SIGNIFICANT ULP CASES IN 2023

by

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I have set forth below the significant ULP cases decided by the Board in 2023.

SECTION 8(a)(1)

Protected Concerted Activity

***American Federation for Children, Inc.*, 372 NLRB No. 137 (Aug. 26, 2023).**

The Board (McFerran, Wilcox, Prouty; Kaplan dissenting) reversed the judge's conclusion that an employee had not engaged in protected concerted activity by her advocacy among her fellow employees for the rehire of a former colleague.

The case primarily involved the efforts of Sarah Raybon, an employee of the Respondent, to enlist support from her colleagues in connection with the actions of a newly hired management official, Steve Smith. At the time of Smith's arrival, in early January 2019, the Respondent was in the process of facilitating the rehiring of Gaby Ascencio, a former employee of the Respondent who was valued by her colleagues and highly regarded by management. Not long after Smith's arrival, Raybon became concerned that Smith was jeopardizing Ascencio's pending reemployment. Later in January and February, Raybon raised these concerns with several coworkers, at times asserting in such conversations that Smith was "racist." On February 21, the Respondent's president, John Schilling, confronted Raybon based on reports from employees that Raybon had called Smith "racist." Schilling subsequently investigated the matter and, on February 25, decided to terminate Raybon and obtained a resignation letter from her.

Disagreeing with the judge, the Board majority found that Raybon had engaged in protected concerted activity by her advocacy for Ascencio's rehire. In so finding, the Board held, contrary to the judge, that Ascencio was an employee under established Board precedent holding that applicants are employees under the Act. Because Ascencio was an employee, the majority concluded, efforts taken by Raybon for Ascencio's benefit fell within Section 7's coverage of activities for employees' "mutual aid or protection."

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Alternatively, the majority held, even if Ascencio had not been a statutory employee, Raybon's advocacy for Ascencio was nonetheless protected by Section 7 because (1) this case implicated the well-established solidarity principle, whereby aid to a nonemployee may reasonably be expected to ultimately lead to some reciprocal benefit to employees; and (2) the Respondent's employees would likely have benefited from the reinstatement of a valued colleague whose work would have tended to benefit all of them.

In so holding, the majority reversed the Board's decision in *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019), *review denied per curiam sub nom. Jarrar v. NLRB*, 858 F. App'x 374 (D.C. Cir. 2021), which had held that advocacy for nonemployees—interns who worked alongside statutory employees, in that case—was not for "mutual aid or protection" of employees. According to the majority here, the *Amnesty* Board offered no reason for categorically ruling out the possibility that in helping nonemployees, employees can have the object of helping themselves in addition to the nonemployees. The majority further found no support for *Amnesty*'s holding in Board precedent, Supreme Court decisions, or policies of the Act.

Having found that Raybon engaged in protected concerted activity, the Board remanded the case to the judge to revisit an allegation that Raybon was unlawfully discharged in retaliation for such activity, which the judge had dismissed. In so doing, the Board stated that the judge may consider whether Raybon's accusation that Smith was "racist" was part of the broader sweep of Raybon's protected concerted activity, and whether a *Wright Line* analysis would be appropriate. The Board also remanded several other allegations dismissed by the judge—including Section 8(a)(4) retaliation after Raybon's discharge, threats, and other interference with Section 7 rights—that turned on whether Raybon had engaged in protected concerted activity or where the judge had otherwise failed to take account of relevant considerations.

Dissenting, Member Kaplan argued that *Amnesty International* did not apply here and, thus, the Board's overruling of that decision was nonprecedential dicta. Member Kaplan further argued that the Board had improperly departed from the General Counsel's theory of the case and that a remand was unnecessary. Finally, he would have found that the Respondent lawfully discharged Raybon for calling Smith a "racist" in conversations with colleagues.

***Capstone Logistics LLC and Associated Wholesale Grocers, Inc.*, 372 NLRB No. 124 (Aug. 22, 2023).**

The Board (McFerran, Wilcox, Prouty) unanimously adopted the judge's determination that the employer did not violate Section 8(a)(1) as to one employee and rejected that same finding as to a second employee. As to the second employee, the Board concluded, contrary to the judge, that the record supported two rationales for finding that she was unlawfully discharged: (1) she sent a LinkedIn message to

a customer to enlist support for an employee compensation matter, and (2) the employer believed that she engaged in a protected concerted conversation with its Director of Distribution.

The Board concluded that the second employee engaged in protected concerted activity by sending the LinkedIn message to a customer of the employer's partner to ask the partner to intervene with the employer on the employees' behalf concerning their pay, the logical outgrowth of prior concerted activity. The Board reasoned that employees have a Section 7 right to communicate with their employer's customers for Section 7-protected purposes and the LinkedIn message specifically complained about the employee's co-workers' pay, not just her own. Additionally, although there was no direct evidence that employer's VP knew about the employee's LinkedIn message when he decided to fire her, the Board concluded that the record warranted an inference of such knowledge based on compelling circumstantial evidence.

The Board further rejected the judge's conclusion that the employee's discharge was lawful because there was no evidence that the employee engaged in protected concerted activity in her meeting with the employer's Director of Distribution, which the judge concluded "more likely than not" led to her discharge. The Board reasoned that under extant Board law, even if an employee has not actually engaged in protected concerted activity, an employer violates the Act if it discharges an employee under the mistaken belief that they had. Here, the record supported a finding that the employer's belief that she had raised group concerns to the Director of Distribution during their meeting was a motivating factor in the employee's discharge, and the Board rejected the employer's contention that it would have otherwise fired the employee absent its belief that she engaged in protected concerted activity.

***Miller Plastic Products, Inc.*, 372 NLRB No. 134 (Aug. 25, 2023).**

The Board (McFerran, Kaplan, Wilcox, Prouty) adopted the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging an employee for raising concerns about the Respondent's COVID-19 protocols and its decision to remain open during the early stages of the COVID pandemic.

Around March 2020, the emerging pandemic was a frequent topic of conversation at the Respondent's plant in Burgettstown, Pennsylvania, which manufactures plastic storage products. One of the employees who engaged in such conversation was Ronald Vincer. On March 16, the day after Pennsylvania's governor announced the closure of nonessential businesses, the Respondent convened an all-hands meeting at the plant. At the meeting, the Respondent's Chief Operating Officer stated his belief that the Respondent would be classified as an essential business and outlined health and safety measures taken by the company. In response, Vincer asserted the Respondent lacked the proper precautions and that the employees should not be working. Other employees raised questions regarding

whether the Respondent qualified as an essential business. Subsequently, Vincer continued speaking with employees about pandemic-related concerns, and, on March 23, again raised concerns with the Chief Operating Officer. On March 24, the Respondent discharged Vincer.

In adopting the judge's conclusion that the Respondent violated Section 8(a)(1) by discharging Vincer, the Board unanimously agreed with the judge that Vincer's COVID-related complaints constituted concerted activity under extant law, including the Board's decision in *Alstate Maintenance, LLC,* 367 NLRB No. 68 (2019).

A Board majority (McFerran, Wilcox, Prouty), however, overruled *Alstate*. According to the majority, *Alstate* had cast aside the Board's holistic approach to determining whether activity is concerted, under which the Board thoroughly reviewed all record evidence to decide whether an individual employee's protest had "some linkage to group action." In its place, the *Alstate* Board adopted a checklist of factors that substantially narrowed the circumstances in which statements made by individual employees in front of their coworkers would be found concerted. Specifically, *Alstate* set forth five "relevant factors" that would tend to indicate that an individual's statement was concerted: (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

The majority here deemed these factors too restrictive and returned to the Board's traditional approach of examining the totality of the record evidence. In disagreement with Member Kaplan, the majority stated that contextual evidence arising after the alleged concerted activity, including whether an individual employee's remark sparks group action, is relevant to the determination.

Applying this standard to the facts of this case, the majority "easily" concluded that Vincer's conduct was concerted. His comments at the all-hands meeting were protected because they sought to bring "truly group complaints to the attention of management," and the group nature of the complaints was further evinced by other employees' voiced concerns at the meeting. The majority further noted that Vincer continued speaking to other employees about pandemic-related concerns after the meeting. Finally, Vincer's conversation with the Chief Operating

Officer on March 23 was concerted because it was a logical outgrowth of Vincer's group complaint on March 16.

Member Kaplan, concurring in the result, disagreed with the majority's decision to reach the holding in *Alstate*, which he viewed as nonprecedential dicta. He also contended that *Alstate* was correctly decided.

Loss of protection/setting-specific standards

Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023).

On remand from the Fifth Circuit, a Board majority (McFerran, Wilcox, Prouty; Kaplan dissenting) overruled the prior Board's decision in *General Motors LLC,* 369 NLRB No. 127 (2020), and returned to the long-established "setting-specific" standards applicable to cases where employees are disciplined or discharged for misconduct that occurs during activity otherwise protected by the Act.

