after the term of employment, use for his or her own benefit or the benefit of others, or disclose or divulge to others, any such confidential information.

The ALJ found that employees would not construe the agreement to restrict discussion of terms and conditions of employment, given the examples described in the agreement. However, the majority found the agreement unlawful to the extent that it barred employees from discussing human resources information and investigations by outside agencies because employees would construe those phrases to encompass terms and conditions of employment or to restrict employees from discussing protected activity such as NLRB complaints or investigations. In addition, the majority found that the portion of the agreement that prohibited an employee from using such information for his or her own benefit or the benefit of others would be construed to limit protected concerted activity. **Johnson** dissented.

Protected Concerted Activity

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

A Board panel (**Miscimarra**, **Johnson** and **Schiffer**) held that a Facebook conversation between two employees lost the Act's protection because the exchange contained numerous statements advocating insubordination. Thus, the employer did not violate the Act by rescinding offers to rehire the employees because of the material they posted.

Alternative Energy Applications, Inc., 361 NLRB No. 139 (2014)

A Board panel (**Miscimarra, Hirozawa** and **Schiffer**) held that an employer violated Section 8(a)(1) of the Act by instructing an employee not to discuss wages with other employees and threatening to discharge him if he did so. The panel stated that it is unlawful for employers to prohibit employees from discussing wages among themselves.

In addition, a 2-1 majority (**Hirozawa** and **Schiffer**) found that the employer unlawfully terminated the employee because it believed he had discussed wages with other employees. **Miscimarra** dissented.

M.D. Miller Trucking & Topsoil, Inc., 361 NLRB No. 141 (2014)

A 2-1 Board majority (**Pearce** and **Schiffer**) held that statements made by the owner of a trucking company to an employee regarding the filing of a contractual grievance constituted unlawful threats of futility in violation of Section 8(a)(1) of the Act. The owner had repeatedly stated: "Go file a grievance. You'll get nowhere." The employer argued that these statements did not violate the Act because the owner was simply opining on the merits of a potential grievance, but the majority rejected this argument in light of the circumstances surrounding the statements. Specifically, the majority found that the employer was undermining the union by engaging in direct dealing; a supervisor had just unlawfully threatened loss of overtime; and the employee had just been unlawfully discharged in a heated environment. **Johnson** dissented.

Lou's Transport, Inc., 361 NLRB No. 158 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) held that the operator of a quarry violated the Act by terminating a truck driver who was engaged in protected concerted activity. The driver posted signs in the window of his truck complaining about safety conditions at the quarry, and he also had a radio conversation with another driver about safety concerns. The employer contended that the driver was discharged solely for displaying the signs in his truck and that displaying the signs was not protected concerted activity. The panel found, however, that he was fired for displaying the signs and for the radio conversation with a fellow driver. But even assuming that the employee was discharged solely for displaying the signs, the panel still found his discharge unlawful because, regardless of whether displaying the signs was itself concerted activity, the employer believed it was. The panel stated that an employer violates the Act by discharging an employee because it believes he engaged in concerted activity for mutual aid or protection regardless whether the activity was in fact concerted.

Battle's Transportation, Inc., 362 NLRB No. 17 (2015)

A Board panel (**Pearce, Johnson** and **McFerran**) found that a medical patient transportation company violated the Act by posting this memo to employees:

We were contacted this morning by the front office staff at the VA Medical Center. They wanted to report that Battle's drivers notified clients that they were transporting that Thursday was the last day of our contract. They interpreted it that it was the last day we would be transporting them.

It is important to correct this miscommunication and to advise all drivers that you are not to communicate any company business with our clients. If there is information to communicate, the management staff will handle these matters.

The ALJ found that the memo addressed a specific recent problem and employees would construe it to address that problem and not to restrict their Section 7 rights. However, the panel found that the prohibition against discussing any company business with the employer's passengers was unlawful because employees would interpret it to prohibit them from discussing terms and conditions of employment. The panel stated that the ability of employees to communicate with customers about terms and conditions of employment is a right protected by Section 7 of the Act, notwithstanding that a listener might misinterpret or react unfavorably to the communication.

