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THE CERTIFICATE IN EMPLOYEE RELATIONS LAW SEMINAR

LABOR LAW

PREFACE

Reference materials are provided for instruction purposes only and are not legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. This information should not be acted upon without seeking professional counsel.

The materials present a fair outline of the National Labor Relations Board process. The case selection, interpretation and application is a topic for you and your counsel. Our role at IAML is as teachers and not counselors until appointed by you.

Note About These Block I Materials:

Our special thanks to Raymond Deeny, Robert Deeny,

Thomas Kennedy, Patrick R. Scully, Karla E. Sanchez, and Howard Rohan, Members of the law firm of Sherman & Howard L.L.C.

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I. NATIONAL LABOR RELATIONS BOARD.

The National Labor Relations Board ("NLRB") consists of five members and a General Counsel, all of whom are appointed by the President and confirmed by the Senate. Tradition dictates that the party in power has a majority on the Board.

The NLRB has 28 Regional Offices which are staffed with a Regional Director, lawyers and investigators to investigate and process both complaint ("C") cases and representation ("R") cases. In recent years, the NLRB has experienced a reduction in case load and as a result, has consolidated regions by eliminating several regional offices and converting them into subregions of existing regional offices.

The NLRB decides "R" cases and "C" cases and is responsible to interpret the National Labor Relations Act ("NLRA") in deciding cases that come before it. "R" cases deal with how unions obtain or lose certification as bargaining agents. Issues include elections, voter eligibility, appropriate bargaining units, election tactics, objections, challenges and clarification of existing units. "R" cases can be initiated by unions, individuals or employers by filing petitions: "RC", "RD", "RM" and "UC". The case is processed in the appropriate Regional Office. Regional Directors are delegated authority to decide "R" case issues. Regional Director decisions may be appealed to the NLRB by either party. NLRB decisions in "R" cases are infrequent. Review of NLRB "R" case decisions in the courts of appeal can only be done through testing of certification by refusing to bargain with the union certified by the NLRB.

Complaint or "C" cases involve unfair labor practice charges which can be filed by individuals, unions or employers. There are five unfair labor practice charges that can be filed against employers and seven against unions. "C" cases are investigated in the Regional Office and if the case is deemed to have merit, settlement is sought. Failing settlement, a complaint will

issue and a formal trial will be held before an Administrative Law Judge ("ALJ") whose decision may be appealed to the NLRB.

NLRB unfair labor practice decisions may be appealed to the courts of appeal and to the Supreme Court if necessary. The circuit court selection is important. The law may vary from circuit to circuit. Some circuits are more disposed to the NLRB or unions and others more employer-friendly.

II. NLRB REMEDIES.

The NLRB has broad power to fashion remedies to effectuate the Act under Section 10(c) of the Act. *SureTan, Inc. v. NLRB*, 467 U.S. 883 (1984). The usual remedy is reinstatement, back pay and notice posting. If an employer's ULPs make a free election unlikely, the NLRB can order bargaining based on card majority. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Restorative remedies, *i.e.* access and notice, are sought to assist unions in organizing. In *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), the employer was ordered to publish and mail notices to all employees in local papers, convene employees during working time so a VP could read the notice to them, supply the union with names and addresses, and allow the union access to bulletin boards and non-work areas during non-work time and speech time during work time.

The NLRB requires electronic notice posting. *J. Picini Flooring*, 356 NLRB No. 9 (Oct. 22, 2010). E-Mail notices may also be required. *Pacific Bell*, 330 NLRB 271 (1999).

The standard remedy for discrimination is back pay and reinstatement. Front pay, which includes issues of life expectancy and potential increases, can be sought in cases of extreme misconduct and animus. Consequential damages as part of make whole remedies are also part of the remedial alternatives to remedy all economic consequences that foreseeably flow from unlawful discharges.

NLRB litigation is often a lengthy process so increasingly injunctive relief under 10(j) is sought even in bargaining order cases. The standard for relief is a strong likelihood of success on the merits, possibility of irreparable harm if injunction is not granted, balance hardships and public interest. *Miller v. California Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994). NLRB injunctive relief under 10(j) has been obtained to bar companies from moving to Mexico after losing a union election. *Aguayo v. Quadtrech Corp.*, 129 F. Supp. 2d 1273, 1280-81 (C.D. Cal. 2000). In *Quadtrech*, the employer was barred from relocating and entered into a formal settlement agreement to cease layoffs and subcontracting in retaliation for union activities. *Id.* The employer also was ordered to bargain, provide access to records, and reinstate discriminatees. *Id.*

In *Pye v. Excel Case Ready*, 2000 U.S. Dist. LEXIS 19656 (D. Mass. May 8, 2000), *aff'd* 238 F.3d 69 (1st Cir. 2001), the company was ordered to reinstate five employees, including two non-supporters of the union who were fired to make the discharge of three union supporters look lawful.

In *NLRB v. Aldworth Co.*, 124 F. Supp. 2d 268 (D.N.J. 2000), the company was enjoined from making threats of discharge, plant closure, loss of benefits and ordered to bargain based on a narrow card majority even though the union lost the election due to employer ULPs.

In *Scott v. Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001), the court upheld an injunction ordering bargaining based on card majority which was undermined by the employer's grant of benefits. NLRB Regional Directors view injunctive relief as a remedy where union organizing efforts are met with employer ULPs.

III. HOW THE UNION BECOMES THE BARGAINING AGENT.

An employer may recognize a union based on a showing of majority, *i.e.* usually signed authorization cards, employee polls, or a non-NLRB election. An employer who has neither

committed ULPs nor agreed to be bound by the results of a card check or poll, cannot be required to bargain with the union who has a majority of cards absent an election by secret ballot. *Linden Lumber v. NLRB*, 419 U.S. 301 (1974). Recent examples of employers voluntarily recognizing unions include Verizon, SBC and several Las Vegas Casinos. Once recognition has been extended, an employer may not withdraw it for a reasonable period.

Unions typically make a demand for recognition simultaneous to the filing of a petition with one of the NLRB's Regional Offices. Employers should respond to that demand in writing asserting a good faith doubt about the union's majority in an appropriate unit and suggest the matter be resolved by a secret ballot election run by the NLRB. When a petition is filed, the NLRB Regional Office sends a notice to the employer of the petition and a notice they request you post. You are not required to post the initial notice. The petition will state the bargaining unit's inclusions and exclusions. A typical appropriate unit is all production and maintenance employees, excluding office clericals, guards, and supervisors as defined in the Act. The Regional Office will schedule an informal conference to reach agreement for an election by stipulation or consent agreement. There is no requirement that you agree to an election. If you do, the election will be scheduled in 3-4 weeks from the petition's filing. If there is no agreement, a hearing will be held to determine disputed issues, such as commerce, scope of unit, supervisory status, contract bar, etc. Absent agreement, the Regional Office must hold a hearing. *Angelica Health Services Group*, 315 NLRB 1320 (1995). The NLRB Hearing Officer merely takes evidence for the Regional Director to make a written decision. Elections after a hearing usually result in 6-8 weeks from the filing of the petition.

In the last few years, the NLRB has attempted to regulate a shorter election time frame. On June 21, 2011, the Board proposed changes to the election procedures. These changes, which

shortened the time period from the filing of the petition to the election, took effect on April 30, 2012. The changes, however, were indefinitely suspended on May 14, 2012, after the Court of Appeals for the District of Columbia struck them down, finding that the Board did not have a valid quorum when it passed the regulations.

A. Recognition Without Elections.

1. General Rule.

An employer who commits no ULPs and does not agree to be bound by card check or poll cannot be required to bargain without an election. *Linden Lumber v. NLRB*, 419 U.S. 301 (1974). However, if an employer refuses to recognize or bargain, undermines the majority support for the union in an appropriate unit by serious and pervasive ULPs, bargaining will be ordered. *NLRB v. Gissel Packing,* 395 U.S. 575 (1969).

A Union can proceed to an election, lose and still get bargaining rights if the employer's conduct makes a free election impossible and the union files objections to the lost election.

An employer may assert defenses that authorization cards are not a reliable indication or are ambiguous, *i.e.*, union told employees cards "were to get an election" or "were confidential," or there was no demand for recognition (petition not sufficient). These defenses are rarely sustained, however. Cards must be fresh. Supervisor involvement in organizing activity is generally prohibited as "taint." *Harborside Healthcare Inc.*, 343 NLRB 906 (2004); *DTR Industrie*s, 311 NLRB 833 (1993); *Katz's Deli,* 316 NLRB 318 (1995); *Ellis Electric,* 315 NLRB 1187 (1994).

2. Employer ULPs May Lead to Bargaining Order Without Election.

Test: A bargaining order will be required where the employer's conduct is so egregious and outrageous as to impede majority and undermine the election process, and chances of erasing effects through traditional remedies are slight. *NLRB v. Gissel Packing,* 395 U.S. 575 (1969);

Skyline Distributors, 319 NLRB 270 (1995), *enf'd* 99 F.3d 403 (D.C. Cir. 1996) (wage increase during campaign not justify bargaining order bargaining); *Scott v. Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001); *Davis Supermarket,* 306 NLRB 426 (1992), *enf'd* 2 F.2d 1162 (D.C. Cir. 1993) (may rely on unfair labor practice before majority for bargaining order).

a. Conduct Warrant Order.

Hallmark violations - 8(a)(3), retaliation, discharge of organizers, threats to close, assaults on union, wage and benefit cuts, reprisals, promise or grant of benefits, improved conditions, increased benefits, wages, and promotion.

Electrical Construction, 320 NLRB 896 (1996).

Flexsteel Industries, 316 NLRB 745 (1996).

Interstate Truck Parts, 312 NLRB 66 (1993).

Holly Farms, 311 NLRB 273 (1993).

Q-1 Motor Express, 308 NLRB 1267 (1992).

Bargaining orders more likely when ULPs are committed in a small unit, committed by top management company officials and the timing of the ULPs are close to the start of union activity.

Lasar Tool, 320 NLRB 105 (1995).

Cassis Management, 323 NLRB 456 (1997).

Kentucky May Coal, 317 NLRB 60 (1995).

b. Conduct Where No Bargaining Order Warranted.

Customary notice remedy sufficient when there is no discharge, changed circumstances, turnover, no egregious conduct, timing is remote to election, no 8(a)(3)s, and benefits conferred with no other ULPs.

Skyline Distributors, 99 F.3d 403 (D.C. Cir.1993).

Avecor, Inc., 931 F.2d 924 (D.C. Cir. 1991).

Flamingo Hilton, 148 F.3d 1166 (D.C. Cir. 1998).

NTA Graphics, 303 NLRB 801 (1991).

Daniel Finley Allen, 303 NLRB 846 (1991).

c. Defenses to Bargaining Order.

Defenses to *Gissel* orders include majority due to card defects, *e.g.*, ambiguity, misrepresentations, union coercion of card signers and waiver of initiation fees only for those who sign prior to election. *NLRB v. Savair Manufacturing*, 414 U.S. 270 (1973).

The NLRB usually finds change of circumstances, turnover, passage of time and delay immaterial, but courts disagree, denying enforcement. *NLRB v Bakers of Paris,* 929 F.2d 1427 (9th Cir. 1991).

IV. REPRESENTATION ISSUES.

A. Types of Petitions.

Petitions by unions and employees: RC and RD. Require 30% showing of interest. *Dart Container Corp.*, 294 NLRB 798 (1989); *Metal Sales Mfg.,* 310 NLRB 597 (1993). UC and AC deal with changes to the certification and no showing of interest or election occurs.

Petition by employer ("RM") - statements by employees show level of support for union has dissipated. Same standard applies for polling or withdrawal. Historically, employers need objective evidence that union lacked majority support before RM petition would be processed. *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998); *Wagon Wheel Bowl*, 322 NLRB 602 (1996). In *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board loosened the standard for the processing of an RM petition based on good-faith uncertainty.

B. Certification Year - One Year Rule and Contract Bar.

Ray Brooks v. NLRB, 348 U.S. 96 (1954).

Irrebuttable presumption for one year.

Bars any RC and RD petition but not UC petition.

NLRB will extend the year for a refusal to bargain. *Lower Bucks Cooling,* 316 NLRB 16 (1995).

Voluntary recognition is a bar to another union petition unless intervening union has 30% support at time of recognition or where the union is actually organizing at time of recognition.

Where an employer settles unfair labor practice with incumbent union after contract expiration and ULPs are filed before rival petitions, a bar usually is present. *King Manor Care Center*, 303 NLRB 19 (1991); *Custom Deliveries*, 315 NLRB 1018 (1994); *Douglas-Randall,* 320 NLRB 431 (1995); *Smith's Food and Drug Centers,* 320 NLRB 844 (1996); *Super Shuttle,* 330 NLRB 1016 (2000).

Contract offer to union, majority lost, union accept = Employer BOUND. *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996).

A petition filed more than 90 days before the expiration date of a collective bargaining agreement will be dismissed as premature.

A petition filed within 60 days of expiration of a contract also will be dismissed, in order to allow the parties to an existing contract to have an "insulated period" to negotiate a new agreement without disruptive effects of rival petitions. *Deluxe Metal Furniture Co.,* 121 NLRB 995 (1958). An agreement entered into within the 60 days then serves as a bar to election for the term of the agreement or three years, whichever is shorter.

Changed circumstances within the contract term can remove the bar. *General Extrusion,* 121 NLRB 1165 (1958). Change in the status of the contracting union may negate the contract bar. *Hershey Chocolate Corp.*, 121 NLRB 901 (1958).

C. Schism/Defunct.

Schism will remove the contract as a bar if there is a basic intra-union conflict at the highest level disrupting existing intra-union relationships; if employees have had an opportunity to express their views at an open meeting called with due notice for the purpose of taking disaffiliation actions; and if the action of the employees took place within a reasonable time after the occurrence of the basic intra-union conflict (eighteen months is reasonable).

Defunctness of the bargaining representative will prevent a contract from barring a petition. A union is defunct if it is unable or unwilling to represent employees. Mere temporary inability to function, or a loss of all members in the unit, does not constitute defunctness. Mere change in the name or affiliation of the union is not enough.

Because schism or defunctness may be used by the union to avoid an unfavorable contract, the Board will consider the good faith of the union's actions.

D. Relocation Doctrine.

A prior contract is a bar if mere relocation of operations, accompanied by transfer of a considerable number of employees to another plant, is not accompanied by change in the

character of the jobs and the function of the employees in the unit. *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366 (2d Cir. 1995).

E. Accretion Doctrine.

If a group of newly-added employees is found by the NLRB to be part of an existing bargaining unit, the terms of the existing collective bargaining unit must be applied to the new group without the benefit of a vote by the new employees. The new group is deemed to have been accreted into the existing unit. Accretions are important in determining the "appropriate unit," the duty to bargain, and the coverage of the terms of an existing contract. Accretions usually occur because of construction or purchase of additional facilities near the location covered by the existing contract.

Factors to be considered in determining whether there is a sufficient "community of interest" so that the Board may find there has been an accretion. *Central Soya Co. v. NLRB*, 867 F.2d 1245 (10th Cir. 1989):

- Frequency of employee interchange between the existing unit and newly added group.
- Geographic proximity.
- Common supervision.
- Similar terms and conditions of management (in particular, centralization of labor relations).
- Integration of product lines, machinery, and operations.
- Similar job classifications, skills, and working conditions.

Ratio of number of employees at the existing facility to number of employees at the accreted facility.

Kroger Co., 219 NLRB 388 (1975) (After acquired clauses - no right to election).

Borden, Inc., 308 NLRB 113 (1992).

Technological changes lead to new hires; collective bargaining contract jurisdiction clause not job classification used to define scope of unit by work performed. Avoid defining unit by work performed. List classification only. Recognition clauses are important. *The Sun,* 329 NLRB 854 (1999).

When new jobs are similar to unit employees' jobs, NLRB may presume new employees should be added to unit. It is the employer's burden to show new group dissimilar.

F. UC Petitions.

Status of employees unresolved by certification or negotiations, permitted during contract period to clarify when substantial change in unit to create doubt whether employees should continue to be excluded.

Kirkhell Rubber, 306 NLRB 559 (1992).

ATS Acquisition, 321 NLRB 712 (1996).

Armco Steel, 312 NLRB 257 (1993).

Temporary employees generally cannot be accreted into an existing unit. However, they may be organized in a separate unit. *Oakwood Care Center*, 343 NLRB 659 (2004) (overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)).

G. Appropriate Unit.

1. Determination of "An Appropriate Unit".

NLRB unit stands unless arbitrary; there is wide latitude. An appropriate unit need not be the most appropriate unit. *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184 (D.C. Cir. 2000). In *Specialty Healthcare*, the Board overturned *Park Manor Care Center*, 305

NLRB 872 (1991), and held that it will now presume that the petitioned-for unit is appropriate even when a larger bargaining unit would also be appropriate. *Specialty Healthcare and Rehabilitation Center of Mobil, Inc.*, 357 NLRB No. 83 (Aug. 26, 2011).

The basic test is whether there is a "community of interest" among the employees: *Virginia Mtg.,* 311 NLRB 992 (1993); *Speedrack,* 320 NLRB 627 (1995) (work release employees); *Scolaris' Warehouse,* 319 NLRB 153 (1995) (meat dept employees).

- Degree of functional integration of the plant;
- Common supervision;
- Nature of employee skills and functions;
- Interchangeability and contact among employees;
- Work situs;
- Fringe benefits.

History of collective bargaining may get substantial weight, but there are exceptions for consent units, ineffective bargaining, etc.; and

Extent of organization may be considered, but "shall not be controlling".

2. Excluded Classifications of Employees.

a. Supervisors.

Before taking a position on supervisory status, the employer needs to calculate the risk. "Supervisory types" tend to vote for the employer, but including them in the unit could cause trouble if the union wins the election. Remember, the employer is bound by the acts of supervisors and agents in unfair labor practice and election objection cases. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (supervisory status clarified).

b. Confidential Employees.

Confidential employees (closely related to management) will be excluded, but only if their work involves formulation of labor relations policy. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). Clericals in accounting, production control, and payroll are not confidential, despite access to confidential and proprietary information. However, access to confidential wage data to be used in negotiations may be a basis for exclusion from the bargaining unit.

c. Managerial Employees.

Managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. They have discretion in the performance of their jobs independent of their employer's established policies. *NLRB v. Yeshiva University,* 444 U.S. 672 (1980); *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974).

d. Independent Contractors.

The NLRB ruled that it would apply the factors found in the Restatement (Second) of Agency, Section 220(2) in determining independent contractor status. *Roadway Package System, Inc.*, 326 NLRB 842 (1998); *Dial-a-Mattress,* 326 NLRB 884 (1998). The factors to be considered are:

(1) The extent of control which, by the agreement, the master may exercise over the details of the work;

(2) Whether or not the one employed is engaged in a distinct occupation or business;

(3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(4) The skill required in the particular occupation;

(5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) the length of time for which the person is employed;

(7) the method of payment, whether by the time or by the job;

(8) whether or not the work is part of the regular business of the employer;

(9) whether or not the parties believe they are creating the relation of master and servant; and

(10) whether the principal is or is not in the business.

e. Family Relationships.

Parent or spouse of employer, or children of major stockholder in closely held corporation, regardless of whether the employees enjoy special job-related privileges. *NLRB v. Action Automotive, Inc.,* 469 U.S. 490 (1985).

f. Domestic Servants.

3. Particular Problems.

a. Part-Time.

Regular part-time employees are included if they work for a sufficient period of time to have a "substantial and continuing interest" with full-time employees. Casual employees hired for short periods of time on an on-call basis, receiving different compensation, are excluded.

Technical employees, who are highly skilled and have formal education, but do not meet the statutory test for professionals (*see infra*), such as draftsmen, programmers and analysts (sometimes), and electronic specialists are generally excluded from production and maintenance units. The Board will create a separate technical unit based upon "community of interest."

Laid-off employees will be included in the unit if they have a reasonable expectation of reemployment.

Residual or fringe employees usually will be added to the unit to avoid leaving them unrepresented.

4. Professional Units.

A unit combining professionals and non-professionals is inappropriate unless a majority of the professionals vote to be included with the non-professionals. Section 9(b)(1).

A single election is held to determine whether the professional employees desire to be separate from or included in the more comprehensive unit and whether they wish to be represented by the union.

Section 2(12) of the Act defines a professional as one whose work:

1. is predominantly intellectual and varied;
2. involves the consistent exercise of discretion and judgment;
3. output cannot be standardized; and
4. requires advanced knowledge in field of science or learning requiring extensive study.

5. Guards.

Although guards are considered employees and enjoy Section 7 rights, even part-time guards may not be intermingled with other classes of employees in a single unit. Section 9(b)(3). Those who do guard-like functions incidental to primary duties like couriers, door persons, secretaries are not guards. *Wolverine Dispatch*, 321 NLRB 796 (1996). Unlike professionals, there is no provision for a preference election.

Guards are those who "enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." The purpose of excluding guards is to avoid a conflict of loyalties. Section 9(b)(3) does not bar, however, the inclusion of fire prevention specialists who perform no security functions. *Burns International Security Services*, 300 NLRB 298 (1990).

The Board may not certify as the representative of guards, even in an otherwise appropriate unit of guards alone, a union which admits non-guard members. An exception exists if the non-guard members are public employees, as these employees are specifically excluded from coverage under the Act. *Children's Hospital,* 302 NLRB 255 (1991).

The parties may achieve by informal agreement the recognition of a mixed unit of guards and non-guards, which the Board cannot certify. Such a unit is appropriate only

so long as the employer consents to recognize it. *Truck Drivers Local Union No. 807 v. NLRB,* 755 F.2d 5 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 225 (1985).

6. Craft Units.

May be severed from larger departmental or industrial units under certain limited circumstances. The question of craft versus industrial classifications, which is associated with the rivalry between the American Federation of Labor and the Congress of Industrial Organizations, has a long history. The current criteria are set forth in *Mallinckrodt Chemical Works,* 162 NLRB 387 (1966), which limits craft severance by stressing bargaining history and industrial stability.

a. Illustrative Relevant Criteria for Craft Units.

Distinct and homogeneous group of skilled journeymen craftsmen performing non-repetitive work (*e.g.*, tool-and-die makers, bakers, electricians, welders, drivers, or cartoon animators);

History of productive and stable collective bargaining at the plant in question as well as at the employer's other plants;

Extent to which employees in the proposed unit have established and maintained their separate identity while included in a larger unit, and extent of participation in representation; and

History and pattern of collective bargaining within the industry, and experience of the petitioning union in representing this craft.

The result of a craft determination by the Board is a "craft severance" election in which the designated employees may express their preference by majority vote. Attempts at craft severance sometimes influence the composition of departmental units. Maintenance employees are not an appropriate separate unit where range is unskilled. *Harrah's*

Corp., 319 NLRB 749 (1995); *Ore-Ida Foods*, 313 NLRB 1016 (1994). In retail, the grocery meat department is presumptively appropriate if employees possess full range of skills. *Scolare's Warehouse,* 319 NLRB 153 (1995).

7. Criteria for Single v. Multi-Location Units.

In the construction industry, all in same trade in a defined geographic area are appropriate. *Fish Engineering*, 308 NLRB 836 (1992). However, single locations are presumed appropriate in all industries.

The Board prefers single plant, single establishment units, even when the employer operates at a number of locations. This presumption may be rebutted based on the following factors:

- Central control of labor relations;
- Absence of local autonomy of management;
- Interchange of employees;
- Similarity of skills;
- Common conditions of employment;
- Common supervision;
- Geographical proximity;
- Plant and production integration; and
- History of bargaining.

The employer's preference for single location or multiple location unit depends upon the employer's assessment of the concentration of union support and the risk of a large loss versus a small loss.

8. Multi-employer Bargaining Units.

- Multi-employer bargaining units are permitted. The Board will conduct an election only with the consent of all employers and the union(s). *Oakwood Care Center*, 343 NLRB 659 (2004).

- The union or an individual employer may withdraw only with either the consent of the other party or by unequivocal written notice to all parties prior to the commencement of negotiations. *Bonanno Linen Service Inc. v. NLRB*, 450 U.S. 979 (1981). Perhaps in other unusual circumstances, such as business failure; mere impasse in negotiations is not an unusual circumstance permitting withdrawal. Substantial fragmentation of a multi-employer bargaining unit may constitute an unusual circumstance. *See Chel la Cort,* 315 NLRB 1036 (1994) (for lack of notice by association).

- Acceptance of multi-employer contract with automatic renewal bars withdraw if employer fails to give timely notice. *Construction Labor Unlimited,* 312 NLRB 364 (1993).

9. Hospital Units.

The Board rules find eight appropriate units, including registered nurses, physicians, other professional employees and technical employees in acute care hospitals. The rules also endorse units for skilled maintenance workers, business office clericals, and service and other non-professional employees, and guards. Hospitals that are exclusively psychiatric will not be governed by the above rules but will be governed by the rule in *Specialty Healthcare*, where the Board held that it will presume that the petitioned-for unit is appropriate even when a larger unit would also be appropriate. *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 83 (2011). The party contending that excluded employees in the petitioned-

for unit should be included has the burden of proving that the excluded employees share an overwhelming community of interest with the included employees. No petition for initial organization will be entertained, except under extraordinary circumstances, if the petition seeks certification in a bargaining unit not in substantial accordance with the rules. The Supreme Court has upheld the Board's determination. *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991). Although the NLRB ruled that interns and residents were employees in *Boston Medical Center*, 330 NLRB 152 (1999), in *Brown University*, 342 NLRB 483 (2004), the Board found graduate teaching assistants were students and not employees. Single facility presumption dominates in healthcare but may be rebutted by facilities in close proximity, functional integration, and employee interchange. *Children's Hospital of San Francisco,* 312 NLRB 920 (1993); *Lutheran Welfare Services,* 319 NLRB 886 (1995).

In acute care health care institutions, the eight unit presumption will not bar a broader unit if sought by the union. *Dominican Santa Cruz Hospital,* 307 NLRB 506 (1992). Supervisory issues in healthcare continue due to NLRB disregard for supervisory authority despite the Supreme Court holding in *NLRB v. Healthcare Retirement Corp.*, 511 U.S. 571 (1994), finding any single indicia of supervisory authority sufficient.

Units in nursing homes will continue to be determined based on the test articulated in *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 83 (2011).

10. Warehouse Employees.

The Board has set forth the following criteria for separate warehouse units, as opposed to store wide units, in the retail industry: the warehouse is geographically separated, there is no substantial functional integration between warehouse and store employees, and there is separate supervision of warehousing functions. *Roberds, Inc.,* 272 NLRB 1318 (1984); *A.*

Harris & Co., 116 NLRB 1628 (1956). This limited standard does not apply to wholesale or non-retail operations. *Esco Corp.,* 298 NLRB 837 (1990).

11. Joint Petitions.

Two labor organizations may petition to appear jointly on the ballot. *Mid-South Packers, Inc.*, 120 NLRB 495 (1958). The joint petitioners must intend to bargain jointly. Joint petitions sometimes are used as a sham to sever a large unit into smaller units, which the Board might not approve if separate petitions were presented.

Authorization cards count if they name either or both of the joint petitioners. *The Stickless Corp.,* 115 NLRB 979 (1956).

V. PROCEDURAL STEPS TO ELECTION

Petition must be filed by labor organization or employees. It is used where the employer has no union or where rival union seeks to replace incumbent.

Requires 30% showing of interest.

A. Authorization Cards.

Showing of interest usually consists of authorization cards which must be signed and dated. Cards older than one year may be stale.

NLRB determines the sufficiency of showing of interest by comparing the number of cards to the showing of interest list requested from the employer. Failure to provide the list results in NLRB presumption of adequate support.

Employer cannot inspect cards at the representation hearing. Issues of fraud, forgery or coercion should be raised.

After a petition is filed, the Regional Director sends one copy to each party, requesting its views on unit issues and enclosing the following forms:

- Commerce questionnaire. This form need not be returned, but failure to produce evidence of lack of coverage may create an inference that the employer is covered.

- Notice to employees of the filing of the petition and an outline of employees' rights. Posting is not required, and many employers do not post this form because it stresses employer unfair labor practices.

- Outline of Board election procedures.

- Notice of appearance.

- Notice of Designation of Representative as Agent for Service of Documents. This form authorizes the Board to serve all documents in the representation proceeding (except for subpoenas, direction of election, or notices of election) exclusively upon the designated representative. This usually is undesirable for outside attorneys.

Showing of interest list is requested by the Regional Director. This is an alphabetical list of employees and job classifications in the proposed unit. It should include employees on the last payroll immediately preceding the date the petition was filed. This list is used to cross check cards and does not preclude a subsequent employer challenge to the employee's eligibility to vote. The employer should explain in a cover letter any possible discrepancies with the employer's position on the unit question. The employer need not furnish a list, but if it is not furnished, the Board will assume that the requisite 30% exists.

B. Agreement on Issues.

After mailing the petition to the employer, the Region attempts to determine whether the parties can agree on the issues and avoid a hearing.

Some Regions will attempt to obtain agreement; others automatically will set the hearing date 7-14 days from the filing of the petition.

If agreement is possible, the Region will set an informal conference to work out arrangements.

The employer's goals at the informal conference are to:

- Schedule the time of day and location of the election to maximize the number of employees voting. The union wins if a majority of those voting vote for the union. Nonvoters usually prefer no union.