Those setting-specific standards are: (1) the test in *Atlantic Steel*, 245 NLRB 814 (1979), which governs employees' conduct towards management in the workplace, and under which the Board considers (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee's outburst; and (d) whether the outburst was, in any way, provoked by an employer's unfair labor practice; (2) the totality-of-the-circumstances test, which governs social media posts and most cases involving conversations among employees in the workplace; and (3) the standard in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985), which governs picket-line conduct, and under which the Board considers whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.

According to the majority, a key premise of the setting-specific standards that the federal courts have accepted is the "fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses," and therefore misconduct in the course of Section 7 activity is appropriately treated differently than misconduct in the ordinary workplace setting that is unrelated to Section 7 activity. The *General Motors* Board broke sharply with settled precedent by replacing the setting-specific standards with the motive-focused *Wright Line* test, effectively shifting away from the Board and instead to the employer the right to determine whether certain employee conduct (undertaken during the course of otherwise protected activity) lost protection of the Act. Doing so erased the fundamental distinction between misconduct committed during protected activity and other misconduct. While the *General Motors* Board asserted, among other things, that the setting-specific standards prevented the Board from accommodating antidiscrimination statutes, the *Lion Elastomers* Board found that it failed to substantiate this concern, and its rationale was further undercut by the

fact that a violation might be found under *Wright Line* if an employer, with an improper motive, disciplines employees for conduct that may be contrary to antidiscrimination goals. The majority also rejected the proposition advanced by the *General Motors* Board that an employer should have complete freedom to police the "civility" of employees engaged in Section 7 activity as part of a labor dispute with the employer. According to the majority here, this proposition most obviously frustrates the Act's purposes where an employer disciplines or discharges an employee who was representing coworkers in collective bargaining or in a grievance proceeding, settings where the Act envisions the employee to be management's equal. In this respect, the majority concluded that the *General Motors* standard has the potential to chill all manner of Section 7 activity, lest an employee err in its exercise and run afoul of the employer-determined standards of conduct. The majority concluded the setting-specific standards reflected a better policy choice than adopting the *Wright Line* framework, and therefore overruled *General Motors*.

Consistent with its overruling of *General Motors*, the majority reaffirmed its original Decision and Order in *Lion Elastomers LLC*, 369 NLRB No. 88 (2020), which applied the *Atlantic Steel* test to find that the Respondent had violated the Act.

Dissenting, Member Kaplan would have adhered to *General Motors* and remanded the case to the judge.

***Serta Simmons Bedding*, 372 NLRB No. 115 (Aug. 4, 2023).**

The Board unanimously adopted the judge's conclusion that the Respondent violated Section 8(a)(1) by threatening to fire employees for engaging in protected concerted activity. A Board majority (Wilcox & Prouty; Kaplan dissenting) also adopted the judge's conclusions that the Respondent violated Section 8(a)(1) by (1) firing 13 employees for engaging in a protected in-plant work stoppage; (2) informing employees that they were fired because of their protected activity; and (3) summoning police to have employees removed from the Respondent's cafeteria for engaging in protected activity.

In the summer of 2020, the Respondent announced to its unrepresented employees that it was raising its starting wage for new hires by $2 per hour while providing smaller raises to incumbent employees. The announcement upset some incumbent employees because it meant that they would receive the same pay as new hires and the pay differential between long-term employees and new hires would shrink. In July, one of the incumbent employees, accompanied by two coworkers, asked the Respondent's Operations Manager to remedy the situation. Two weeks later, the Operations Manager informed the employee, in the presence of other employees, that there was no money for a raise.

On August 3 at about 9 a.m., 40 employees walked off the job and asked to speak with the Operations Manager about their pay. In response, a different Respondent official told the employees to "go back to work or you are fired." Half the group thereupon went to the Respondent's cafeteria to wait for the Operations Manager. After 11:15 a.m., the Operations Manager told the group in the cafeteria that the Respondent had decided to fire them, but they had one last opportunity to return to work. The Respondent thereafter terminated 13 employees who did not return to work, issuing them termination letters that stated they were fired for refusing to return to work. Afterwards, a Respondent official said she would call the police if the employees did not leave. The employees remained in place and repeated their demand to speak about their wages. Thereafter, around 11:30 a.m., the official called the police. A police officer arrived around noon, told the employees to leave, and the employees left the facility.

In affirming the judge's Section 8(a)(1) conclusions, the Board majority agreed with the judge that the employees' work stoppage did not lose the protection of the Act under *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), which sets forth 10 factors to consider in determining whether an on-the-job work stoppage retains its protection as balanced against the employer's property rights. The factors are: (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had an adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged or disciplined. The Board agreed with the judge's reasoning in finding that seven of the factors (1, 2, 3, 5, 8, 9, and 10) weighed in favor of protection but analyzed the three remaining factors differently.

First, the majority agreed with the judge that factor 4 (whether employees had an adequate opportunity to present grievances to management) was inconclusive, but on a different rationale. The majority assumed for purposes of its decision that, during the work stoppage, the Respondent informed the employees in the cafeteria that the Operations Manager would meet with employees individually but not as a group. The majority concluded that the Respondent's offer failed to accommodate the employees' Section 7 right to join together for the purposes of mutual aid and protection, and, under *Wal-Mart Stores, Inc.*, 364 NLRB 1729 (2016), factor 4 therefore neither supported nor detracted from protection. Further, the majority rejected the argument that the exchanges between the Operations Manager and a much smaller number of employees in July constituted an adequate opportunity to present grievances to management. Member Prouty separately noted his view that an employer should not be able to limit or extinguish employees'

otherwise protected Section 7 right to engage in an in-plant work stoppage simply because it said no to a previous employee demand on the same subject.

Second, in disagreement with the judge, the majority found that factor 6 (the duration of the work stoppage) weighed in favor of protection. The majority assumed for purposes of its decision that the Respondent did not fire the employees until 11:30 a.m., after a 150-minute work stoppage. In light of prior Board decisions finding on-the-job work stoppages of similar duration protected and the fact that, at the beginning of the stoppage, a Respondent official had unlawfully told employees to "go back to work or you are fired," the employees were entitled to persist for a reasonable period of time in their effort to meet as a group with the Operations Manager to resolve their wage protest. The majority distinguished cases in which employees had persisted in remaining on the property long after being offered the opportunity to concertedly present their grievances to their employer.

Third, in disagreement with the judge, the majority found that factor 7 (whether employees were represented or had an established grievance procedure) weighed in favor of protection because, under the Respondent's open-door policy, the Respondent would only meet with employees individually to discuss wage concerns.

Among other relief, the majority ordered a notice-reading remedy. Member Prouty noted that he would require that the notice be distributed to each employee present at notice-reading meetings to facilitate employee comprehension of the notice and enhance the remedial objectives of the notice reading.

Dissenting in part, Member Kaplan concluded that the work stoppage had lost the protection of the Act by the time the employees were discharged, and that therefore the Respondent's only violation was threatening to fire employees for engaging in protected concerted activities.

Severance Agreements

***McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023).**

A Board majority (McFerran, Wilcox, Prouty; Kaplan dissenting), overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a/ International Game Technology*, 370 NLRB No. 50 (2020), and restored prior Board precedent, which examined the facial language of proffered severance agreements to determine if that language restricts Section 7 rights, without regard to the commission of additional unfair labor practices or any other external circumstances.

The Board majority found that the employer violated Section 8(a)(1) by offering a severance agreement to 11 unit employees that contained provisions broadly prohibiting disparagement of the employer and requiring confidentiality about the terms of the severance agreement. Returning to Board precedent in place before *Baylor and IGT*, the Board majority focused on whether the language of the

proffered severance agreement on its face had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights. The Board concluded that *Baylor* and *IGT* were flawed and inconsistent with the NLRA in what it found to be an arbitrary adoption of a two-step analysis: (1) that the employer discharged the severance agreement recipient unlawfully or committed another unfair labor practice against employees, and (2) that the presence of employer animus is relevant in the analysis of whether the agreement itself is lawful. The Board majority reasoned that while the existence of exacerbating circumstances enhances the coercive potential of the severance agreement, its absence does not eliminate the potential chilling effect of an unlawful agreement. Additionally, the presence of animus is irrelevant to the long-established objective test for determining whether an employer violated Section 8(a)(1). Moreover, *Baylor* and *IGT* disregarded the well-established Board precedent that employees may not broadly waive their NLRA rights, which generally includes protection for communicating with third parties about ongoing labor disputes.

Applying its standard here, the majority found that the employer violated Section 8(a)(1) by proffering the severance agreement because the non-disparagement and confidentiality provisions on their face interfered with, restrained, or coerced employees in the exercise of their Section 7 rights and the agreement conditioned employees' receipt of severance benefits on their acceptance of those unlawful provisions.

Dissenting, Member Kaplan argued that the Board should retain the *Baylor* and *IGT* standard. Applying that precedent here, Member Kaplan concluded that the employer violated Section 8(a)(1) by proffering the severance agreement because the employer committed an additional Section 8(a)(5) and (1) violation in this case.