HealthBridge Management, LLC, 362 NLRB No. 33 (2015)

A Board panel (**Pearce, Johnson and McFerran**) found that the operator of a nursing facility violated Sections 8(a)(3) and (1) of the Act by discharging an employee for leading a group of employees into the office of the facility's administrator to present complaints about working conditions. The panel stated that the Board considers four factors to determine whether an employee's conduct is so egregious as to lose the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices.

The panel found that in this case the first three factors strongly favored finding that the employee's conduct remained protected. The walk-in took place in the administrator's office, away from any patient care area, and there was no evidence that the conversation was overheard by patients or visitors or that it disturbed the employer's operations. The employee was clearly engaged in protected concerted activity when he informed the administrator of employee concerns regarding terms of employment. As to the third factor, the employee's remarks were mild, merely informing the administrator that the group was there to discuss concerns about employment conditions. The employee did not refuse an order to leave the office or attempt to prevent the administrator from leaving, and he did not engage in any menacing or abusive behavior. Although there was no evidence that the employee's conduct was provoked by an unfair labor practice, the panel found that this factor was outweighed by the other three.

Dues Checkoff

Space Needle, LLC, 362 NLRB No. 11 (2015)

A Board panel (**Pearce, Hirozawa and Johnson**) found that an employer violated Section 8(a)(1) of the Act by distributing letters to employees that encouraged them to resign from a union and by polling the employees through tracking their responses to the letters. The employer had distributed the letters after the expiration of a collective bargaining agreement to advise the employees of their options for the payment of dues, including the revocation of dues checkoff authorizations and resignation from union membership. The employer instructed managers who delivered the letters to inform the employees that it did not want to resume dues deduction but would do so unless they directed otherwise.

The panel stated that an employer may provide only ministerial or passive aid to employees who wish to withdraw from union membership. Thus an employer may lawfully provide neutral information to employees regarding their right to withdraw union support, provided that it offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere in which employees would feel peril in not withdrawing.

The panel distinguished earlier cases in which an agreement provided for an annual window period allowing employees to revoke dues checkoff authorizations and the employer issued letters to union members just prior to that period, pointing out the revocation provision and dates. In those cases, the letters reassured employees that the employer was not urging them to remain union members or to resign from the union and their choice would have no effect on their wages, benefits or treatment, and the action occurred in an atmosphere free of any coercion.

With regard to the unlawful polling, the panel concluded that the employees understood they were revealing their choices regarding membership to management by their action or inaction following the employer's letters, and that placing employees in a position in which they would feel pressured to make an observable choice demonstrating their support for or rejection of the union was coercive.

In addition, the panel adopted the ALJ's finding that the employer violated Sections 8(a)(5) and (1) of the Act by reneging on an agreement to reinstate payroll dues deduction. The employer canceled the dues deduction after the agreement expired but agreed to reinstate it after the union demanded that it do so under the Board's decision in *WKYC-TV*. The ALJ found that, although that decision was not retroactive, there was a meeting of the minds in which the employer agreed to reinstate the deductions. The panel acknowledged that the decision in *WKYC-TV* was invalidated by the Supreme Court in *Noel Canning*, but found that the viability of the decision was immaterial to whether the employer had entered into the agreement.

Information Requests

Lenox Hill Hospital, 362 NLRB No. 16 (2015)

A Board panel (**Pearce, Johnson and McFerran**) affirmed an ALJ's conclusion that a hospital violated Sections 8(a)(5) and (1) of the Act by refusing to furnish a union with the following information for a 6-month period:

- The number of hours or shifts for nurse aides working one-on-one assignments.
- Patient census reports for the units named in a grievance alleging contractual violations.
- The FTE full complement standard of filled and unfilled positions for registered nurses and nurse aides for each unit named in the grievance.
- The number of overtime hours and shifts nurse aides worked for the units named in the grievance.
- The number of times nurse aides were pulled off units to cover one-on-one assignments.

A 2-1 Board majority (**Pearce and McFerran**) also found that the hospital violated the Act by refusing to give the union the mean and mode hours between the time patients were

given discharge orders and when they left the hospital. The majority found that this information directly related to the calculation of nurse-to-patient ratios. They rejected the hospital's defense that the information would be burdensome to provide and implicated confidentiality concerns, and stated that the hospital was required to bargain with the union towards an accommodation. **Johnson** dissented because it would be burdensome to review hundreds of patient medical files and also because the union's representative appeared satisfied with the hospital's explanation. He stated that the duty to act in good faith covers both parties involved in an information request; the union was required to clarify that it did not agree with the hospital's position on burdensomeness; and requiring the hospital to obtain a formalistic withdrawal of the request by the union elevated form over substance.