- Try to set an advantageous election date, usually as far in the future as possible. The union is in the better position to poll employees and has complete control of timing the initiation of Board processes, so it usually is assumed that the union files when its support is peaking.

There are two types of voluntary agreements for elections where there is no dispute as to the bargaining unit:

1. Consent election allows the Regional Director to make final decisions on all disputes regarding objections and challenges.

2. Stipulation for Certification upon Consent Election ("Stip") allows appeal to the Board, although all disputes initially are decided by the Regional Director. "Stip" usually is preferable because it provides a check on the Regional Director.

C. Agenda for Informal Conference.

Set the date for the election. The Board will push for 25 to 30 days from the expected date of issuance of the Regional Director's direction of election, which occurs within a day or so after agreement. The election cannot be held earlier than ten days after the employer files the *Excelsior List* (names and addresses of all employees in the unit), and the employer has seven days after the Regional Director's direction of election to file the *Excelsior List*. If the

employer needs additional time to make its case to the employees, it should insist on a hearing by refusing to agree to a unit determination. This usually will cause a several week delay. The employer need not put on a "defense" at the hearing, but merely can force the union to put on its proof. You should have a legitimate issue for the hearing, *e.g.* whether the employer is engaged in interstate commerce to determine if the Board has jurisdiction. You may appeal the Regional Director decisions ordering election but such appeal will normally not delay the election. The ballots will be impounded if the Board grants the appeal.

Set the election for a Wednesday, Thursday, or Friday to avoid the "24-hour" *Peerless Plywood Rule* (prohibitions on speeches to massed assemblies within 24-hours of the election). Payday is a good day.

D. Location of election. The employer usually wants the election to be held on the employer's premises and the NLRB approves. The employer's goal is to maximize the likelihood of voting by apathetic employees.

E. Voting times. Maximize turnout. Consider problems caused by shifts, part-time or weekend employees. One hour is sufficient for 100 employees to vote. Definition of bargaining unit - carefully describe the unit for future bargaining.

Specific payroll period for determining voter eligibility - usually the period preceding the stipulation, consent or decision and direction of election.

Parties can agree upon a unit that the Board otherwise would consider inappropriate, unless the unit conflicts with statute (*e.g.,* mixed professional and nonprofessional unit) or well-established Board doctrine. Timing affects unit composition concessions; a union in a hurry will compromise on discreet classifications to permit gerrymander of unit.

Under the rule in *Norris-Thermador*, 119 NLRB 1301 (1958), the parties may agree upon a final list of the names of each and every eligible voter. The Board will approve this list if no employee included on the list is ineligible under the Act. Such an agreement precludes subsequent challenge to voter eligibility, but it can be helpful in getting some individuals out of a unit, if the union is in a hurry for an election.

The NLRB has ruled that it will use mail ballots when voters are scattered over a large geographic area, where eligible voters are working different schedules and where there is a strike, lockout or picketing. S*an Diego Gas and Electric*, 325 NLRB 1143 (1998).

F. Eligibility and the "Excelsior" List.

Excelsior voter eligibility list must be received by the Regional Director within seven days of the direction of election or approval of stipulated or consent election agreement. *Excelsior Underwear. Inc.*, 156 NLRB 1236 (1966), *approved in, NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The list will be provided to the union, and the election may not take place fewer than ten days after the *Excelsior* list is provided. Failing to submit the list will result in setting aside the election if a proper objection is filed.

The list must contain the name and address of each employee in the bargaining unit and on the payroll during the payroll period closing immediately prior to the direction of election or approval of consent election agreement. Omission of a few names still may constitute substantial compliance (omissions are treated more seriously than inaccuracies). The most current name and address from the employer's records are required, but there is no requirement that the information be verified.

Economic strikers are eligible to vote in an election held within 12 months of the commencement of the strike. Section 9(c)(3). Permanent replacements also may vote.

Unfair labor practice strikers may vote even after the 12-month limit for economic strikers; replacements for unfair labor practice strikers may not vote.

Including a name on the *Excelsior* list does not preclude subsequent challenge. Some employers prefer to omit from the list the names they plan to challenge and provide these names to the union separately, to prevent an objection that would set aside an election resulting in employer victory.

Employees who quit or are discharged for cause prior to the election are not eligible.

Probationary employees who have a reasonable expectation of permanent employment are eligible.

Employees on sick leave, military leave, or other leave of absence are eligible to vote if they automatically will return to work when the leave is over. There is a rebuttable presumption that an employee on sick leave will remain in that status until recovery. The employer has the burden to rebut the presumption, which requires more than a showing of the employee's subjective belief that he will not return to work for the employer.

Laid-off employees must have a reasonable expectation of recall as of the payroll eligibility period in order to vote in an election. *Apex Paper Box Co.,* 302 NLRB 67 (1991).

Employees employed in the unit on the payroll eligibility date and the date of the election are eligible to vote. The NLRB's notice of election must be posted at least three full days prior to the election date. Observers are permitted, but must be non-supervisory. Discharged employees who are the subject of a pending unfair labor practice charge may be observers. *Kelwood Co.*, 299 NLRB 1026 (1990).

Election Procedures include a pre-election conference where observers are instructed as to their duties and given written instructions. The voting list is updated by deleting terminations. Voter release procedures are discussed. Parties are admonished to stay clear of the voting area. Potential challenges may be resolved. Voting times are generally followed to the letter.

The opportunity to vote is left to the discretion of NLRB agents at the site. Normally early or late arriving employees will not be permitted to vote absent agreement by the parties. *Monte Vista Disposal*, 307 NLRB 53 (1992).

The valid ballot test is the ability to determine the true intent of the voter. *Hamilton Plastic*, 309 NLRB 678 (1992); *TCI West Inc.*, 322 NLRB 928 (1997). Challenges must be made prior to the ballot being placed in the ballot box and are untimely if made any later. *Heartshare Human Services*, 317 NLRB 611 (1995).

If the union wins the election, it enjoys an irrebuttable presumption of majority status for one year. *Brooks v. NLRB*, 348 U.S. 96 (1954). If the union has a majority in an appropriate unit and the employer commits serious unfair labor practices ("ULPs") to undermine that majority, the NLRB can order bargaining as a remedy even if the union loses the election. *NLRB v. Gissel Packing*, 395 U.S. 575 (1969). The union must file objections to set aside the election and a timely refusal to bargain unfair labor practice to take advantage of this remedy.

VI. ELECTION PROCESS.

A. Recurring Issues: Majority, unambiguous, single purpose cards, no supervisor solicitations, cards signed by current employees, demand for bargaining in an appropriate unit, employer campaign materials and techniques.

Electioneering in and around the voting area is usually improper. *Milken, Inc.*, 170 NLRB 362 (1968); *Fieldcrest Cannon*, 318 NLRB 470 (1995).

B. The *Peerless Plywood* "24-Hour Rule".

Prohibits both employers and unions from making "captive audience" speeches on company time and pertaining to election issues during the 24-hour period immediately preceding an election. *Peerless Plywood Co.*, 107 NLRB 427 (1953). Violation of the rule is not an unfair labor practice, but is grounds for setting aside the election.

The rule does not prohibit non-coercive anti-union statements to individual employees at their work stations, even within the 24-hour period. The rule does not forbid distribution of campaign literature to employees within the 24-hour period. Nor does the rule forbid an employer to meet individually and privately with employees during the 24-hour period, so long as the employer's remarks are non-coercive.

The ballot box is protected by the NLRB agents. Objections to the election must be timely and they are if postmarked at least one day before the deadline which is seven days after the election date. 29 C.F.R. 102.111(b). Evidence to support objections must be filed within seven days thereafter. *Temple Inland Forest*, 301 NLRB 302 (1991); *McClane Mid-Atlantic*, 316 NLRB 299 (1995).

An NLRB election must be conducted in "laboratory conditions." ULPs are a basis for setting aside an election depending on the size of the unit, the extent of dissemination, severity of the conduct and the number of ULPs and other relevant factors. However, the Board has recently been more apt to order re-run elections. *Jurys Boston Hotel*, 356 NLRB No. 114 (March 28, 2011). Conduct occurring prior to the filing of the petition is usually not a basis for objections. *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275 (1961). The NLRB ignores the truth or falsity of pre-election statement of parties unless a party has used forged documents which render voters unable to recognize the propaganda for what it is. *Midland National Life Insurance*, 263 NLRB 127 (1982); *AWB Metal*, 306 NLRB 109 (1992); *Mt. Carmel Medical*

Center, 306 NLRB 1060 (1992). Ballot facsimiles with "NO" marked may be objectionable unless it is clear that the employer prepared the altered ballot. A party must identify the source of the material on its face. *3-Day Blinds*, 299 NLRB 110 (1990). Misrepresentation of NLRB action is not grounds for objection if it does not impugn the NLRB's neutrality. *Riveredge Hospital*, 264 NLRB 1094 (1982).

There is a general reluctance to set aside elections based on third party interference, such as a letter to employees by US congressional representatives urging employees to continue to fight for respect, dignity and justice at their employer. *Chipman Union*, 316 NLRB 106 (1995). Threats by pro-union employee card solicitors are not attributable to the union as a general rule. *HCF, Inc.*, 321 NLRB 1320 (1996).

The NLRB has permitted unions to set forth benefits obtained from collective bargaining. *Alyeska Pipeline Service*, 261 NLRB 125 (1982); *Shrader's, Inc.*, 293 NLRB No. 76 (April 11, 1989) (provide free hats and shirts to voters); *Nelson Dairy Systems*, 311 NLRB 987 (1993) (file a $20 million class action RICO suit on behalf of employees); *52nd Street Hotel Associates*, 321 NLRB 624 (1996) (provide counsel for a wage hour lawsuit); *NLRB v. Savair Mfg.*, 414 U.S. 270 (1973) (make unconditional promises to waive or reduce initiation fees or dues); but see, *Stericycle, Inc.*, 357 NLRB No. 61 (Aug. 23, 2011) (union engages in "objectionable conduct" necessitating a second election where the union finances a lawsuit filed after the filing of a petition but prior to the election).

Union campaign techniques include invasions of the employer's premises, home visits, testing trespass laws, challenging no solicitation policies, setting employers up for NLRB unfair labor practice charges, promising whatever it takes to get votes, filing lawsuits and charges with agencies such as the EEOC, OSHA, Department of Labor, filing environmental

claims, urging government contractor delisting for frequent NLRB violations, and salting the work force. *NLRB v. Town & Country*, 516 U.S. 85 (1995); *FES, a Division of Thermo Power*, 331 NLRB 9 (2000).

Employer's campaign should include a thorough examination and disclosure of the union's constitution, financial reports, unfair labor practice history, election losses, membership decline, bargaining tactics, and strike history.

Company policy regarding unions should be clear that you prefer solving problems without the intervention of third parties.

C. Legal Restrictions on the Employer's Election Campaign.

1. No ULPs.

Once the campaign is under way, the employer and its supervisors must avoid ULPs by remembering "T.I.P.S."– no threats, interrogation, promises, or spying.

An election also may be set aside for serious unfair labor practices or for conduct that does not constitute an unfair labor practice, but destroys the "laboratory conditions" considered necessary for a fair election. The critical period for objectionable conduct begins with the filing of the petition, *Ideal Electric and Manufacturing Co.,* 134 NLRB 1275 (1961). Unfair labor practices before the petition is filed may serve as the basis for setting aside the election in extreme cases. *Carson International, Inc.,* 259 NLRB 1073 (1982). Objections must be filed within seven days of the election tally of ballots.

Probably the most onerous remedy is the *Gissel* bargaining order for "exceptional" cases marked by "outrageous and pervasive" unfair labor practices, which requires the employer to bargain without the necessity of the union winning an election. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

D. Free Speech Issues.

The employer is entitled to present its views to the employees. Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

Opposition to union organization may not be a basis for a finding of anti-union animus by itself. *Holo-Krome Co. v. NLRB,* 907 F.2d 1343 (2d Cir. 1990).

Classic borderline free speech issues, each of which is decided on a case-by-case basis in the context of other statements and conduct, include:

E. Predictions of Adverse Consequences.

These must be based upon objective facts concerning matters beyond the control of the employer, and the employer's statements must not convey the impression that the employer will take steps of its own to affect adversely the employment status of its employees.

An employer may predict that it will close down if the union wins the election provided that the prediction is based on objective circumstances beyond the employer's control. It is better to avoid this tactic absent extensive research of NLRB case law.

No interference with the election was found when an Employer distributed letters from customers saying that unionization could create instability and the customers might cease doing business with the Employer. *Eagle Transportation Corp.,* 327 NLRB 1210 (1999).

An employer's statement that "bargaining will start from scratch" likely will be not violative. Where the statement implied that all existing benefits would be unilaterally eliminated upon the success of the union's campaign, the election was set aside.

"Start from scratch" is an unnecessary (and unimaginative) red flag for the NLRB. The same message can be conveyed more accurately with less risk. *For example,* "the union has an agenda of its own, such as union security, dues check-off, super-seniority for union officials administering the agreement, and consistency with other union agreements; the union's agenda is not yours; anything can be traded for anything else; and the union may trade employee benefits to achieve its own ends."

Urging employees not to sign authorization cards is permissible, but it may be incorrect to tell them that signing the cards may result in the union becoming the exclusive bargaining representative. The latter happens only if the employer recognizes the union or, under certain circumstances, if the employer commits egregious unfair labor practices.

Offering advice on revocation of authorization cards is permissible if the employee requests such advice. Cards are revoked by a statement to the union of the employee's unequivocal intent no longer to be represented by the union, and a request for the return of the card, delivered to the union prior to a demand for recognition. Employer assistance, such as providing revocation forms, has been found permissible, but only where the employee requests the assistance. It is dangerous.

Misrepresentations alone will not cause an election to be set aside, even if they consist of a substantial departure from the truth at a time when the other party is prevented from making an effective reply. NLRB will not inquire into truth or falsity of preelection statements. *Midland National Life Insurance Co.,* 263 NLRB 127 (1982). Even "grossly inaccurate" statements alone are not sufficient to overturn an election. Notwithstanding the general rule of *Midland National,* certain deceptive practices, such as forged documents, potentially provide

cause for setting aside an election. More importantly, misrepresentations are unnecessary and an unwise campaign tactic.

F. Pre-Election Raffles and Contests.

The Board prohibits employers and unions from conducting a "raffle" if (1) eligibility to participate is in any way tied to voting in the election or being at the election site on election day; or (2) the raffle is conducted at any time during a period 24 hours before the scheduled opening of the polls and ending with the closing of polls. *Atlantic Limousine*, 331 NLRB 1025 (2000).

An employer-held preelection contest offering prizes such as a microwave oven and a color television set to employees who pointed out something good about the company or a reason why everyone should vote for neither of the two unions running was held unlawful. The contest was an unlawful award of a benefit because it constituted purchase of endorsements by the company and created the appearance that the entrants were against unionism. *Dynamics Corp. of Am.,* 286 NLRB 920 (1987). Similarly, an employer interfered with a decertification election by conducting a contest designed to test employee's knowledge of the decertification process. *Houston Chronicle Pub. Co.,* 293 NLRB 332 (1989); *Melampy Mfg. Co.,* 303 NLRB 845 (1991) (contest interfered with election because participants were told to sign their names and, even though the prize was insignificant, the employees did not know that until after the contest).

An employer was found to have interfered with a union election when, two days before the employees voted, it gave them a paid day off and held a cook-out at which it delivered speeches opposing union representation. The Board noted that the employer failed to explain why it could not have pursued alternative means of communicating its campaign message. *B & D Plastics*, 302 NLRB 245 (1991).

A union was found not to have interfered with an election when on the eve of the election it announced that it had filed a lawsuit against the employer that could result in each employee receiving a substantial amount of money. *Novotel New York,* 321 NLRB 624 (1996); *Contra, Freund Baking Co. v. NLRB,* 165 F.3d 928 (D.C. Cir. 1999); *but see Stericycle, Inc.*, 357 NLRB No. 61 (Aug. 23, 2011) (union engages in "objectionable conduct" necessitating a second election where the union finances a lawsuit filed after the filing of a petition but prior to the election).

G. No-solicitation/No-distribution Rules.

Rules Applicable to Employees:

Solicitation (and use of authorization cards) may be prohibited during working time, but the rule must make clear that the employee's own time, such as a break or meal period, or time before or after work, is not covered by the rule. *Our Way, Inc.,* 268 NLRB 394 (1983) (prohibition of any solicitation during "working time" permissible).

Retail stores and restaurants may prohibit solicitation in work areas accessible to the public during both work and non-work time. Depending upon the circumstances (*e.g.*, alternatives to communication and degree of "intrusion" upon private property), retail stores' prohibitions against solicitation may not always be extended to adjacent sidewalks and parking areas. *Ameron Automotive Centers*, 265 NLRB 511 (1982).

Health care institutions may prohibit solicitation, even on non-work time, in patient care areas, but not public areas such as cafeterias, gift shops, and lobbies. A hospital further may limit solicitation if it can prove that solicitation will interfere with health care operations. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.* 442 U.S. 773 (1979).

Distribution refers to the passing out of written materials (except authorization cards, which are governed by rules on solicitation). Distribution may be prohibited during working time and in working areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

Off-duty employee access can be limited to work time for work areas. No access rules must be limited to work areas. *Ryder Student Transport*, 333 NLRB 9 (2001); *Tri-County Medical Center*, 222 NLRB 1089 (1976).

H. Non-employees Solicitation.

As a general rule, an employer cannot be compelled to permit non-employee solicitation or literature distribution on the employer's premises. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

If the employer allows other charitable, non-employee groups to solicit or distribute literature but precludes the union from such activity, the employer violates the Act by excluding non-employee union representatives unless:

- the non-union charitable solicitation involved a small number of isolated beneficent acts. *Albertson's, Inc.*, 332 NLRB 1132 (2000).
- the non-union solicitation is related to the company's business function and purpose. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979).

The NLRB overruled its longstanding view that union organizers had the right to solicit in a public eating area located in the employer's premises. The NLRB ruled that the non-employee organizers had other reasonable means of communicating their message. *Farm Fresh, Inc.,* 326 NLRB 997 (1998). Whether union organizers are trespassers will be determined by reference to state trespass law and the status of leases under state property law. *Indio Grocery Outlet*, 323 NLRB 1138 (1997); *UFCW v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000).

An employer may distribute union-related material in the work place while prohibiting employees from distributing union-related materials. *Beverly California Corp.*, 326 NLRB 232 (1998). The Board continues to adhere to the rule of the Supreme Court in *NLRB v. United Steelworkers of America (NuTone and Avondale Mills),* 357 U.S. 357 (1958), that an employer does not violate its own no solicitation/no distribution rules when it engages in anti-union activities.

Promulgation of a no-distribution/no-solicitation rule directly after the onset of a union campaign suggests illegal discriminatory intent.

I. Systematic Polling.

To determine the extent of employee support for a union may be permissible under very special conditions, but rarely is helpful. Polling is permissible if:

- the purpose of the poll is to determine the truth of a union's claim to have majority status;
- this purpose is communicated to the employees;
- assurances against reprisal are given;
- the employees are polled by secret ballot; and
- the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Construction Co.,* 165 NLRB 1062 (1967).

Distribution of anti-union buttons to employees by a supervisor is unlawful, but anti-union material may be made available for employees to pick up, where the employees are not required to make their choice in the presence of the supervisor.

J. Surveillance and Films.

Surveillance of union activities is an unfair labor practice, even if the employees do not know of the surveillance. Similarly, giving the impression of surveillance is illegal, even if there is no actual surveillance. Photographing employees on a picket line is impermissible where there has been no violence or reason to expect disturbance, but photographing acts of trespass, violence, or mass picketing is permissible and extremely useful. Use of video tapes of employees in campaign to be avoided. *Allegheny Ludlum Corp v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

Anti-union films are available like "Little Card, Big Trouble" but NLRB scrutiny of them will occur. *Projections, Inc.*, 331 NLRB 1067 (2000).

K. The Status Quo Must Be Maintained.

This is the most difficult task, especially in a large unit and in a long campaign. Preserving the status quo may require making changes, as well as refraining from making changes. The prohibition against changes applies to granting benefits, as well as to withdrawing them. *NLRB v. Exchange Parts Co.,* 375 U.S. 405 (1964).

Where the status quo is clearly apparent, a change is an unfair labor practice, regardless of employer motive. Where there is no clearly established past practice (as where wage reviews are irregular and discretionary), a change is a violation if the NLRB can show that the change was motivated by anti-union sentiment. *NLRB v. Katz*, 369 U.S. 736 (1962). However, where the timing of raises was fixed but the amount of the raise undetermined, it was unlawful to not proceed with the raises. *Daily News of Los Angeles v. NLRB,* 73 F.3d 406 (D.C. Cir. 1996). A wage increase granted the day before the election was found unlawful despite the employer's claim that the wage increase was based on its discontinuation of the previous owner's attendance program. *Perdue Farms, Inc. V. NLRB,* 144 F.3d 830 (D.C. Cir. 1998); informing

employees of existing benefits that were not previously revealed was not unlawful; a speech explaining the decertification process and the granting of a bonus two weeks later did not violate the Act. *Exxel/Atmo, Inc. v. NLRB,* 147 F.3d 268 (D.C. Cir. 1998).

Discharge, discipline, or less favorable treatment of union adherents must be documented carefully; however increased surveillance and increased documentation are, in themselves, discriminatory.

L. More on Electioneering.

Prolonged conversation between a representative of a party and voters or election observers will invalidate an election regardless of the content of the conversation. *Milchem, Inc.,* 170 NLRB 362 (1968). The rule is relaxed as to non-parties. It is permitted for pro-union employees to walk among and talk to employees in line. *Rheem Mfg. Co.*, 309 NLRB 459 (1992); *Crestwood Convalescent*, 316 NLRB 1057 (1993); *O'Brien Memorial*, 310 NLRB 943 (1993).

Recording the names of employees who have voted, aside from the official eligibility list, is grounds for setting aside an election.

Observation by supervisory personnel of voting will justify setting aside an election.

Electioneering at the polling place before the polls open is not prohibited. The Board has drawn a "bright line" between the time before and after the polls open, and has established a per se rule of permissibility and impermissibility.

The union interfered with an election because of the boisterous conduct of 40 union supporters who formed lines on both sides of an aisle way leading to the voting area and cheered, clapped and talked with employees passing by. *Pepsi-Cola Bottling Co.,* 291 NLRB 578 (1988). Union's sound truck blasting pro-union songs for nearly ten hours violated election

rules. *Bro-Tech Corp. v. NLRB*, 105 F.3d 890 (3rd Cir. 1997). Union promise to hold "the biggest party in Texas" may have tainted the union's victory. *Trencor v. NLRB*, 110 F.3d 268 (5th Cir. 1997). However, partying, pro-union signs, the sounds of air horns and photographing outside the polling area was held not to interfere with the election. *Overnight Transportation Co. v. NLRB,* 104 F.3d 109 (7th Cir. 1997).

M. Appeals to Racial Prejudice.

Pitting race against race may be objectionable if it is a centerpiece of the campaign and is inflammatory. *Sewell Mfg.*, 138 NLRB 66 (1962); *KT(USA)*, 309 NLRB 1063 (1992); *Englewood Hospital*, 318 NLRB 806 (1995); *Zartec, Inc.*, 315 NLRB 495 (1994); *O'Brien Memorial*, 310 NLRB 943 (1993).

N. Good Campaigns Include:

- Review of no solicitation policy to ensure non-discriminatory enforcement.
- Union background is obtained from web sites and news articles.
- LM-2 filings and Constitution clauses which set forth union dues, fees, and assessments and discipline power over members.
- Strike and contract history review is required.
- Supervisor or precinct captain training is part of any successful campaign.
- Employers should address the problem of the pro-union supervisor. The law does not protect them in most cases and they should be converted or removed.

Impact of union on supervisors on promotions, layoffs, grievances, work assignments is detailed to enhance commitment to the campaign.

- Bargaining explained.

- Strike replacement rules.
- TIPS training.
- NLRB procedures.
- Issue identification audits.
- Periodic polling.
- Campaign material tips.
- Company speeches, films.
- Formation of anti-union employee groups.
- Vote "NO" buttons.
- Response to union promises by guarantee sheet.

VII. MAINTAINING OR ACHIEVING UNION-FREE STATUS.

A. Non-Union Status Techniques are Basically Good Employee Relations.

Various techniques employed for "maintaining nonunion status" simply amount to good employee relations, *i.e.*, good management. Most techniques for maintaining nonunion status are applicable to the organized workplace.

In organizing campaigns, unions attempt to convince employees that the interests of management and employees are fundamentally opposite and that a union is a necessary protector of employees. To the extent that management has taken steps before a campaign to make employees feel "part of the team" and to provide a fundamentally fair employment environment, union attempts to sell "us versus them" will fail.

Thinking as an advocate of collective bargaining, a "mature" collective bargaining relationship, while somewhat adversarial, involves union and management working

together for a common benefit. The union merely reflects the will of the employees. Logically therefore, good employee relations should foster good union relations.

In the "real" world, the institutional interests of a union and internal union politics sometimes make unions take positions which they know to be inimical to long-term interests of the company and, consequently, its employees.

B. Use of Employee Handbooks.

An employee handbook is a union-free substitute for the collective bargaining agreement and, if properly written, can support the maintenance of such union free status. The handbook serves as a statement of employee rights and obligations. It should:

- Set out management expectations of employees to achieve company objectives.
- Communicate what employees may expect to gain.

Use of an employee handbook has legal ramifications which are discussed more fully in the materials addressing Employment at Will, contained in Block III. These ramifications will address the use of both substantive and procedural provisions in the handbook. Although use of an employee handbook creates the risk of implied contractual obligations, employers frequently accept that risk in order to institute the best defense against union organization. At-will statements can be used by the union to show a need for a union contract. Those unwilling to take such a risk may insert employer protective language in the handbook.

The Board in recent years has heightened its review of employee handbooks. In particular, Regional offices have commenced requesting employee handbooks as part of their investigation of charges filed against employers and found that some policies concerning

confidentiality, solicitation, restrictions on the use of social media, and the arbitrability of employee claims are unlawful.

C. Role of Supervisor.

1. The "Key".

Just as the first-line supervisor is the key to winning an organizational campaign, he is the key to avoiding the dissatisfaction that will make an organizational campaign viable. The first line supervisor:

- Has daily interaction with employees;
- Should know employees' needs and problems;
- Should be the major source of communication between employees and management; and
- Should be the first member of management contacted when an employee has a grievance and should attempt to settle grievances at an early stage.

2. Training Supervisors.

When employees feel that they must bypass supervisors to get information or settle grievances, the company has serious problems. Therefore, training of supervisors is essential to insure:

- Employee and supervisory awareness of company procedures and policies;
- Employee and supervisory understanding of proper disciplinary measures; and
- Consistent, fair, and non-discriminatory treatment.

Supervisors should be made aware of legal restrictions and requirements, so they can identify situations with LMRA, EEO, OSHA, wage-hour, or other legal implications. They also should know when and where to seek assistance when such situations arise.

Just as supervisory meetings are held to discuss production problems and progress, meetings should be held to discuss employee morale and problems. Supervisors learn supervisory traits from their superiors, and where a department head freely sacrifices morale or fair treatment as a temporary expedient, subordinates will act in the same way. Top management must demand adherence to policies by middle management personnel or training of first line supervisors will be wasted.

Supervisors must be trained in the maintenance of union-free status before any union activity first develops. Often unfair labor practices and initial management position before training will determine the outcome of an election.

D. Union-free Complaint Procedure.

1. Purpose.

The establishment of a complaint procedure in a union-free setting serves many purposes:

- Safety valve, to prevent action which may not have been taken if such a valve were available.
- Outlet for expression of complaints without fear of retribution.
- Aid in identifying and eliminating legitimate causes of dissatisfaction.
- Enables company to prevent minor problems from mushrooming into major grievances.

- Provides a peaceful way for handling disputes.
- Is an important contribution to harmonious employee relations which can favorably affect the morale and efficiency of the entire organization. It may be a first line of defense to expensive litigation of discrimination complaints.

2. Types.

The type of complaint procedure used may vary in formality and structure, depending upon the size of the unit, the complexity of the organization, and the prevailing operating conditions.

The usual structure gives an employee several opportunities to air his grievance and seek its final resolution. Typical procedures include the following:

a. First Level

Discussion with immediate supervisor; the supervisor attempts to resolve complaint at time and point of origin. If the employee is not satisfied, he is free to take further steps without fear of retaliation.

b. Second Level

Complaint discussed with immediate supervisor, or department head. This management representative must be sure to reinforce the employee's confidence that a fair resolution will be sought, while taking care not to undermine the immediate supervisor's decision.

c. Third Level

Resolution by top management officials. Impartiality at this level is key to the process. Sometimes lower management decisions must be reversed.

The Employee Relations Department must have a key role in facilitating the use of a complaint procedure, which must be actively promoted to the employees so that they will use it when the need arises.

At every stage of the proceeding, management must:

- Promise an answer to the complaint within a short time frame (in contrast with union contract procedures, which may take months).
- Listen to the employee.
- Be willing to change positions and correct mistakes when necessary.
- Explain any action (or inaction) taken so that the employee understands what result is being achieved, and the reasons therefore.

A union-free final resolution must be perceived by the employees to have been reached.

