I have set forth below the significant ULP cases decided by the Board in 2020.

LEAD CASES

**General Motors LLC, 369 NLRB No. 127 (July 21, 2020).**

The full Board (Ring, Kaplan and Emanuel) overruled the setting-specific standards for determining whether an employee may be lawfully disciplined for abusive conduct in the course of otherwise-protected activity set forth in Atlantic Steel Co., 245 NLRB 814 (1979), Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984), enforced mem., 765 F.2d 148 (9th Cir. 1985), and Pier Sixty, LLC, 362 NLRB 505 (2015), enforced, 855 F.3d 115 (2d Cir. 2017). Instead, the Board will now apply the burden-shifting framework established in Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), approved in NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983), and will do so retroactively.

Prior to this case, the Board assumed that abusive conduct in the context of protected activity was part of the res gestae of that activity, rendering a mixed motive analysis under Wright Line unnecessary. In other words, abusive conduct was considered analytically inseparable from the Section 7 activity. This precedent was based on the view that employees should be permitted some leeway for impulsive behavior when engaged in concerted activity, and the accommodation of such behavior should be balanced against an employer's right to maintain order and respect. The Board therefore applied setting-specific standards for determining whether an employee's conduct in the course of Section 7 activity was abusive enough to lose the protection of the Act. For outbursts during discussions with management, the Board applied the four-factor analysis of Atlantic Steel, which weighed the place of the discussion, the subject matter, the nature of the outburst, and any provocation; for conduct on the picket line, the Board applied the Clear Pine Mouldings test of whether nonstrikers would have been reasonably coerced; and for social media posts and coworker discussions, the Board examined the totality of the circumstances under Pier Sixty.

Here, the Board overruled those prior standards, holding that nothing in the Act can be read as "intending any protection for abusive conduct from nondiscriminatory discipline." In the Board's view, those standards undervalued employers' right to maintain order and respect, failed to yield predictable, equitable

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results, and were in tension with employers’ legal obligation to maintain a workplace free from invidious discrimination. The Board rejected the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful. Indeed, the Board observed that employees can and do engage in Section 7 activity in a civil manner, and that it is reasonable for employers to expect employees to do so. Accordingly, the Board determined that abusive conduct (e.g. a profane ad hominem attack or racial slur) is unprotected and is differentiable from Section 7 activity. Once it is recognized that these are severable, the causal connection between the protected activity and adverse action is properly in dispute.

Accordingly, where an employer asserts that discipline was motivated by abusive conduct in the course of protected activity—be it on the shop floor, the picket line, or the internet—the Board will apply the familiar *Wright Line* framework to determine whether the employer violated Section 8(a)(1) or (3). Thus, the General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity which must be proven with evidence sufficient to establish a causal relationship between the discipline and the protected activity. Once the General Counsel’s initial burden is met, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of Section 7 activity. The Board reinforced that this test presupposes that the employee actually engaged in misconduct; if not, a different standard applies, *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

Finding that *Wright Line* should apply in such cases retroactively, the Board remanded the case to the ALJ to reopen the record to hear evidence relevant to that inquiry and apply the new standard. Specifically, the ALJ will reconsider whether a Union committeeperson was lawfully suspended for a profanity-laced exchange with management about overtime coverage as well as for mockingly acting a caricature of a slave during a subcontracting meeting. *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (May 29, 2020).

The full Board (Ring, Kaplan and Emanuel) overruled the standard for distinguishing solicitation from mere “union talk” articulated in *Wal-Mart Stores*, 340 NLRB 637 (2003), *enforcement denied in relevant part*, 400 F.3d 1093 (8th Cir 2005), and *ConAgra Foods, Inc.*, 361 NLRB 944 (2014), *enforcement denied in relevant part*, 813 F.3d 1079 (8th Cir. 2016), in favor of a broader definition of solicitation that includes both soliciting authorization cards and encouraging voting for or against a union. Applying that new standard, the Board found that an employee outside the petitioned-for unit engaged in solicitation in violation of a lawful rule and therefore her discipline was lawful.