McKenzie-Willamette Regional Medical Center Associates, LLC, 362 NLRB No. 20 (2015)

A Board panel (**Pearce, Miscimarra** and **McFerran**) held that a hospital violated Sections 8(a)(5) and (1) of the Act when it failed to provide information requested by a union in connection with bargaining for a successor collective bargaining agreement and when it unreasonably delayed providing other information. The hospital argued that that it reached a successor agreement with the union after the close of the hearing and this proved the information requested by the union was not necessary for its representative role. However, the panel stated that the standard for assessing the relevance of requested information is not whether the union would be unable to function without it. Instead, it is a liberal discovery-type standard, which requires only the probability that the desired information was relevant and would be of use to the union in carrying out its statutory responsibilities.

United Parcel Service of America, Inc., 362 NLRB No. 22 (2015)

In a rare decision by the Obama NLRB, a Board panel (**Miscimarra, Hirozawa** and **McFerran**) found that UPS did not violate the Act by failing to provide information requested by a Teamsters local. Approximately once every 10 days, a union steward filed grievances on behalf of all bargaining unit employees claiming that the employer was forcing drivers to work through their lunch period. For each grievance, the steward requested, for all drivers during the preceding 10-day period, the timecards, delivery reports, manifests, average speed of a vehicle on each route, time between stops, weekly operation report, and driver recap summary.

The panel found that the employer effectively rebutted the presumption of relevance with respect to many of the requested documents. Also, with respect to the information requests as a whole, the employer had raised legitimate concerns over their burdensomeness and breadth, to which the union did not respond adequately.

Although some of the documents were relevant, the panel found that the union insisted on a vast number of documents and information that went far beyond what would be potentially relevant to determine if drivers recorded their lunchbreaks and whether they delivered packages during those breaks. The union sought six different reports on every driver for every day for months. These reports contained information such as where packages were located on a truck, who signed for each package, how much time a driver spent backing up, and much more detailed information about each driver's workday. The union did not explain how this requested information was even potentially relevant to the issue of lunchbreaks raised in the grievances. Moreover, many of the reports contained overlapping information, and the

union did not explain how it would benefit from having the same information in multiple reports.

In addition, the panel found that the employer timely asserted its concerns over the burdensomeness and overbreadth of the information requests and attempted to reach an accommodation with the union. For example, the employer offered to furnish time records for a sample of drivers for a single day, or for specific drivers who claimed to have missed lunchbreaks. These proposals were found to be reasonable in the circumstances, yet the union rejected them out of hand, never stating why they would not have satisfied its needs.

Unilateral Changes

Hallmark-Phoenix 3, LLC, 361 NLRB No. 146 (2014)

A Board panel (**Pearce, Hirozawa** and **Johnson**) held that a government contractor that lost its contract violated Sections 8(a)(5) and (1) of the Act by failing to pay union-represented employees in two bargaining units for all accrued vacation time in a timely manner; to include an hourly wage differential in the vacation pay of lead employees; to make severance payments; and to deduct union dues and transmit them to the unions. The panel found that the employer's failure to comply with its obligations under the agreements constituted midterm contract modifications within the meaning of Section 8(d) and thus violated Section 8(a)(5) of the Act.

The panel also found that the employer failed to prove that it relied on a sound arguable contract interpretation in failing to make the severance payments. **Pearce** and **Hirozawa** stated that they did not agree with the sound arguable basis standard, but they agreed that under that standard the employer's failure to make severance payments violated the Act.

In addition, the panel found that the employer violated Sections 8(a)(5) and (1) by inserting waiver language on the back of each employee's paycheck, stating that the employee acknowledged that the check represented the full amount owed to the employee.

Champaign Builders Supply Company, 361 NLRB No. 153 (2014)

A Board panel (**Miscimarra, Hirozawa** and **Schiffer**) affirmed an ALJ's decision that a concrete supplier violated the Act when it closed its business without engaging in effects bargaining. **Hirozawa** and **Schiffer** stated that the ALJ used language suggesting that the employer had an obligation to bargain over the decision to close the business, but it was clear that the employer had an obligation to bargain only over the effects of the decision to close. **Miscimarra** concurred in the decision but stated that the ALJ's decision warranted correction or clarification in several respects.