Neutral persons may include the following individuals listed below. However, if a person in the company's management scheme is used, a pattern of some rulings favoring employees must be established, or trust in the procedure will be quickly eroded.

- plant manager.
- plant employee relations person.
- headquarters line management.
- headquarters human relations person.
- outside arbitrator.

Arbitration is particularly useful in traditionally unionized industries. The company must pay most of the cost of the arbitration although the grieving employee should pay a nominal amount to prevent abuse of the system. Attorneys should be allowed to participate in the arbitration, but care must be taken so that the employee does not feel overwhelmed and that the system is not too inaccessible.

The NLRB has attacked some arbitration agreements. The NLRB has found unlawful mandatory arbitration agreements that require all claims to be addressed through arbitration, holding that such agreements inhibit an employee from filing NLRB charges. *U-Haul Co.*, 347 NLRB 375 (2006). The NLRB has also found unlawful arbitration agreements that require employees to address their claims individually through arbitration rather than pursuing class actions. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

Remember: Most union campaigns must address five basic issues: pay, benefits, safety, security and voice.

E. Summary.

The company should have a policy regarding unions. It should be clear that you prefer solving problems with your employees without the intervention of third parties. Unions often bring no more to the table than another level of bureaucracy and a plethora of rules that impede real solutions and put a premium on process over progress. Your no solicitation and e-mail policies should be drafted to comply with NLRB regulations. The policies should be reviewed and reinforced with employees to insure a non-discriminatory enforcement. The union will attempt to vitiate your policy and thus open the door to wide open solicitation for their cause if they can establish that your policy is either unlawful, or even if lawful, is not enforced uniformly.

Information about the union is essential. It can be obtained from websites, news articles, and from knowledgeable labor counsel. Each union is required to file annual reports with the government listing their finances. These are known as LM-2 reports and set forth sources of revenue and expenditures and will provide good campaign material focusing on union fees and assessments in addition to dues. The union constitution should be reviewed. It sets forth the union's rules regarding dues, fees, assessments, and discipline power over the members.

The union strike and bargaining history review is required.

You will invariably find clauses in union contracts with other companies that will be less favorable than what you currently provide your employees.

Supervisory training is part of any successful campaign. Supervisors are the equivalent of precinct captains in a political campaign. Supervisors are responsible for establishing relationships with the employees they supervise and will be your primary communication vehicle of the campaign message to the employees. Your periodic polling should focus on issue identification audits of the people in the work force. Supervisors will be polled periodically to determine the union's strength in their area and the issues that are concerning the employees.

Occasionally you will be required to deal with a pro-union supervisor. The law does not protect pro-union supervisors in most cases and they should either be converted or removed from their supervisory position. You have the right to have supervisors who have total, undivided loyalty to your cause.

The impact of a union on the supervisors in their decisions regarding promotions, layoffs, grievances, work assignments and the day-to-day aspects of their job should be detailed to further enhance their commitment to your campaign.

The techniques of collective bargaining should be explained. Too often, people feel that with the union, bargaining will result in more, not less. This is clearly not the law and you should engage in detailed explanation of how bargaining works so that the work force is not deluded.

Strikes should be discussed as well as the NLRB striker replacement rules.

Supervisors should undergo extensive TIPS training to avoid unnecessary and unfair labor practices. The NLRB procedures regarding elections and election objections should be reviewed. Your written campaign materials should be reviewed to make sure they do not contravene any legal rules set forth in NLRB cases. These cases are continually being issued by the NLRB and you need to keep abreast of those developments to take advantage of cases that favor you and to avoid the consequences of cases that don't. There are many company speeches and films that are available. Again, scrutiny of these for legality should be conducted prior to their use. Lawful campaign tactics would include and discuss the formation of anti-union employee groups, vote "NO" buttons, and the various methods for dealing with union promises.

Employer unfair labor practices should be avoided. This can usually be done by thorough training of the supervisors. Most employer unfair labor practices occur because of verbal statements made by supervisors during the course of the campaign.

VIII. EMPLOYER UNFAIR LABOR PRACTICES AND PROTECTED CONCERTED ACTIVITY.

"Heart" of the Act is Section 7.

The "heart" of the Act is Section 7, which guarantees that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

1. Protected Concerted Activity.

Employees filing grievances are protected even if they exceed bounds of contract language unless excessive or obnoxious. Moments of "animal exuberance" are usually excused. *Illinois Bell Telephone*, 259 NLRB 1240 (1982). *See also, Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000) (Criticism at group meeting of management decision and change work schedule); *Office Depot,* 330 NLRB 640 (2000) (use of word "Scab" in expression of support of strikers at another employer protected); *Lockheed Martin Aeronautics,* 330 NLRB No. 66 (2000) (discussion of medical restrictions in context of accommodations affecting other employees protected); *American Red Cross*, 322 NLRB 590 (1996) (protest of travel requirements in presence of other employees protected).

Only "protected, concerted" activities are the subject of regulation by the Act. Protected, concerted activity unrelated to Union activity include filing an EEOC complaint, *Yellow Freight Sys.*, 297 NLRB 322 (1990); alerting news media and posting signs regarding mysterious illness afflicting employees, *Martin Marietta Corp.*, 293 NLRB 719 (1989); refusal to participate in scheme to get goods on employees exercising protected activity, *Phoenix Newspapers,* 294 NLRB 47 (1989); effort to get paid maternity leave to co-worker, *Boese Hilburn Electric,* 313 NLRB 372 (1993); posting health safety flyer on bulletin board urging "work safety rule" protected even in context of unprotected union "work to rule" strategy, *Caterpillar, Inc.* 324 NLRB 201 (1997); assisting prominent, non-employee speaker to enter plant after Union rally, *Earle Industry,* 315 NLRB 310 (1994); coworkers complaining about another co-worker on Facebook, *Hispanic United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 12, 2012).

Union agent appears before city board to complain about non-union contractor's non-compliance with surety bond ordinance to ensure level field for union and non-union contractors. Company refused to hire him - "you tried to hurt our company" violation found. *Tradesman Int'l, Inc.*, 332 NLRB 1158 (2000).

In *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978), the Court sanctioned conduct of distribution of Union newsletter on company property in non-work area urging opposition to state right to work law and criticizing veto of increase in minimum wage. The reach of Section 7 covers employee concerted activity "in support of employees of employers other than their own." *Id.* at 565. It also protects efforts to improve conditions or "their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565. Activities related to wages, hours, or working conditions of employees are protected and concerted if engaged in with the knowledge and support of other employees. An individual employee may be engaged in concerted activity where the single employee seeks to initiate, induce or prepare for group action. *Meyers II*, 281 NLRB 8872 (1986), was enforced by the D.C. Circuit in *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) *cert. denied*, 108 S.Ct. 2847 (1988).

2. Conversations as Protected Concerted Activity.

Mere conversation among employees may be protected concerted activity if it relates to group action in the interest of employees, *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964), but individual griping and complaining, however, is not protected. *Capital Ornamental Concrete Specialties, Inc.*, 248 NLRB 851 (1980). *But see Salisbury Hotel*, 283 NLRB 685 (1987) (holding that an employee was engaged in protected concerted activity by complaining about a new lunch hour policy to other employees and to U.S. Department of Labor, at least where other employees had complained to management about the policy.)

In *L.G. Williams Oil Co.*, 285 NLRB 418 (1987), the Board found a violation of Section 8(a)(1) in an employer's blanket prohibition on the discussion of salaries among employees. In *Brookshire Grocery Co.*, 294 NLRB 462 (1989), an employee was discharged for violating a rule prohibiting employees from discussing wages, although the employee admittedly copied the information from the employee's confidential records. The employee's discussions using materials gained from these files were protected.

3. Enforcing Collective Bargaining Agreement is Protected/Concerted.

Individual efforts to enforce the terms of a collective bargaining agreement are concerted and protected, even though co-workers and the union have no interest in or even knowledge of the complaint. *Interboro Contractors, Inc.,* 157 NLRB 1295 (1966). The Supreme Court endorsed the NLRB approach in *City Disposal Systems*, 465 U.S. 822 (1984).

4. Other Examples of Protected Activity.

In *Tobias Kotzin Co.,* 271 NLRB 1200 (1984), the NLRB held that an employee who individually walked off the job to protest the employer's piece work rate was not engaged in protected concerted activity. Even though the wage rate was of common interest to other employees and other employees had complained of the rate, the protest was solely that of the individual.

Employee's act of sending anonymous letter to parent company requesting that employer's president be removed was protected where letter reflected discussions among employees about the president's mismanagement, which they believed had a detrimental effect on their working conditions. *Oakes Machine Corp.*, 288 NLRB 456 (1988).

Four members of a union negotiating committee, who sent a letter to 50 of the employer newspaper's advertisers asking for their help in speeding up protracted negotiations for a new contract, were engaging in protected activity and the newspaper violated the Act when

it fired them. *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989). The means chosen by the employees was not so unreasonable as to lose protection on the grounds of disloyalty.

Two female employees engaged in protected concerted activity when they joined together to protest malicious workplace gossip linking them to extra-marital affairs with a male co-worker. *Gatliff Coal Co.*, 301 NLRB 793 (1991).

In *Timekeeping Systems, Inc.,* 323 NLRB 244 (1997), the Board found that an e-mail sent by an employee to fellow employees complaining about a new vacation policy was concerted activity protected by the Act. E-mail calling for partial work stoppage not protected, *Electronic Data Systems Inc.*, 331 NLRB 343 (2000), but e-mail support of employees of another employer is protected.

Employees' walkout in protest of discharge of supervisor even if discharge is lawful still protected; protest must be reasonable. *Southern Pride Catfish*, 331 NLRB 618 (2000).

The employer's decision to terminate employees who complained about another employee on Facebook was unlawful because the employees engaged in protected activity. *Hispanic United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 12, 2012); *see also*, *OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases* (May 30, 2012).

Legitimate management concerns about harassment do not justify policies that discourage §7 rights by subjecting employees to investigation. Requiring employees to submit to investigation of harassment complaint because employee complained about harassment by union activity of pro-union employees is a 8(a)(1) violation. *Consolidated Diesel Co.*, 332 NLRB 1019 (2000).

Termination of an employee for violating a rule prohibiting employees from discussing wages. The rule was unlawful because the freedom to discuss wages is fundamental to the right of employees to engage in activities for mutual aid. *L.G. Williams Oil Co.,* 285 NLRB 418 (1987); *NLRB v. Mainstreet Terrace*, 218 F.3d 531 (6th Cir. 2000).

5. Non-Union Employees.

Protection for concerted activity extends to non-union employees. For example, non-union employees who engaged in a spontaneous walkout to protest cold working conditions were engaged in protected concerted activity. *NLRB v. Washington Aluminum Company,* 370 U.S. 9 (1962). Four employees who walked out to protest their supervisor's abusive treatment were engaged in protected concerted activity and could not be discharged. *Arrow Electric Co. v. NLRB*, 155 F.3d 762 (1st Cir. 1998). Three employees who walked off to protest hot working conditions engaged in protected activity. *Magic Finishing*, 323 NLRB 234 (1997). Protection may extend to people intending to engage in protected concerted activity. *Parexel International, LLC*, 356 NLRB No. 82 (Jan. 28, 2011).

6. Limits on Protection of Concerted Activity.

Conduct that is otherwise protected concerted activity can lose its protection if it is too extreme, egregious or offensive. *United Parcel Service*, 311 NLRB 974 (1993); *Atlantic Steel Co.*, 245 NLRB 814 (1979).

Walkout to protest the discharge of supervisor causes significant business disruption on a busy Friday evening; means of protest relevant. *Bob Evans Farms v. NLRB*, 163 F.2d 1012 (7th Cir. 1998).

Security guard walkout at large, dangerous public housing complex, safety of residents endangered. *NLRB. v. Federal Security*, 54 F.3d 751 (7th Cir. 1998).

Hospital lab employees walk out over working conditions protected and not indefensible where no danger to patients. *Bethany Medical Center*, 328 NLRB 1094 (1999).

Activity that is in derogation of union status as bargaining agent, *i.e.*, bypassing union grievance procedure in collective bargaining agreement by direct dealing with employer, picketing, urging consumer boycott. *Emporium Capwell Co. v. Western Addition Community,* 420 U.S. 50 (1975) (Court refused to permit subgroups in the bargaining unit to enforce demands. Discharge of Protesters not illegal).

a. Violence.

Violent or illegal activity is unprotected. *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942) (mutiny on shipboard); *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939) (denying protection to a sit-down strike).

b. Collective Bargaining Agreement.

Concerted activities breaching contracts are unprotected. *NLRB v. Sands Manufacturing Co.,* 306 U.S. 332 (1939); *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71 (1953). However, even a strike in violation of a no-strike clause is protected if it is in protest of serious unfair labor practices. *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1956).

c. Disloyalty.

Certain disloyalty to the employer may not be protected. *NLRB v. Local 1229, IBEW ("Radio Engineers")*, 346 U.S. 464 (1953) (upholding discharge for distributing handbills that disparaged the employer, making no reference to labor dispute). *Washington Adventist Hospital,* 291 NLRB 95 (1988) (finding unprotected an employee's sending system-wide computer message to co-workers protesting impending lay-offs and criticizing management); *Hormel v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) (denying enforcement to an

NLRB order and holding that an employee's participation in a consumer boycott of his employer's products is unprotected).

d. Statements at Bargaining.

An employee's statements in a negotiation session are usually protected, while those same statements made in another forum may be unprotected if not related to the subjects over which the parties are bargaining.

Calling company president a "son of a bitch" during bargaining; no attempt at violence, protected. *Tool Industries*, 301 NLRB 1166 (1991).

The NLRB is normally unwilling to consider obscenity a concerted activity. However, if the obnoxious conduct occurs in the process of grievances a certain amount of "animal exuberance" is tolerated. *Caterpillar Tractor Co.*, 276 NLRB 1323 (1985).

e. Other Statements.

No protection for airing complaints in front of patients. *Aroostook County Regional Ophthalmology Center v. NLRB,* 113 F.3d 1 (D.C. Cir. 1996). No protection for an employee's use of obscenity towards a supervisor on the production floor. *Atlantic Steel Company*, 245 NLRB 814 (1979). No protection for conduct which is so disloyal that it loses the protection of the Act. *Jefferson Standard*, 346 U.S. 465 (1953) (employees distributed handbills accusing the employer of considering the city a "second class city" without making no reference to the union or any labor controversy.).

7. Some Activity is Not "Concerted".

In *Parke Care,* 287 NLRB 710 (1987), the Board held that an employee was not engaged in concerted activity when she spoke with other workers about the discharge of a fellow employee. There was no evidence that the employee planned to do anything about the discharge or that collective action was contemplated. Similarly, in *Adelphi Institute, Inc.*, 287

NLRB 1073 (1988), the Board ruled that an employee was not engaged in concerted activity when she told a fellow worker that she had been placed on probation, and asked the fellow worker if he had ever been placed on probation. The Board ruled that the NLRB did not protect the employee from later discharge, because her conversation was not intended to initiate group action against the employer and was a matter of purely personal concern to the employee. Compare, *Mauka, Inc.*, 327 NLRB 803 (1999), where the Board ruled that a strike by a single employee was concerted activity since it had been discussed with others.

8. Safety Complaints.

Concerted refusals to work because of unsafe conditions are protected even if there is a no strike clause if condition is "abnormally dangerous." Labor Management Relations Act § 502, 29 U.S.C. § 143; *Gateway Coal v. UMW*, 414 U.S. 368 (1974); *Combustion Engineering,* 224 NLRB 542 (1976); *Whirlpool v. Marshall*, 445 U.S. 1 (1980) (OSHA Regulations protect employees' refusal to work because of reasonable apprehension of serious injury).

Not concerted where employee expresses safety concerns only in his own interest; merely telling co-worker vehicle is unsafe is not sufficient. *NLRB v. Portland Limousine*, 163 F.3d 662 (1st Cir. 1998).

In *Jefferson Electric Co.,* 271 NLRB 1089 (1984), the NLRB held that an employee's complaint to state OSHA was not protected concerted activity. There was no indication that the employee solicited support from co-employees before filing the complaint and the collective bargaining agreement did not address the issue. OSHA's retaliation prohibition would cover him.

In *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822 (1984), the Supreme Court held that a driver's refusal to drive an unsafe garbage truck constituted protected concerted

activity where the collective bargaining agreement specifically addressed truck safety. The Court stated: "[W]hen an employee invokes a right grounded in the collective bargaining agreement, he does not stand alone." It is concerted because it is a continuation of the concerted activity of negotiating the agreement. The employee must be invoking a right that arguably arises from the agreement.

An injunction can be obtained against a safety strike if the employees' belief in the existence of the dangerous condition is unjustified, regardless of the employees' good faith. *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974) (construing Section 502 of the Act, 29 U.S.C. § 143, as protecting "quitting of labor . . . in good faith because of abnormally dangerous conditions for work . . .").

In *Quality C.A.T.V.,* 278 NLRB 1282 (1986), the NLRB held that two telephone linemen who refused for safety reasons to climb utility poles after they had been rained on were acting concertedly, even if their primary unspoken concern was about their personal comfort or their supervisor's attitude, rather than their safety.

B. Section 8(a)(1).

Section 8(a)(l) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Examples of employer activities which may result in Section 8(a)(l) violations include:

1. Inevitability of strikes or violence if unionization occurs is Section 8(a)(1).

Pyramid Management, 318 NLRB 607 (1995) (Strike inevitable = violation).

Employer Notice: The Real Question. The Company and Union organizers are miles apart. Are you willing to see this site become another victim in long, bitter

negotiations? Are you willing to face the possibility of a long and ugly strike? Vote No. No violation. *General Electric Co.*, 332 NLRB 919 (2000).

- *Mid-State, Inc.*, 331 NLRB 1372 (2000) (Threats to shoot union agent in the butt if he visits home or "kick his ass" if he comes to the plant are threats of physical violence directed at the union activity which usually violate 8(a)(1).

- *Sears Roebuck Co.*, 305 NLRB 193 (1991) (Employer comments that union breaks legs to collect dues - no violation).

2. Serious Harm Notices.

Threats that unionization leads to closure, loss of jobs, dire economic consequences are unlawful. These may constitute *Hallmark* violations and can lead to a request for a bargaining order.

3. Bargain from Scratch or Threats Expressed/Implied.

Lawful to explain the give and take of bargaining in good faith negotiations.

Unlawful to threaten to bargain regressively or eliminate benefits before bargaining begins (lose everything, have nothing, start from scratch, zero = violation). *Eldorado Tool*, 325 NLRB 222 (1997).

Total Context of Comments Determine if a Threat.

Threats of reprisal or promise of benefit not based on objective facts outside control of employer--*Hallmark* violations. The remedy of bargaining order if the union has a card majority. *NLRB v. Gissel Packing*, 395 U.S. 575 (1969).

Bargaining could last more than a year, wages and benefits programs typically frozen during bargaining--lawful (in very limited circumstances). *Mantrose - Haeuser Co.*, 306 NLRB 377 (1992).

Bargaining like horse trading, employees could gain or lose benefits; bargain for first contract is bargaining basically from nothing, ground zero. *So - Lo Foods*, 303 NLRB 749 (1991).

Business automatically reduced if union = "unlawful." *DFR Industries*, 311 NLRB 833 (1993).

Employees could lose - lawful. Employees would lose - unlawful. *Flamingo Hilton - Laughlin*, 324 NLRB No. 14 (1997).

4. Plant closing threats.

Generally, violative unless financial condition of the company supports objective belief that union causes business failure.

Employer must provide objective factual basis outside the Employer's control for adverse consequences of unionization in order for comments to be lawful.

House of Raeford Farms, 308 NLRB 568 (1992).

Brown & Groves Lumber, 300 NLRB 640 (1990).

Cannondale Corp., 310 NLRB 845 (1993).

Superior Coal, 295 NLRB 439 (1989).

Springs Industries, Bath Fashions Division, 332 NLRB 40 (2000) (plant closure threat presumed disseminated because it's a more serious threat, is equivalent of a *Hallmark* violation and the Board

will presume that discussion is inevitable. So even though it is made to one person, it will be presumed to carry throughout the workforce.)

Threats by pastor of plant closing binding on employer where there's no disavowal. Speaking at the employer's premises numerous times is the equivalent of a cooperative effort to defeat the union. *Southern Pride Catfish*, 331 NLRB 618 (2000).

Threat of plant closure due to union is *Hallmark* violation - presumed to be disseminated among employees. *Springs Industries, Bath Fashions Division*, 332 NLRB 40 (2000).

5. Promises of Benefits.

Size of benefits, number receiving, timing, prior practice - all relevant.

Thorgren Tool, 312 NLRB 628 (1993) (Overtime granted during decertification petition violative).

Coca Cola of Dubuque, 318 NLRB 814 (1995) (Distribution of 401K estimates just before decertification election violative).

6. Grant of Benefits or Delay of Benefits.

NLRB v. Katz, 369 U.S. 736 (1962) ("Fist inside the velvet glove." Unilaterally conferring a benefit affects union desires of employees is violation). Benefits are presumed coercion.

Kavai Coconut Beach Resort, 317 NLRB 996 (1995) (Delay wage increase but tell employees retro regardless of election. Outcome and delay done to avoid appearance of interference not unlawful. Employer burden to explain).

Emery World Wide, 309 NLRB 185 (1992) (Bonus announced on eve of election valid. Company-wide defense. Timing alone insufficient).

7. Withhold benefits.

Wage increase for prior years; not granted due to litigation over certification or not granted due to union objections, is a violation.

Proceed as if no union on scene, *i.e.* if preplanned and well-documented proceed. (If not, preplanned, why implementing when union on the scene?).

Laidlaw Waste Systems, 307 NLRB 52 (1992) (Wage increase for four years; stop due to litigation over certification unlawful).

LRM Packaging, 308 NLRB 829 (1992) (Wage increase delayed due to union objections to election unlawful).

8. Futility of organizing.

"Never deal with union. Never sign a contract." Avoid Unfair labor practice by assuring bargaining in good faith and that strikes are not inevitable.

ITT Automotive, 324 NLRB 609 (1997).

Kaumograph, 316 NLRB 793 (1995).

9. Interrogations.

Interrogations of employees concerning their union sympathies, if the interrogations include threats, promises, or coercion.

Rossmore House, 269 NLRB 1176 (1984).

Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964).

In determining whether or not an interrogation is coercive, the Board will consider:

a. the background surrounding the interrogation;

b. the nature of the information sought through the communication;

c. the identity of the questioner;

d. the place and method of interrogation; and

e. truthfulness of reply.

Blue Flash Express, 109 NLRB 591 (1954).

Gold Shield Security, 306 NLRB 20 (1992).

Acme Bus, 320 NLRB 458 (1995).

Stoody Co., 320 NLRB 18 (1995).

Southern Pride Catfish, 331 NLRB 618 (2000).

Interrogations of well-known union adherents are more likely to be permitted under this analysis.

Diversified Products, 272 NLRB 1070 (1984).

An employer's instructions to a supervisor unlawfully to interrogate employees are not objectionable unless the supervisor carries out the instructions or discloses them to the employees.

Resistance Technology, 280 NLRB 1004 (1986).

10. Interrogation in Defense of Unfair Labor Practice Charge/Representation/Petition.

Unfair labor practice preparation guidelines - The NLRB "Miranda"

Johnnie's Poultry, 746 NLRB 770 (1964).

Requests for statement given to the NLRB is a Unfair labor practice unless employee is assured of no retaliation.

Fun Connection, 302 NLRB 740 (1991).

11. No Solicitation Rules and Social Media Policies.

Late establishment or disparate enforcement of a no-solicitation rule may be a violation of Section 8(a)(1). Unlawful disparate enforcement found where an employer discharged an employee for one isolated violation of the employer's no-solicitation rule because the disruption of the workplace resulting from the union solicitation was substantially less than the disruption resulting from non-union solicitations that the employer had condoned.

Restaurant Corp. of America v. NLRB, 827 F.2d 799 (D.C. Cir. 1987). (prohibit solicitation "on the clock" overbroad. Must specify work time that excludes lunch and break time).

Midon Restaurant, 331 NLRB No. 128 (2000) (rule prohibiting employees from distribution of materials in work areas but directs supervisors to pass out anti-union material is valid).

NLRB v. Nutone, 357 U.S. 357 (1958) (employer may choose to use its own premises to engage in distribution).

Beverly Enterprises-Hawaii, Inc. Hale-Nani, 326 NLRB No. 37 (1998) (it is not discriminatory enforcement of the rule to permit distribution by supervisors and deny same to the employees).

NLRB General Counsel regards e-mails and social media posting to oral solicitations and therefore apply the no-solicitation case law to business use of electronic e-mail including employees' messages otherwise protected by Section 7 of the Act. You should have a separate standing e-mail policy that conforms with the General Counsel's memorandum.

In *Lockheed Martin Aeronautics,* 330 NLRB No. 66 (2000), the occasional use of company equipment was used by supporters of a decertification effort in using their e-mails. The union was permitted to use the e-mails to oppose the decertification effort.

12. General Counsel's Scrutiny of Other Policies.

Other policies, including policies restricting the disclosure of confidential information, contact with the media, and contact with the government may violate the Act if found to be over broad. Policies that prevent the discussion of confidential information may be over broad if confidential information is not defined to exclude employee information, which can include wages and other benefits. Policies that prevent communication with the government may be too broad if the policies are not limited to prohibiting such contact only for official business purposes. Similarly, policies that prevent all contact with the media may violate the Act, unless the prohibition is limited to contact for official communications.

13. Polling.

Prerequisite to a poll is objective evidence of union loss of majority.

Strucksnes Construction, 165 NLRB 1062 (1967) (lawful poll requires notice to union).

Sea Breeze Health Care Center, Inc., 331 NLRB 1131 (2000) (employer's union truths quiz with monetary prize was equivalent of polling).

Allentown Mack v. NLRB, 118 S.Ct. 818 (1999) (NLRB rule that poll must be supported by evidence to justify withdrawal of recognition valid).

Poll to require employees participate in anti-union video but permissible to use managers in poll.

Allegheny Ludlum, 320 NLRB 484 (1995).

14. Surveillance.

Passive observance of union activity okay if done as part of normal business routine. Video of employees or union is usually unlawful absent some business justification.

Florida Coca Cola, 321 NLRB 21 (1996).

FW Woolworth Co., 310 NLRB 1197 (1993).

15. Solicit Grievances.

Absent past practice implies promise to remedy; promise of remedy includes suggestion box just before election or annual opinion surveys.

Torbitt & Castleman, 320 NLRB 907 (1996).

Great Plains Coca Cola, 311 NLRB 509 (1993).

16. Pro-Union Supervisors.

Supervisors are agents of employers. Discipline is permitted unless the discipline is half-hearted participation in employer-desired unfair labor practices. Violation if done to give testimony under Act, refusal to commit ULPs, retaliation for union activities.

Parker Robb Chevrolet, 262 NLRB 402 (1982).

Kenrich Petrochemicals, 294 NLRB 519 (1989).

Miller Electro, 301 NLRB 1103 (1991).

Southern Pride Catfish, 331 NLRB 618 (2000).

Promotion of pro-union employee out of unit to supervisor strategy.

Direct supervisory solicitation of authorization cards taints those authorization cards and may result in the dismissal of the petition. *Dejana Indus., Inc.*, 336 NLRB 1202 (2001). Supervisors may not be election observers for either party. *Family Service Agency*, 331 NLRB 850 (2000).

17. Authorization Card Return.

Request violates 8(a)(1); response to Q by employees lawful; assist in revocation where employee initiate idea lawful.

Lee Lumber, 306 NLRB 408 (1992).

Gibson Greetings, 310 NLRB 1286 (1993).

18. Threat of Suit Against Employees.

Bill Johnson Restaurant v. NLRB, 461 U.S. 731 (1983) (Bad faith, non-meritorious state lawsuit lacking reasonable basis is unfair labor practice). If employer withdraws suit or loses, NLRB may find retaliation.

If meritorious, permissible regardless of motivation. *Leohmann's Plaza,* 305 NLRB 663 (1991) (Unfair labor practice complaint, state countersuit for injunction against union picketing is pre-empted and continued pursuit 8(a)(1)). Applies to exclusion of non-employee or union organizers from employer property.

In *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Supreme Court struck down the Board's decision that the fact that a lawsuit was unsuccessful rendered the suit objectively baseless. The Court remanded the case to the Board to determine a new standard.

C. Section 8(a)(2).

Section 8(a)(2) makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

1. "Labor Organization".

Section 2(5) of the Act defines "labor organization" as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

a. Criteria.

In *Electromation, Inc,* 309 NLRB 990 (1992) the NLRB held that three criteria must be satisfied in order to find a "labor organization":

- employee participation;
- in an organization that exists at least in part for the purpose of "dealing with" employers; and
- about conditions of work or other statutory subjects such as grievances, labor disputes, wages rates of pay or hours of employment.

The NLRB held that three factors need to be examined to determine whether there is a Section 8(a)(2) violation:

- whether the labor organization is the creation of management;
- whether the structure and function of the labor organization are determined by management; and

- whether the continued existence of the committee depends on the fiat of management. The appropriate remedy is an order to disband the unlawful committee. *NLRB v. Webcor Packing, Inc.,* 118 F.3d 1115 (6th Cir. 1997).