Threats of Reprisals

***Lush Cosmetics, LLC*, 372 NLRB No. 54 (Feb. 10, 2023).**

The Board (McFerran, Kaplan, Wilcox) unanimously found that the employer violated Section 8(a)(1) by issuing a letter to an employee who had made a series of protected posts to its non-public intranet site for employees. The employee's posts addressed organizing and working conditions. His final post, which addressed wages and union organizing and charged the employer with not paying employees, including immigrant workers, a livable wage, prompted the employer to issue him a letter advising him that his conduct in posting what it characterized as unsubstantiated allegations was not acceptable, and asking him to refrain from doing so in the future or the employer would consider his actions to amount to misconduct.

The Board concluded that the judge erred in treating the statements in the letter as unlawful work rules under the Board's then-current standard

in *Boeing* Co., 365 NLRB No. 154 (2017),[2] rather than as an unlawful threat of unspecified reprisal as was alleged. The Board explained that analyzing the statements in the letter under an allegedly unlawful threat of reprisal standard was consistent with the General Counsel's complaint and both parties' litigation at trial, adding that Board precedent distinguished "one-off" threats from generally applicable work rules. Thus, the applicable standard considers, under the totality of the circumstances, whether the statements in the employer's letter would have a reasonable tendency to coerce employees in the exercise of Section 7 rights as opposed to *Boeing*, which not only required an assessment of whether a neutral rule would in context be interpreted by a reasonable employee to potentially interfere with Section 7 rights, but also compel an evaluation of the nature and extent of the potential impact on NLRA rights as well as any legitimate justifications associated with the rule. The impact is not part of threat of unspecified reprisal standard, which is essentially an objective test. Thus, the Board concluded that the statements in the employer's letter—to the extent that they suggested that continued protected concerted activity would be treated as misconduct—had a reasonable tendency to coerce employees in the exercise of Section 7 rights.

Wage Increase During Organizing Campaign

CVS Pharmacy, 372 NLRB No. 91 (June 8, 2023).

The Board (McFerran, Wilcox, Prouty) unanimously affirmed the judge's decision that the employer violated Section 8(a)(1) and engaged in objectionable conduct by announcing and granting a wage increase during an organizing campaign at one of its stores. In light of this employer unfair labor practice and additional election objections, the Board set aside the results of the election and ordered a second election.

In *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), the Supreme Court held that an employer's conferral of benefits while a representation election is pending to induce employees to vote against the union unlawfully interferes with employees' protected right to organize. The Board will infer an improper motive absent an employer's showing of a legitimate business reason for the timing of the benefits during an organizing campaign. Applying that precedent, the judge here, as affirmed by the Board, concluded that the employer's wage increases announced during the organizing campaign would cause employees to reasonably view the wage increases as an attempt to interfere with their choice in the campaign. The employer was aware of the campaign and wages were an issue in the campaign. The judge further rejected the employer's defense that the raises at the store were tied to the employer's nationwide wage increases because the employer did not uniformly implement its nationwide wage increases. The employer gave some stores, including the one at issue in the campaign, higher increases than others—

[2] *Boeing* was in effect at the time of this decision before the Board subsequently overturned it in *Stericycle Inc.*, 372 NLRB No. 113 (Aug. 2, 2023).

what employer officials referred to as "union rates." Moreover, the employer failed to establish a legitimate reason for the timing of the wage increases. Thus, this unlawful conduct, coupled with meetings the employer held with the employees to announce the raises and ask what they could do better to support them in the store would cause employees to believe it was unnecessary to vote for the union because they were already granted "union rate" wages during the campaign.

Work Rules

***Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023).**

A Board majority (McFerran, Wilcox, Prouty; Kaplan dissenting) adopted a new legal standard for evaluating whether employer work rules that do not explicitly restrict Section 7 activity are facially lawful.

The new standard revises and builds on the standard from *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the new standard, a challenged rule is deemed presumptively unlawful, in violation of Section 8(a)(1), if the General Counsel proves that it has a reasonable tendency to chill employees' exercise of their Section 7 rights. The employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and the employer cannot advance that interest with a more narrowly tailored rule.

Under the new standard, the Board will interpret a work rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumptively unlawful, even if a contrary, noncoercive interpretation of the rule is also reasonable. Furthermore, the new standard will allow case-by-case consideration of the specific wording of a challenged rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe. The Board will also evaluate any explanations or illustrations contained in the rule regarding how the rule does not apply to Section 7 activity.

The Board's decision did not disturb the Board's long-established doctrines covering work rules that address protected solicitation, distribution, or insignia. However, in adopting the new standard, the Board overruled *Boeing Co.*, 365 NLRB No. 154 (2017), *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), and their progeny. Under the *Boeing*/*LA Specialty* standard, it was the General Counsel's initial burden "to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights." If the General Counsel satisfied her burden, the Board evaluated (i) "the nature and extent of the potential impact on NLRA rights," and (ii) "legitimate

justifications" associated with the rule. The rule's maintenance violated Section 8(a)(1) if the Board determined that the justifications were outweighed by the adverse impact on rights protected by Section 7. Furthermore, the Board placed rules into three categories: Category 1 (rules that, as a type, were always lawful to maintain); Category 2 (rules that warranted individualized scrutiny in each case); and Category 3 (rules never lawful to maintain).

The majority reasoned that the *Boeing*/*LA Specialty* standard was problematic because it permitted employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7. That standard failed to account for the economic dependency of employees on their employers and did not require employers to narrowly tailor their rules to further their business interests without unnecessarily burdening employee rights. The majority also rejected *Boeing*/*LA Specialty*'s categorical approach to work rules, under which certain types of rules were held to be always lawful to maintain regardless of how they were specifically drafted or what specific interests a particular employer cited as being furthered by the maintenance of those rules. The majority reasoned that this was an arbitrary and capricious approach to the analysis of work rules.

The majority remanded the case to the judge to allow the parties to present arguments and introduce any relevant evidence under the new standard.

Dissenting, Member Kaplan would have adhered to the *Boeing*/*LA Specialty* standard, which he believes struck a more appropriate balance between employee rights and employer interests than the majority's new standard.

SECTION 8(a)(3)

Darlington

***Quickway Transportation, Inc.*, 372 NLRB No. 127 (Aug. 25, 2023).**

A Board majority (Wilcox & Prouty; Kaplan dissenting) found the Respondent committed violations of Section 8(a)(1), (3), (4), and (5), in its response to an organizing campaign among its truck drivers working out of a terminal in Louisville, Kentucky. Most importantly, the majority found that the Respondent violated Section 8(a)(1), (3), and (5) by discriminatorily shutting down operations at the terminal and discharging the drivers without bargaining with the union over the decision.

The Respondent is a commercial motor carrier and part of a group of affiliated trucking companies that operates 17 terminals nationwide, for which The Kroger Company provides the majority of revenue. Starting in 2014, drivers at the Louisville terminal, who were unrepresented at the time, transported goods from a Kroger Distribution Center (KDC) in Louisville, alongside union-represented drivers employed by another carrier.

In June 2019, the union began an organizing campaign at the Louisville terminal. In the year that followed, the Respondent reacted to the campaign by, among other things, threatening employees with closure of the Louisville terminal if they selected the union as their representative, threatening employees that it would lose its contract with Kroger and be forced to discharge all the employees at the Louisville terminal if they selected the union, threatening to cease making contributions to employees' employee stock ownership plan accounts if they selected the union, threatening to take legal action against an employee because he filed an unfair labor practice charge, employing "union busters" from Labor Relations Institute and National Labor Relations Advocates, and segregating its drivers based at another terminal from the Louisville drivers to avoid the union "infect[ing]" the other drivers.

On June 22, 2020, the union won a mail-ballot election to represent the Louisville drivers. The Respondent thereafter continued to engage in anti-union conduct, but, after the Board denied a request for review in the representation proceeding on October 26, the Respondent agreed to begin bargaining. The parties met for a first bargaining session on November 19, wherein the union indicated it was adamant about maintaining the area standards set by the union's collective-bargaining agreement with the other carrier operating at the KDC. However, after the Respondent subsequently learned from inquiries by local television stations about a possible strike by the Louisville drivers, the Respondent obtained Kroger's permission to cease operations at the KDC. On December 9, the Respondent ceased operations at the Louisville terminal and discharged the drivers based there.