Professional Medical Transport, Inc., 362 NLRB No. 19 (2015)

In an unusual decision by the Obama NLRB, a Board panel (**Pearce, Johnson** and **McFerran**) held that an emergency medical transportation company did not unlawfully refuse to bargain with a union over a decision to relocate employees from one station to another station about six miles away because labor costs were not a factor in the decision. In addition, the panel found that the employer did not unlawfully refuse to bargain over the effects of the decision because there was no evidence showing that the change had an impact on unit

employees. However, the panel disavowed a suggestion in the ALJ's decision that an employer need only bargain over the effects of a decision if unit employees are adversely affected. Rather, in determining the impact of a change, the Board considers the extent to which it departs from the existing terms and conditions affecting employees.

Springfield Day Nursery a/k/a Square One, 362 NLRB No. 30 (2015)

In a case involving two distinct legal theories under Section 8(a)(5) of the Act, a Board panel (**Pearce, Johnson** and **McFerran**) decided on due process grounds that an employer's use of substitute teachers and van drivers to perform bargaining unit work did not constitute a unilateral change in violation of that section. The employer provided childcare and van services for pre-school age children at five centers. Regular part-time employees were covered by a collective bargaining agreement but substitutes, who were hired on a day-to-day basis to fill a vacancy or replace an employee, were not covered. Regular part-time was defined as regularly scheduled to work at least 10 hours but less than 35 hours per week, and most of the substitutes worked more than 10 hours per week.

The ALJ found that the employer's use of substitutes involved a failure to apply the contract to employees who were unit members in violation of Sections 8(a)(5) and 8(d) of the Act. However, he also found that the failure to classify substitutes as part-time employees constituted a unilateral change in violation of Section 8(a)(5). The panel reversed the unilateral change finding because that theory was not alleged in the complaint, litigated at the hearing, or addressed in the General Counsel's posthearing brief. Instead, the violation alleged in the complaint and litigated by the parties was that the employer modified the agreement within the meaning of Section 8(d) by failing to apply contract terms to the substitute employees.

The ALJ also found that the employer's failure to provide contract benefits to the substitutes constituted an unlawful contract modification under Section 8(d). The panel affirmed the finding as to the substitute van drivers, but a 2-1 majority (**Johnson** and **McFerran**) reversed it with respect to the substitute teachers because the allegation was time-barred under Section 10(b). **Pearce** dissented, arguing that the allegation was not time-barred.

In addition, a 2-1 Board majority (**Pearce** and **McFerran**) held that the employer violated Section 8(a)(5) of the Act by issuing sick leave rules that conflicted with the provisions of a collective bargaining agreement. The employer rescinded the rules as soon as the union objected, but the majority concluded that was not an adequate repudiation under the Board's *Passavant* precedent. **Johnson** dissented, arguing that the General Counsel failed to show that the employer made a unilateral change in violation of Section 8(a)(5). He explained that not every unilateral change in terms and conditions of employment constitutes a breach of the employer's bargaining obligation, and that a change must be material, substantial and significant. Thus, it was not necessary to decide the repudiation issue.

Employment Arbitration

Murphy Oil USA, Inc., 361 NLRB No. 72 (2014)

A 3-2 Board majority (**Pearce, Hirozawa** and **Schiffer**) reaffirmed the Board's earlier decision in *D.R. Horton*, where a 2-member Board ruled that an arbitration agreement in which employees were required to waive the right to file a class or collective action violated the Act.

In this decision the Board majority invalidated a similar arbitration agreement. Notwithstanding the agreement, four employees filed a collective action in federal district court alleging violations of the Fair Labor Standards Act. The company responded by filing a motion to compel individual arbitration of the claims. The lead plaintiff then filed a charge with the Board, and the General Counsel issued a complaint against the company. At that point, the company revised the arbitration agreement to provide that employees did not waive their right to file a group, class or collective action, but the company could seek dismissal of such claims under the Federal Arbitration Act. The district court subsequently granted the motion to compel arbitration. However, the Board majority found that the company had committed two violations of the NLRA—by requiring employees to sign the arbitration agreement and by enforcing the agreement in court. The majority was not persuaded by the Fifth Circuit's reversal of *D.R. Horton*, or by numerous other federal and state court decisions that have rejected the precedent of that decision.