The Employer, a hotel and casino, maintained a lawful solicitation policy that prohibited employees from soliciting in work areas during the work time of either
the employee soliciting or the employee being solicited. During an organizing drive targeting the Employer’s security officers, an already unionized table-games employee struck up a conversation with an on-duty security officer at his post. The table-games employee told the security officer that she “heard you guys are having an election pretty soon. Good luck on that.” After the security officer expressed doubt about the prospect of unionization due to accusations made against the Union in captive audience meetings, the table-games employee responded that any union was better than no union, that the games employees had been able to unionize and the security officers should as well, and that the security officers shouldn’t listen to the Employer and needed their own voice.

Board precedent defined solicitation—as opposed to mere “union talk”—as “asking someone to join the union by signing his name to an authorization card.” *W.W. Grainger*, 229 NLRB 161, 166 (1977), enforced, 582 F.2d 1118 (7th Cir. 1978). This standard was interpreted by the Board in *Wal-Mart* and *ConAgra* to mean that in order to constitute solicitation the solicitor’s conduct must also include the contemporaneous tender of a union authorization card. The Board here rejected that view as an unjustified narrowing of the definition that was inconsistent with precedent. Noting the Eighth Circuit’s rejection of that narrower view in *Wal-Mart* and *ConAgra*, the Board agreed that employees would understand such conversations as solicitations to sign cards, regardless of whether a card was placed directly in front of them at the time.

The Board further held that solicitation not only means asking an employee to join a union by signing a card, but also includes encouraging employees to vote for or against union representation. The Board reasoned that such conduct constitutes solicitation because the employee is selling or promoting the services of the union or urging employees to reject those services. Such conduct is consistent with the dictionary definition of solicitation—“to approach with a request or plea” or “to urge (something, such as one’s cause) strongly”—as well as the Supreme Court’s definition of solicitation in the First Amendment context.

The Board here also overturned *Wal-Mart* and *ConAgra*’s “working time” exception. In those cases, it was held that even where a rule bans solicitation during working time, on-the-clock union solicitation will remain protected if it was brief and there was no evidence it caused significant interruption. The Board, agreeing again with the Eighth Circuit, found that under the Act’s balance between employee and employer rights, a rule prohibiting solicitation during working time is presumed valid and an employer may lawfully discipline violators regardless of whether there was any work disruption.

Applying these principles to the case at hand, the Board found that the table-games employee was engaged in solicitation during working time when she urged the security officer to vote for the Union in the upcoming election. Accordingly, her discipline pursuant to the Employer’s valid policy was lawful.
The full Board (Ring, Kaplan and Emanuel), applying the principles of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), reversed the ALJ and found that an arbitral confidentiality clause did not violate the Act since it was limited to information learned at the arbitration.

The Employer maintained a mandatory arbitration agreement with employees covering employment-related claims. That agreement included a provision stating that “[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceedings.”

The Board first determined that the confidentiality provision might violate the Act if it were maintained as an employer-promulgated work rule as it would have been governed by the Board’s *Boeing* framework. Disagreeing with the ALJ, the Board construed the provision as being limited in scope, banning only the disclosure of the award or decision and evidence introduced in the arbitral proceeding. Thus, in the Board’s view, the agreement does not prohibit disclosing information a party possessed independently, and therefore does not restrict employees from disclosing the existence of the arbitration, employees’ claims, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitral proceeding. Nonetheless, the Board recognized that the provision would restrict employees from discussing terms and conditions of employment that were learned in the arbitral proceeding and, particularly, from disclosing that they prevailed on a workplace claim common to other employees, and therefore it would have an adverse effect on Section 7 rights. The Board assumed without deciding that such adverse effect outweighed the Employer’s “weighty” interests in saving resources, protecting parties from reputational injury, and facilitating discovery, thereby rendering the provision unlawful if maintained as a work rule.