Safety, benefits, policy review committees have been found violative; employee suggestion committee permitted. "Deal with" is the equivalent of a pattern of committee proposals considered by management. Violation will occur when committees are established for discussions of things like absenteeism, bonuses, pay progressions, no smoking policies where the committee is representative, it exists to deal with the employer, the employer points the participants and there is a pattern or practice of dealing with the employer.

Efco Corp. v. NLRB, 215 F.3d 1318, 2000 WL 632468 (4th Cir. May 17, 2000).

b. No Formalized Structure Required.

A labor organization exists even in the absence of formal organizational structure, even if the group is characterized as a committee rather than a union, and even if matters beyond the scope of ordinary employer-union negotiations are discussed, so long as the group was established to deal with an employer with respect to wages, hours, or working conditions. Originally, 8(a)(2) was enacted to prevent an Employer from unlawfully forming an in-house union thereby preventing any other bona fide labor organization from organizing its employees. *See Autodie International Corp. v. NLRB,* 169 F.3d 378 (6th Cir. 1999).

A company violated Section 8(a)(2) when it established a committee to promote employee involvement in improving the workplace. By dominating, supporting and assisting with the formation of the Design Team, a group that included supervisors as well as rank-and-file workers (both union members and non-members), the company created an illegal

labor organization. The Design Team fit the definition of a labor organization because its members acted as representatives of fellow workers, identifying workplace problems and proposing solutions. *E.I. DuPont de Nemours & Co.,* 311 NLRB 893 (1992).

Beware of employee committees and "quality circles" with designated spokesmen. Domination of such an organization would be illegal, even if the committee operated only by making recommendations. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

The handbook committees should be instructed not to discuss wages and benefits or working conditions as permitted. There must be a pattern or practice of dealing, one time discussion of vacation policy is not sufficient. *Von's Grocery*, 320 NLRB 53 (1996); *Stoody Co.*, 320 NLRB 18 (1996).

Brainstorming usually permitted but where company decides the number of employees or committee and reserves the right to abolish it and the issues discussed are safety and fitness, a violation occurs. *Keeler Brass*, 317 NLRB 1110 (1995).

Committees to review discipline, suggest revisions for the employer establish a violation. Benefit, safety policies, employer-established committees dealing with suggestion box or committee is not an unfair labor practice. *EFCO Corp.*, 327 NLRB 350 (1998); *Polaroid Corp.*, 329 NLRB 424 (1999).

2. Unlawful Assistance or Recognition.

An employer may continue to bargain with an incumbent union even though an outside union has filed an election petition. *RCA Del Caribe, Inc.,* 262 NLRB 963 (1982). The employer may not execute an agreement with the incumbent if the agreement contains union-security and dues check-off provisions where objective evidence exists rebutting the incumbent's majority status. *S.M.S. Automotive Products*, 282 NLRB 36 (1986). An employer may lawfully recognize a labor organization which represents an uncoerced, unassisted

majority even though a rival union is attempting to organize the employees, so long as the rival union has not filed a petition. *Abraham Grossman d/b/a Bruckner Nursing Home,* 262 NLRB 955 (1982). An employer may not automatically withdraw from bargaining "merely" because a decertification petition has been filed. *Dresser Industries, Inc.,* 264 NLRB 1088 (1982).

Paying employee representatives for attendance at union meetings, allowing union solicitation on company time, permitting union meetings on company property, and allowing a union to receive the proceeds from vending machines on company property can be indications of improper employer support for a union. The trend, however, has been to permit these activities unless other circumstances indicate that more than mere cooperation is involved. For example, the NLRB held that an employer may lawfully pay union members for time spent negotiating a collective bargaining agreement, provide ballots used at the meeting to ratify the agreement, and allow employees to attend a ratification meeting without loss of pay, unless there is evidence illustrating the lack of an arm's length relationship. *Coppinger Machinery,* 279 NLRB 609 (1986).

3. Majority Recognition.

An employer may not recognize a union as the sole representative of its employees before the union has gained the support of an uncoerced majority of the employees:

Neither the good faith belief of the employer and the union that the union had majority support, nor the union's acquisition of majority support after a contract is agreed upon, is a defense. *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.),* 366 U.S. 731 (1961).

Although an employer may be required to recognize a union if the employer has objective evidence of the employees' majority support, an employer may not recognize a union based on the results of an unlawful, coercive poll of the employees. *S.M.S. Automotive Products*, 282 NLRB 36 (1986).

If the employer and a minority union enter into a contract containing a union security provision, the employer and the union are jointly and severally liable to those employees who paid union dues and initiation fees, but who would not otherwise have joined the union; and

If an employer voluntarily recognizes a union based on authorization cards, it may later refuse to bargain if the union initially misrepresented its majority status. *Royal Coach v. NLRB,* 838 F.2d 47 (2d Cir. 1988). Exception: Section 8(f) of the Act allows "prehire" agreements in the construction industry, permitting an employer to recognize a union and to execute a contract with that union prior to the union's having demonstrated majority support. Prehire agreements may not be repudiated until the contract expires, or the employees vote in an NLRB-conducted election to reject or change their collective bargaining representative. *John Deklewa & Sons,* 282 NLRB 1375 (1987).

D. Section 8(a)(3)

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

1. Persons Protected.

Applicants for employment, as well as current employees, are protected.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

Wright Line, 251 NLRB 1083 (1980).

In *Willmar Electric Services*, 303 NLRB No. 33 (1991), *enf'd*, 47 F.3d 975 (D.C. Cir. 1992), an employer unlawfully refused to hire a job applicant who worked full-time as a union organizer; the NLRB rejected the contention that the applicant was not an

employee entitled to the protection. This position was affirmed by the Supreme Court in *Town & Country Electric*, 516 U.S. 85 (1995).

2. General Counsel's Burden.

Establishes prima facie case/employer reason.

Can use employer reason to show pretext.

Burden throughout to show reason is union animus.

Southwest Merchandising v. NLRB, 53 F.3d 1334 (DC Cir. 1995).

Pretext - real reason.

Dual motivation - would do anyway.

The NLRB has the burden of showing discrimination, but in "dual motive" cases the General Counsel need make only a prima facie showing, creating an inference that protected conduct was "a motivating factor," to then shift the burden of proof to the employer to show "by a preponderance of the evidence" that the same action would have been taken anyway. *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

The General Counsel must show that the anti-union reason was a substantial motivating factor. The respondent must be able to show as affirmative defense that it would have imposed the discipline even if there was no union activity. *Manno Electric*, 321 NLRB 278 (1996); *King Soopers, Inc.*, 332 NLRB 23 (2000).

Employer wins if it can show a reason other than union animus. *Meco Corp. v. NLRB,* 986 Fed. 1434 (D.C. Cir. 1993); *Laro Maintenance v. NLRB,* 56 F.3d 224 (D.C. Cir. 1995).

3. Typical 8(a)(3) Violations.

a. The following acts violate Section 8(a)(3) if motivated by anti-union animus:

- Refusal to hire. Beware of questioning applicants about union membership or the degree of union organization at their previous place of employment.
- Discharge, suspension, or warnings.
- Transfer or demotion.
- Denial of preferred job assignments or promotions.
- Denial of overtime, sick leave, or withholding benefits.
- Subcontracting work.
- Lockouts.

b. Reporting undocumented aliens who are engaged in union activity to the Immigration and Naturalization Service. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

c. Refusal to hire predecessors union employees to avoid higher union wages is unfair labor practice. *Honeywell, Inc.*, 318 NLRB 637 (1995).

d. Employer cancels union contractor to perform work with own employees is unfair labor practice *Sierra Realty Corp.,* 317 NLRB 832 (1995), *enf. denied* 82 F.3d 494 (D.C. Cir. 1996).

4. Lockouts and 8(a)(3).

Lockouts are generally disfavored by the NLRB. The purpose of the lockout determines its legality. Requiring resignation from the union to work, forcing the union to accept unlawfully implemented offer, forcing union to accept non-mandatory subject, lockouts in a context of other ULPs, and compelling acquiescence in ULPs are all illegal purposes.

Schenk Packing Co., 301 NLRB 487 (1991).

Teamster Local 649 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991).

Greensboro Coca Cola, 311 NLRB 1022 (1993).

Horsehead Resource Development, 321 NLRB 404 (1996).

Employer refused information request, declared impasse, unilaterally implemented its offer, lockout, hired replacements resulted in 10(j) and 8(a)(3) finding. *Rivera - Vega v. ConAgra, Inc.,* 70 F.3d 153 (1st Cir 1995).

Lockouts to support employer's bargaining position can be a legitimate economic weapon even though it may discourage union activity. *American Shipbuilding v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965). Lockouts in reprisal for inside game tactics or slowdowns are also lawful and effective.

Lockouts to compel agreement to the employer's offer or in response to the union's "inside game" and work to the rule strategies is a legitimate tactic. *White Cap Inc.*, 325 NLRB 1166 (1998); *Central Illinois Public Service*, 326 NLRB 928 (1998), *enf'd Local 702, IBEW, AFL-CIO*, 215 F.3d 11 (D.C. Cir. 2000); *International Paper*, 319 NLRB 1253 (1995), *reversed* 115 F.3d 1045 (D.C. Cir. 1997). This can be a powerful weapon.

5. Inherently Destructive.

Anti-union motivation need not be shown if the employer's conduct is "inherently destructive" of important employee rights, even if the employer's conduct was motivated by business reasons. Inherently destructive arises where employer distinguishes among workers based on union activity or engages in actions that make bargaining appear futile. *Lourdes Health,* 316 NLRB 284 (1995); *Circuitwise Inc.,* 309 NLRB 905 (1992). If, however, the employer's discriminatory conduct has only a "comparatively slight" adverse impact upon employee rights and if the employer has introduced evidence of "legitimate and substantial

business justifications for the conduct," anti-union motivation must be shown to establish violation.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

In the absence of an employer showing of an adequate business justification, discriminatory conduct having only a "comparatively slight" adverse impact on employees' rights will constitute a violation of the Act.

a. Inherently Destructive Subcontracting.

Subcontracting of work during a lockout is "inherently destructive" of Section 7 rights. *International Paper Co.,* 319 NLRB 1253 (1995), *reversed,* 115 F.3d 1045 (D.C. Cir. 1997). Employer implemented proposal giving it right to permanently subcontract work of locked out employees who had been temporarily replaced. Implementation of permanent subcontracting proposal was severe, hindered future bargaining, showed hostility to the bargaining process, making it futile in the eyes of employees.

b. Inherently Destructive Examples.

Most courts recognize two classes of inherently destructive conduct:

1. Actions that distinguish among employees based on participation in a strike, or

2. Actions that show bargaining to be futile.

Alaska Pulp, 300 NLRB 232 (1990), requiring former strikers to return to work or lose recall rights, inherently destructive. Administrative convenience defense not sufficient business justification. *Teamster Local 822 v. NLRB (Lone Star),* 956 F.2d 317 (D.C. Cir. 1992). Breach of strike settlement by failing to re-

hire strikers was inherently destructive. Special bonuses to non-strikers, denial of vacation benefits to strikers, special benefits to non-strikers are usually violative. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

6. Partial shutdown.

An employer may close all facilities even for discriminatory motives, but a partial closing is an unfair labor practice if undertaken to chill unionism. *Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263 (1965). It may be difficult to identify the proper business entity in determining whether a shutdown is partial or complete.

7. Discriminatory Discharge Elements.

Union Activity.

Knowledge motivation.

Small plant doctrine, mass layoffs.

Direct evidence, internal knowledge.

Inconsistent, disparate treatment.

Flannery Motions, 321 NLRB 931 (1996).

Yesterdays Children, 321 NLRB 766 (1996).

Trader Horn of NJ, 316 NLRB 194 (1995).

Davis Supermarkets v. NLRB, 2 F.3d 1162 (D.C. Cir. 1993).

8. Intentional Showing of Anti-Union Animus.

Timing, recent promotion, wage increase, failure to investigate, lack of prior warnings.

Failure to give reasons or shifting reasons.

Punishment not fit crime; similar conduct given more lenient punishment.

8(a)(1) statements.

Waste Stream Management, 315 NLRB 1088 (1994).

Aero Detroit, 321 NLRB 1101 (1996).

Caterpillar, Inc., 322 NLRB No. 115 (1996).

9. Plant Closings.

Textile Workers v. Darlington Mfg., 380 U.S. 263 (1965).

Total closing even with union animus sometimes ok.

However, partial closings, subcontracting, relocations if done in a context of union organizing or concerted protected activities will be examined under *The Wright Line Transportation Management* analysis. Remedy for violations is restoration to status quo ante, reinstate, back pay.

Cub Branch Mining, 300 NLRB 57 (1990).

Automatic Sprinkler, 319 NLRB 401 (1995).

Gold Coast Produce, 319 NLRB 202 (1995).

Ferragon Corp., 318 NLRB 359 (1995).

RBE Electronic, 320 NLRB 80 (1995).

10. Transfers or Runaways.

Employer motivation in moving work from union to non-union facility examined by looking at business justification, past practice; timing; direct evidence of intent.

Langston Co., 304 NLRB 1022 (1991).

Nu-Skin Int'l, 320 NLRB 385 (1995).

Employer's defense is to show economic reason for closure.

Employees get better jobs, transport costs.

Customer preference.

Central Transport, 306 NLRB 166 (1992) (Relocation 2 ½ months after union certification and after one bargaining meeting).

Seminole Intermodal Transport, 312 NLRB 236 (1993) (Employees walk out of meeting with manager to explain collective bargaining agreement with manager and manager says, "We'll see who gets last laugh").

Facility profitable until closure.

11. Replacement and Reinstatement of Strikers as 8(a)(3) Violations.

a. Leading Cases.

- *Laidlaw Corp.,* 414 F.2d 99 (7th Cir. 1969).
- *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).
- Executive order prohibits federal government to contract with employers who hire permanent replacements. Invalid under NLRA. *Associated Grocers,* 295 NLRB 806 (1989).

b. Reinstatement to Substantially Equivalent Job.

Unconditional offer to return must be made by employees but viewed liberally.

- *Rose Printing,* 304 NLRB 1188 (1991) (Employer obligation to place returning strikers in same or substantially equivalent jobs not jobs for which they merely qualify).

- *NLRB v. Fleetwood Trailer,* 389 U.S. 375 (1967) (Employer must offer returning striker reinstatement to any job that is the same as or substantially equivalent to the present job. Mere qualification not sufficient).

- *Chicago Turbine,* 318 NLRB 920 (1995) (Employer must offer same or substantially equivalent driver jobs at one facility equivalent to those at second struck location).

- *SKS Diecasting,* 307 NLRB 207 (1992) (Permanent replacements hired before conversion to unfair labor practice strike not subject to displacement by unfair labor practice strikers).

- *NLRB v. Augusta Bakery,* 957 F3d 1467 (7th Cir. 1992) (Substantial equivalent not met by reinstatement causing loss of seniority to different shift, lower wage. Regular part timers are entitled to reinstatement).

c. Definition of Permanent Replacements.

Employer's burden to show mutual understanding with replacements.

- *IMA Holdings,* 310 NLRB 1349 (1993) (Striker replacements permanent even though they did not complete application, physical exam, or drug tests).

- *Harvey Mtg.*, 309 NLRB 465 (1992) (Temporary agency employees are not permanent).

- *Crown Beer Dist.*, 296 NLRB 541 (1989) (Employer does not need to use magic word "permanent" to establish replacements were permanent).

- *Bel Knap v. Hale*, 463 U.S. 491 (1983) (State Court breach of contract claims by terminated replacements).

Use of permanent = contract claim by replacements.

12. Union Security and Discrimination.

a. Closed Shop.

Discrimination in violation of Section 8(a)(3) occurs when an employee is required to be a union member to be hired. This is known as a closed shop, and is illegal under the Act.

The Act permits a union and an employer to negotiate a union shop clause, however, Section 14(b) permits states to ban union security provisions by right-to-work laws.

b. Agency Shop.

An agency shop merely requires payment of a service fee, which is the equivalent of initiation fees and periodic dues. Practically speaking, there is little difference between the "union shop" and the "agency shop" because the "membership" which Section 8(a)(3) permits the parties to require is "whittled down to its financial core." *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963). Many right-to-work states have prohibited this type of arrangement. The NLRB ruled that a union may refuse to disclose financial information pertinent to negotiation of an agency fee since it was not a mandatory subject of bargaining. *North Bay Development Disabilities Services Inc. v. NLRB,* 905 F.2d 476 (D.C. Cir. 1990) (*But see Beck,* discussed below.)

c. Beck Rights.

Section 8(a)(3) does not permit a union, over the objection of dues-paying non-member employees, to expend funds collected from non-member employees on activities unrelated to collective bargaining, contract administration, or grievance adjustment. *Communications Workers v. Beck,* 487 U.S. 735 (1988). This principle has led to considerable debate over methods of determining the allocation of union expense to representation duties. Similarly, in the public sector the union must show that the dues are used for employee

representation and not for other political purposes. *Abood v. Detroit Board of Education,* 431 U.S. 209, (1977); *Lehnert v. Ferris Faculty Assoc.,* 500 U.S. 507 (1991) (a public employer union cannot assess non-members for lobbying and public relations expenses that are not related to their unit's collective bargaining agreement). Unions now must advise employees of their Beck rights. *Textron,* 300 NLRB 1124 (1990). The NLRB is becoming more adamant concerning the requirement that Unions advise employees of their right to be non-members. *See California Saw & Knife Works,* 320 NLRB 224 (1995); *Service Employees International Union, Local 74,* 323 NLRB 289 (1997). In 1998, the Supreme Court ruled on the narrow issue of whether a union security provision that is written using the language of the Act (membership) violates a union's duty of fair representation. The Court said no. *Marquez v. Screen Actors Guild, Inc.,* 525 U.S. 33 (1998).

Non-member dues payers need not pay for matters beyond the collective bargaining negotiations, contract administration or grievance-adjustment. *Teamsters, Local Union 492 (United Parcel Service)*, 346 NLRB 360 (2006); *Paperworkers Local 1033 (Weyerhaeuser Lumber)*, 320 NLRB 224 (1995).

Unions must give members of the unit notice of their *Beck* rights to permit them to object to expenditures. *Teamsters, Local Union 492 (United Parcel Service)*, 346 NLRB 360 (2006) (union failed to give *Beck* rights, unlawfully punished objectors and resignees). Union may use dues money and assessments to fund organizing drives elsewhere. *United Food and Commercial Workers, Local 952 (Meijer, Inc.)*, 329 NLRB 730 (1999).

A maintenance of membership clause does not require that an employee join a union, but merely requires that those who have already joined remain members.

d. Dues Checkoff.

A dues check-off is legal if it is irrevocable for one year or less. Section 302(c)(4) of the Act. Explicit language within the check-off authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. *Electrical Workers, IBEW, Local 2088 (Lockheed Space Operations Co.),* 302 NLRB 322 (1991).

e. Superseniority to Union Representatives.

Superseniority legality determined by official duties of union official and benefits of clause. Limited to lay off or recall.

Dairy Lee Cooperative, 219 NLRB 656 (1975).

Gulton Electronics, 266 NLRB 406 (1983).

R L Lipton, 311 NLRB 538 (1993) (wage premium for steward unlawful).

E. Section 8(a)(4) Retaliation for Involvement with NLRB Procedures.

Section 8(a)(4) makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act.

1. Scope.

Section 8(a)(4) covers more than just filing charges and providing testimony; it includes "involvement" in any NLRB investigation or proceeding. For example, 8(a)(4) protection extends to protect an employee in the following situations:

- Employs the *Wright Line* shifting burden analysis. Includes any form of retaliation, suspension, demotion, warnings, reduced hours, and more onerous working conditions.

Caterpillar, Inc., 322 NLRB No. 115 (1996).

Sportsman Service Center, 317 NLRB 261 (1995).

Kroger Co., 312 NLRB 7 (1993).

Pillsbury Chemical, 317 NLRB 261 (1995).

- Employer state lawsuit against union and business agent over false unfair labor practice charge. Federal law controls unfair labor practice must be in bad faith for Employer to avoid retaliation charges. *LP Enterprise,* 314 NLRB 580 (1994); *Manno Elec.,* 321 NLRB 278 (1996).

- An employee provides sworn written statements to an NLRB field examiner.

- NLRB compliance officer, refusing to withdraw unfair labor practice charge, refuses to disclose employee who filed charge, corroborating witnesses protected.

- An employer disciplines an employee who refuses to appear voluntarily to testify in an unfair labor practice proceeding.

- An employee is scheduled to testify but does not actually testify, or an employee is suspected of having filed a charge but in fact has not.

Brown Transportation, 296 NLRB 552 (1989).

Sahara Las Vegas, 297 NLRB 726 (1990).

Yeager Trucking, 307 NLRB 567 (1992).

Dorsey Trading, 310 NLRB 777 (1993).

National Surface Cleaning, 54 F.3d 35 (1st Cir. 1995).

Bill Johnson Restaurants v. NLRB, 461 U.S.731 (1983) (Bad faith filing of state lawsuit is unfair labor practice where no reasonable basis). Once NLRB issues an unfair labor practice complaint, state court action is preempted. Therefore, filing a lawsuit violates 8(a)(1) and 8(a)(4).[1]

Loehmann's Plaza, 305 NLRB 663 (1991).

IX. UNION UNFAIR LABOR PRACTICES:

A. Section 8(b)(1).

Section 8(b)(l) prohibits restraint or coercion of employees "in the exercise of rights guaranteed in Section 7." *Scofield v. NLRB*, 394 U.S. 423 (1969). So long as union rule has a legitimate union interest and is enforced against members who are free to resign, a union may fine employees.

1. May Not Affect Job.

Causing employer to fire non-union members, asking employer to not recall employees who oppose union business agent. Rule requires fines and assessments be paid before accepting dues in union security settings causing termination for late payment of dues are

[1] Employers who prevail against unfair labor practice charges should be aware of the Equal Access to Justice Act, 5 U.S.C. § 504(c)(1), which allows payment of reasonable attorneys' fees and expenses to prevailing parties in adversary proceedings against the United States. *See* 29 C.F.R. §§ 102.143 (1990) for NLRB's rules on administrative proceedings. Eligible parties are individuals with net worth of less than $2 million; the sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees; a charitable or other tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees; a cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

ULPs. Must give employee notice and chance to cure before union can cause employer to terminate under union security clause.

2. Restraint or Coercion.

Attempts to regulate member conduct after resignation or expulsion considered restraint or coercion. *See e.g., Teamsters, Local Union 492 (United Parcel Service)*, 346 NLRB 360 (2006).

Fining employees who cross picket lines after resignation from the union barred by *Machinists, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.),* 270 NLRB 1330 (1984), where the Board prohibited unions from restricting in any way the right of employees to resign from the union at any time.

Fining or threatening members with loss of union membership for refusing to engage in unprotected activity that would jeopardize their employment relationship under no strike clause. *Marble Polishers Local 24 (Remco Maintenance),* 305 NLRB 943 (1991). Threatening to have an employee fired for non-payment of dues after the employee was ousted from the union for supporting a rival union violates the Act. *Transport Workers Union,* 320 NLRB No. 3 (1998). Refusal to process grievance because employees oppose incumbent in union election. *UAW Local 933 (Allison Gas Turbine)*, 307 NLRB 1065 (1992).

Expelling from a union or taking other disciplinary action against an employee who filed or threatened to file NLRB charges or refused to withdraw charges. Union may enforce union security against suspended or expelled member as discipline for rival union support or decertification activities. *Transport Workers Local 525 (Johnson Controls World Services),* 317 NLRB 402 (1995); *Sheet Metal Local 18 (Globe Sheet Metal Works),* 314 NLRB 1134 (1994). Fining for filing decertification petition is unlawful but it is not unlawful to enforce union security clause as in *Johnson Controls'* employees could resign and avoid; Union

Hobson choice with disloyal member *Boiler Makers (Kaiser Cement)*, 312 NLRB 218 (1993); *Operating Engineers Local 399 (Tribune Properties)*, 304 NLRB 439 (1991); *Laborers Local 324 (Lawson Mechanical),* 318 NLRB 589 (1995); *Avon Roofing,* 312 NLRB 499 (1993); *Teamsters Local 287 (Airborne Express),* 307 NLRB 980 (1992); *Carpenters Local 296 (Acrom Construction Service),* 305 NLRB 922 (1991).

Restraint or coercion may consist of violence or threats of violence, *i.e.*, physical force used to coerce cooperation in organizational activity.

In *Pattern Makers' League v. NLRB,* 473 U.S. 95 (1985), the Supreme Court upheld the Board's decision prohibiting a union from fining employees who resigned from the union and returned to work during a strike. The Court also upheld the Board's decision invalidating a union rule which prohibited member resignation just before or during a strike.

Union constitution restrictions on resignation by member or provisions seeking to impose union rule after resignation are invalid. *Operating Engineer Local 399 (Tribune Property),* 304 NLRB 439 (1991). Requirement to reimburse strike fund if return to work are invalid. *Mine Workers (Canterbury Coal),* 305 NLRB 516 (1991). Resignation from union is effective upon receipt if delivered, postmark if mailed. *Pattern Makers (Michigan Model Mfgs. Association),* 310 NLRB 929 (1993).

3. Section 7 Rights May Yield to Union Discipline Rights.

Teamster Local 741 (A.B.F. Freight System), 314 NLRB 1107 (1994).

Removing two elected officials for opposing the local president in union election was not a violation. 8(b)(1)(A) does not cover internal union sanctions, it has no effect on the job. Union interference with access to NLRB and physical violence generally will violate 8(b)(1)(A). Union discipline for filing unfair labor practice charge, compelling violations of a no strike clause, compelling strikes violative of 8(g) or 8(b)(4), and discipline for filing a

decertification petition will result in 8(b)(1)(A) violations. *OPEIU Local 251 (Sandia Corp.)*, 331 NLRB No. 193 (2000).

IUOE Local 39, 746 F.2d 530 (9th Cir. 1984).

IUOE Local 138 (Charles S. Skura), 148 NLRB 679 (1964).

UMWA Local 12419 (National Grinding Wheel), 176 NLRB 628 (1969).

Molders Local 125 (Blackhawk Tanning), 178 NLRB 208 (1969).

Scofield v. NLRB, 394 U.S. 423 (1969) (Reasonable fine for exceeding production quota - no violation).

Machinists v. Golzalez, 356 U.S. 617 (1958) (Expulsion - state court action not preempted under NLRA).

NLRB v. Allis Chalmers, 388 U.S. 175 (1967) (8(b)(1)(A) does not reach discipline affecting only status as members - fine for crossing picket line permitted).

NLRB v. Shipbuilders, 391 U.S. 418 (1968) (Expulsion for filing unfair labor practice charge without exhausting internal remedy = violation).

NLRB v. Boeing, 412 U.S. 67 (1973) (Reasonableness of fine if job not affected - not a violation; unreasonable fine - not a unfair labor practice).

Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (union cannot restrict member resignation to avoid discipline; union

constitution no resignation during a strike or when strike imminent is invalid).

Textile Processors, Local 311, 332 NLRB 1352 (2000) (union discipline that does not involve access to NLRB or affect job is not covered by 8(b)(1)(A).

Teamsters, Local Union 492 (United Parcel Service), 346 NLRB 360 (2006) (discipline for exercising rights to resign or object).

Preventing a member from resigning while the union is bringing internal charges of misconduct against the member is violation. *Sheet Metal Workers v. NLRB,* 873 F.2d 236 (9th Cir. 1989). Fining supervisors who resign during a strike to perform unit work is a violation. *Sheet Metal Workers International Association, Local 68,* 298 NLRB No. 1000 (1990).

But fining employees for exceeding union established production quotas is not unlawful. *Scofield v. NLRB,* 394 U.S. 423 (1969). Nor is fining employees for giving false testimony in an arbitration which is established by objective evidence. *Graphic Communications International Union (Georgia Pacific Corp.),* 300 NLRB 1071 (1990).

Fine in retaliation for testifying against union president in arbitration hearing unlawful but not rule requiring union representative present during investigatory interview. *Sheetmetal Workers Local 550 (Dynamics Corp.)*, 312 NLRB 229 (1993).

4. Union Restraint and Coercion Involving Supervisors.

The employer may require supervisors to resign from the union.

Sections 8(b)(l)(B) and 8(b)(4)(A) prohibit a union from restraining or coercing "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." Illegal conduct must either be aimed at forcing

employer to select a particular 8(b)(1)(B) representative or affect adversely the manner in which representative engages in grievance processing or contract interpretation. *Teamster Local 507 (George R. Klein Lewis Co.),* 306 NLRB 118 (1992).

Interest arbitration, conflicting jurisdiction and work assignments are grist for the mill where pressure applied to supervisor member. *NLRB v. Sheet Metal Workers Local 104 (Simpson Sheet Metal),* 64 F.3d 465 (9th Cir. 1995). Fine for assigning employees to worksite in conflict with collective bargaining contract; contract interpretation rejected--merely doing his job--NLRB found violation. *Eagle Delta Coal Corp.*, 311 NLRB 758 (1993).

A union may discipline supervisor-members who perform non-emergency rank-and-file bargaining unit work during a lawful strike. *Florida Power & Light Co. v. Electrical Workers,* 417 U.S. 790 (1974). A union may not discipline a supervisor-member for performing supervisory duties during a lockout, even though there is some overlap between the supervisor's duties and bargaining unit work.