Johnson and **Miscimarra** dissented. **Johnson** stated that the majority had chosen to double down on a mistake that was blatantly obvious; that the decision was an unfortunate example of a federal agency refusing to follow the clear instructions of the Supreme Court on the interpretation of the NLRA; and that the majority was compounding that error by rejecting the Supreme Court's clear instructions on how to interpret the Federal Arbitration Act, a statute where the Board possesses no special authority or expertise. **Miscimarra** criticized the majority for treating the NLRA as the protector of class action procedures under all laws, everywhere; and for concluding that the NLRA trumps all other federal statutes.

Cellular Sales of Missouri, LLC, 362 NLRB No. 27 (2015)

Adhering to the Board's precedent in *D.R. Horton* and *Murphy Oil*, a 2-1 majority (**Pearce** and **McFerran**) found that an employer violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration policy that waived the right of employees to maintain class or collective actions in all forums, whether arbitral or judicial. **Johnson** dissented.

In addition, the full panel found that the employer violated the Act because the arbitration policy restricted the right of employees to file charges with the Board. The policy provided that "all claims, disputes or controversies arising out of, or in relation to this document or employee's employment with Company shall be decided by arbitration." The panel concluded that, in the absence of any limits to this provision, employees would believe it waived or limited their right to file Board charges or to access the Board's processes.

Secondary Boycotts

International Longshore & Warehouse Union, 362 NLRB No. 40 (2015)

A Board panel (**Pearce**, **Miscimarra** and **Hirozawa**) affirmed an ALJ's decision finding that an ILWU local union violated Sections 8(b)(4)(i) and (ii)(B) of the Act by picketing a neutral barge company at its tie-off locations on two rivers between Oregon and Washington to force it to cease hauling grain for two primary employers that locked out ILWU members who worked at their grain elevators. The ALJ found that the *Moore Dry Dock* criteria did not apply because the picketing occurred at the barge company's neutral locations.

Although the barge company had chartered barges to another company established by the two primary employers, **Miscimarra** and **Hirozawa** decided that it was unnecessary to pass on whether the barge company was an ally of the grain companies. **Pearce** found that it was an ally, but he agreed that the ILWU had violated the Act by its secondary picketing.

Deferral to Arbitration

Babcock & Wilcox Construction Co., Inc., 361 NLRB No. 132 (2014)

A 3-2 Board majority (**Pearce**, **Hirozawa** and **Schiffer**) decided to modify the Board's standard for deferring to arbitration decisions in cases involving an alleged violation of Sections 8(a)(3) and (1) of the Act. The majority stated that the standard for deferral is solely a matter for the Board's discretion because Section 10(a) of the Act provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award and the courts have uniformly so held.

The majority explained that in *Spielberg Mfg. Co.*, decided in 1955, the Board held that it would defer, as a matter of discretion, to arbitral decisions in cases in which the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. The deferral doctrine announced in *Spielberg* was intended to reconcile the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices with the federal policy of encouraging the voluntary settlement of labor disputes. Thirty years later, in *Olin Corp.*, the Board adopted the current deferral standard, holding that deferral is appropriate where the contractual issue is factually parallel to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue, and the award is not clearly repugnant to the Act.

The majority concluded that the existing deferral standard does not adequately balance the protection of employees' rights under the Act and the national policy of encouraging arbitration of disputes arising over the application or interpretation of a collective bargaining agreement. The majority stated that the current standard creates excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory issue, or when it is impossible to tell whether he or she has done so, and the result is that employees are effectively deprived of their Section 7 rights if disciplinary actions that are in fact unlawful employer reprisals for union or protected concerted activity are upheld in arbitration.

The majority concluded that deferral is appropriate only when the arbitrator has been explicitly authorized to decide the statutory issue, either in the collective bargaining agreement or by agreement of the parties in the particular case. Accordingly, if the arbitration procedures appear to have been fair and regular, and the parties agreed to be bound, the Board will defer to an arbitral decision under the new standard if the party urging deferral shows that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.