The Board majority reversed the judge and concluded that the Respondent violated Section 8(a)(3) and (1) under *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), by ceasing operations and discharging the drivers at its Louisville terminal for antiunion reasons and to chill unionism at its other terminals and at its affiliate companies in circumstances where such a chilling effect was reasonably foreseeable. The majority agreed with the judge that the Respondent's decision was motivated by union animus based on the Respondent's coercive response to the organizing campaign, additional conduct indicative of union animus, and the timing of the decision—only a few weeks after the first bargaining session, at which the union indicated its adamance about maintaining area standards, which the Respondent would have viewed as potentially disrupting its preferred business model. In disagreement with the judge, the majority concluded that the General Counsel had sufficiently established the Respondent's motive to chill unionism at other locations based on the aforementioned evidence of antiunion motivation, which indicated a disposition toward a second antiunion purpose to chill unionism at the Respondent's other terminals and affiliated companies, an inference that the Respondent believed that union activity was imminent at other locations, the geographic proximity of other Respondent or affiliate operations, and an inference that the Respondent would have known that employees at its other terminals would learn of its cessation of

operations at the Louisville terminal. The majority rejected as false and pretextual the Respondent's contention that it acted out of fear of catastrophic liability and damages from the potential strike raised in the media inquiries.

Because an employer's decision to close part of its business is not exempt from bargaining when the employer was motivated by antiunion reasons in violation of Section 8(a)(3), the majority concluded that the Respondent violated Section 8(a)(5) and (1) by failing to provide the union notice and an opportunity to bargain regarding its decision to cease operations at the Louisville terminal and discharge all the unit employees. The majority concluded that the Respondent also violated Section 8(a)(5) and (1) by failing to provide the union notice and an opportunity to bargain regarding the effects of that decision.

In light of the unfair labor practices discussed above, the Board majority reversed the judge and found that the General Counsel properly vacated and set aside two informal settlement agreements addressing prior allegations against the Respondent. The majority proceeded to analyze the allegations in the complaint covered by those agreements and concluded that the Respondent violated Section 8(a)(1) by, among other things, its pre-election threats, and independently violated both Section 8(a)(1) and (4) by threatening to take legal action against an employee because he filed an unfair labor practice charge. Additionally, the majority affirmed the judge's conclusion that the Respondent violated Section 8(a)(1) by coercively interrogating employees about their union activities. Finally, the Board unanimously reversed the judge's conclusion that the Respondent violated Section 8(a)(1) by condoning prior surveillance of employees' union activities and sanctioning further surveillance. Although Members Wilcox and Prouty dismissed the surveillance allegation based on *Resistance Technology*, 280 NLRB 1004 (1986), *enforced mem.*, 830 F.2d 1188 (D.C. Cir. 1987), which holds that an employer does not violate Section 8(a)(1) by instructing a manager or supervisor to engage in unlawful conduct, they expressed interest in reconsidering *Resistance Technology* in a future appropriate case.

To remedy the above unfair labor practices, the Board majority ordered, among other things, that the Respondent reopen and restore its business operations at the Louisville terminal as they existed on December 9, 2020, offer reinstatement to the unlawfully discharged unit employees to the extent that that their services are needed at the Louisville terminal to perform the work that the Respondent is able to attract and retain from Kroger or new customers after a good-faith effort, offer reinstatement to any remaining unit employees to any positions in its existing operations that they are capable of filling, with appropriate moving expenses, and place any unit employees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions in its existing operations that they are capable of filling.

Dissenting in most respects, Member Kaplan would have dismissed the entire complaint.

Inherently destructive conduct

***10 Roads Express, LLC*, 372 NLRB No. 105 (July 14, 2023).**

On a stipulated record, the Board (McFerran & Prouty; Wilcox dissenting) concluded that the Respondent did not violate Section 8(a)(5), (3), or (1) by withholding an interim wage increase from its represented employees that it implemented for its unrepresented employees following the union's refusal to accept the wage offer conditioned on the Respondent's unilateral discretion to reduce or eliminate the wage increase.

The Respondent hauls mail for the U.S. Postal Service and has five facilities in the Chicago region. Employees at three of those facilities are not unionized, while employees at the two other facilities have been represented by the union since 2020. In August 2021, during ongoing negotiations for an initial CBA, the Respondent notified the union that, given a labor shortage, its unrepresented Chicago region employees would receive a wage increase subject to downward adjustment as market conditions change. The Respondent offered the same increase to the union subject to the same condition of unilateral authority to reduce or eliminate it. The wage increase went into effect in late August for the unrepresented employees only. In a September status report email, the Respondent told its represented employees of its offer and that the "union continues to reject" it. In November, the parties agreed to an initial CBA, which required the Respondent to make a retroactive lump-sum payment, without interest, to represented employees to provide for the additional pay they would have received had the wage increase taken effect for them at the same time as for the unrepresented employees.[3]

The majority concluded that the Respondent's conduct did not constitute unlawful discrimination in violation of Section 8(a)(3) and (1) because the Respondent treated its represented and unrepresented employees equally and, moreover, the General Counsel failed to prove that animus against union or other protected conduct was a motivating factor in the Respondent's action. The majority rejected the argument that the Respondent's September email, which the majority viewed as accurately updating employees about negotiations, indicated antiunion animus. Further, the majority declined to adopt the General Counsel's proposed extension of the Board's *Great Dane* doctrine and hold that the Respondent's withholding of the wage increase only from represented employees was "inherently destructive" of Section 7 rights and unlawful regardless of antiunion animus. Citing *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), *enforcement denied on other grounds*, 662 F.3d 1235 (D.C. Cir. 2011), *on remand*, 362 NLRB 455 (2015), *enforcement denied on*

[3] The interest payments would have been included in a Board remedy.

other grounds, 861 F.3d 193 (D.C. Cir. 2017), the majority noted that the Board has recognized that an employer's withholding of an *existing* benefit from represented employees, while continuing it for unrepresented employees, is "inherently destructive" of Section 7 rights. The majority distinguished that situation from withholding a *new* benefit from represented employees while giving that new benefit to unrepresented employees (conduct that, absent an unlawful motive, is lawful under *Shell Oil Co.*, 77 NLRB 1306 (1948), and its progeny). However, the majority concluded that the distinction between new and existing benefits was irrelevant here because no benefit was withheld at all. Rather than withholding the wage increase from the represented employees, the Board concluded that the Respondent offered those employees the same benefit, on the same terms, that it gave to its unrepresented employees.

The majority also found that the Respondent did not unlawfully refuse to bargain in good faith in violation of Section 8(a)(5) and (1) by conditioning its offer of the interim wage increase on unilateral discretion to reduce or eliminate the wage increase. Rather than seeking complete discretion concerning wages, the Respondent only sought the right to adjust employees' wages above the previously set wage floor as an interim measure during first-contract bargaining, which eventually resulted in the represented employees receiving a lump-sum payment retroactive to the date the unrepresented employees started receiving the wage increase. In addition, the Respondent articulated specific reasons for seeking to retain discretion—namely, to address labor shortages and make adjustments as market conditions changed. Accordingly, the majority concluded the Respondent's conduct did not evince bad faith bargaining.

Dissenting, Member Wilcox would have found the Respondent violated Section 8(a)(5) and (1) because she viewed the Respondent's condition as a take-it-or-leave-it offer inconsistent with good faith bargaining. Because she would have found a violation under that theory, she found it unnecessary to pass on whether the Respondent also violated Section 8(a)(3) and whether to extend the Board's ruling in *Arc Bridges* and overrule *Shell Oil*. However, Member Wilcox indicated she would be open to reconsidering those decisions in a future appropriate case.

Wright Line

***Intertape Polymer Corp.*, 372 NLRB No. 133 (Aug. 25, 2023).**

The Board unanimously found that the Respondent violated Section 8(a)(3) and (1) by disciplining two employees because of their union activity—finding that a warning to shop steward Tremper and a disciplinary layoff to union committeeman Prucolli—were both unlawful.[4] In so doing, the Board declined the General

[4] Earlier discipline issued to employee Abbott and steward Tremper was severed, with the Board issuing a Notice to Show cause why those allegations should not be

Counsel's request to overrule *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), but a majority (McFerran, Wilcox, Prouty; Kaplan concurring in result) instead clarified *Tschiggfrie*.

For more than 40 years, the Board has applied the *Wright Line* framework where it is alleged that an employer has violated the Act by taking adverse action against an employee and the critical question is whether the adverse action was motivated by animus or hostility toward union or other protected activity. Under *Wright Line*, the General Counsel must first make a prima facia showing, based on direct or circumstantial evidence, that protected conduct was a "motivating factor" in the employer's decision. The elements typically required to sustain the General Counsel's initial burden are (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) animus against union or other protected activity on the part of the employer. Once that showing is made, the burden shifts to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct.

In *Tschiggfrie*, the Board had attempted, on remand from the Eighth Circuit, to respond to criticism of the *Wright Line* framework from that court and what it described as confusion in a number of the Board's decisions. The court had explained that under its precedent, "the General Counsel must prove a connection or nexus between the animus and the [adverse action]," and "proving '[s]imple animus toward the union is not enough." On remand, the *Tschiggfrie* Board declined to adopt the Eighth Circuit's formulation of the General Counsel's initial burden, explaining that the *Wright Line* framework "is inherently a causation test" and therefore "identification of a causal nexus as a separate element that the General Counsel must establish to sustain his burden of proof is superfluous." It also overruled several Board decisions "to the extent they suggest that the General Counsel necessarily satisfies his burden of proof under *Wright Line* by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity."