Union sanctions against supervisors are illegal if the sanction "may adversely affect the supervisor's conduct in performing his grievance-adjustment or collective-bargaining duties" for the employer. *ABC , Inc. v. Writers Guild,* 437 U.S. 411 (1978).

The courts have found "no merit" in the Board's "reservoir doctrine," invoked to protect supervisors from union discipline whereby anyone who is a supervisor is deemed to be part of a reservoir from which the employer may select representatives for collective bargaining or grievance adjustment purposes. *NLRB v. IBEW Local 340 (Royal Electric)*, 780 F.2d 1489 (9th Cir. 1986), *aff'd,* 481 U.S. 573 (1987). The Supreme Court has limited this doctrine so that an inquiry into whether a union has violated Section 8(b)(1)(B) must focus on the adverse effect union sanctions might have on the supervisor's performance of his

collective bargaining or grievance adjustment tasks, thereby coercing the employer not to select such a union-disciplined supervisor for these duties. *See NLRB v. IBEW, Local 340 (Royal Electric),* 481 U.S. 573 (1987). Violations of Section 8(b)(1)(B) do not automatically result when a union disciplines a supervisor-member. *American Broadcasting Companies, Inc. v. Writers Guild,* 437 U.S. 411 (1978).

The NLRB and courts have approved union discipline of supervisors who perform more than a minimal amount of work during a strike. *Columbia Typographical Union,* 242 NLRB 1099 (1979). When a union does not represent and does not intend to represent a company's employees, there can be no Section 8(b)(1)(B) violation when the union disciplines that company's supervisors, even if the disciplined member-supervisors are bargaining representatives for the company. *NLRB v. IBEW, Local 340, Royal Electric,* 481 U.S. 573 (1987).

B. Section 8(b)(2) Violations.

Section 8(b)(2) makes it an unfair labor practice for a labor organization to discriminate against an employee, or to cause an employer to discriminate against an employee, in violation of Section 8(a)(3), or to discriminate against an employee who has been denied membership in the union, except that the union may deny membership for failure to pay dues or fees required as a condition of membership.

1. Threats of Discharge or Reduction in Duties.

Union threats or conduct to cause an employer to discharge an employee because of his filing grievances to address health and safety, political opposition to union leadership, filing grievance or unfair labor practice against union, bypassing steward to go to union office, criticism of union, intent to withdraw from union and opposition to hiring hall rules

are unlawful. *Kroger Co.,* 312 NLRB 7 (1993); *UAW Local 235 (General Motors), 313 NLRB 36 (1993); Teamster Local 331 (Statewide Co.),* 315 NLRB 10 (1994).

Employer violates 8(a)(3) if it fires employees upon union demand for a reason other than failure to pay dues and fees. *Monson Trucking Inc.,* 324 NLRB 933 (1997); *Green Team of San Jose,* 320 NLRB 999 (1996). Union obligated to notify non-member of his dues obligation and right to object under *CWA v. Beck*, 487 U.S.735 (1988) (*Financial Core members); IBEW Local 99, Electrical Maintenance & Control*, 312 NLRB 613 (1993), *enf'd* 61 F.3d 41 (D.C. Cir. 1995).

Violation of 8(b)(2) to cause an employer to not hire employees because the union believed they were working during a strike or lockout. They were therefore engaging in protected activity. *Newspaper & Mail Delivery (City Delivery)*, 332 NLRB No. 77 (2000).

Threatening to cease representing employees, if they voted to deauthorize a union security provision, violates Section 8(b)(2) unless objective evidence proves that without such union security provision, it would not be economically feasible to continue representation. *1115 Joint Board (Pinebrook Nursing Center),* 305 NLRB 110 (1991).

Union may remove members from policy making positions for political reasons where teamwork, loyalty or where necessary to administer contract. *General Motors, Allison Transmission,* 313 NLRB 998 (1994); *Shenango, Inc.*, 237 NLRB 1355 (1978).

2. Seniority.

Basing seniority on duration of union membership is an unfair labor practice. *Mine Workers Dist. (Joshua Industries),* 315 NLRB 1052(1994). Causing an employer to stop overtime for union adherents is a violation. *NALC Local 86 (USPS)*, 315 NLRB 1176 (1994).

Contract clause to permit those who leave unit to return with full seniority if they maintain membership in union unlawful. Method to compute seniority, deny time at non-union mine and denial of accrued seniority due to acceptance of non-union employment outside the unit is an 8(b)(1)(A) and (2) violation. Union causing employer to refuse to recognize accrued seniority because they work behind picket line with non-union company is unlawful. *Manitowoc Engineering,* 291 NLRB 915 (1988); *IBEW Local 1212 (WPIX),* 288 NLRB 374 (1988); *Mine Workers District 23 (Peabody Coal),* 293 NLRB 77 (1989); *Teamster Local 705 (Pennsylvania Truck Lines),* 314 NLRB 95 (1994).

3. Hiring Halls.

It is an unfair labor practice if the union fails to provide the hiring hall rules. Union's failure to follow rules and failure to give reasonable notice of dues delinquency and chance to cure before being removed from hiring hall list is unlawful. *Radio Electromco Officers v. NLRB (Sea Land Service),* 16 F.3d 1280 (D.C. Cir. 1994).

4. Discriminatory Hiring Hall.

Section 8(b)(2) prohibits a union from operating its hiring hall in a manner that discriminates against nonunion workers and without any legitimate union objectives being served by such discrimination. *Teamsters, Local 357 v. NLRB,* 365 U.S. 667 (1961). An employer that accepts referrals from a discriminatorily operated union hiring hall will not be liable for the 8(b)(2) violation if the employer had no knowledge of the discrimination.

Rule changes must be given in timely manner to users if affirmative action by user is required, *i.e.*, eligibility requirements. Union's failure to follow own rules for referral is a violation. *Plumbers & Pipefitters Local 38 (Mechanical Contractors Assn),* 306 NLRB 511 (1992); *Iron Workers Local 118 (California Saw)*, 309 NLRB 808 (1992).

Reasonable fee from non-union workers is valid. Refusal to refer member of sister locals, dissidents, political opponents, unfair labor practice charge filers and members refusing picket duty is a violation. *Pittsburgh Press v. NLRB,* 977 F.2d 652 (D.C. Cir. 1992); *Iron Workers Local 46,* 320 NLRB 982 (1996); *Iron Workers Local 45*, 320 NLRB 1079 (1996); *Carpenters Local 836 (Corbett Construction);* 397 NLRB 801 (1992); *Teamsters Local 186,* 313 NLRB 1232 (1994); *Plumbers Local 521 (Huntington Plumbing),* 301 NLRB 27 (1991).

5. Superseniority.

Section 8(b)(2) prohibits a union from enforcing a collective bargaining provision that permits a union steward to bump less senior employees unless the union can show that such superseniority rights are necessary for contract administration. Shift premium to stewards is un unfair labor practice. Superseniority must be limited to layoff and recall. Mere agreement by union and employer is not sufficient. Issue is duty of union steward and benefits that superseniority attaches. *Joy Technologies,* 306 NLRB 1 (1992); *Gulton Electro Voice,* 276 NLRB 1043 (1985); *Dairylea Cooperative,* 219 NLRB 656 (1975), 311, 538 (1993). In *Teamsters Local 293 (R.L. Lipton Distributing),* superseniority for overtime equalization and shift preferences to union committee persons found not to violate act. *UAW Local 235 (General Motors),* 313 NLRB 36 (1993); *Goodyear Tire & Rubber,* 322 NLRB 1007 (1997).

C. Section 8(b)(3).

Section 8(b)(3) makes it an unfair labor practice for a labor organization to refuse to bargain collectively with an employer. Unions have an obligation pursuant to this section to provide relevant information necessary for the Employer to bargain collectively (which includes the grievance and arbitration procedure).

D. Section 8(b)(4).

Sections 8(b)(4)(A), (B), and (C) prohibit certain "secondary" activity. (See Section XV, infra).

Section 8(b)(4)(D) prohibits strikes, boycotts, picketing, and coercion in "jurisdictional disputes," where the object is to force an employer to assign certain work "to employees in a particular trade, craft, or class." This arises most often in the construction industry. The purpose of the statute is to protect a neutral employer in a dispute where two groups make competing claims for work assignments. The NLRB holds a Section 10(k) hearing to determine the appropriate group for the work. The employer's preference receives strong weight. The Board will not act if there is an agreed-upon method of resolving the dispute, such as the joint boards common in the construction industry. In fact, most jurisdictional disputes are resolved through procedures of the AFL-CIO.

Stationary banners are not "coercive." *Southwest Regional Council of Carpenters, Local 1506 (Held Properties, Inc.)*, 356 NLRB No. 16 (Oct. 29, 2010); *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, 356 NLRB No. 88 (Feb. 3, 2011).

E. Section 8(b)(5).

Section 8(b)(5) forbids a union from charging excessive or discriminatory initiation fees.

F. Section 8(b)(6).

Section 8(b)(6) prohibits "featherbedding." The statutory language itself forbids a union from causing an employer "to pay or deliver any money or other thing of value in the nature of an exaction for services which are not performed or are not to be performed." Judicial

interpretations have rendered the Section virtually meaningless. As long as some actual work is performed, Section 8(b)(6) is not violated, even if the work was neither necessary nor desirable.

Company hired to supervise other employees on construction project. Union demand on-site steward to coordinate deliveries, safety of Teamsters at the site. Employer refused. Union picket = no violation. *Teamsters Local 282 (TDX Constructors)*, 332 NLRB 922 (2000). Narrow interpretation, some work must be performed or contemplated regardless of whether employer needs or deserves it. Union may not demand pay for services not performed.

G. Section 8(b)(7).

Section 8(b)(7) makes it an unfair labor practice to picket for recognition for longer than a reasonable time, not to exceed 30 days, without filing a petition for an election. "Area standards" picketing, however, is permitted, and often is used as a disguise for recognitional picketing. *See* Section XV. Section 8(b)(7) also prohibits:

- Picketing during the term of a contract with another union; and
- Picketing within 12 months of a valid union election, even one that includes another union.

Section 8(b)(4)(C), prohibiting picketing an employer with a certified union, is complemented by Section 8(b)(7)(A), which protects employers from picketing when recognition is informal, so long as the union is "lawfully recognized," *i.e.*, not a "sweetheart" arrangement. When a petition is filed and recognitional picketing is in progress, the Board will conduct an "expedited election."

The proviso to Section 8(b)(7)(C) permits truthful informational picketing to advise the public "that an employer does not employ members of, or have a contract with, a labor organization."

Picketing is not protected by the proviso, however, if the picketing causes a disruption of pickup and delivery or other services.

X. SETTLING UNFAIR LABOR PRACTICES:

A. Informal/Formal Settlements.

1. Who Decides.

NLRB General Counsel has substantial discretion under §3(d): "he shall have final authority in respect of the issuance and prosecution of complaints." The withdrawal and dismissal of a complaint is not reviewable. *NLRB v. Sears Roebuck & Co.,* 421 U.S. 132 (1975); *IAM v. Lubbers*, 681 F.2d 598 (1982). Exceptions to rule precluding review on jurisdiction or constitution grounds. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Detroit Newspaper v. Schaub,* 984 F. Supp 1048 (E.D. Mich. 1997). The Board may give binding effect to a private settlement even if the General Counsel deems the remedies provided in the agreement to be inadequate. *Independent Stave Co., Inc.,* 287 NLRB 740 (1987).

2. Factors.

In assessing settlement agreements, the Board will consider a variety of factors including: whether all parties have agreed to be bound; whether the general counsel supports settlement; whether the settlement is reasonable in light of litigation considerations; whether there has been any fraud, coercion, or duress in reaching the settlement; whether the employer has breached previous settlement agreements; and whether the employer has engaged in a history of violations of the Act.

Under the NLRB's internal procedures, the Board may refuse to settle charges informally if it believes an Employer has proclivity to violate the Act.

3. Scope.

Unfair labor practice occurring prior to a settlement are barred unless unknown to General Counsel, *i.e.* not readily discoverable or specifically received. General Counsel has prosecution discretion to settle over the Charging Party's objection. Discretion ends at opening of unfair labor practice hearing. *Hollywood Roosevelt Hotel Co.,* 235 NLRB 1397 (1978); *Ratlift Trucking,* 310 NLRB 1224 (1993); *Fairmont Hotel*, 314 NLRB 534 (1994).

XI. COLLECTIVE BARGAINING

A. Duty to Bargain Encompasses the Following Areas.

Bargaining obligations; per se violations; good faith; duty to furnish information; economic pressure during bargaining; impasses; defenses; construction industry 8(f); notice under 8(d) and (g); bargaining during term; and double breasting.

Before bargaining, employers should determine whether and to what extent a bargaining obligation exists. Consult LMRA, RLA, and relevant state law, such as right-to-work law.

B. LMRA Provisions.

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees.

Section 8(d) defines collective bargaining:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Remedies for violation: order to cease and desist, order to bargain in good faith; and order to make whole, which may include:

- Back pay on unilateral change of conditions.
- Reinstitution of the benefit eliminated.

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

C. Meet Confer Negotiate.

8(d) Reasonable times . . . in good faith.

Caribe Staple, 313 NLRB 877 (1994) (Violate by restricting the size of union committee, condition or waiver of right of union to file unfair labor practice charge, dilatory schedules, restrict length of meetings).

Phillip Morris USA, 314 NLRB 292 (1994) (6 days of meetings, no limit on time or content - no violation).

DuPont, 969 F.2d 1263 (D.C. Cir. 1992) (No violation to insist on meeting at company. No pay for union reps for time at table. Past practice will control).

XII. GOOD FAITH IN COLLECTIVE BARGAINING.

Totality of conduct, surface bargaining, concessions, proposals, dilatory conduct, representative with inadequate authority, unilateral changes, bypassing and ULPs away from table.

A. Totality of Conduct.

"Although some statements by parties may show intent not to bargain in good faith, we are careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining."

Logemann Bros., 298 NLRB 1018 (1990) (Employer states: "it will be our agreement or none at all; it is this certification or none." No unfair labor practice).

Employer must indicate a present intention to find a basis for agreement and as having an "open mind and sincere desire to reach an agreement." *NLRB v. America National Insurance Co.,* 343 U.S. 395 (1952).

1. No "take it or leave it"

Bargaining technique called "Boulwarism" was held unlawful in *General Electric Co.*, 150 NLRB 192 (1964), *enf'd*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). General Electric, on the basis of its research, made an offer characterized as "fair and firm." It advertised that there was "no reason for a strike and claimed that the offer was subject to change only if new information showed that the offer was not 'right.'" The offer was preceded by massive publicity campaign. The Board found bad faith bargaining, holding that: Collective bargaining must be bilateral, and G.E.'s "take it or leave it" approach "trapped [the company] by its own creation." Note: "best offer first" is not unlawful per se.

2. Indicia of good or bad faith.

Any one of the various surface bargaining factors ("indicia") standing alone is usually not enough.

Unbelievable, Inc. d/b/a Frontier Hotel, 318 NLRB 857 (1995) (take it or leave it attitude).

In *Logemann Bros. Co.,* 298 NLRB 1018 (1990), the employer's proposal to expand the management rights clause and eliminate the union security and dues check-off

provisions was not a violation when the employer did attend all scheduled sessions, presented a complete proposal, and did agree to modify some of the provisions.

Surface bargaining, *i.e.*, "going through the motions." The employer rejects the union's proposal, tenders his own, and does not attempt to reconcile the two. *Atlanta Hilton Tower*, 271 NLRB 1600 (1984); *R.B. Electronics*, 320 NLRB 80 (1995); *Litton Microwave Cooking*, 300 NLRB 3242 (1990); *Longston Co.,* 304 NLRB 1922 (1991).

It is not bad faith to exhibit "mutual hostility" or negotiate in a "cool atmosphere." Conduct away from the table is used to consider bad faith. *Unbelievable, Inc. d/b/a Frontier Hotel*, 318 NLRB 857 (1995).

White Cap. Inc., 325 NLRB 1166 (1998) (withdrawal from tentative agreement or imposing deadline for ratification not unlawful- lockout to compel agreement permitted).

Telescope Casual Furniture, 326 NLRB 588 (1998) (presentation of more onerous proposal if union didn't agree to first packaged proposal OK so long as employer is willing to negotiate on more onerous proposal).

3. Concessions.

Section 8(d) provides that good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." Evidence of concessions, however, may provide a defense to a bad faith bargaining charge.

The employer should view the totality of the circumstances to determine if it is engaged in "hard bargaining" rather than "unlawful bargaining." An employer did not violate the duty to bargain in good faith by sticking to its proposals for over a year and refusing

to agree to check off, union security binding arbitration and benefits. *Overnight Transportation*, 307 NLRB 666 (1992).

4. Dilatory Tactics.

Bad faith also may be evidenced by the schedule of meetings, the duration of meetings, cancellations, or the timing and advancement of proposals or demands. Negotiators who have no authority, as well as the unavailability of a negotiator or decision-maker, is evidence of bad faith. *Golden Eagle Bottling*, 319 NLRB 64 (1995); *Unbelievable, Inc. d/b/a Frontier Hotel*, 318 NLRB 857 (1995).

5. Other Significant Cases.

- *NLRB v. American National Insurance*, 343 U.S. 395 (1952) (NLRB may not compel concessions or sit in judgment on substantive terms of the collective bargaining agreement).

- *H.K. Porter v. NLRB*, 397 U.S. 99 (1970) (NLRB has no power to compel contract on substantive terms. Parties might not reach contract).

- *Atlanta Hilton & Towers*, 271 NLRB 1600 (1984) (Totality of circumstances at and away from the table).

- *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993) (Withdrawal from tentative agreement without explanation and substitute regressive proposals is unfair labor practice).

- *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983) (Withdraw proposal when union acceptance imminent is unfair labor practice. Tentative agreements and withdrawal of proposals not sufficient to establish bad faith unless it's without good cause and where union acceptance was imminent).

- *Oklahoma Fixture Co.*, 331 NLRB 1116 (2000) (Harsh proposals, company not bound to retain or improve once concessions rejected by union).

- *Central Management*, 314 NLRB 763 (1994) (Totality of the circumstances bypass and solicit, abandon union, request for information, threats to strikers, unilaterally cease contributions to benefit fund).

- *Reichhold Chemical*, 288 NLRB 69 (1988) (Broad management rights clause, narrow grievance procedure, broad no strike clause, no bad faith).

Case by Case, 8(d) no party can be forced to agree to a particular provision.

- *Presbyterian University Hospital,* 320 NLRB 122 (1995) (Insist on clause not BF where agree on many others).

- *DJ & C Towing,* 307 NLRB 198 (1992) (Okay to offer status quo).

- *Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996) (Tactics to exert economic pressure during bargaining okay if used in support of legitimate positions not if done to evade obligation).

B. Bypassing the Representative.

The employer cannot circumvent the bargaining representative by making individual deals. However, the Board permits an employer distributing leaflets to employees to publicize its offer at the bargaining table. Such communication is permissible free speech (unless accompanied by illegal threats or promises).

Howard Immel, Inc., 317 NLRB 1162 (1995).

Fairhaven Properties, supra;

Americare Pine Lodge Nursing, 325 NLRB No. 4 (1997).

Southern California Gas, 316 NLRB 979 (1995) (questionnaires on cost cutting program and asking employees to summarize duties by not passing).

C. Bargaining for Reasonable Time.

Caterair, Inc., 322 NLRB No. 11 (1996).

Lee Lumber and Building Material Corp., 322 NLRB 175 (1996).

Williams Enterprises, 312 NLRB 937 (1993) (reasonable time for bargaining to flourish after recognition and withdrawal of recognition).

Americare - New Lexington, 316 NLRB 1226 (1995) (Union enjoys irrebuttable presumption of 1 year for certified unit).

Auciello Iron Works v. NLRB, 517 U.S. 781 (1996) (even pre contract good faith doubt as to union majority inadequate to support exception to presumption arising from moment contract accepted; cannot raise after offer accepted. NLRB settlement bar raise majority status for 1 year).

Textron, 300 NLRB 1124 (1990) (Non-board settlement imposes reasonable time to bargain without loss of majority issue).

After a reasonable period or one year, an employer may have good faith doubt of the majority based on objective considerations that the union no longer enjoys majority status in a context fee of ULPs. *NLRB v. Curtis Matheson Scientific,* 494 U.S. 775 (1990). Turnover alone not sufficient. *Bi-Craft Litho,* 316 NLRB 302 (1995).

Must be specific complaints that a majority does not want the union. For example, five of ten employees in unit ask for direct negotiations. *W.A. Kruegh*, 299 NLRB 914 (1990); *Slapco, Inc.*, 315 NLRB 717 (1994).

Levitz Furniture Co., 333 NLRB 717 (2001), established a new standard for withdrawal of recognition. Employer must have conclusive proof at the time of withdrawal that union actually lost majority support. Despite this new, more difficult standard, the Board also loosened the requirements for filing an RM petition.

D. Neutrality Agreements - Verizon, SBC, CWA, IBEW, UNITE-HERE, UAW

Purpose: Reverse declining unionism - increase membership without NLRB

Method: Card checks.

Enforceable under §301 unless NLRB "R" case issue. *HERE Local 2 v. Marriott*, 961 F.2d 1464 (9th Cir. 1992).

Mandatory - issue between employer and employees, rates of pay, hours - impasse are okay.

If Board determines permissive - Impasse illegal.

Neutrality clauses:

- Gag Orders.
- Preference at new facilities.
- List of names and addresses.
- Union access.
- Card majority recognition.
- Short contract negotiations or binding arbitration.

Sahara Hotel & Casino, 355 NLRB No. 154 (2010) (card check, gag order, access, Koster provision).

United Food and Commercial Workers, Local 951 (Meijer, Inc.), 329 NLRB 730 (1999) (expenses for organizing are chargeable to members. Neutrality mandatory since union strength benefit unit employees).

Lexington Health Care, 328 NLRB 894 (1999) (promise not to organize other employees of employer valid).

E. Mandatory Subjects.

Topics are mandatory or permissive or illegal. Parties can insist on bargaining over mandatory subjects, request bargaining over permissive; may never bargain about illegal.

1. "Mandatory" subjects give rise to the following consequences.

The employer and the union must bargain in good faith;

The employer is prohibited from unilateral action prior to reaching an impasse in bargaining;

The employees are excluded from making their own individual arrangements with their employer regarding these subjects.

The Board has examined the extent to which a subject may be considered to be "mandatory" in two similar cases. *Toledo Blade Co.*, 295 NLRB 626, (1989); *Colorado-Ute Elec. Assn.*, 295 NLRB 131 (1989). In *Toledo Blade,* the Board found that an employer's insistence to impasse on a proposal that management be permitted to offer retirement and separation incentives directly to individual bargaining unit employees without bargaining with the union over the content of those incentives was a mandatory subject of bargaining. The Board recognized that the proposal required the waiver of the union's right to bargain, yet held that to

be of no moment. It likened the proposal to other, legitimate waiver-of-bargaining provisions such as "zipper clauses." Nevertheless, the Board parenthetically noted that, while the employer could insist on such a proposal to impasse, "unilateral implementation of such a proposal may not be privileged."

In *Colorado-Ute,* the Board considered an employer's merit pay proposal, whereby management would reserve the right to determine the timing, criteria for, and amounts of merit pay raises. The Board agreed that the proposal involved a mandatory subject of bargaining, yet found the employer's implementation of the merit pay proposal to be contrary to the Act.

2. Under Section 8(d), mandatory subjects include: "wages, hours, and other terms and conditions of employment."

"Wages" include:

- hourly rates;
- pieces rates;
- incentive pay rates;
- overtime;
- shift differentials;
- paid holidays;
- paid vacations;
- severance pay;
- Christmas bonuses, whether considered gifts or wages; and
- Cost of living allowances.

3. "Working hours" include:

- hours of day;
- days of week;
- work schedules; and
- lunch and rest breaks.

4. Pension and other welfare plans.

Such benefits include any "emolument of value . . . which may accrue to employees out of their employment relationship."

Benefits for retirees--not employees--are not a mandatory subject. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

In *Apex Investigation & Security Co., Inc.*, 302 NLRB 815 (1991), an employer violated its bargaining duty by unilaterally ceasing to make payments to a union health and welfare fund. Although the contract had expired, the employer had a duty to continue making those payments until impasse or until a renewal agreement had been reached, but neither event occurred.

The designation of management trustees on pension fund. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

Non-profit hospitals intending to withdraw from the Social Security system must bargain over such withdrawal.

Employer violates Section 8(a)(5) by unilaterally terminating insurance coverage for employees and instituting new group insurance plan which provided fewer benefits and covered fewer employees than prior plan.

A recreation fund that subsidized activities suggested by employees is a mandatory subject of bargaining even though established unilaterally by employer. The fund had been in existence for nearly 30 years and the policy controlling management of the fund was included in the employee handbook.

Profit-sharing plans must be bargained even if they are voluntary.

Similarly, stock purchase plans usually must be bargained even if they are voluntary.

Merit wage increases give rise to a bargaining obligation concerning the formulation and application of compensation standards.

NLRB v. Borg Warner, 356 U.S. 342 (1957) (Mandatory = relates to wages, hours, working conditions).

NLRB v. McClatchey Newspapers, 964 F.2d 1153 (D.C. Cir 1992) (merit pay mandatory).

Mercy Hospital Buffalo, 311 NLRB 869 (1993) (Cafeteria service hours mandatory).

American Packaging, 311 NLRB 482 (1993) (Performance bonus mandatory).

Batavia Newspapers, 311 NLRB 477 (1993) (Work assignment mandatory; change in scope of unit permissive).

5. Company Housing, etc.

If company housing results in a savings in transportation to employees, the expenses are mandatory terms.

Company housing is not a mandatory term if rent causes no substantial savings; if attractive, adequate housing is available; if living in company housing is not a condition of employment.

Company meals, even if furnished by a subcontractor.

Company discounts.

No smoking. Employer unlawfully implemented tobacco free policy without first bargaining.

6. Management Rights Clauses.

The Board may not pass judgment upon the desirability of substantive terms of the agreement, even where the agreement reserves substantial discretion to the employer. The Board's only responsibility is to determine whether the agreement has been "bargained in good faith." *NLRB v. American National Ins. Co.,* 343 U.S. 395 (1952).

7. Drug Testing Program.

The Board has held that employers must bargain before establishing drug and alcohol testing programs for current employees but that bargaining is not required before testing job applicants. *Star Tribune*, 295 NLRB 543 (1989).

8. Entrepreneurial Decisions.

According to *Dubuque Packing Co.,* 303 NLRB No. 66 (1991), the Board adopted the following test for the determination of whether a decision to relocate bargaining-unit work is a mandatory subject of bargaining:

To establish a prima facie case, the NLRB's general counsel must show that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation.

The employer may rebut this prima facie case by showing that the work done at the new location varies significantly from the work done at the old location, that the work done at the old location is to be discontinued entirely rather than moved to the new location, or that the relocation decision involves a change in the scope and direction of the enterprise.

Alternatively, the employer may show that labor costs--direct and/or indirect--were not a factor in the decision or, if they were a factor, that the union could not have offered labor-cost concessions which could have changed the decision to relocate.

The Board stated that to rebut the prima facie case, the employer must show that the factors it raises in its defense were relied on at the time the decision to relocate was made; the Board observes that it is not concerned with "potential justifications" for the relocation decision. Therefore, the burden is on the employer to produce evidence as to its motivation for the relocation decision, because as the Board says, "it alone, more often than not, is the party in possession of the relevant information."

9. Effect of the Zipper Clause.

A "zipper" or "sole source" clause in the collective bargaining agreement may be used to limit mandatory subjects of bargaining to those which are expressly stated in the collective bargaining agreement. By use of the "zipper" clause, the parties waive all rights to bargain about any matter not contained in the agreement itself. *TCI of New York*, 310 NLRB No.122 (1991) (an employer whose new collective-bargaining contract does not refer to bonuses and states that it "supersedes all prior agreements, understandings, and past practices" lawfully discontinued a bonus program that had been in effect for several years. The zipper clause is a clear and unmistakable waiver of the union's right to bargain over the discontinuance).

10. New Areas.

In *Alan Ritchey*, the Board found that individual discretionary disciplinary decisions are a mandatory subject of bargaining. *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012). The Board noted that this issue will usually arise during the period after the union has become the employees' bargaining representative but prior to the establishment of a grievance procedure.

F. Permissive Subjects.

1. Definition.

"Permissive" subjects are exactly what the term implies. Bargaining about such subjects is permitted but not required. It is an unfair labor practice to insist to impasse on a permissive subject. Examples include:

Union ballot on the contract. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

2. Scope of Bargaining Unit.

3. Other Permissive Subjects.

- Parties to collective bargaining agreement, *e.g.*, local versus international.
- Performance bonds, *e.g.*, for indemnification against picketing or payment of employees' wages.
- Internal union affairs.
- Nonunion employees voting on negotiated contract.
- Strike vote as condition precedent to the employee ratification of condition.
- Union label.

- Industry promotion funds.
- Settlement of unfair labor practice charges.
- Withdrawal of fines levied during strike.
- Tape-recording of grievance meetings. *Pennsylvania Telephone Guild,* 277 NLRB 501 (1985), *enf'd,* 799 F.2d 84 (3rd Cir. 1986).
- Personal services contracts are permissive subjects of bargaining. *Retlaw Broadcasting Co. v. NLRB,* 172 F.3d 660 (9th Cir. 1999).