Miscimarra and **Johnson** dissented.

Verizon New England, Inc., 362 NLRB No. 24 (2015)

A 2-1 Board majority (**Pearce** and **Hirozawa**) refused to defer to an arbitration award in a case in which an employer told employees to remove informational picket signs from the windows of personal vehicles parked on its property. An arbitration panel found that the display constituted picketing in violation of the no-picketing provision of a collective bargaining agreement, and the ALJ deferred to the award. However, the majority found that that the award was clearly repugnant to the Act because the contractual provisions did not address or reasonably encompass the display of signs in personal vehicles and there was no evidence that the parties intended the contract to cover that conduct. **Johnson** dissented.

Jurisdictional Disputes

International Longshore & Warehouse Union, Local 19, 361 NLRB No. 122 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) found reasonable cause to believe that an ILWU local union violated Section 8(b)(4)(D) of the Act by picketing with an object of forcing a general contractor to assign work to employees represented by the ILWU rather than to employees represented by the Carpenters and the Operating Engineers. The work involved the construction of an underground double-deck highway beneath downtown Seattle. A significant component of the project was the excavation of a tunnel using a boring machine and a conveyor system that transported muck out of the tunnel for removal from the construction site. The disputed work included two conveyor operators and two winch operators.

The panel found that there were competing claims to disputed work between rival groups of employees and that the ILWU used proscribed means to enforce its claim to the work. Additionally, the parties had not agreed on a method for voluntary adjustment of the dispute.

The panel found no merit in the ILWU's contention that this case involved a contractual dispute between the contractor and the ILWU over the preservation of work and therefore did not fall within the scope of Section 10(k) of the Act. The panel stated that in all cases where the Board has quashed a notice of hearing based on a work preservation claim, the work in dispute was historically performed by the union claiming the breach of its agreement with the employer, which was not true in this case. Thus, the panel found that the objective of the ILWU was work acquisition, not work preservation.

The panel concluded that employees represented by the Carpenters and Operating Engineers were entitled to perform the disputed work based on collective bargaining agreements, employer preference, current assignment, and economy and efficiency of operations.

International Brotherhood of Teamsters, Local 407, 362 NLRB No. 42 (2015)

A Board panel (**Pearce, Johnson** and **McFerran**) found reasonable cause to believe that a Teamsters local union violated Section 8(b)(4)(D) of the Act by threatening to strike and picket with an object of forcing an employer to assign work to employees represented by the Teamsters rather than to employees represented by a local union of the Operating Engineers.

The work in dispute was the operation of forklifts, lift trucks and industrial trucks in performing rigging work during the installation of a spiral conveyor system at an industrial facility.

The panel found reasonable cause to believe that the Teamsters and Operating Engineers both claimed the work in dispute for the employees they represented. The performance of the work by the employees represented by the Teamsters indicated their claim to it. In addition, a threat by the Teamsters to picket or strike if the employer reassigned the disputed work to other employees also constituted a claim to the work. Furthermore, the panel found that the Operating Engineers claimed the disputed work by filing a pay-in-lieu grievance with the employer. The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work.

In addition, the panel found no merit in a contention by the Operating Engineers that the grievance constituted a work preservation claim. The record showed with respect to rigging work at the facility that the employer had always assigned the use of forklifts, lift trucks and industrial trucks to Teamster-represented employees. The panel stated that where a union is claiming work that has not previously been performed by employees it represents, the objective is not work preservation, but work acquisition.

Finally, the panel found no merit in a contention by the Operating Engineers that the threat by the Teamsters was not genuine or was the result of collusion with the employer. The Board has consistently rejected this argument, absent affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion, and the record contained no such evidence.

The panel concluded that employees represented by the Teamsters were entitled to perform the work in dispute based on the factors of employer preference and past practice, area and industry practices, and economy and efficiency of operations.

Immigration

Farm Fresh Company, Target One, LLC, 361 NLRB No. 83 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) held that an ALJ correctly granted a motion in limine to exclude direct questions about the immigration status of alleged discriminatees. The employer argued that this evidence was relevant to its defense that the employees were not discharged but rather voluntarily quit. The panel stated that the employer was permitted to ask questions that could support the defense without probing the employees' immigration status, including whether they resigned, whether they were concerned about having their work authorization reverified, and whether they resigned because of those concerns. In addition, other evidence contradicted the employer's defense, particularly the credited testimony of the employees that they were discharged. The panel also stated that the employer would be able raise the issue of work authorization at the compliance stage of the proceeding.