Here, the Board majority acknowledged that *Tschiggfrie* had caused significant confusion for parties before the Board. According to the majority, the *Tschiggfrie* Board had inadvertently led parties and judges to believe that the Board had raised the General Counsel's burden by unnecessarily overruling Board decisions that it mistakenly viewed as having lowered that burden—including cases that made clear that the General Counsel was not required to show any kind of

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remanded to the judge for further consideration under *Lion Elastomers*, inasmuch as those disciplinary measures were taken for conduct that occurred in the course of a meeting at which Tremper was representing Abbott in connection with Abbott's having raised a potential safety hazard in connection with the inspection of a machine that had caught fire earlier that morning, and which fire Abbott had extinguished.

particularized animus. The majority here clarified that *Tschiggfrie* did not change the General Counsel's burden of proof, but rather merely reaffirmed the principle, already embedded in the *Wright Line* framework, that the General Counsel is required to establish that protected activity was a "motivating factor" in an alleged unlawful employment action. The majority also clarified that where the evidence in the record as a whole supports a reasonable inference that protected activity was a "motivating factor" in the challenged employment action, the General Counsel is not required to produce separate or additional evidence of a connection or nexus between the employer's animus toward protected activity and the challenged employment action. Additionally, the General Counsel is not required to show that the employer harbored particularized animus toward an alleged discriminatee's own protected activity.

The Board declined the General Counsel's invitation to overrule *Electrolux Home Products*, 368 NLRB No. 34 (2019). In *Electrolux*, the Board held that although it may find in all the circumstances of a particular case that the General Counsel has carried her initial *Wright Line* burden based on a showing that an employer's proffered justification for an adverse action is pretextual, such a finding is not compelled. A majority here determined that the instant case did not implicate *Electrolux*, and thus there was no need to revisit that decision. Member Wilcox, however, would have revisited *Electrolux* and found it was wrongly decided.

Concurring in result, Member Kaplan agreed that *Tschiggfrie Properties* did not change the General Counsel's burden under *Wright Line* but deemed the majority's clarification neither necessary nor relevant to the holding in the case. Further, Member Kaplan would have taken the opportunity to clearly state that, consistent with the causation principles intrinsic to *Wright Line*, there must be some analytical outer limit to the generality of animus evidence.

SECTION 8(a)(5)

Information Requests

***John Gore Theatrical Group, Inc.*, 372 NLRB No. 114 (July 31, 2023).**

The Board (McFerran, Wilcox, Prouty) unanimously adopted the judge's finding that the employer violated Section 8(a)(5) and (1) by failing and refusing to furnish relevant information requested by the union. The Board rejected the employer's defense that it offered a nondisclosure agreement as an accommodation for its confidentiality interests because the employer could not establish that the confidentiality interest was legitimate and substantial.

The union requested the information here to ascertain whether the employer was diverting funds in violation of the collective-bargaining agreement. The Board held that the mere existence of a confidentiality agreement does not suffice to establish a legitimate confidentiality interest under Section 8(a)(5). The Board

further concluded that the information request did not encompass the language of its third-party confidentiality agreements.

Additionally, the Board rejected the Eeployer's argument that the information sought by the union was "sensitive" because the argument was untimely, and insufficient in that it relied on the employer's blanket conclusory description. Moreover, the union did not seek an audit but rather information in which theatrical productions the employer had an interest and the nature of that interest.

Finally, the Board agreed with the judge's finding that the employer failed to establish a confidentiality defense regarding non-public organizational information because it failed to substantiate its claim that the union tended to publicize private information. Member Prouty would not have relied on the judge's finding that the employer effectively held the non-public organizational information hostage to pressure the union to sign a confidentiality agreement.

***United States Postal Service,* 372 NLRB No. 110 (July 31, 2023).**

The Board (McFerran, Wilcox, Prouty) unanimously affirmed the judge's rulings, including that the employer violated Section 8(a)(5) by failing and refusing to provide information the union requested pursuant to the parties' collective-bargaining agreement.

The Board rejected the employer's defense that it had no obligation to provide the requested information because the union submitted its request to the employer's district office and the employer directed the union to instead submit its request to the employer's local offices. The Board applied long-standing precedent holding that an employer cannot avoid its statutory obligation to provide relevant information by suggesting that it can be obtained by another source or third party. The Board further reasoned that the employer did not articulate its concerns to the union about why the local offices would be better able to respond to the union's request nor did it timely offer to bargain with the union to reach a mutually-acceptable accommodation.

Unilateral Changes

***Metro Health, Inc., d/b/a Hospital Metropolitano Rio Piedras*, 372 NLRB No. 149 (Sept. 30, 2023).**

The Board (McFerran, Kaplan, Prouty), unanimously concluded that the employer violated Section 8(a)(5) and (1) by deciding to subcontract its Environmental Control Department services and lay off the entire bargaining unit without first bargaining with the union. The Board explicitly declined the General Counsel's request to overrule *MV Transportation*, 368 NLRB No. 66 (2019), which applies a contract-coverage standard for analyzing whether a collective bargaining agreement grants an employer the right to take certain actions unilaterally. Although Chairman McFerran and Member Prouty applied *MV Transportation* as

governing law for institutional reasons, Chairman McFerran noted that she continued to adhere to her dissent in that case while Member Prouty stated that he "would be open to reconsidering" *MV Transportation* in a future appropriate case.

Thus, applying *MV Transportation*, the Board majority (Chairman McFerran and Member Prouty) concluded that there was nothing in the collective-bargaining agreement that expressly gave the employer the right to subcontract or otherwise contract out bargaining unit work. Although under the contract-coverage standard, a contract need not "specifically mention" a managerial decision to cover it, there had been a clearer relationship between the contractual language and unilateral action in cases finding contract coverage than existed in this case. Moreover, as in *Regal Cinemas v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003), where the court concluded that general contract language did not cover the decision to subcontract out all unit work and "unilaterally extinguish the bargaining unit altogether," the decision to subcontract the entire Environmental Control Department was not a subset of any expressly conferred management right. Moreover, nothing in the contract suggested the parties understood it to authorize the employer to unilaterally subcontract the work of an entire department, nor did the parties' bargaining history or contemporaneous communications about the subcontracting decision support the employer's interpretation.

Member Kaplan likewise rejected the employer's contract-coverage defense but on a slightly different rationale. Member Kaplan relied on the facts that the contract did not clearly memorialize the employer's right to subcontract, nor did the employer demonstrate that the parties bargained about subcontracting.

Finally, in the absence of exceptions, the Board unanimously adopted the judge's conclusion that the union did not clearly and unmistakably waive its right to bargain over subcontracting.

***Troy Grove, Inc.*, 372 NLRB No. 94 (June 22, 2023).**

The Board (Wilcox, Prouty; Kaplan, dissenting in part) concluded that the employer violated Section 8(a)(5) and (1) by declaring impasse and threatening to unilaterally implement its pension fund proposal before reaching impasse, even absent evidence of implementation. The Board, including Member Kaplan, further concluded the employer violated Section 8(a)(1) by issuing (and then rescinding) layoff notices to two employees who had clocked out to serve as union observers at a ballot election count. The Board reversed the judge's finding that the layoff actions also violated Section 8(a)(3), since the layoff notices were rescinded before they took effect and therefore the Board concluded there was no adverse employment action, a necessary element of proof for a Section 8(a)(3) violation.

The Board majority concluded that an outstanding information request precluded impasse between the parties and therefore the employer had no right to unilaterally cease contributions to the pension fund. However, the employer declared during bargaining multiple times that the parties were at impasse on the

pension fund issue, said it would unilaterally cease pension fund contributions, and nothing in the record suggested that the parties met again or that the employer had any intent to continue negotiating over the pension fund issue. The complaint did not allege, and the Board did not conclude, that the employer ever ceased its pension fund contributions.

The Board majority concluded that the employer's actions were sufficient to constitute a Section 8(a)(5) violation even in the absence of evidence that the employer actually implemented its threatened unilateral change because they conveyed to employees that the employer no longer intended to deal with the union as their exclusive representative on the pension fund issue and would cause a reasonable employee to assume the unilateral change would be implemented. Moreover, the employer's actions sent a message to employees that it was dictating employees' terms and conditions of employment and they had no need for their union.

Dissenting, Member Kaplan disagreed with the majority that its holding was consistent with extant Board law, in particular, with the concept of lawful "hard bargaining" and with the Board's policy of encouraging free and full discussion during bargaining.

***Twinbrook OpCo, LLC*, 373 NLRB No. 6 (Dec. 28, 2023).**

On a stipulated record, the Board (McFerran & Prouty; Kaplan concurring) found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating shift differential payments for certain bargaining unit employees without giving the union notice or an opportunity to bargain.