G. Illegal Subjects.

"Illegal" subjects concern issues as to which agreement is prohibited. It is an unfair labor practice to demand bargaining over illegal subjects. Examples include:

- Closed shop, whereby the employer will hire only those who are members of the union at the time of hire.
- "Hot cargo" clause.
- Separation of employees by race.

XIII. PER SE COLLECTIVE BARGAINING VIOLATIONS.

A. Unilateral Changes.

Neither party may implement changes in mandatory subjects of bargaining without first giving notice of the change and an opportunity to negotiate to impasse. This is true, even when the changes (in a pension plan) were mandated by federal law (union should have been allowed to bargain when there were alternatives to complying with the changes in the law). *Trojan Yacht,* 319 NLRB No. 97 (1995). However, the employer may implement changes in non-mandatory subjects without collective bargaining. *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Notice and opportunity to bargain also are not

necessary if bargaining on the issue has been waived. Waiver is seldom found unless "clear and unmistakable." *But see, Bath Iron Works Corp.*, 345 NLRB 499 (2005) (Union consent, no contract modification).

NLRB v. Katz, 369 U.S. 736 (1962) (Unfair labor practice at expiration of contract if employer makes changes absent impasse - survive the contract "rule").

Litton Financial Printing v. NLRB, 501 U.S. 190 (1991) (Post expiration of contract; unfair labor practice to make unilateral change of an existing term without bargaining to impasse. Union security and dues check off do not survive contract expiration).

Hacienda Hotel, Inc., 331 NLRB 665 (2000).

Southwest Steel & Supply v. NLRB, 806 F. 2d 1111 (D.C. Cir. 1986) (union shop, dues checkoff, no strike, post expiration arbitration do not survive contract expiration).

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971) (Employer may make unilateral change regarding non-mandatory subjects, like health insurance for retirees).

B. Refusal to Execute Contract.

NLRB v. H.J. Heinz, 311 U.S. 514 (1941).

NLRB v. Auciello Iron Works, 517 U.S. 781 (1996) (Employer refused to sign claim; doubted union majority after union accepted company offer).

C. Insisting to Impasse on Non Mandatory Subjects.

NLRB v. Borg Warner, 356 U.S. 342 (1957) (It is an unfair labor practice to insist on impasse on permissive subjects. Permissive subjects: obtain arbitration award, court reporter at meetings, conduct outside workplace or call off strike).

McLean Hospital, 311 NLRB 1100 (1993).

Timken Co., 301 NLRB 610 (1991).

Gibson Greetings, 310 NLRB 1286 (1993).

XIV. THE DUTY TO FURNISH INFORMATION.

A. In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the Supreme Court held that an employer must supply the union with information necessary and relevant to bargaining. *See also, NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Information is relevant if it relates to the union's function as bargaining representative and is reasonably necessary to the performance of that function. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). If the information is "presumptively" relevant, the employer may not ask the union to substantiate its request.

Duty to furnish names, addresses, telephone numbers, wage rates, fee schedules, hours, workers comp salary, insurance plans, pension plans, time study data, attendance records, all discipline actions, environmental audit, collective bargaining contracts at other plants, names of supervisors of non-unit employees, subcontracting names and addresses of striker replacements.

B. Examples.

1. Names and addresses of employees.

The names and addresses of bargaining unit members, whether or not they have joined a union, must be released to the union representing that unit; this information is presumptively relevant.

2. Cost of non-contributory pension or welfare plans.

Nevertheless, an employer need not provide payroll data to the trustees of a union pension fund because the trustees were neither the union's agents nor its representatives. *Commercial Property Services, Inc.*, 304 NLRB 134 (1991).

3. Non-Unit Employees.

Union must establish relevance and necessity to request attendance records to show disparate treatment. *USPS*, 310 NLRB 391 (1993); *King Soopers Inc.*, 332 NLRB 23 (2000).

4. Confidential wage survey.

If a wage survey is used at the table, the employer is required to divulge the names of other employers. However, the employer may be able to demonstrate "confidentiality," which will be balanced against the union's need to know. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979) (aptitude test results held confidential). The employer will still be required to provide an accommodation.

5. Employees' exposure to potentially harmful chemicals and substances.

The union's right to conduct safety studies at the worksite is determined by balancing the employees' representation rights against the employer's property rights. The Board in *American Nat'l Can Co.*, 293 NLRB 901 (1989), ruled that the company violated 8(a)(5) by refusing to grant a union access to a plant to measure heat levels. The union was

entitled to the heat-measurement data in question because excessive heat in the workplace is potentially hazardous to employees' health and safety.

6. Information pertaining to bargaining unit employees is presumptively relevant.

Information concerning non-unit employees is not covered by this presumption and relevance must be established. In *Chicago Tribune Co.*, 303 NLRB No. 106 (1991), the Board held that by refusing to furnish an employees' union with relevant data concerning the names of striker replacements, bargaining information, and payroll data, an employer violated its duty to bargain. The requests were for a specific and necessary purpose and the employer was not privileged to withhold this information since there was no clear and present danger to those whose names were divulged. *International Paper*, 319 NLRB 1253 (same).

7. Pleas of Inability to Pay.

If an employer claims inability to pay as a reason for not meeting the union's demands, the employer is obligated to produce financial data, *e.g.*, profit and loss statements, to substantiate its claim. *Nielson Lithographers*, 305 NLRB 697 (1991) (financial information to union when present inability to pay claims). Similarly, an employer's claim that acceptance of the union's demand would place it at a "competitive disadvantage" may be construed by the Board to be a plea of inability to pay for which substantiation is required. The Board makes a distinction between an inability to pay and an unwillingness to pay; the latter of which does not require the disclosure of financial information.

8. Other Areas

Employer ordered to furnish union with data concerning race, national origin and gender of job applicants on theory that union was concerned about disproportionate

hiring of foreign national and the bargaining obligation to eliminate discriminatory employment practices. *Hertz Corp.*, 319 NLRB 597 (1996).

Unfair labor practice to deny union personnel file, names, addresses and phone numbers of unit employees, rules of conduct, but no duty to provide witness statements. *Fleming Co.*, 332 NLRB 1086 (2000); *Anheuser-Busch*, 237 NLRB 982 (1978).

Crowley Marine Service v. NLRB, 234 F.3d 1295 (D.C. Cir. 2000) (Probable or potential relevance is test. Arbitration award of subsidiary must be produced.)

Employee statements may no longer be withheld, but must be produced. *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012). The Board applies a balancing test where the employer must prove that it has a legitimate confidential interest in protecting the statements from disclosure.

C. Union's Obligation.

The union is equally obligated to provide information to the employer to assist in negotiations or the processing of grievances under its Section 8(b)(3) obligation to bargain. *California Saw*, 326 NLRB No. 142 (1999); *Bell Telephone*, 317 NLRB 802 (1995); *Asarco*, 316 NLRB 636 (1995) (employer's requirements).

D. Employer Defenses.

1. Confidentiality - Mixed Results, Accommodation Required.

Fairmont Hotel, 304 NLRB 746 (1991) (Must produce name of complaining guest since employer not promise anonymity to guest).

US Postal Service, 306 NLRB 474 (1992) (Employer withheld names of informants, audio and videotapes in discipline case were relevant but trust and security outweighed union's need for names).

Roseburg Forest Products Co., 331 NLRB 999 (2000) (NLRB rules that medical information the union truly needs must be disclosed - attempt to reconcile its ruling with the EEOC which would include turning over medical condition information under the ADA. In this case, the employer placed an employee in the job as an ADA accommodation and the union objected, requesting the medical information of the employee to test the bona fide reasons.

East Tennessee Hospital, 304 NLRB 872 (1991) (Employer must give nonunion employees wage rates where unit employees get market rate).

GTE Southwest Inc., 329 NLRB 563 (2000).

Silver Brothers, 312 NLRB 1060 (1993) (Okay to bargain with union regarding confidentiality concerns).

Pennsylvania Power & Light, 301 NLRB 1104 (1991) (Drug free work place. Union request for names and addresses of confidential informants, employer required to provide some information).

XV. IMPASSE

A. Definition - Is There Such a Thing?

An impasse is reached when, after exhaustive good-faith negotiations, there are irreconcilable differences in the parties' positions. No impasse can occur until there is no realistic possibility that a continuation of bargaining would be fruitful. *AMF Bowling*, 314 NLRB 969 (1994).

The existence of an impasse must be determined on case-by-case basis. Whether or not a bargaining impasse exists is a matter of judgment. The bargaining history, the good

faith of the parties in negotiations, the length of the negotiations, the importance of the issue(s) as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations all are factors considered by the Board in deciding whether or not an impasse in bargaining existed. *Taft Broadcasting Co.,* 163 NLRB 475 (1967); *CJC Holdings*, 320 NLRB 1041 (1996); *Martin Marietta Energy*, 316 NLRB 868 (1995); *O'Reilly*, 314 NLRB 378 (1994); *Airflow Research & Manufacturing*, 320 NLRB 861 (1996). An impasse can be broken and the duty to bargain is resumed.

Impasse reached gives the employer the right to implement its last offer. *Loral Defense Systems*, 320 NLRB 755 (1996); *Blue Circle Cement*, 319 NLRB 954 (1995). Existence of ULPs, *i.e.*, failure to supply information taints any impasse. *Orthodox Jewish Home for the Aged*, 314 NLRB 1006 (1994). Dilatory conduct by union preventing agreement or impasse may permit employer to implement. *Serramonte Oldsmobile*, 318 NLRB 80 (1995).

Impasse on one topic (no fault attendance policy) does not permit implementation until there is overall impasse; piecemeal impasse does not permit implementation. *Duffy Tool & Stamping, LLC*, 330 NLRB 298 (1999).

Grinnell Fire Protection, 328 NLRB 585 (1999). No impasse exists unless both parties are unwilling to compromise, even if the company is unwilling to compromise, there must be a showing that the union is unwilling. Must be a "contemporaneous understanding of the parties."

B. Examples.

- No impasse existed when an employer decided to change wage structure upon expiration of the contract regardless of status of negotiations; unfair labor practice resulted.

- No impasse on wages existed when parties met only two times and the union was not given sufficient time to respond to the employer's proposed action.

- An employer and a union met four times in a month before a contract expired, with the employer seeking wage benefit reductions and the union demanding higher wages and increased benefits. The union struck on the day after expiration of the contract. The Court found impasse was reached at the time of the strike, which ended the bargaining between the parties.

- Impasse was found to have occurred when, during the fourth negotiation, the union stated that there was no way it could ever accept a proposal granting the employer complete control over work assigned to unit employees and stated: "Call it impasse, deadlock or whatever--we are, without question, locked up on this thing."

- An impasse existed at the time that a tentative agreement had been reached, but prior to its ratification by the union members. The Board reasoned that the impasse would break if the agreement was ratified, but would endure if the agreement was rejected.

- An employer lawfully refused to resume face-to-face negotiations after bargaining to impasse on its demand for the unlimited right to subcontract bargaining-unit work. The clear message from the union was that nothing else that might happen in negotiations could persuade the union to alter its strong opposition to the subcontracting proposal. *Holiday Inn Downtown-New Haven*, 300 NLRB 773 (1990).

- No impasse where wage negotiations lasted only one day. The parties did not have an adequate chance to negotiate on the association's "hard core economic position." Immediately after the association's negotiator declared impasse, the union negotiator "strongly disagreed." These protestations show that one party did not view the negotiations as having

reached impasse. *Teamsters Local 639 v. NLRB (D.C. Liquor Wholesalers)*, 924 F.2d 1078 (D.C. Cir. 1991) (*enf.'d* 292 NLRB 1234 (1989)).

C. Consequences of Impasse.

When an impasse is reached, the duty to bargain is suspended.

An impasse on a single issue does not suspend the obligation to bargain on other unsettled issues.

The suspension of the obligation to bargain does not occur when an impasse is the result of a party's bad faith or unfair labor practices.

D. Rights of Employers.

Unilateral changes may be implemented after expiration of an existing agreement without committing an unfair labor practice if impasse has been reached. However, the change cannot exceed the company's best offer to the union. If impasse has not been reached and a strike results, it is an unfair labor practice strike.

The Board has held that an employer may insist to impasse that a union waive its right to bargain over amounts of merit pay increases and that these increases be immune from the grievance and arbitration procedures. *McClatchy Newspapers, Inc.,* 295 NLRB No. 156 (1990). Nevertheless, the Board also held that the employer could not proceed with implementation without bargaining over the timing and amounts of the raises. *Colorado-Ute Electric Assn.,* 295 NLRB No. 67 (1989).

The union usually will attempt to avoid impasse by maintaining that it is flexible on disputed issues. Attempt to obtain the union's final position on the disputed issue.

The employer will have the burden of proving an impasse existed in a subsequent unfair labor practice proceeding. Consequently, accurate negotiation minutes are essential.

An impasse in bargaining does not justify the unilateral withdrawal by an employer from a multi-employer bargaining unit. *Bonanno Linen Service Inc. v. NLRB*, 450 U.S. 979 (1981).

E. Impasse Bargaining Strategy—Where Is It Likely That Negotiations Will Reach a Deadlock?

How to avoid bad faith bargaining and get to impasse:

Discuss and/or negotiate everything.

Do not make "substantial" unilateral changes in wages, hours, and terms and conditions of employment without prior notice to and negotiation with the union either to an agreement or to an impasse. Never unilaterally change a term or condition governed by a contract that is still in effect.

Date and document all company proposals and agreements. Write certified letters to the union's chief negotiator during the negotiations giving advance notice of the company's positions on certain topics and confirming such things as agreed-upon bargaining session dates.

Show flexibility where possible and clearly state reasons for the company's refusal to accept certain union proposals.

Do not take away existing wages and benefits unless there are compelling reasons.

Treat non-economic demands, such as, union check-off and union security, as seriously as economic demands. Consider some compromise.

Do not try to dictate to the union the composition of its bargaining committee. When those chosen seriously impair the company's productive capabilities, however, do not hesitate to raise this issue.

Do not attempt to bypass the union to bargain directly with the employees. If desirable, communicate with the employees to keep them up to date on company positions and the bargaining in general.

Be patient. Do not feel that you must agree to something at every meeting.

Negotiate from a position of strength. Be prepared to accept a strike if necessary.

Avoid disclosing your trump card, and be prepared to use "brinkmanship" if appropriate.

XVI. EMPLOYER TECHNIQUES IN NEGOTIATIONS

A. Negotiations for First Contract.

If agreement is reached, it will set tone for future dealing with the union.

The employer's emphasis should be on preserving the right to manage the business without undue interference. Management must realize that any collective bargaining agreement, no matter how good, is a restriction on its rights.

Rank-and-file employees will be interested primarily in an economic package. Typically, they are less concerned with restriction of management rights than is the union. Further, rank-and-file employees usually are unconcerned about many items of paramount importance to the union leadership, such as checkoff, right to honor picket lines of other unions (sympathy strikes), union security, and union access and responsibility provisions (strikes).

B. Contract Renewal Negotiations.

The stage has been set months or even years before. The attitude of the company is known. Company employees have perceptions of union strength. The same rules generally hold true in contract renewal negotiations, except that the union, once established in a company, has had better opportunity to indoctrinate employees with the notion that union's institutional interests are the same as employees' interests.

C. Preparation for Negotiations.

1. Know the Industry.

How does the company's wage and benefit package compare?

Are any other employees in the industry represented by unions? If so, obtain current contracts and discuss bargaining history with negotiators for those companies.

If dealing with the same union, find out that union's key concerns and strike issues.

Ascertain provisions of current contracts that have interfered with management. Consult line supervisors.

Is there a "pattern" settlement for the industry? Learn extent of deviation from that pattern.

2. Know the Area.

How does the company's wage and benefit package compare with others in the area that are its competitors for labor supply?

If the union were to strike, would the company's package help or hurt in attracting permanent replacements?

3. Know the Union.

Obtain other contracts in the area negotiated by the local union (or International if nationwide pattern exists).

Each union has its own idiosyncrasies. Some are stronger in some areas than others. Examples: USW, Teamsters, and the UMW.

Each union negotiator has his own idiosyncrasies. Find out as much as you can about the business agent who is likely to negotiate the contract.

4. Know the Employees in the Unit.

Talk to supervisors. What are the real gripes and concerns of employees? Can legitimate concerns be corrected without risking unfair labor practice of "unilateral change"? (Do not poll employees on proposals.)

For example, if employees are legitimately irritated about unsafe conditions or broken vending machines, it is safe and prudent for the company to correct these problems immediately rather than face contract demands regarding them or provide the union with strike issues.

If employees have legitimate concerns which cannot be remedied unilaterally, the company should be prepared to address these concerns early in negotiations.

5. Know the Union's Employee Negotiating Committee.

Who are its leaders?

Which members are responsible employees and which are perpetual malcontents?

Is the union's bargaining power placed in the committee or reserved, as a practical reality, to the business agent? In the first contract situation, power almost always is in the business agent.

Can the committee and the business agent control employees?

6. Know the Company.

Secure the necessary economic data of your plant, so that you will know the total cost to the company of a proposal before you agree.

List of employees (for small units); hiring date (for vacation and seniority use); current rate of pay; current job classifications; past wage and benefit increases and type; the number of employees per shift; and the cost of increasing shift differential.

In larger units, have this information prepared according to employee categories and use statistical studies.

Labor cost figures: Figures for labor turnover and the average number of weeks worked in preceding two years; amount of overtime worked; and average hourly rate.

Group insurance: Schedule of coverage and cost of each item; the kinds of claims the employees have been filing; the cost of increasing coverage; the cost of group insurance for employees and dependents; and the number of employees who have dependent coverage under group insurance plans by type of coverage (*e.g.*, spouse, children and family).

Other fringe benefit information: Current age of work force in five-year increments for pension proposals; and the amount of use of sick leave and leave of absence.

Data for particular problems: Excessive absence or tardiness (may help in negotiating or promulgating work rules), average hourly cost of total fringe benefits (also broken down by benefit), vacations by week, holidays by days, possible accommodation needs under the Americans with Disabilities Act, etc.

Most important figure: Added cost to product or service for each one-cent per hour average wage increase in bargaining unit.

Finally, do not overlook the cost of granting some benefits given to the bargaining unit to non-bargaining unit: clerical, administrative staff, and supervisors.

7. Gather Additional Economic Data for Negotiations.

Cost of living figures on both national and local levels.

Productivity analyses: counter union argument that employees are entitled to more because of increased productivity. Direct labor cost per unit of production during preceding years.

8. Preparation for Contract Renewal Negotiations Should Begin On the Day First Contract is Executed.

Begin systematic retention of materials for next negotiations. Do not wait until several months before the contract reopens to start preparing and gathering information.

Consult members of management, line supervisors, personnel or industrial relations departments, and members of top management for opinions on what proposals the company should make based upon their experiences and problems. Be specific as to what paragraphs need revision, why, and how.

Study appealed grievances. Repeated grievances under the same clause indicate ambiguity or confusion as to meaning. Then review the grievance settlement to determine if, in effect, you have already agreed to a modification of the contract, or defined an ambiguous word.

9. Arbitration Awards.

Review arbitration awards with companies that have similar contract language.

Consider reversing impact of adverse arbitration awards by new contract language.

10. "Past Custom or Practice".

If a past practice is favorable to the employer's position, normally there is no need to submit revised contract language. It is important to communicate to supervisors the need to continue the favorable practice.

If the practice is mixed, a language change may be sought if the issue is very important to management and management anticipates a serious challenge. In more normal circumstances a mixed practice should be corrected by generating a practice consistently favorable to management rather than to make it a major negotiation issue in the matter. Of course if management is in a position to dictate contract terms, why not correct it?

If the practice is unfavorable to management and a change in practice is likely to be challenged by the union, then a change through negotiation process is desirable. As with all issues, management evaluates the importance of injecting the question into the negotiation process. Disputes or strikes over insignificant issues often are not desirable. Use of past custom or practice is not admissible when contract language is clear, although a minority view would always admit it as background or to determine whether there is an ambiguity. It is admissible, however, in order to resolve ambiguities in contract language or to fill gaps in contract language or to amend the contract in those situations where the practice is well known to both parties and sufficiently consistent and clear as to infer an amendment to express contract language.

Beware of creating bad bargaining history concerning unachieved demands. For example, if the contract is silent on required overtime and management proposes this in negotiations and, for whatever reason, does not secure it, and then subsequently attempts to require overtime, the arbitrator will hold that the company does not have this right--if it did, it would not have proposed it initially in negotiations. This is the "company trying to get in arbitration what it could not get in negotiations."

Bargaining history frequently can be used against a union in grievances because of union's tendency to submit substantial list of proposals.

It may be advisable to avoid proposals to clarify provisions. Test first in arbitration and if unsuccessful, then negotiate.

If the contract contains a flat prohibition, however, there is no legal reason not to propose deletion.

Review history of past negotiations: Items proposed and not agreed upon; union arguments in support of items not agreed upon (the union can be expected to propose the same items again so be prepared to respond); and monetary and fringe benefit settlement.

Establish bargaining goals.

Management must decide what it wants from negotiations and what it must have in its contract. While these goals may change in good faith negotiations, it is essential that the company enter negotiations with clear goals and intentions.

11. Be Realistic.

Inexperienced management often sets objectives for negotiations that are not attainable practically. Realistically assess what issues may be strike issues and upon which of those issues management is willing to accept a strike. Consider productivity enhancement. Too often negotiators are concerned principally with economic issues and are willing to impose operating restrictions upon management that may result in significant economic impact. Negotiations may achieve productivity enhancement. This may be essential to meet nonunion or foreign competition.

Management should analyze the ability of the company to prevail if there is a strike, the strength of the union, and the attitude of the employees. The attitude that strike must be avoided "at all costs" may prove fatal. Unions seem to have the innate ability to sense this attitude and will negotiate accordingly. While the company should not try to provoke a strike, sometimes a strike cannot be avoided regardless of the fairness of the company's

proposals. On the other hand, the union sometimes cannot get employees to strike regardless of the company's position.

12. Aggressive and Affirmative.

Management's approach to negotiations must be aggressive and affirmative, not reactive. If the union is used to taking without giving, management will over time lose important rights bit by bit. Recapturing control of the company will, in this case, be a difficult and expensive process.

Company proposals should be defined and reviewed with management and supervisors before negotiations open. Although this input is required, it may result in leaks to the union, so it is necessary to have arguments ready.

13. Conduct of Negotiations.

Consider selection of the chief negotiator: Should you use a single individual or a team? Does the company's negotiator actually possess authority or at least give the appearance of one who does? Is the negotiator believable? Is there an absent decision maker?

Establish the mechanics of contract negotiations:

a. Place and/or Location

Negotiate with union; seek neutral site; avoid plant, own offices, and union hall, if it will disturb some parties; and try to have one or more other rooms in which the parties may caucus.

b. Time

Negotiate, but try not to agree to pay union's employee negotiating committee for time spent in negotiations (arm's length negotiations); be available at reasonable times, but negotiate times with the union; avoid around-the-clock sessions, except when

absolutely essential. Around-the-clock sessions imply too much concern and cause parties to become frustrated and tired. Use these as assets only when necessary.

c. Miscellaneous

Have one or more persons take notes; do not use a court reporter; do not try to tape bargaining sessions. Try to avoid all ambiguities and misunderstanding, but do not attempt to work out mutually agreeable bargaining notes with the union.

14. Approach to Negotiations.

State company objectives at the outset, either before or just after the union outlines its proposal.

Try to avoid unnecessary recriminations and harsh words, but do not just sit there and take abuse without comment or reply. Challenge distortions or lies, but do not be overly moralistic or righteous--establish and maintain credibility.

Maintain the initiative on drafting. Doing the drafting gives the advantage of language selection; however, be aware that negative language may be construed against you.

Try to obtain all union proposals in writing at the outset. Write down all union oral proposals and then verify wording.

Try to compel the union to articulate reasons for its various proposals and problems that it seeks to correct through them. Compel the union to articulate reasons for rejection of company proposals. Often the real concern can be resolved with minimum language impact.

Listen to union/employee complaints. Listening may help to relieve frustration and tension. Sometimes a demonstration of good faith can relieve the need for language changes.

Try to sense union's priorities. Make sure that you understand, and try to make the union understand your position.

Investigate union complaints and other matters raised across the bargaining table. Do not be afraid to interrogate or ask the union and its committee detailed questions.

Respond forcefully after the company's position is firm and certain. Fight hard to negotiate from the company's proposal; it is easier to change the company's language to arrive at a workable arrangement than to try to improve the union's. Results will be far better.

15. Caucuses.

Feel free to call a caucus with your management negotiating team at appropriate times. Do not make firm commitments without checking with your team.

Have a reason for the caucus. Use the caucus to educate the company's bargaining committee and/or to discuss strategy.

16. Resolution of Non-Economic Matters.

Try to resolve prior to the economic issues; identify the important and the less important issues, and management's position with reference to them. (Are any of these really strike issues?) Do not condition bargaining of economics on resolution of non-economic terms.

Economic proposals:

Make the first economic proposal significant. Do not keep increasing first proposal by bits and pieces as this destroys credibility.

Do not raise proposals just because the union lowers its proposal.

If the union proposal is unreasonable, tell the union so at the outset and over again.

Maintain flexibility; often a little move can resolve big issues. Frequently, the union is just testing.

Make the union understand every benefit has a cost. If you translate into wages, be prepared to back up your figure.

17. FMCS.

Consider utilization of a federal mediator under the auspices of the Federal Mediation and Conciliation Service: either party may request the services of a federal mediator; failure to utilize when the other party so requests may be evidence of bad faith bargaining; differentiate mediation from arbitration.

18. Contract Language.

Be clear. Avoid general language such as: "reasonable," "excessive," "equalize," "just cause," "normal," and "regular," when it is possible to formulate a clear cut rule. However, a clear cut rule may hinder management and general concepts may provide more flexibility.

Recognize potential for arbitration and what arbitrators have ruled with reference to certain kinds of contractual language.

Use the same word for the same idea throughout the contract. Examples: "base rate," "regular rate," "daily rate," "straight-time rate," and "normal work week."

Define a word only one time in a contract.

19. Troublesome Situations.

Some troublesome problems which may be faced during negotiations:

Whether the employer should keep the union guessing throughout most of the negotiations or should signal where the company is heading.

An attempt by the union to favor a union steward or a union committee person with extra compensation.

Dealing with a union that has no or very little control over certain militants or over the employees.

Short, "quickie" work stoppages, whether or not authorized by the union. It may be desirable to insert language requiring union stewards to attempt to prevent these.

Hourly wage increases versus percentage wage increases.

Absolutely unreasonable union demands coupled with strike threats.

Waivers during the term of the contract may not outlive the expiration of the contract. *Omaha World-Herald*, 357 NLRB No. 156 (Dec. 30, 2011) (the union's waiver to bargain over 401(k) contributions expired because there was no evidence that the union had agreed to waive bargaining after the expiration of the contract).

20. Communications During Negotiations Must Be Factual.

Avoid personal attacks and inflammatory remarks.

Do not "cry wolf" until necessary.

Do not bargain directly with employees - but do communicate about your proposals and positions.

XVII. ADMINISTRATION OF THE COLLECTIVE BARGAINING AGREEMENT.

A. Practical Suggestions - Be Alert to Common Sources of Problems.

Management fails to comply with the agreement. A collective bargaining agreement limits the authority of management and supervisors to make spontaneous and independent decisions.

Supervisors do not know of or understand the terms of the contract. Solution: acquaint supervisors with provisions of the collective bargaining agreement affecting them, including work rules, leave provisions, disciplinary procedures, and grievance procedures.

Management allows its rights to be eroded by exceptions. Consistent treatment becomes very important, for lenient treatment becomes the new standard. Solutions: "Exceptions" need to be documented, showing the reason for the "exceptional treatment" and different departments with similar problems may have to learn to work together to achieve similar standards. Exceptions should be noted as being made on a non-precedential basis in writing.

Manuals, policies, and job descriptions can become tools used against management. They should be reviewed, although changes in them may require midterm bargaining.

B. Breach of the Collective Bargaining Agreement.

1. Jurisdiction.

Federal and state courts have concurrent jurisdiction over suits to enforce collective bargaining agreements under Section 301 of the Act. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). State courts must apply federal law. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

The courts and the NLRB may have concurrent authority in disputes that involve both an unfair labor practice and a breach of the collective bargaining agreement. *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974).

If a contract does not contain an arbitration clause and permits a strike over an unsettled grievance, the contract issue of just cause can be resolved by a court proceeding. *Groves v. Ring Screw Works*, 498 U.S. 168 (1990).

In addition to damage actions against the responsible parties, injunctions may be obtained to enforce no-strike clauses. Individual employees may not be held liable. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981)).

C. *Weingarten* Right to Representation Upon Request at Disciplinary Interviews.

1. *Weingarten* Rule.

An employee is entitled, upon request, to the presence of a union representative at any employer interview if the employee reasonably fears that the interview may result in discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The necessary elements for this right to come into existence are:

The interview must be one from which the employee reasonably fears discipline.

The employee must request the presence of the union representative; the employer need not ask.

An employee was entitled to the assistance of a union steward at a meeting at which management demanded that he submit to a drug test. Because management was inquiring into the employee's absenteeism record, the employee could reasonably feel that discipline could result. *Safeway Stores, Inc.*, 303 NLRB 989 (1991).