Mezonos Maven Bakery, Inc., 362 NLRB No. 41 (2015)

On remand from the Second Circuit, a Board panel (**Pearce, Miscimarra** and **Hirozawa**) ordered the conditional reinstatement of employees who, at the time they were unlawfully discharged by the employer, lacked proper documentation to work in the United

States. The Board previously held that the Supreme Court's decision in *Hoffman Plastic Compounds* precluded awarding backpay to the employees because they were undocumented workers, but the Board did not address in that decision the question whether it could order reinstatement subject to the employees presenting documentation that they had become authorized to work in the United States. Thereafter, the Second Circuit remanded the case to the Board for consideration of issues relating to the request by the employees for conditional reinstatement.

Retaliatory Lawsuits

Atelier Condominium, 361 NLRB No. 111 (2014)

A Board panel (**Miscimarra, Hirozawa** and **Schiffer**) held that the operator of a condominium building violated the Act by filing a state court lawsuit against a former employee who had participated in a union organizing effort. The lawsuit alleged that the former employee had published libelous statements on the Internet accusing the employer of criminal conduct.

The panel stated that a reasonably based lawsuit, whether ongoing or completed, does not violate the Act regardless of the motive for filing it, but a lawsuit determined to be baseless is unlawful if the plaintiff's motive was to retaliate against protected rights, and a lawsuit is baseless if no reasonable litigant could realistically expect success on the merits. In applying this standard to a pending case, the Board is guided by the Supreme Court's decision in *Bill Johnson's*, which held that the Board may enjoin an ongoing lawsuit only if it lacks a reasonable basis and was filed with a retaliatory motive.

The panel concluded that in this case the employer's lawsuit was baseless and it had a retaliatory motive. Under New York law a plaintiff must establish five elements to succeed in a libel suit, and in the present case the baselessness of the employer's suit turned on the second libel element: the defendant's publication of the statement to a third party. The panel found that the evidence was insufficient to establish that there was a genuine dispute of fact as to whether the former employee published any of the alleged defamatory statements, and so the case against him necessarily failed. In addition, the panel found that the defamation allegations were motivated by a desire to retaliate against the former employee because of his protected conduct.

Miscimarra concurred in the decision.

Weingarten

Bentley University, 361 NLRB No. 125 (2014)

A Board panel (**Hirozawa, Johnson** and **Schiffer**) held that an employer violated Section 8(a)(1) of the Act by denying an employee union representation at an investigatory meeting where the employee's representative was prohibited from speaking. The panel concluded that the employee would have reasonably believed the meeting could result in discipline, and that the meeting was investigatory for the purposes of the *Weingarten* analysis. The panel stated that an interview is investigatory where an employee is summoned in front of management to explain his or her version of a disputed event. In addition, a supervisor made clear that he scheduled the meeting because he was not satisfied with the employee's refusal to

accept that there was a problem with her conduct. Thus, the panel found that the employee had a right to the active assistance of her union representative.

Smith's Food and Drug Centers, Inc. d/b/a Fry's Food Stores, 361 NLRB No. 140 (2014)

A Board panel (**Miscimarra, Hirozawa** and **Schiffer**) held that an employer violated Section 8(a)(1) of the Act by denying an employee her *Weingarten* rights by denying the union representative of her choice at an investigatory interview. The employee was aware of an ongoing investigation of theft at the facility and had arranged for a union representative to be available nearby and waiting for her to call if needed.

2-1 Board majority also found that the employer further violated Section 8(a)(1) by not allowing the employee to confer with her employer-appointed representative before the interview and by directing the representative not to speak during the interview. **Miscimarra** dissented.

Howard Industries, Inc., Transformer Division, 362 NLRB No. 35 (2015)

A 2-1 Board majority (**Pearce** and **Hirozawa**) found that a manufacturing company violated Section 8(a)(1) of the Act by threatening a union steward with discipline for using notes while representing an employee during an investigatory interview. The employee failed to use a breakdown pad to prevent denting transformer components on which he was working. The steward met with the employee prior to the interview and took notes, which reflected that the employee was never trained to do the job in question. During the interview, the steward raised his notebook, drawing the employee's attention to the notes regarding the lack of training, and the employee read aloud what was written. The manager conducting the interview told the steward to close the notebook and threatened to suspend him.