The Respondent operates a unionized skilled nursing facility in Erie, Pennsylvania. At the time it commenced bargaining for an initial CBA with the union, the Respondent paid bargaining unit employees a shift differential for working the second or third shift—a practice in place when it bought the company, and which it continued without objection. While bargaining was ongoing, the Respondent unilaterally made shift differential payments more generous. (The General Counsel did not allege that unilateral conduct to be unlawful.) However, beginning with the second pay period after a CBA reached by the parties went into effect, the Respondent unilaterally eliminated shift differential pay for certain unit employees.

The Board found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating the shift differential payments—a mandatory subject of bargaining—for the employees without giving the union notice or an opportunity to bargain. Because the Respondent invoked several CBA provisions to justify its unilateral conduct, the Board determined that the correct framework for analyzing the Respondent's arguments was the "contract coverage" standard in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), which Chairman McFerran and Member Prouty applied here for institutional reasons, though Chairman McFerran

adhered to her partial dissent in that case and Member Prouty indicated openness to reconsidering the decision in a future appropriate case. Under that standard, the Board examines, in relevant part, whether the employer was privileged to act unilaterally because the unilateral act was "within the compass or scope" of contractual language or the union had clearly and unmistakably waived its right to bargain over the change. Here, the Board rejected the Respondent's arguments that various provisions of the CBA, which were silent about shift differential payments, either terminated the payments or entitled the Respondent to terminate them unilaterally. The Board further found that because the parties never mentioned shift differential payments during contract negotiations, the union did not waive its right to bargain over them. In this regard, the Board found that the mere presence of an "integration clause" in the CBA indicating that the CBA represented the entire understanding between the parties, which the parties entered into without discussion of its effect on shift differential payments or on another CBA article addressing wages, did not serve as a waiver by the union.

Member Kaplan, concurring in the result, wrote separately agreeing that the Respondent violated Section 8(a)(5) and (1).

***Wendt Corp.*, 372 NLRB No. 135 (Aug. 26, 2023) and *Tecnocap, LLC*, 372 NLRB No. 136 (Aug. 26, 2023).**

The Board overruled *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) on two separate bases on the same day in *Wendt* and *Tecnocap*. Taken together, *Wendt* and *Tecnocap* overruled *Raytheon* in its entirety.

First, in ***Wendt***, on remand from the D.C. Circuit, a majority of the Board (McFerran, Wilcox, Prouty; Kaplan concurring in the result) reaffirmed its prior finding that the employer violated Section 8(a)(5) and (1) by temporarily laying off 10 unit employees and determined that the layoff was not privileged by the employer's past practice under *Raytheon*.

The Board majority in Wendt overturned *Raytheon* to the extent that it dispensed with the Supreme Court's holding in *NLRB v. Katz*, 369 U.S. 736 (1962) and pre-*Raytheon* Board and court precedent holding that unilateral action cannot be justified if it was informed by a large measure of managerial discretion. The Board majority concluded that even if *Raytheon* was permissible under *Katz*, the Board would still have overruled *Raytheon* on this basis because it undermined collective-bargaining and thereby failed to serve the Act's policies that were better served by pre-*Raytheon* Board law.

Further, the Board majority overturned *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019), explaining that while that case upheld *Katz's* regularity requirement that the party asserting a past practice bears the burden of proving that the practice occurred with sufficient regularity and frequency that employees could expect it to reoccur on a consistent basis, *Mike-Sell's* was wrongly decided in its factual application of that standard, as set forth in Chairman McFerran's dissent

in *Mike-Sell's*. The *Wendt* majority further explicitly declined to overturn *Raytheon's* holding that a past practice permitting unilateral action may be established pursuant to an expired management-rights clause because *Wendt* did not involve a management-rights clause.

Finally, as an alternative basis for its holding, the Board majority in *Wendt* reaffirmed prior Board precedent holding that an employer can never defend a unilateral change by invoking a past practice that was developed before the union represented the employees.

Concurring in the result, Member Kaplan found the layoffs at issue in *Wendt* to be unlawful because the employer failed to meet its burden to establish that it had a past practice that privileged it to act unilaterally. However, he would not have overruled *Raytheon* or *Mike-Sell's*, finding those cases to be beyond the scope of the D.C. Circuit's remand and correctly articulated the Board's past practice standard.

Second, the Board majority in ***Tecnocap*** (McFerran, Wilcox, Prouty; Kaplan, dissenting) reaffirmed the principles of *Wendt* and *Katz* and reached the issue it had explicitly declined to decide in *Wendt*, overturning *Raytheon's* holding that a past practice permitting unilateral action may be established pursuant to an expired management-rights clause or other clause authorizing discretionary unilateral employer action. The Board majority rejected the judge's finding that the employer was privileged to unilaterally implement 12-hour and 11-hour shifts following the expiration of a collective-bargaining agreement based on expired contract language giving the employer the discretion to adjust shifts that did not further state that the provision survived the contract's expiration. In overturning *Raytheon* on this basis, the Board majority explained that it was guided by three fundamental principles: adhering to *Katz*, being mindful of long-settled Board precedent disfavoring and prohibiting unilateral conduct, and the importance of collective-bargaining that is at the core of the Act.

Dissenting, Member Kaplan argued that *Raytheon* was well-supported and consistent with *Katz* and would have applied *Raytheon* to affirm the judge's finding that the employer acted consistent with an established past practice of adjusting employees' shifts.

Remedies

Columbus Electric Cooperative, Inc., 372 NLRB No. 89 (June 8, 2023).

The Board (McFerran, Wilcox, Prouty) unanimously adopted the judge's conclusions that the employer violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith during first contract negotiations and failing and refusing to furnish the union with requested information about its subcontracting.

With regard to bad faith bargaining, the Board agreed with the judge's reliance upon the following: failure to timely respond to requests to begin bargaining; insistence on recording the parties' first bargaining session; refusing to bargain pending resolution of certain union unfair labor practice charges; making proposals that deprived the union of a representative role, such as a broad management rights clause and no strike provision and reserving to the employer final authority on adverse employment actions, thereby precluding independent review by an arbitrator; making regressive bargaining proposals; making and failing to revise inconsistent and incorrect proposals and refusing to furnish the union with certain information. The Board further concluded that given the bad faith finding, the parties did not and could not reach a valid impasse. To the extent the respondent cited the Board's decision in *George Washington University Hospital*, 370 NLRB No. 118, the Board found it and other cases cited by respondent factually distinguishable from the instant case.

In addition, the Board agreed with the judge and cited *Caterair International*, 322 NLRB 64 (1996) in ordering that an affirmative bargaining order was warranted to remedy the respondent's unlawful conduct. The Board did observe that the D.C. Circuit has required that the Board justify in each case the imposition of such an affirmative bargaining order. *See Vincent Industrial Plastics v. NLRB*, 209 F 3d, 727, 738-40 (D. C. Cir. 1997). The Board recognized that in Vincent, the D.C. Circuit required that justification of an affirmative bargaining order include a balancing of three considerations: (1) employees' Section 7 rights; (2) whether other purposes of the Act override the right rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations found. Despite its disagreement with the D.C. Circuit, the Board noted that in the instant case, an affirmative bargaining order was necessary to remedy the rights of unit employees who were denied the benefits of collective bargaining in the instant case. The Board also found that the imposition of an affirmative bargaining order, along with which goes a bar to raising a question concerning representation for a reasonable amount of time would not unduly prejudice the Section 7 rights of employees who may oppose the union inasmuch as the affirmative order is no longer than reasonably necessary to remedy the violation here. Second, the Board found that an affirmative bargaining order in this case would foster meaningful bargaining and industrial peace and remove the respondent's incentive to delay bargaining in the hope that union support will erode. It further ensures that the union will not feel pressured to achieve immediate results following the Board's resolution of its unfair labor practice allegations. Finally, the Board found that a cease and desist order, alone, would be insufficient as it would permit a challenge to the union's majority status before the taint of the respondent's unlawful conduct had been dissipated and before employees had a reasonable chance to regroup and bargain through their representative in an effort

to reach a first contract and the imposition of an affirmative bargaining order shows employees that their rights will be protected. A bargaining order was particularly appropriate here where the employer's unlawful conduct would likely have a continuing effect for a period of time after a cease-and-desist order, since employees were not privy to the employer's unlawful actions and would thus likely blame the union for the lack of bargaining progress.

In addition, the Board ordered a 12-month extension of the certification year pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962).

Member Wilcox noted that she "would consider revising the Board's framework for analyzing union requests for nonunit information in a future appropriate proceeding."