Preliminary and Postliminary Interviews: The "reasonable fear" of discipline requirement eliminates the right of representation in conversations preliminary to disciplinary investigation or subsequent to disciplinary decisions. If the conversation is of a preliminary or general nature prior to any indication of possible discipline, there is no such right. There also is no representation right in a meeting to announce the results of discipline previously decided upon.

The right of representation: Inures only to the employee who is being subjected to possible discipline, and not to the union representative.

2. Identity of the Representative.

An employee generally must choose either a union representative, if such a person exists, or a co-worker. He may not choose someone who is neither of the above. Although a supervisor, as defined by statute, is not eligible to serve as a *Weingarten* representative, a request that the supervisor be present is sufficient to put the employer on notice of the desire for representation. Generally, the employee can have his or her choice of representative. *Anheuser-Busch*, 337 NLRB 756 (2005).

3. Pre-interview Preparation.

The employee has the right to consult with his representative prior to the interview. *U.S. Postal Service v. NLRB*, 969 F.2d 1064 (D.C. Cir. 1992). However, the employer need not permit the consultation to occur on company time so long as there is adequate non-working time prior to the interview. The employer need not delay an interview, suggest alternative representatives, or otherwise disrupt normal scheduling when the requested representative is unavailable.

4. Role of Representative at Hearing.

The Board has held that the employer may not deny the representative an opportunity to speak. The representative has the right to participate in the interview. However, the rights of the representative are limited. He may not turn the interview into a formalized adversarial contest nor may he persistently interrupt and object. *N.J. Bell Tel.*, 308 NLRB 32 (1992).

5. Non-Union Employee's *Weingarten* Rights.

The right of representation which was extended to nonunion employees in *Materials Research Corp.*, 262 NLRB 1010 (1982), and again in *Epilepsy Foundation*, 331 NLRB No. 92 (2000), was overruled in *IBM Corp.*, 341 NLRB 1288 (2004). Accordingly, unrepresented employees do not have *Weingarten* rights.

6. Waiver of the Right to Representation.

A waiver must be "clear and unmistakable."

7. Employer Response.

The employer is free to cancel the interview in issue after the request for representation is made. A *Weingarten* violation occurs only if the employer proceeds with the interview without accommodating the request, or the employer discharges or disciplines the employee because the request was made.

8. Remedy for *Weingarten* Violation (Will the Discharge Stand?).

Where the *Weingarten* rule has been violated, the employer will be ordered to cease and desist from its practice of denying representation rights.

The more difficult question is whether the employee is entitled to the "make whole" remedy of reinstatement and back pay.

The Board rule is that a make-whole remedy of reinstatement and back pay is inappropriate for a *Weingarten* violation if there is an insufficient nexus between the unfair labor practice (denial of representation) and the reason for discharge. *Taracorp Industries*, 273 NLRB 221 (1984).

In *Taracorp*, however, the Board noted that a make-whole remedy is still appropriate when an employee has been discharged or disciplined for the actual assertion of the right to representation.

D. Grievance and Arbitration.

1. Grievance/Arbitration and No Strike Clause.

Grievance and arbitration are the quid pro quo for a no-strike clause. A no-strike agreement (except for sympathy strikes and unfair labor practice strikes) will be implied from the mere existence of a comprehensive grievance and arbitration provision, even in the absence of express language dealing with the union's no-strike obligation.

2. The grievance procedure should be designed and used to settle as many grievances as possible before arbitration.

The filing of grievances can provide valuable information to management concerning areas of worker dissatisfaction.

The breadth of the grievance provision is defined by the agreement; usually a broad definition, encompassing all disputes between employees and the company, is desirable.

Some agreements allow union officials to receive compensation for time spent handling grievance procedures; this usually is undesirable.

The NLRA protects the right of individuals to present grievances independently:

> [A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided . . . that the bargaining representative has been granted the opportunity to be present at such adjustment.

3. Presumption of Arbitrability.

There is a strong presumption of arbitrability of employment disputes. *AT&T Technologies v. CWA*, 475 U.S. 643 (1986). Rights under a collective bargaining agreement cannot be enforced in court until the employee has first utilized the grievance procedure under the collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). An exception to this rule exists for cases in which the employee has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the employee's grievance. *Vaca v. Sipes*, 386 U.S. 171 (1967).

4. Employer's Don't Agree to Grieve.

The duty to arbitrate applies to employers as well as to employees. However, if the grievance and arbitration procedure is drafted with exclusively employee-based initiation language, then the employer may not be required to use the procedure. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) (DO NOT AGREE TO GRIEVE).

5. Time Limits.

Grievance procedures should provide for time limitations in order to proceed to the next step and ideally should provide that the time limitations are "jurisdictional."

Extensions may be granted, but each extension should be documented and should state that it does not create a precedent.

6. A Matter of Falling Within the Terms of the Collective Bargaining Agreement.

Arbitration is solely a matter of contract, so that no employer or union can be required to arbitrate a dispute unless it is a signatory to an agreement to arbitrate the particular dispute for which arbitration is being sought. Whether a particular dispute is subject to an arbitration agreement is a question that must be answered by a court not an arbitrator, unless the parties have clearly given the arbitrator such authority. *AT&T Technologies v. CWA*, 475 U.S. 643 (1986). Furthermore, in construing collective bargaining agreements, courts must refer to federal common law so that collective bargaining agreements will be subject to a uniform system of interpretation. The federal common law must be applied whether the suit arises under Section 301 or state tort law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

7. Selecting the Arbitrator.

a. Sources.

(1) American Arbitration Association ("AAA") will send to each party a list from which names may be stricken; AAA will submit a second list, and if no choice is satisfactory, it will select an arbitrator not on either of the first two lists;

(2) Federal Mediation and Conciliation Service ("FMCS") will supply lists, and the service is free;

(3) the collective bargaining agreement may designate a permanent panel or a person (chief judge of local court) who may appoint the arbitrator; and

(4) National Mediation Board provides lists for arbitration under the Railway Labor Act.

b. Criteria for Arbitrators.

(1) not unduly identified with labor or management (beware the arbitrator who attempts to overcome an identification with management);

(2) it is preferable to have a lawyer if the arbitration involves legal questions, although a lawyer may be more expensive (*see* the NLRB's deferral doctrine *infra*), since some attorneys representing unions will take advantage of non-lawyers;

(3) some arbitrators are acceptable for some kinds of disputes, but not for others, *e.g.,* contract interpretation versus discipline; and (iv) local colleges and universities are a frequent source of arbitrators, but some faculty may be too academic and detached from the needs of the parties.

8. Preparation for Arbitration.

Review what took place during the preceding steps of the grievance procedure.

Review the collective bargaining agreement from beginning to end, looking for provisions that may have hidden relevance, either for or against your position.

In contract interpretation disputes, review negotiation history, including proposals by management and union, notes of discussions at the table, and the union's ratification materials, if any.

Review past practice and cross-examine supervisors with care to detect inconsistent treatment.

Consider whether witnesses must be subpoenaed. There is subpoena power under most arbitration statutes, but it sometimes is unwise for management to promote pre-arbitration discovery because the union can use it more effectively against management.

Interview all witnesses. Tell them what the issues are and what helps and hurts. Most witnesses do better after they have been introduced to a practice cross-examination.

9. The Arbitration Hearing.

Arbitrators usually open by obtaining a statement of the issue to be resolved. Often this is contained in the submission agreement.

Sometimes the parties agree upon a statement of facts, but this is usually more trouble than it is worth. A comparable result can be achieved by accepting the parties' opening statements of facts, with specified exceptions.

Arbitrators prefer opening statements from both parties. Unlike judges, arbitrators often prefer to hear argument in the opening statement so that they know the parties' position as quickly as possible. Cite pertinent contract language so the arbitrator knows the criteria to be applied.

In contract interpretation matters, the union generally begins. In discipline cases, the company goes first.

Formal rules of evidence usually are not observed, and most arbitrators will hear anything that a party strenuously urges the arbitrator to hear. Arbitrators vary greatly on this, however, and some homework on the particular arbitrator's idiosyncrasies can save embarrassment.

Arbitrators do not tend to rely on technical rules for assigning the "burden of proof."

Management often is deemed to have information at its disposal, and a failure to come forward with such information raises an inference against management's position.

Arbitrators will permit either oral or written summation, but not both. Brevity usually is preferable. Surprises at the end of an arbitration generate resentment.

10. Special Problems in Arbitration.

a. Standards of Proof.

Confusion exists regarding the standard of proof in discharge and discipline cases involving a crime or dishonesty (*e.g.,* theft, use of illegal drugs): some arbitrators require an employer to show proof "beyond a reasonable doubt." Contract language can be used to place the burden of proof in all cases, including discipline and discharge, upon the party alleging violation of the contract, as well as to define the standard of proof to be applied. Contract language can also limit the arbitrator's authority to set the penalty if he determines that an employee has committed the acts of which he is charged. This is important because arbitrators tend to "level down" discipline to the lowest standard of conduct or penalty. In the contract, negate mitigation by the arbitrator, and document extenuating circumstances when exceptions are made.

b. Past Practice.

Past practice can be used to bind the employer to its earlier tolerance or mistakes due to bad management. Negate the effect of past practice in the contract, and try to avoid the evolution of "practices" disadvantageous to the employer.

c. "Class Action" Arbitration.

Contract should require that the grievance be signed by the individual employee and prohibit "class action" arbitration without mutual agreement. This will tend to

limit the scope of the remedy (*i.e.*, back pay only for the grievant), but will not limit the precedential value of the award.

d. Grievance Settlements.

To avoid establishing precedents use standard language disclaiming precedential value in each settlement.

e. Work Assignments Often Need Clarification.

Express contractual language giving management the right to subcontract, to assign work to other employees outside the bargaining unit or to permit supervisors to perform bargaining unit work may be necessary; some arbitrators may feel that these rights are implicitly abrogated by general contract provisions in areas such as seniority, wages, and recognition.

f. Seniority.

A seniority provision may override management's right to make selections on merit. Careful contract language is necessary to overcome arbitral bias toward seniority.

g. Discrimination.

Historically, discrimination claims that could be asserted under federal law usually resulted in a no-win situation for the employer. An employee's loss in arbitration did not preclude him from suing in court on the same matter, although the arbitration award was generally admissible in court. On the other hand, the identification of discrimination complaints through the grievance procedure sometimes avoided later litigation. In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), however, the Supreme Court gave new life to arbitration agreements in the discrimination area. See Block II. The reasoning of these cases together with the endorsement of alternative dispute

resolutions in the Civil Rights Act of 1991, may provide a means to preclude litigation under certain circumstances.

h. Other Arbitrator's Decisions.

Arbitrators are not bound by precedent. As a general rule, the precedential value of prior awards is greater if the prior awards construed the contract between the same parties or the same contract language. The value depends also upon the reputation of the arbitrator, the strength of the reasoning, and the factual similarity.

i. Ex parte Arbitration.

If an employer is admittedly bound by an arbitration provision in a collective bargaining agreement, it is unwise for the employer to challenge the arbitrability of a dispute by refusing to participate in the arbitration hearing, particularly after the employer has cooperated in selecting the arbitrator and the date and time for the arbitration hearing. An award obtained by the union's unilateral arbitration may be enforced even though the employer did not participate in the hearing. *Toyota of Berkeley v. Automobile Salesmen's Union*, 834 F.2d 751 (9th Cir. 1987).

11. Challenging Arbitration Awards.

Arbitration awards may be challenged in federal court only on limited grounds.

a. General Guidelines.

In *Steelworkers Trilogy*, the United States Supreme Court identified the circumstances in which an award may be reviewed. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Unless the parties specifically provide that the arbitrator will decide arbitrability issues, the courts will determine those issues. Any doubts over arbitrability will be resolved in favor of arbitration.

The arbitrator is to interpret the agreement, and courts will overrule an arbitrator's interpretation only if the arbitrator has exceeded his authority.

Courts will not examine the merits of the grievances arbitrated.

Motion to Vacate: If either party seeks to vacate an arbitration award, a judicial proceeding must be commenced within three months after the delivery of the award or the defenses provided in the Federal Arbitration Act will be lost. 9 U.S.C. § 12. State enactments of the Uniform Arbitration Act should also be consulted.

Courts "should not undertake to review the merits of arbitration awards but should defer" to arbitrators; but where the award "seriously undermines the integrity of the arbitral process," the award will not be treated as final. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (Section 301 suit permissible where evidence discovered after the arbitration showed the employees had not falsified expense records).

b. Public Policy–Very Limited Ground for Appeal.

Paperworkers v. Misco, Inc., 484 U.S. 29 (1987). The Supreme Court reaffirmed the rule that federal courts may not make their own findings of fact when reviewing an arbitration award but must remand to the arbitrator if the award contains serious flaws in fact finding.

c. Statute of Limitations.

The statute of limitations to be applied to a court action to enforce an arbitration award requires an analysis of state laws. *United Parcel Service, Inc. v. Mitchell*, 449

U.S. 898 (1980). The shortest state limitation period should apply. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). A hybrid breach of contract/breach of duty of fair representation suit requires the application of the six-month limitations period provided in Section 10(b) of NLRA, as amended. *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

d. Terms Beyond Parties' Agreement.

Terms and interpretations will not be imposed upon the parties beyond the scope of their agreement. *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991).

12. Federal Preemption.

One of the advantages to the employer of being bound by an arbitration provision in a collective bargaining agreement is that many state law claims will be preempted by Section 301 of the LMRA.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the U.S. Supreme Court held that state law tort claims, *e.g.*, breach of the duty of good faith, are preempted by Section 301 if an evaluation of the state law claim is "inextricably intertwined with consideration of the terms of the labor contract." *Accord, Young v. Anthony's Fish Grottos*, 830 F.2d 993 (9th Cir. 1987) (wrongful discharge claims based on the public policy exception to employment-at-will and breach of the implied covenant of good faith and fair dealing were preempted).

In *Lingle v. Norge Division of Magic Chef*, 489 U.S. 399 (1988), the Supreme Court held that the plaintiff's state tort remedy was not preempted by Section 301, and that a state law claim is preempted by Section 301 only if the application of state law requires the interpretation of the collective bargaining agreement. In *Lingle*, the plaintiff alleged that she had been discharged for filing a workers' compensation claim. The union, of which plaintiff was a member, also filed a grievance under the collective bargaining agreement that contained a just cause provision.

The Court reasoned that, to show retaliatory discharge, the plaintiff would have to set forth facts to show that (1) she was discharged or threatened with discharge, and that (2) the employer's motive for the discharge or theft was to deter the plaintiff from exercising her rights under the state workers' compensation act. The Court determined that each of these questions was factual and that a court would not have to construe or interpret the collective bargaining agreement to resolve the state law claim. Thus, the claim was not preempted by Section 301. Few cases since *Lingle* have found worker's compensation retaliatory discharge claims preempted.

13. Arbitrability of Unfair Labor Practice Cases.

In unfair labor practice cases, the NLRB generally will defer its decision to an arbitration award, so long as certain conditions are met. *United Technologies*, 268 NLRB 557 (1984).

a. Deferral Conditions.

The criteria for deferral have been outlined in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955); *Raytheon Co.*, 140 NLRB 883 (1963):

(1) the unfair labor practice issue must have been presented to and considered by the trial panel;

(2) the proceedings must have been fair and regular;

(3) all parties to the proceedings must have agreed to be bound by the result; and

(4) the decision of the arbitrator must not be clearly repugnant to the purposes and policies of the Act.

The Board has since expanded the standard to require the issues before the arbitrator to have been factually parallel to those before the NLRB and the arbitrator to have

been presented generally with those facts relevant to disposing of the unfair labor practice charges. *Olin Corp.*, 268 NLRB 573 (1984).

The Board also will defer where the dispute currently is set for arbitration. *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963). If the case is not prosecuted promptly the NLRB will reconsider deferral. However, the General Counsel recently assessed deferral principals in *Guideline Memorandum Concerning Collyer Deferral*, GC 12-01 (Jan. 20, 2012) and in *Guideline Memorandum concerning Deferral to Arbitral Awards and Grievance Settlements*, GC 11-05 (Jan. 20, 2011).

b. Deferral Considerations.

In a matter that is proper for deferral, the Board will defer to the parties' contractually negotiated grievance arbitration procedure, even when it has not been utilized. *Collyer Insulated Wire*, 192 NLRB 837 (1971). However, the Board will not defer unless the dispute arises within a stable collective bargaining agreement and both parties are willing to arbitrate. Under its new guidance, the arbitrator must agree to decide the statutory issues in 8(a)(1) and 8(a)(3) discharge cases. The Board retains jurisdiction to permit a showing that the matter was not properly resolved by arbitration or that the procedure was unfair or resolved inconsistently with the Act. In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board made it clear that deferral applies to cases involving alleged violations of Sections 8(a)(l) (interference), and 8(a)(3) (discrimination), and 8(a)(5), to the extent that unilateral changes are alleged.

The NLRB has declined to defer to arbitration where the union and the employer are hostile to the interests of the employees involved.

In *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*), the court held that an individual employee must exhaust the grievance-arbitration machinery of a collective-bargaining contract before the NLRB considers his allegation that his employer discriminated against him in violation of Section 8(a)(3). The NLRB may require an employee to exhaust grievance remedies before filing an unfair labor practice charge alleging discrimination in violation of Section 8(a)(3).

14. Obligations to Arbitrate After Termination of the Agreement.

a. Accrued and Vested Rights.

An employer can be forced to arbitrate rights which accrued during the life of a bargaining agreement, even though that agreement had expired at the time the closure arose and arbitration was requested. *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977); *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (holding the arbitration clause survived contract termination and a merger).

b. "Arising Under".

An employer need not arbitrate the grievances of employees who were laid off almost a year after its collective-bargaining agreement expired, since these grievances did not "arise under" the contract. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991). A post-expiration grievance arises under the agreement only where:

> the grievance involves facts and occurrences that arose before expiration;
>
> an action taken after expiration infringes a right that accrued or vested under the agreement; or
>
> the disputed contract right survives expiration of the rest of the agreement, under normal principles of contract interpretation.

E. Duty of Fair Representation.

1. Union's Duty.

The union must represent all employees in the bargaining unit fairly. The duty of fair representation is "the duty to exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (as initially defined under the Railway Labor Act). The union must also represent dues-paying non-members fairly. In *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that a union violated the duty of fair representation as well as Section 8(a)(3) of the Act where the union, over the objection of dues-paying non-members, expended funds collected from non-members on activities unrelated to collective bargaining activities. In *Beck*, the plaintiffs (non-union bargaining unit employees) objected to having their fees expended on such activities as organizing other employers, lobbying for labor legislation, and social, charitable and political events.

2. Standards for Breach of Duty.

The standard for determining breach of the duty is whether the union's representation of the employee is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171 (1967). Mere negligence does not breach the duty of fair representation. *Steelworkers v. Rawson*, 496 U.S. 362 (1990). *Steelworkers* held that a state law negligence claim against a union by the survivors of deceased union members was preempted by Section 301 of the LMRA.

The courts have treated unions more leniently in contract negotiation cases than in discipline cases. There is a "wide range of reasonableness" in bargaining, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), and provisions of collective bargaining agreements rarely are set aside for breach of the duty of fair representation.

The Court concluded that a union did not breach this duty when it negotiated a back-to-work agreement that gave striking pilots the option of participating in the airline's system for allocation of vacant positions, electing not to return to work and receiving severance pay, or retaining their individual claims and becoming eligible to return to work only after all the settling pilots had been reinstated. *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991). The Court stated that the final product of the bargaining process may be evidence of a breach of the fair-representation duty only if, in light of the "factual and legal landscape," it is so far outside a "wide range of reasonableness" as to be wholly "irrational" or "arbitrary." Even if the settlement was bad, it was by no means irrational in light of the legal landscape at the time it was negotiated, the Court concluded.

The most difficult issue for the union is whether to pursue particular grievances; after investigating the grievance, the union is entitled to weigh the costs and benefits of going to arbitration. Employees do not have a right to insist that their union demand arbitration.

3. Impact on Employer.

Breach of the duty of fair representation has an impact upon the employer because the employer may be sued in federal court for breach of the collective bargaining agreement, even when the employee has not pursued arbitration or has arbitrated and received an unfavorable award.

The employee need not exhaust internal union appeals procedures unless they would afford him complete relief (*e.g.*, the employee is not seeking reinstatement). *Clayton v. UAW*, 451 U.S. 679 (1981). Exhaustion of grievance procedures is not required where the employee can show that pursuit of the contractual procedures would be futile; for example,

where the union has already taken an official position against the employee. In cases where internal union appeals must be exhausted, the statute of limitations may be tolled.

The six-month statute of limitations applies to suits for a union's breach of duty of fair representation. *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

4. Damages.

An employee's damages initially caused by his unlawful discharge, but increased by his union's breach of its duty of fair representation, are apportioned between the employer and union. *Bowen v. United States Postal Service*, 459 U.S. 212 (1983). The employee may obtain injunctive relief, including reinstatement, but the union is not liable for punitive damages. *Electrical Workers v. Foust*, 442 U.S. 42 (1979) (Railway Labor Act case, but principles probably are the same under NLRA). A jury trial is available. *Teamsters Local 391 v. Terry*, 494 U.S. 558 (1990).

Where an employee claims that the union breached its duty by failing to pursue a grievance, no damages will be awarded unless the employee proves that the grievance was meritorious. *Iron Workers, Local Union 377*, 326 NLRB 375 (1998).

XVIII. ENDING THE EMPLOYER-UNION RELATIONSHIP.

A. Refusal to Bargain Based on Good Faith Doubt of Majority Status.

1. Circumstances.

This issue may arise from union inactivity, such as when the union and the employer are unable to reach agreement in prolonged negotiations and long periods of time pass without a request for a meeting by the union. The issue also may arise when the employer believes that a majority of employees no longer desire a union.

When the employer has a justifiable good faith doubt of union majority status, the employer may refuse to bargain with the union, but the employer may not repudiate an existing contract.

2. Certification Year.

The union's majority status is irrebuttably presumed for one year after certification. Thereafter, majority status is presumed, but may be rebutted.

The certification year may be extended where, because of employer unfair labor practices, the union has not had an opportunity for one full year of bargaining.

Where, during the certification year, the employer has objective evidence that the union no longer has majority status, the employer may insist upon a contract's expiration at the end of the year, but the employer may not refuse to bargain.

3. Employer's Burden.

In *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board held that the employer must have conclusive proof at the time of withdrawal that the union actually lost majority support.

All unit employees specifically and personally advised the employer that they did not desire to be represented by the union. *Green Oak Manor*, 215 NLRB 658 (1974).

Resignation of officers comprising the union negotiating committee and failure to notify employer of the election of new officers, significant employee turnover, general grievance inactivity, and union failure to file required annual LMRDA reports.

Employee dissatisfaction, union inactivity, lack of communication with employer for six months, and turnover of 389 employees in work force of 100.

Petition repudiating the union was received from more than 60% of the employees. Letters signed by a majority of unit employees claiming they no longer wished to be

represented by the union is sufficient. Such letters must be unambiguous and demonstrate a clear intention by the employees to not be represented by the union. No violation of Section 8(a)(5) where employer withdrew recognition from union after receiving anti-union petition signed by 92 out of 120 employees, notwithstanding union contention that employer's unfair labor practices caused employee dissatisfaction with the union; unfair labor practices were not sufficiently related to the anti-union petition to have been the cause of it.

Employee complaints that more than half of the workers did not desire union representation, high employee turnover, vote by the majority of members to de-authorize the union shop, small and declining number of dues check-offs, and filing of decertification petition.

4. High Burden to Meet.

The following factors, standing alone, have been held insufficient to justify withdrawal of recognition:

minority of employees were on dues checkoff;

minority of employees were union members;

non-payment of dues, the union's failure to hold meetings, and employee dissatisfaction;

majority of employees crossed the union picket line during a strike;

decertification petition was filed.

5. Polling Employees.

The NLRB has held that an employer may not conduct a non-coercive secret ballot poll of employees unless it already has objective evidence of loss of majority status.

Employee polls taken during a union's initial demand for recognition have been held to be lawful when:

the purpose of the poll is to determine the truth of a union's claim of majority;

this purpose is communicated to the employees;

assurances against reprisal are given;

the employees are polled by secret ballot; and

the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Struksnes Construction Co., Inc., 165 NLRB 1062 (1967). These steps also should be taken in conducting a poll to determine whether a union retains majority support from the bargaining unit.

Remember, under *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board will entertain an "RM" petition when there is some evidence of loss of majority support.

B. Changes in Ownership; Successorship.

Successorship applies when a new corporate entity purchases the business.

1. Successorship Obligations.

When a "successor" employer hires a majority of the predecessor's employees, the successor is obligated to recognize and bargain with the union, but the successor is not bound by the substantive terms of the predecessor's collective bargaining agreement. *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972); *UGL-UNICCO Service Company*, 357 NLRB No. 76 (Aug. 26, 2011). However, a successor employer may become bound by the terms of a predecessor's collective bargaining agreement if the successor voluntarily chooses to adhere to the terms of the agreement rather than entering into negotiations for a new contract. The Supreme Court upheld the validity of a District of Columbia law that required a purchaser to hire all of the employees of the seller. The Court found no interference

with federal labor law. *Washington Service Contractors Coalition v. District of Columbia*, 516 U.S. 1145 (1996).

2. Test for Successorship.

The essential test for successorship is whether there is substantial continuity of identity in the business enterprise. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). In determining whether there is substantial continuity between the new and old companies, the Board will consider, based on the totality of circumstances, whether the new company has acquired substantial assets of its predecessor and continued the predecessor's business. In making this determination the Board will assess:

> whether the business of both employers is essentially the same;
>
> whether the employees of the new company are doing the same jobs in the same working conditions and under the same supervisors; and
>
> whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

3. Stock v. Asset Purchase.

In *EPE v. NLRB*, 845 F.2d 483 (4th Cir. 1988), the court upheld the Board's determination that where the shareholders of a corporation sell 100% of its stock to a second corporation, the purchasing corporation is a "continuing" employer and remains bound by its labor contract. *See also Esmark Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989) (successorship analysis not applicable to stock sale transaction).

4. Successor Obligation to Recognize and Bargain.

The successor's duty to bargain will arise at the point that it has hired a "substantial and representative complement," if a majority of that complement consists of the

predecessor's employees. *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987). In determining when a substantial and representative complement has been hired, the Board considers the following:

> whether the job classifications designated for the successor's operation substantially have been filled;
>
> whether the successor's operation is in substantially normal production;
>
> the size of the complement and the time expected to elapse before a substantially larger complement would be at work; and
>
> the relative certainty of the employer's expected expansion, if any.

Successorship established and contract imposed on successor where employer makes it "perfectly clear" that it will retain the seller's employees. *Canteen Corp. v. NLRB*, 317 NLRB 1052, *enf'd*, 103 F.3d 1355 (7th Cir. 1997); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (9th Cir. 1983).

NLRB v. Advanced Stretch Forming Int'l, 233 F.3d 1176 (9th Cir. 2000) (Company forfeited right to set initial terms because a manager told workers that the new company would have "no union, no seniority, no nothing.")

No successorship found by court where there was two year hiatus following closing, complete refurbishing of plant and new product lines upon reopening. *CitiSteel, USA Inc. v. NLRB*, 53 F.3d 350 (D.C. Cir. 1995); *Nephi Rubber Products*, 303 NLRB 151 (1991) (an employer that purchased a bankrupt company's unionized plant was held to be a successor despite a 16-month hiatus in plant operations. The job situation of the employees who were retained by the purchaser was not so altered that it would have changed their attitudes

toward union representation); *El Torito-La Fiesta Restaurants v. NLRB*, 929 F.2d 490 (9th Cir. 1991) (the essential factor in finding a contract bar after a shutdown in operations is the continuing existence of the bargaining unit. If the bargaining unit remains intact through the hiatus in operations, because the shutdown was of a temporary nature and the employees had a reasonable expectation of re-employment, then the employer must recognize the union even if the employer hires an all-new workforce.).

5. Refusal to Hire Predecessor Employees.

An employer violates Section 8(a)(3) if it refuses to hire predecessor employees solely because they are bargaining unit members in order to avoid successorship. The "perfectly clear" remedy will be imposed. The employer may decline to hire the predecessor's employees for other legitimate reasons. *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987).

XIX. STRIKES AND STRIKE ACTIVITY.

A. Economic Strike

1. Employer Countermeasures: Hire "Permanent" Replacements for Strikers.

NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

Strikers are still "employees" and therefore are still entitled to the protections of Section 7, but an employer can continue his business during the strike by hiring permanent replacements for the strikers. Permanently replaced strikers are not entitled to "bump" their replacements from their positions even if they elect to return to work before the end of the strike. *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). "At-will" employees who are hired to replace strikers may be considered to be "permanent" employees so as to show that the replacements were intended to be permanent.

Solar Turbines, Inc., 302 NLRB 14 (1991); *Transport Service Company*, 302 NLRB 22 (1991). NLRB held that 39 economic strikers were permanently replaced and therefore were not entitled to reinstatement, where their replacements had accepted offers of permanent employment but had not yet taken the requisite drug and alcohol tests at the time the strikers offered to return to work. Because the replacements were assigned job classifications, work departments, and employee badge numbers, indicating that the employer was committed to hiring them as permanent replacements, meant that they were considered permanent replacements.