The majority stated that an employer is entitled to investigate an employee's alleged misconduct without interference from union officials and it is free to insist on hearing the employee's own account of the matter under investigation. However, the role of the union representative under *Weingarten* includes providing active assistance and counsel to the employee and he does not need to sit silently like a mere observer. The majority found that there was no evidence that the steward interfered with the integrity of the investigation or otherwise engaged in any activity that might have exceeded his *Weingarten* role. **Miscimarra** dissented.

Union Stewards

Battle's Transportation, Inc., 362 NLRB No. 17 (2015)

A Board panel (**Pearce, Johnson** and **McFerran**) adopted an ALJ's finding that a medical patient transportation company violated Section 8(a)(1) of the Act by requesting that a union replace an employee as its steward, although the employer did not refuse to deal with the steward as the union's representative. The steward had spoken to a passenger about an incident in which another passenger fell out of a wheelchair and was injured, and the employer concluded that this violated company policy. The ALJ found that the employer's request to replace the steward was unjustified and coercive, and it was foreseeable that the employee

would be informed about the request. **Johnson** and **McFerran** concurred in the decision for different reasons.

Union Discrimination

Good Samaritan Medical Center, 361 NLRB No. 145 (2014)

A Board panel (**Miscimarra, Johnson** and **Schiffer**) held that a union violated the Act by causing a hospital to discharge a new employee for a statement made at an orientation meeting. A union delegate stated at the meeting that the hospital was a union shop and all employees were required to be union members. The employee replied that the law prohibited the union from requiring membership and he pointed to union literature stating that an employee could be an agency fee payer. The union subsequently requested that the employee be discharged and the hospital complied with the request. The panel also found that the hospital violated the Act by discharging the employee.

Section 8(f)

Hawaiian Dredging Construction Company, Inc., 362 NLRB No. 10 (2015)

A 2-1 Board majority (**Pearce** and **Hirozawa**) held that a general contractor violated Sections 8(a)(3) and (1) of the Act when it terminated 13 members of a Boilermakers local union upon repudiation of its Section 8(f) bargaining relationship with that union. The employer was a member of a multi-employer association that negotiated with the Boilermakers, and the association and the Boilermakers had been parties to an 8(f) prehire agreement for at least 20 years. Pursuant to this agreement, the Boilermakers provided the employer with employees to perform welding and other duties. The most recent agreement had expired and the parties had not reached a new agreement despite ongoing negotiations. At that point, the association terminated its 8(f) relationship with the Boilermakers and the employer temporarily shut down its welding operations and issued termination notices to the employees who were separated by the Boilermakers. The notices stated "contract has expired" as the reason for the terminations.

Several days later, the employer entered into a collective bargaining agreement with the United Plumbers and Pipefitters and resumed its welding operations with employees dispatched by that union. The employer also contacted 10 of the 13 terminated employees, informed them that it had reached an agreement with the Plumbers, and stated that they would need to speak to that union if they were interested in returning to work. Eight of the 13 employees registered with the Plumbers.

The Board majority concluded that the discharges were not motivated by a substantial and legitimate business justification because they were motivated by the union affiliation of the employees. In the alternative, the employer's conduct was found to be inherently destructive of the employees' rights and its asserted business justification did not outweigh the destructive impact.

Miscimarra dissented.

Remedies

HTH Corporation d/b/a Pacific Beach Hotel, 361 NLRB No. 65 (2014)

A 3-2 Board majority (**Pearce, Hirozawa** and **Schiffer**) decided to impose several special remedies on an employer with a 10-year history of violations of the Act. Among other remedies, the majority ordered the employer to pay the litigation expenses of the General Counsel and the union; pay the union's bargaining and other expenses; post and mail the Board's notice, the decision and an explanation of rights to employees, supervisors and managers; publish the notice and explanation of rights in local publications; and require all employees, supervisors and managers to attend a public reading of the notice. **Miscimarra** and **Johnson** concurred in the decision, but they dissented as to some of the remedies because they exceed the Board's authority.

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