***Noah's Ark Processors, LLC d/b/a WR Reserve,* 372 NLRB No. 80 (Apr. 20, 2023).**

The Board (McFerran, Kaplan, Prouty) unanimously concluded that the employer violated Section 8(a)(5) and (1) by bargaining in bad faith in the most recent negotiations and implementing its final offer in the absence of a valid impasse. Because of the employer's history of violations prior to the instant case—including engaging in multiple violations of the Act, losing a Section 10(j) proceeding, and being found in contempt of court—the Board majority (McFerran and Prouty; Kaplan, dissenting in relevant part), ordered special remedies in this case. Additionally, although the Board will continue to evaluate the nature, severity and extent of a respondent's violations in each case when determining an appropriate remedial order, the Board majority listed the following potential remedies that it will consider where a broad order may be appropriate:

- Explanation of Rights;
- Notice/ Explanation of Rights reading;
- Notice/ Explanation of Rights mailing;
- Presence of supervisors/ managers at the notice/ Explanation of Rights reading;
- Notice signing (including by the person who bears significant responsibility in the respondent's organization);
- Publication (of the notice and any explanation of rights document in a local publication of broad circulation and local appeal);
- Extended posting of the notice and Explanation of Rights (beyond the Board's standard 60-day notice posting); and
- Visitation (which permits the Board inspection– e.g., of a bulletin board or records -- and taking statements from individuals to ensure compliance occurred).

Given the egregious circumstances here, in addition to the remedies ordered by the judge, the Board ordered most of the remedies listed above, with the

exceptions of publication and the presence of supervisors at the reading of the notice and explanation of rights.

Dissenting in part, Member Kaplan disagreed with most of the extraordinary remedies ordered in this case and argued that the majority's opinion amounts to an improper advisory opinion, giving litigation advice to the General Counsel on what extraordinary remedies she might seek in future cases and implicitly encouraging her both to seek them and to do so more frequently. According to Member Kaplan, the majority's "treatise" on extraordinary remedies was also unnecessary since remedies will continue to be determined on a case-by-case basis.

SECTION 8(b)(1)(A)

Union Silence During Unlawful Employer Threat

National Rural Letter Carriers Association (USPS), 372 NLRB No. 52 (Feb. 13, 2023).

The Board (Wilcox, Prouty; Kaplan, dissenting) concluded that the union steward did not violate Section 8(b)(1)(A) by failing to actively disapprove of a supervisor's unlawful threat of discipline in their joint meeting with an employee.

The supervisor called the employee into a meeting. On the way to the meeting, the steward explained to the employee that it was one "we" just decided to do, presumably meaning the steward and supervisor. In that meeting, both the steward and supervisor warned the employee to stop leaving her mail sorting case to talk with co-workers about the union or the employer's new work rule. After the employee refused, the supervisor said that she would be disciplined if she did not remain in her mail sorting case and stop discussing co-worker problems or ongoing conditions at the worksite. The steward remained silent during this exchange. After the meeting, the steward privately told the employee that the employer had every right to tell her to discuss these matters off of the workroom floor.

The Board majority concluded that the union did not violate Section 8(b)(1)(A) because the record did not support that the steward ever threatened the employee explicitly or by implication, or that the steward acted in concert with the supervisor or otherwise adopted the supervisor's explicit threat. The Board reasoned that the steward's silence alone was insufficient to communicate either an implicit threat or adoption of the supervisor's threat because a reasonable listener could have several objective interpretations of what the silence meant. The Board rejected the dissent's suggestion that the steward had an obligation to disagree with the supervisor or disabuse the employee of any concern that she was siding with management to avoid the employer's unlawful threat being attributable to the union, particularly here involving a threat of discipline in a single meeting. The Board majority pointed out that there is no precedent concluding that a union agent's "mere disapproval" of employee protected activity constitutes a threat. Additionally, the Board majority reasoned that the steward's statement that "we"

decided to set up the meeting is open to multiple reasonable interpretations, including that they only recently set up a spur-of-the-moment meeting. Further, the steward's post-meeting statement was an accurate description of the employer policy—even though this was not consistently enforced—and the caselaw distinguishes between accurate observation and coercive, baseless speculation.

Dissenting, Member Kaplan argued that any objective listener in the employee's position would have believed that the steward threatened her with unspecified reprisals during and after the meeting. He opined that when viewed in context, any reasonable employee would understand that the union agreed that the unlawful discipline would be proper, and that it would not support the employee should she be disciplined.

SECTIONS 8(b)(4)(D) and 10(k)

***Operating Engineers, Local 14-14B (Tishman Construction Corp.)*, 372 NLRB No. 65 (Mar. 10, 2023).**

Tishman Construction Corporation (Tishman) had filed a charge in this Section 10(k) proceeding alleging that the union violated Section 8(b)(4)(D) by picketing a construction site with the object of forcing Tishman to assign hoist work to employees represented by the union rather than a non-union subcontractor. The Board (McFerran, Wilcox, Prouty) found that this case was not appropriate for resolution under Section 10(k) and quashed the notice of hearing.

For more than 40 years, Tishman had been a member of a multiemployer association with a CBA with the union that gave the union jurisdiction over the operation of cranes and hoists. However, Tishman withdrew from the CBA in 2017. In October 2021, Tishman contracted with Long Island Concrete (LIC) to build the concrete superstructure at a construction site. LIC was bound by a CBA with the union, and, accordingly, a union member operated the crane at the construction site. Although that CBA also gave the union jurisdiction over the operation of hoists, the subcontracting agreement between Tishman and LIC specified that Tishman, not LIC, retained the right to operate the hoist at that site and by explicit terms denied the work to the union. Tishman assigned the hoist's operation to an employee unaffiliated with the union, which led union members to stop work and picket at the site until Tishman agreed to let a union member operate the hoist.

The Board found that the evidence failed to establish a traditional jurisdictional dispute between two rival groups of employees claiming the same work, with an employer caught in the middle. Rather, the Board concluded that Tishman had created a work preservation dispute by inserting a provision in its contract with LIC that explicitly denied the work to the union, in tension (if not direct conflict) with LIC's collective-bargaining obligation with the union. Thus, the Board found that the conduct did not give rise to a jurisdictional dispute within the meaning of Section 10(k) and Section 8(b)(4)(D).

***Teamsters Local 631* (*Freeman Expositions, Inc.*), 372 NLRB No. 57 (Feb. 23, 2023).**

The Board (McFerran, Kaplan, Wilcox) unanimously resolved this Section 10(k) jurisdictional dispute by concluding that there was reasonable cause to believe that Section 8(b)(4)(D) was violated and awarded the disputed work of installing monitor brackets to trade show structures for the mounting of flat screen display monitors to employees represented by IBT Local 631.

In reaching this conclusion, the Board found that a threat from IBT Local 631 to the employer that it would "take all necessary action to oppose [the employer's assignment of the disputed work to IBEW Local 357], including by picketing the jobsite or other economic action as necessary" constituted a proscribed means of enforcing claims to disputed work under the Act. The Board concluded that absent evidence that the threat was a sham or the product of collusion, a threat establishes reasonable cause to believe that the statute was violated. Here, no such evidence was presented. Although a no-strike agreement was in effect, a no-strike agreement does not constitute evidence that the threat was a sham or product of collusion.

***United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 375 (Wolf Creek Federal Services, Inc.)*, 372 NLRB No. 153 (Oct. 26, 2023).**

Wolf Creek Federal Services, Inc. (Wolf Creek) filed a charge alleging that Local 375 violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity—specifically, the filing of an ERISA lawsuit through the Alaska Local 375 Trust Funds (Trust Funds)—with an object of forcing Wolf Creek to assign certain work to employees represented by Local 375 rather than to employees represented by other unions. The Board (McFerran, Kaplan, Prouty) found that this case was not appropriate for resolution under Section 10(k) and quashed the notice of hearing sua sponte (in the absence of a formal motion to quash by Local 375).

Wolf Creek and each involved union were parties to collective-bargaining agreements covering work at two military installations at Fort Greely, Alaska. In 2021, a trustee of the Trust Funds, who also served as a union official for Local 375, commissioned an external audit that identified 24 Wolf Creek employees represented by the non-Local 375 unions who may have performed work within Local 375's jurisdiction and estimated the value of delinquent contributions owed by Wolf Creek. In 2022, a second trustee of the Trust Fund, who also served as a union official for Local 375, filed an ERISA lawsuit in federal district court claiming the delinquent contributions.

The Board found that the conduct did not give rise to a jurisdictional dispute within the meaning of Sections 10(k) and 8(b)(4)(D) because the record evidence did not support a finding that the Trust Funds were acting as agents of Local 375 in filing the ERISA lawsuit. The Board applied *NLRB v. Amax Coal Co.*, 453 U.S. 322

(1981), wherein the Supreme Court held that the trustees of jointly administered trust funds are not agents of their respective parties but are fiduciaries whose duty to the trust beneficiaries overrides any loyalty to the interest of the party that appointed them. Consistent with *Amax Coal*, the Board proceeded from the premise that the trustees were not acting for Local 375, absent contrary evidence. The Board found such evidence lacking. First, the applicable collective-bargaining agreements did not remove the trustees' discretion to administer the Trust Funds for the benefit of employees. Second, the mere fact that the trustees also served as union officials for Local 375 did not establish that their actions were directed by union officials. Finally, the record evidence did not establish that the trustees' actions were taken in their capacities as union officials rather than as trustees because there was no indication the lawsuit would not benefit the Trust Funds' beneficiaries even if it would also benefit Local 375. Accordingly, the Board quashed the notice of hearing.