2. Unconditional Offer to Return to Work.

Even if an economic striker is permanently replaced, once he unconditionally offers to return to work, the employer must offer him any available job for which he is qualified. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). This rule applies until the striker ceases to be an "employee" of the employer under the Act by obtaining "other regular and substantially equivalent employment." 29 U.S.C. § 152(3). The economic striker who makes an unconditional application for reinstatement must be placed on a preferential recall list if no job is currently available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Under the *Laidlaw* Rule, reinstatement of strikers, with full seniority, may be required even if the employer has a cyclical or seasonal business, so that employees in volatile industries are not deprived of their statutory rights.

The Supreme Court has held that at the conclusion of a strike, employers are not required to replace strikers who cross a picket line with strikers who have greater seniority. Granting job preference to non-strikers is not discriminatory because both the RLA

and NLRA protect an employee's decision not to strike. *Trans World Airlines v. Int'l Fed. of Flight Attendants*, 489 U.S. 1064 (1989).

An employer's obligation to permanently replace strikers is met by telephoning and sending an offer of reinstatement to the striker's last known address when a comparable job becomes available. *Brooks Research & Manufacturing Inc.*, 202 NLRB 634 (1973).

3. Union Support Among Strike Replacements and Their Rights.

No presumption of union support among strike replacements. The Board no longer presumes that strike replacements support the union in the same ratio as the striking employees being replaced. Neither will the Board presume that strike replacements repudiate the union, in the absence of further evidence supporting such an inference. The NLRB rule approved by the Supreme Court in *NLRB v. Curtin Matheson Scientific Inc.*, 110 S.Ct. 1542 (1990). The employer may not withdraw recognition from the union on the sole basis that a majority of its employees are permanent striker replacements.

4. Voting Rights of Replaced Strikers.

Permanently replaced economic strikers have a right to vote in any certification election held within 12 months of the commencement of the strike. 29 U.S.C. § 159(C)(3). Permanently replaced economic strikers are entitled to vote in a rerun certification election held more than 12 months after strike began, where they were eligible to vote in original election held within 12 months after strike began which had been set aside. *Jeld-Wen*, 285 NLRB 118 (1987).

5. Breach of Contract by Permanent Replacements.

If an employer promises a "permanent" replacement that he will not be discharged to make way for returning strikers, the replacement may sue for breach of contract or

misrepresentation if the employer reneges on that promise. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Thus, an employer should "condition" its employment offer to replacements accordingly, such as by obtaining an explicit "at will" agreement with the replacement employee.

6. Discharge of Economic Strikers.

An employer may discharge (not just permanently replace) economic strikers engaged in unprotected conduct and may sue individual employees in tort for damages resulting from the employees' unprotected conduct during a strike. On the other hand, retaliation against an employee for engaging in protected activity is prohibited by Sections 8(a)(l) and 8(a)(4) of the NLRA.

B. Employer Lockouts.

In *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), the Supreme Court held that a post-impasse "offensive" lockout to enhance an employer's bargaining position, or to bring pressure upon a union to modify its demands, is a lawful economic weapon. In *NLRB v. Brown d/b/a Brown Food Stores*, 380 U.S. 278 (1965), the Supreme Court found that an employer did not violate Section 8(a)(3) when it used temporary replacements during a "defensive" lockout in order to preserve multi-employer bargaining during a whipsaw strike by the union.

Central Illinois Public Services, 326 NLRB 928 (1998) (Lockout response to work to rule strategy by union sale purpose bring pressure in support of Employer legitimate bargaining position).

Teamsters Local 639 v. NLRB (D.C. Liquor Wholesaler Assn.), 924 F.2d 107 (D.C. Cir. 1991) (Lockout to coerce union into accepting final offer, implemented without impasse is illegal).

Greasburg Coca-Cola, 311, 1022 (1993) (Employer Lockout over nonmandatory subject - scope of unit was found to be a violation).

Goldsmith Motors, 310, 1279 (1993) (Lockout, hire temporaries, implement for temps even in absence of impasse - no violation. Employer may pay lesser benefits to replacements even without impasse).

Fanhaven Properties, 314, 763 (1994) (May not pay non-striker or crossovers less benefits absent impasse).

C. Other Strike Tactics.

Employers also may attempt to enhance their bargaining power during an economic strike by taking other action to undercut support for the strike and to encourage employees to return to work. However, in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), a struck employer offered permanent strike replacements and returning strikers 20 years of extra seniority ("super-seniority"). The Court found this conduct "inherently discriminatory or destructive" of employee rights and also illegal under Section 8(a)(3).

D. Inherently Destructive Employer Conduct.

Employer countermeasures are reviewed under the test set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), where the Supreme Court held that payment of vacation benefits to non-strikers while denying them to strikers violated Sections 8(a)(l) and (3) of the Act. The following test was applied:

First, if it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.

Second, if the adverse effect of the discriminatory conduct upon employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

In either situation, once it has been proven that the employer engaged in discriminatory conduct that could have affected employee rights adversely to some extent, the burden is upon the employer to establish that it was motivated by legitimate business objectives because the proof of motivation is most accessible to the employer.

E. Suspension of Disability Benefits.

In *Amoco Oil Co.*, 285 NLRB 918 (1987), an employer that had locked out striking employees lawfully announced the termination of sickness and disability, as well as occupational illness and injury, benefits and actually terminated the benefits of eight strikers. The Board found this conduct lawful because the eight strikers, during the lockout, did not meet the benefit plan's dual requirements of being disabled and otherwise scheduled to work, their treatment was no different from that accorded laid off employees, the termination of benefits was consistent with the employer's past practice, and such termination of benefits is not inherently destructive of important Section 7 rights.

F. Unfair Labor Practice Strike.

A strike that is caused or prolonged by an employer's unfair labor practices under Section 8 of the NLRA, 29 U.S.C. § 158. A union that mentions unfair labor practice in the context of a strike vote does not create an unfair labor practice strike. *California Acrylic, Inc. v. NLRB*, 150 F.3d 1095 (9th Cir. 1998).

1. Legal Remedies.

No injunctive relief or damages are available against such strikes in the absence of violence or other improper activity, or breach of a no-strike clause, for the same reasons that such relief is unavailable for economic strikes.

2. Employer Countermeasures.

Hire "temporary" replacements for strikers. Upon an unconditional request for reinstatement, however, the employer must oust the striker's temporary replacement and reinstate the striker to his original position. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

Discharge unfair labor practice strikers engaged in unprotected activity. If the strike was precipitated or prolonged by employer unfair labor practices, the NLRB still may order that strikers discharged for unprotected activity be reinstated. *Blades Mfg. Corp.*, 144 NLRB 561 (1963), *enforcement denied on other grounds*, 344 F.2d 998 (8th Cir. 1965). However, an employer can remedy the destructive effects of its own "serious" unfair labor practices by: (1) offering reinstatement with back pay to the unlawfully discharged employees; (2) assuring strikers that seniority provisions of the collective bargaining agreement will be honored in making future layoffs; and (3) pledging to discuss grievances in accordance with the established grievance procedure. *Studio 44 Inc.*, 284 NLRB 597 (1987). Moreover, if a striker is discharged illegally during a strike, the NLRB will order remedial back pay from the date of discharge. The discharged striker need not request reinstatement. *Fry Foods, Inc.*, 241 NLRB 76 (1979), *enf'd*, 609 F.2d 267 (6th Cir. 1979); *Abilities and Good Will*, 241 NLRB 27 (1979), *enforcement denied*, 612 F.2d 6 (1st Cir. 1979).

Sue individual employees in tort for damages. The preemption doctrine also limits relief in some cases. *E.g.*, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)

(showing of malice necessary to recover for defamation based on statements made during labor dispute).

G. Unauthorized/Unprotected Strikes and Employer Responses.

1. Wildcat Strikes.

A wildcat strike (sometimes also concerning other activities such as picketing or hand billing) is a work stoppage by employees without the approval of their authorized bargaining representative.

Wildcat strikes are not enjoinable (absent violence, etc.) unless they are in violation of a no-strike clause in a collective bargaining agreement. Damages in tort can be sought in state court against individual employees for causes of action not preempted by federal law.

Wildcat strikes and other economic pressure not supported by a union are sometimes unprotected by Section 7, and employees may be discharged for engaging in them. *Lee A. Consaul Co. v. NLRB*, 469 F.2d 84 (9th Cir. 1972); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); see also, *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (minority employee group engaging in leafleting and picketing may be discharged).

2. Strikes in Breach of a No-Strike Clause.

a. Legal Relief:

Even if a collective bargaining agreement does not contain an express no-strike clause, courts will imply a no-strike promise co-extensive with the arbitration clause. *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962). This rule applies in suits for damages or injunctive relief. *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974). A general no-strike clause,

however, does not waive the employees' right to strike over "serious" employer unfair labor practices.

b. Injunctions.

Strikes in breach of a no-strike clause are enjoinable under an exception to the Norris-LaGuardia Act announced by the Supreme Court in *Boys Markets Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), if the strike concerns an issue subject to arbitration under the collective bargaining agreement. An injunction will issue even if the strike is a "wildcat" strike, unauthorized by the union.

c. Damages for Breach of Contract.

In *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979), the Supreme Court held that a district and international union could not be held liable merely for failing to take steps to end a strike by members of a local (the "best efforts" theory). Some involvement, encouragement, or ratification ("common law agency") by the union is a necessary predicate for liability. Liability cannot be based on a "mass action" theory (all employees participated, indicating union support).

In *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981), the Supreme Court held that individual employees who participated in a wildcat strike cannot be held liable in damages for breach of contract.

H. Sit-Down Strikes and Partial Strikes.

1. Legal Relief.

Sit-down strikes and partial strikes are enjoinable if they are in breach of an express or implied no-strike clause or if they are improper under state trespass law.

2. Employer Countermeasures.

Sit-down strikes or recurrent unannounced work stoppages are not protected by the Act, provided the no strike clause specifies employees as well as the union. *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Silver States Disposal Serv., Inc.*, 326 NLRB 84 (1998).

I. Strike Following Reopener Disputes.

In the absence of evidence of the parties' contrary intent, a broad no-strike clause does not prohibit a strike occurring during wage negotiations conducted pursuant to a wage reopener provision. *Hydrologics, Inc.*, 293 NLRB 1060 (1989). Starting with the premise that a no-strike clause generally applies only during the term of the contract, the Board reasoned that, in the absence of language indicating that the parties intended to include reopener strikes within the no-strike clause, the parties must have intended to have the same options available in the reopener context as would be available at the termination of a contract.

J. Sympathy Strike.

A work stoppage by one or more employees over the terms and conditions of employment in another work (bargaining) unit. Examples: a delivery man's refusal to cross a picket line while on his delivery route; strike by one group of employer's employees in support of another group.

1. Legal Relief.

Historically, injunctive relief has been unavailable because sympathy strikes are not "over" an issue that is arbitrable under the parties' collective bargaining agreement. *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976).

General no-strike clauses now are presumed to prohibit sympathy strikes absent conflicting contract language, extrinsic evidence, or bargaining history demonstrating that the parties intended to exclude sympathy strikes from coverage of the no-strike clause.

In *Arizona Public Service Co.*, 292 NLRB 1311 (1989), the Board ruled that a broad no-strike clause did not include sympathy strikes where the no strike provision had remained unchanged in the contract since it first appeared and that the employer's proposals to change the language of the no-strike clause to clarify that sympathy strikes were prohibited were rejected and withdrawn. Past practice also indicated that the employer tolerated sympathy strikes. *See also, Food and Commercial Workers Local 1439*, 293 NLRB 26 (1989) (broad no-strike clause did not include sympathy strike because sympathy strikers were covered in a separate contract statement that limited sympathy strikers to no greater rights than those of a "striking employee").

If a picket line is unlawful, (*e.g.*, part of a secondary boycott), a refusal to cross it is unprotected and will subject the employee to immediate discharge.

K. Safety Strike.

A strike over working conditions that employees reasonably believe are dangerous.

A refusal to work engaged in by a group of employees because of safety issues is considered activity protected by Section 7 of the NLRA. In addition, Section 11(c)(l) of the Occupational Safety & Health Act, and regulations promulgated by the Secretary of Labor, 29 C.F.R. § 1977.12, protect employees from reprisal for the exercise of rights protected by the Act. Section 502 of the Labor Management Relations Act also privileges a refusal to work because of abnormally dangerous working conditions, even given the fact of express or implied contractual no-strike obligations. *See also,* Mine Safety and Health Act, Section 105(c), 30 U.S.C. § 815(c).

See generally Charles W. Newcom, *Employee Health and Safety Rights under the LMRA and Federal Safety Law*, CCH Labor Law Journal, July 1981.

1. Legal Relief.

Under Section 502 of the LMRA, a union seeking to justify a safety strike must show by objective evidence that an abnormally dangerous condition exists. *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974). A safety strike may be enjoined pending arbitration if the arbitration clause or no-strike clause is broad enough to cover safety disputes.

2. Employer Countermeasures and Section 7 Rights.

A group of workers who concertedly refuse to work because of perceived safety or health hazards are engaged in protected activity under Section 7. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). An individual health or safety complaint has been protected if, under the circumstances, it is considered concerted activity; *e.g.*, it was made on behalf of a group of employees and there is no evidence of disavowal by fellow employees. *NLRB v. Duquesne Electric & Manufacturing Co.*, 518 F.2d 701 (3d Cir. 1975). *But see, Meyers Industries, supra. Meyers Industries* was subsequently reversed by the District of Columbia Circuit. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

L. Individual/Concerted Strike Activity.

In *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984), the Supreme Court stated:

> As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity. . . .

The presence of a safety or health issue does not privilege repeated intermittent slowdowns and stoppages. *NLRB v. Robertson Industries*, 560 F.2d 396 (9th Cir. 1977).

Employees who continually engage in unfounded safety complaints without resorting to the grievance and arbitration proceeding may be disciplined under the terms of the collective bargaining agreement if it provides for the grievance and arbitration of such disputes. *Irvin H. Whitehouse & Sons Co. v. NLRB*, 659 F.2d 830 (7th Cir. 1981).

1. Employer Countermeasures.

a. Discharge.

Participation in a strike violative of a no-strike clause is unprotected activity, subjecting an employee to discharge.

b. Selective Discipline.

The Supreme Court has held that, absent language in the collective bargaining agreement binding union officers to take affirmative steps to end an unlawful strike, imposing harsher discipline upon union officers for participating in a work stoppage constitutes illegal discrimination under Section 8(a)(3) of the NLRA. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

The Board held that selective discipline may be imposed upon union officials who fail to take affirmative measures to end an unlawful work stoppage, if the contract imposes such a duty upon the union. *Indiana & Michigan Electric Co.*, 273 NLRB 1540 (1985), *enf'd and review denied, IBEW v. NLRB*, 786 F.2d 733 (6th Cir. 1986).

M. Unprotected Activity During Strike.

1. Legal Relief.

Injunctions against mass picketing, violence, coercion, and intimidation are available in state court. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The Supreme Court has held that the NLRB may not issue a cease and desist order to halt an employer's suit against its employees in a state court, even if it was filed for retaliatory purposes, unless the suit lacks a reasonable basis in fact or law. The First Amendment right of courtroom access and the states' interests in keeping the peace and protecting citizens preclude the NLRB from characterizing such lawsuits as unfair labor practices. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

Level of Violence Required for Imposition of Sanctions: There is a distinction between cases in which employees have arguably exceeded the bounds of acceptable conduct during a strike in a moment of "animal exuberance" and those cases in which misconduct is so flagrant or egregious as to require subordination of the employees' statutory right to strike. *Southern Florida Hotel & Motel Association*, 245 NLRB 561 (1979), *enforcement granted in part and denied in part*, 751 F.2d 1571 (11th Cir. 1985); *MP Industries*, 227 NLRB 1709 (1977). Verbal threats alone may justify a refusal to reinstate a striker if they "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 893 (1986).

Unfair labor practice strikes. In reviewing an employer's decision to discipline or discharge an unfair labor practice striker for strike misconduct, the Board will

balance the severity of the employee's misconduct with the severity of the employer's unfair labor practices. *See, Blades Mfg. Corp.*, 144 NLRB 561 (1963), *enforcement denied on other grounds*, 344 F.2d 998 (8th Cir. 1965).

2. Other Violence.

Under the *Clear Pine Mouldings* test, a striker was lawfully discharged where he jumped on the running board of a supervisor's truck and pounded on the window as the supervisor attempted to leave work. *Stroehmann Brothers*, 271 NLRB 578 (1984).

N. Strikes in Violation of Sections 8(g) and 8(d) of the NLRA.

1. Strike Notice.

a. Section 8(g) Notice.

Section 8(g) of the NLRA provides that before engaging in any strike at a health care institution, the union must notify the institution and the Federal Mediation and Conciliation Service at least 10 days in advance of the strike. An employee who strikes during the notice period loses protected status.

The notice requirement does not apply to threats to strike. *District 1199 Greater Pennsylvania Avenue Nursing Center*, 227 NLRB 132 (1976).

b. Union Only.

The notice provision does not apply to a work stoppage engaged in by nonunion employees. *East Chicago Rehabilitation Center*, 259 NLRB 996 (1982), *enf'd*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984); *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977). It applies only to unions representing employees of a health care facility and not to unions that have a dispute with a construction contractor that performs work at the facility premises. *NLRB v. IBEW Local 388*, 548 F.2d 704 (7th Cir. 1977), *cert. denied*, 434 U.S. 837 (1977). However, in *Sheetmetal Workers Local 324*

(Lake Shore Hospital and Health Related Facilities), 254 NLRB 536 (1981), the Board held that a construction union violated Section 8(g) by not giving notice to FMCS and the facility even though the union was not seeking to represent any hospital employees and such employees did not engage in the picketing or the refusal to work. The Board required the notice because the picketing was directed to the hospital in its selection of a "substandard" contractor.

Picketing occurring after the date specified in the 10-day notice is unlawful and requires a new 10-day notice. *Bricklayers Union and Lake Shore Hospital*, 259 NLRB 269 (1981); *Oakwood Manor Inc. d/b/a Danville Nursing Home*, 254 NLRB 907 (1981).

Sympathy strikes in a hospital setting. The Board has held that all unions engaged in a strike at a health care facility must give 10 days' notice before they strike, regardless of whether the unions represent employees at that facility or whether they are engaged simply in sympathy picketing as an informal showing of support for another union. *Service Employees International Union, Local 84*, 266 NLRB 335 (1983), *enf'd*, 725 F.2d 126 (D.C. Cir. 1983); *Local Union No. 200, General Service Employee's Union SEIU*, 263 NLRB 400 (1982).

2. Section 8(d).

Section 8(d) of the NLRA makes it an unfair labor practice for a union to strike during the final 60 days that a collective bargaining agreement is in effect. Striking during this 60-day "cooling off" period deprives strikers of their status as "employees" under the Act and of any protections from discharge that the Act provides. Note also that unions and employers must give two notices if either intends to propose a modification of the agreement at its expiration: one to the other party to the agreement and one to the FMCS. Some courts have held that a union's failure to send the FMCS notice also deprives striking employees of the protections of the Act. *See, Retail Clerks Local 219 v. NLRB*, 265 F.2d 814 (D.C. Cir. 1959); *Operating Engineers v. Dahlem Constr. Co.*, 193 F.2d 470 (6th Cir. 1951). Union threats to

strike within the 60-day period may be enjoined. *NLRB v. Local 3, IBEW*, 828 F.2d 936 (2d Cir. 1987). The employer is also obligated to give the FMCS notice before implementing changes in the bargaining agreement. *Nabors Trailers, Inc. v. NLRB*, 910 F.2d. 268 (5th Cir. 1990).

XX. PICKETING, BOYCOTTS, AND HOT CARGO AGREEMENTS.

A. The Stranger Picket Problems.

1. Section 8(b)(7).

Section 8(b)(7) makes it an unfair labor practice to picket for recognition for more than a reasonable time, not to exceed 30 days, without filing a petition for an election.

A union's threat to engage in recognitional or organizational picketing is unlawful only if picketing actually occurs and no election petition is filed within a reasonable period of time. *Mine Workers (Hatfield Dock and Transfer)*, 302 NLRB 441 (1991).

2. "Area Standards".

"Area standards" picketing is lawful, however, but often is used as a disguise for recognitional picketing.

The proviso in Section 8(b)(7)(C) permits truthful informational picketing to advise the public "that an employer does not employ members of, or have a contract with, a labor organization," so long as such picketing does not cause a disruption of pickup and delivery or other services.

Picketing which satisfies the requirements of Section 8(b)(7)(C) may continue for longer than 30 days without the filing of a petition for an election, even if such picketing is for a recognitional object. *United Food & Commercial Workers, Local 23, AFL-CIO-CLC*, NLRB Adv. Memo. (1985).

If one unlawful object is identified, the picketing is unlawful under Section 8(b)(4)(C) and may be enjoined. *Blinne Construction*, 135 NLRB 1153 (1962).

3. Remedies.

Keep in mind state court relief, depending upon the conduct and location. Trespassory picketing may be enjoined in state court proceedings even though the picketing might also constitute an unfair labor practice. *Sears Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). Note that the *Sears* case is a limited exception to the preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). An employer should never seek an injunction against picketing by alleging that the picketing constitutes an unfair labor practice.

B. Jurisdictional Disputes.

1. Section 8(b)(4)(1).

Section 8(b)(4)(D) prohibits strikes, boycotts, picketing, and coercion in "jurisdictional disputes," where the object is to force an employer to assign certain work "to employees in a particular trade, craft or class." The purpose of the statute is to protect a neutral employer in a dispute in which two groups make competing claims for work assignments. The NLRB handles this by a Section 10(k) hearing to determine the appropriate group to perform the work; the employer's preference receives strong weight. The Board will not act if there is an agreed-upon method of resolving the dispute, such as the joint boards common in the construction industry.

C. Secondary Activity.

Secondary activity is defined as union pressure which is aimed at an employer or other person with whom the union is not directly involved in a labor dispute. Primary activity is defined as pressure exerted on an employer with whom the union is involved in a labor dispute, *e.g.*, a party to a collective bargaining with the union or an employer whose employees have sought the representation of the union. Secondary activity can take the form of boycotts, strikes,

or other coercion, and is outlawed by Section 8(b)(4) of the Act. Stationary bannering is not coercive. *Southwest Regional Council of Carpenters, Local 1506 (Held Properties, Inc.)*, 356 NLRB No. 16 (Oct. 29, 2010); *Southwest Regional Council of Carpenters (New Star General Contractors, Inc.)*, 356 NLRB No. 88 (Feb. 3, 2011). Cease doing business object is essential.

1. Lawfulness of Primary v. Secondary.

Primary striking or picketing is not unlawful under the Act. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951). The determination of primary picketing can be quite complex. It usually involves an analysis of the functional interrelationship of the "primary" and "secondary" employer. *See NLRB v. Longshoremen*, 473 U.S. 61 (1985) (Sections 8(b)(4)(B) and 8(e) prohibit secondary, but not primary, union activity, and bona fide work preservation agreements may constitute protected primary goals).

To be illegal under Section 8(b)(4) of the Act, prohibited activities of engaging in a strike, refusing to handle goods and perform services, or inducing or encouraging an employed individual to engage in such activity must have a "cease doing business" object.

2. The Primary/Secondary Distinction and the "Ally Doctrine".

Employees of third parties may be engaged in "protected concerted activities" when they refuse to cross a "stranger" picket line when ordered to work at a customer's facility.

The "ally doctrine" is divided into two categories consisting of (1) employers who perform farmed-out "struck work"--which but for the strike against the primary employer would not be sent to them; and (2) employers who, because of common ownership, control, and integration of operations, become so identified with the primary employer that their businesses are treated as a single enterprise or a straight-line operation.

3. The Struck-work Category.

It is lawful for the union engaged in a labor dispute with the employer of the employees represented by the union to strike one who is already dealing with the struck employer, but whose work is increased by the strike. *Douds v. Metropolitan Architects Local 231*, 75 F. Supp. 672 (S.D. N.Y. 1948). The question in this circumstance is whether the work is devoted to the related allied employer and thereby helps the struck employer to evade the economic pressure exerted by the strike.

In the more typical situation, the employers have had no prior dealings. The "second" employer now, because of the strike, takes farmed-out work and thereby becomes an "ally" of the primary employer.

4. Common Ownership and Control.

In order to gain the protection of the Act and avoid the proscription of the secondary boycott provisions, the union must establish that a single employer relationship exists and that the "primary" and "secondary" employers are under common ownership and control.

The typical indicia of common control is a unity of decision-making regarding labor relations and business operations in one person or a group of individuals. If a corporation with subsidiaries wishes to obtain the benefits of secondary boycott provisions of the Act, it must stay out of the subsidiaries' operations and decision-making, principally in the employment relations area. Common ownership does not per se establish "alter ego" status. *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 NLRB 303 (1970), *enf'd*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *Teamsters Local 379 (Catalano Brothers, Inc.*, 175 NLRB 459 (1969); *Miami Newspaper Printing Pressmen, Local 46*, 138 NLRB 1346 (1962), *enf'd*, 322 F.2d 405 (D.C. Cir. 1963).

The NLRB holds that where there exist two or more business enterprises and one entity exercises actual control over the others, there is but a single employer, regardless of corporate or legal form.

"Consumer Picketing" Exception. Under the Supreme Court's analysis of Section 8(b)(4) in *NLRB v. Fruit and Vegetable Packers Warehousemen Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), a union does not engage in a secondary boycott by placing pickets at the business site of a separate, secondary employer that sold the products of the primary employer, so long as the picket signs are directed at customers of the secondary employer and urge a boycott only of the primary employer's product, not the secondary employer itself. The Court since has narrowed the scope of permissible consumer picketing. If the primary employer's product constitutes such a large portion of the secondary employer's sales that the picketing will threaten the secondary employer with "ruin or substantial loss," the picketing runs afoul of Section 8(b)(4). *NLRB v. Retail Store Union Employees*, 447 U.S. 607 (1980) (where more than 90% of gross sales of secondary employers derived from sale of the primary employer's product, consumer picketing at the secondary employer's premises violates statute). In addition, an employer may terminate an employee advocating the boycott of the employer's products participating in events when there is no valid foregoing labor dispute. *George A. Hormel & Co. v. NLRB*, 962 F.2d, 1061 (D.C. Cir. 1992).

5. The Board's Reliance on the "Publicity Proviso".

Section 8(b)(4) contains a proviso which states: "[N]othing contained in (this) paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of the labor organization, that a product or products are produced by an employer within the labor organization as a primary

dispute and are distributed by another employer, . . . so long as the publicity does not have the effect of causing a cessation of work or refusal to deliver or transport goods."

The Supreme Court has rejected the Board's attempt to expand the scope of the publicity proviso. In *Edward J. DeBartolo v. NLRB*, 463 U.S. 147 (1983), the union distributed handbills urging a total boycott by customers of all tenants in a shopping mall. The union's primary dispute was with a construction firm with whom one of the tenants had contracted to build a major department store at the mall. The Board did not find that the petitioning owner and operator of the mall and the other tenants actually distributed any product "produced" by the construction firm. Nevertheless, the Board held that they had such a close and "symbiotic" relationship with the tenant who had contracted with the construction firm, that the union's hand billing should receive the protection of the proviso. The Supreme Court unanimously rejected the Board's expansive reading of the proviso, holding that the proviso cannot apply where the mall owner and other mall tenants at whom the boycott was directed had no business relationship with the construction firm and did not "sell any products whose chain of production can reasonably be said to include [that firm]." Because there had not been a determination that the hand billing falls within the secondary boycott prohibition of Section 8(b)(4) and if so, whether it was protected by the First Amendment, the Court remanded the case. On remand, the Board found the hand billing unlawful. *Bldg. Trades Council [DeBartalo Corp.]*, 273 NLRB 1431 (1985). The Board determined that appealing to the public not to patronize secondary employers was one attempt to inflict economic harm on the secondary employers, and constituted economic retaliation and coercion.

6. Trends in Union Access to Private Property.

a. Organizational Activity.

The Supreme Court has clarified an employer's obligation to give non-employee union organizers access to company property. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

The Court in *Lechmere* determined that the Board had failed to differentiate between the organizing efforts of employees and non-employees. The Court emphasized that the exception to the general rule, in which nonemployee access is granted, does not apply "whenever non-trespassory access to employees may be cumbersome or less-than-ideally effective." Rather, the exception only applies "where the location of a plant and the living quarters of employees place employees beyond the reach of reasonable union efforts to communicate with them." *Id.* (citing *Babcock and Wilcox*, 351 U.S. at 113). Then the Court announced "[b]ecause [Lechmere's] employees do not reside on Lechmere's property, they are presumptively not 'beyond the reach' of the union's message." (citation omitted) (emphasis added). *Id.* at 24.

Lechmere's holding, that employees not residing on company property are presumptively not beyond the reach of nonemployee union organizers, creates a major obstacle to organizing efforts. Furthermore, the Court's refusal to equate reasonable alternative access to employees with successful access should make this formidable presumption difficult to overcome. Clearly, the Court has rejected the Board's *Jean County* analysis in the context of non-employees' access to an employer's property for organizational purposes. *Lechmere* held applicable to area standards picketing. *Leslie Homes, Inc.*, 316 NLRB 29 (1995).