Miscellaneous

Adverse Inferences

***Bannum Place of Saginaw*, 372 NLRB No. 97 (June 27, 2023).**

The Board (Kaplan, Wilcox, Prouty) unanimously adopted the judge's findings as to backpay owed to two discriminatees in this supplemental proceeding. Member Kaplan observed that it was not readily apparent from the judge's decision whether she drew any adverse inferences with respect to the backpay findings and advised that in future cases "it would be helpful to the Board and parties for judges to state specifically when they are drawing adverse inferences and the reasons therefor."

Effect of prior charge dismissal

***United States Postal Service*, 372 NLRB No. 119 (Aug. 15, 2023).**

The Board (McFerran, Wilcox, Prouty), in the absence of exceptions, unanimously adopted the judge's decision that the employer violated Section 8(a)(3) and (1) as of July 26, 2021, by limiting the discriminatee's work schedule to part-time. However, the Board further unanimously rejected the judge's evidentiary ruling effectively precluding consideration of evidence that the employer failed to provide the discriminatee with a full-time work schedule from approximately ten months earlier, as had been alleged in the complaint. The Board accordingly ordered the employer to remedy the violation as of October 7, 2020.

The Board held that the judge had erred in refusing to consider record evidence submitted in this case by the General Counsel that the discriminatee was cleared to work a full-time schedule with appropriate assignments as of October 7, 2020, and that application of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), warranted a conclusion that the employer violated Section 8(a)(3) and (1) from the additional period of October 7, 2020 through July 26, 2021.

In reaching his evidentiary conclusion, the judge relied on the Regional Director's October 9, 2020 dismissal of a charge in a separate case alleging the employer discriminated against the discriminatee by not providing her with limited duty assignments, explaining that it was reasonable to conclude that the discriminatee had provided all relevant documents supporting her claim for that period and that the Regional Director had properly considered all of the evidence. The judge also noted that the discriminatee failed to appeal the dismissal. The Board found that the judge's conclusion was an abuse of discretion because it ran counter to Board law that dismissal of a charge is not an adjudication, and that the General Counsel is not precluded from proceeding on a timely-filed charge even though a prior charge involving the same issue had been administratively dismissed.

The Board therefore considered the additional evidence that the judge had erroneously excluded and applied *Wright Line* to conclude that the employer had also violated Section 8(a)(3) and (1) by refusing to provide the discriminatee with a full-time schedule from October 7, 2020 through July 26, 2021.

Independent contractors

***The Atlanta Opera, Inc.*, 372 NLRB No. 95 (June 13, 2023).**

The Board (McFerran, Wilcox, Prouty; Kaplan dissenting in part and concurring in part) revised its approach to assessing whether workers are employees covered under Section 2(3) of the Act or, instead, are independent contractors excluded from coverage.

The Board reinstated the framework set forth in *FedEx Home Delivery*, 361 NLRB 610 (2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017). Under that framework, the Board will assess "all of the incidents of the relationship" between the worker and the putative employer "with no one factor being decisive." Specifically, the Board will evaluate all relevant, traditional common-law factors, including the ten factors identified in Section 220 of the Restatement (Second) of Agency, along with whether the evidence tends to show that the worker is, in fact, rendering services as part of an independent business. The foregoing framework involves a qualitative assessment of which factors are determinative in a particular case and why. As before, the party asserting that workers are independent-contractors has the burden of proving independent-contractor status.

In conducting the independent-business analysis, the Board will consider not only whether the worker has a significant (and not merely theoretical) entrepreneurial opportunity, but also whether the worker: (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in their work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital. In performing this analysis, the

Board will consider evidence that the employer has effectively imposed constraints on a worker's ability to render services as part of an independent business.

By reinstating the *FedEx* standard, the Board overruled, among other things, the standard articulated in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). In *SuperShuttle*, the Board had overruled *FedEx* and announced that it would evaluate the common-law factors "through the prism of entrepreneurial opportunity" when appropriate in a given case.

The majority here found *SuperShuttle* inconsistent with the mainstream of Board law, as well as the common law of agency and Supreme Court precedent, which bind the Board. Significantly, in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the Court held that the Act incorporated the common-law agency test for distinguishing an employee from an independent contractor and explained that "no shorthand formula or magic phrase" may be applied to find the answer. According to the majority here, the *SuperShuttle* Board adopted the kind of "shorthand formula" that the common law and *United Insurance* expressly reject.

Applying the reinstated *FedEx* standard, the Board found that the workers at issue—makeup artists, wig artists, and hairstylists who styled characters in the employer's opera performances—were employees under Section 2(3) of the Act and not independent contractors.

Member Kaplan agreed that the workers at issue were statutory employees but would have adhered to the standard set forth in *SuperShuttle*.

Subpoenas/Pre-Trial Discovery

Starbucks Corporation, 372 NLRB No. 147 (Sept. 29, 2023).

The Board (McFerran, Kaplan, Prouty) granted the Respondent's Request for Special Permission to Appeal the judge's order denying petitions to revoke three subpoenas but denied the appeal on the merits.

The judge had ruled that: (1) the Respondent should produce its "Petition Store Playbook" or have its custodian(s) of records available to testify concerning the Respondent's search for responsive documents; (2) if the Respondent elected to produce documents in TIFF+ format, it must do so at least 4 business days before the unfair labor practice hearing resumes; and (3) the General Counsel properly served a subpoena ad testificandum.

The Board found that the Respondent failed to establish that the judge abused her discretion. Addressing the judge's ruling pertaining to the production of Electronically Searchable Information (ESI), the Board emphasized that it was within the judge's broad discretion, granted by the Board's Rules and Regulations, to require the Respondent's subpoena responses to be made at a time and in a

format that is reasonably usable at the start (or, as here, the resumption) of the hearing. The Board rejected the Respondent's contention that the judge's ruling required the Respondent to engage in pretrial discovery. The General Counsel credibly explained that documents produced in TIFF+ format are not reasonably usable until they are processed through a third-party vendor, and further explained that the NLRB's vendor was unable to make TIFF+ files available for use in fewer than 2 or 3 days. Accordingly, the Board found that the judge did not abuse her discretion in requiring that documents produced in TIFF+ format be produced a reasonable number of days before the resumption of the hearing.

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ADDENDUM:

SIGNIFICANT R-CASE DECISIONS IN 2023

Signaling Future Reconsideration of Mixed Guard Units: The Board (McFerran, Kaplan, Wilcox) unanimously denied the Party In Interest union's request for review of the Regional Director's denial of its motion to intervene, noting that the Party in Interest had not asked the Board to reconsider or overrule *University of Chicago*, 272 NLRB 873 (1984), and the union's arguments were otherwise unpersuasive. The Board added that Chairman McFerran and Member Wilcox "would be open to reconsidering *University of Chicago* [which held that a mixed guard-nonguard union may not participate in a Board-conducted election as a petitioner or intervenor] in a future appropriate case." ***AEG Management Nassau, LLC*, 29-RC-314048 (May 3, 2023).**

Certifiability of Mixed-Guard Unions: The Board (McFerran, Kaplan, Wilcox) unanimously reversed the Regional Director's decision to dismiss the union's petition to represent a unit of guards because the union already represents employees whom the employer contended were not guards. To protect the right of employee guards to union representation, the Section 9(b)(3) proviso must be read to require the party asserting the noncertifiability of a guard unit to prove it by "definitive evidence." Here, because the represented unit of ostensible nonguard employees perform some guard-like duties and have some guard-like responsibilities, the employer had failed to establish, by definitive evidence, that those employees were not guards. Member Kaplan agreed the Director's dismissal of the petition was in error, noting that the Board does not allow collateral attacks on the guard status of "close call" employees to establish noncertifiability of a union under Section 9(b)(3). ***Universal Protection Srvc., LLC d/b/a Allied Universal Sec. Srvcs.,* 373 NLRB No. 3 (Dec. 13, 2023).**

Union Statements: The Board majority (McFerran, Prouty; Kaplan dissenting) denied the employer's request for review of the Regional Director's decision that overruled, without a hearing, an employer objection. The employer objected to the judge's finding that an alleged statement by the union president—that if the employees voted against union representation he would "hire lawyers and file a lawsuit" and that the union would eventually prevail—would not be viewed by a reasonable employee as either threatening or a "message of futility." The Board majority concluded that the statement is a permissible forecast of the union's legal options, and the Board does not probe into the truth of parties' campaign statements. The Board majority further rejected the employer's argument that employees would reasonably believe that the union was implicitly threatening to

force recognition on the employer and disagreed with Member Kaplan that the majority's denial of review relied on an assumption that employees possess the legal savvy to differentiate between employer and union campaign statements about voting. ***Coway USA, Inc***., **372 NLRB No. 145 (Sept. 29, 2023).**