The Board nevertheless found the provision lawful since it is part of an arbitration agreement and is, therefore, shielded by the Federal Arbitration Act (FAA). The Supreme Court has held that courts must enforce the terms of arbitration agreements, including terms that specify the rules under which the arbitration will be conducted, unless the FAA’s mandate has been overridden by a contrary congressional command. In *Epic Systems*, the Court rejected the notion that the Act provides a clear congressional command regarding dispute resolution procedures, and no provision of the Act mentions confidentiality. The Board thus found that the FAA shields arbitral confidentiality provisions to the extent they specify the rules under which the arbitration will be conducted, overruling precedent to the contrary. However, no such shield would apply to a confidentiality provision that went beyond the scope of the arbitration proceeding and restricted
communications about events and facts employees knew about firsthand or learned about from their coworkers.

Here, the Board found that since the confidentiality provision would reasonably be read to apply only to the award or decision itself and information learned during the arbitration, the provision was lawful.

Notably, the Board cautioned that while the confidentiality provision here did not violate the Act, the Employer would not be entitled to discipline or discharge an employee engaged in Section 7-protected disclosure of information even if that disclosure was in breach of the confidentiality clause. In such cases, the Employer would have to seek enforcement through an arbitrator or court.

*See Covenant Care California*, 369 NLRB No. 112 (June 29, 2020) (applying California Commerce Club to find lawful a confidentiality provision stating that “[t]he proceedings before the arbitrator and any award or remedy shall be of a private nature and kept confidential”).

*800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (June 23, 2020).

The full Board (Ring, Kaplan and Emanuel) overruled *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016), to find that employers do not owe a duty to bargain over the discipline of individual employees not yet covered by a labor agreement so long as such discipline is “similar in kind and degree” to its past actions.

In *Total Security*, the Board held that where an employer has a bargaining relationship with a union but has not yet agreed to a contract, the employer is required in most cases to give notice and an opportunity to bargain prior to exercising discretion in imposing serious discipline. Enlarging upon principles first articulated in *Alan Ritchey, Inc.*, 359 NLR 396 (2012), invalidated by *NLRB v. Noel Canning*, 573 U.S. 513 (2014), the Board reasoned that since discharge or other serious discipline of employees causes a significant change in their terms and conditions of employment, the unilateral exercise of discretion in carrying out such discipline was a violation of Section 8(a)(5).

Here, the Board disagreed for three main reasons. First, it noted that the Board had never before found such a violation in the 76 years prior to *Alan Richey*. Indeed, the Supreme Court in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), implicitly approved that state of the law when it said that by giving employees the right to a union representative at a pre-disciplinary meeting, it was not giving the union any right to pre-disciplinary discussions, and that “the employer has no duty to bargain with any union representative.” Id. at 259.
Second, the Board criticized Total Security for misinterpreting unilateral-change doctrine under *NLRB v. Katz*, 369 U.S.736 (1962). While *Katz* requires bargaining prior to making material changes to the status quo, the Board here observed that the status quo can be dynamic, and that changes consistent with a regular past pattern, such as annual wage increases, are not changes to the status quo at all. Even if that past pattern involves some employer discretion, under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Aug. 26, 2017), discretionary aspects of a past policy or practice are as much part of the status quo as the non-discretionary aspects. Thus, the Board here found that the proper analysis under *Katz* must focus on whether an individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice. Only if such disciplinary decision was materially inconsistent with such established policy or practice, including its use of discretion, would it be a unilateral change prohibited by *Katz*.

Third, the Board found Total Security imposed a novel, complicated, and burdensome bargaining scheme that was at odds with traditional bargaining practices. Recognizing the burdens created by a pre-disciplinary bargaining obligation, the Board in *Total Security* created a brand-new bargaining scheme. Specifically, only “serious” discipline required pre-disciplinary notice, whereas the union could be notified of less serious discipline after the fact. In addition, the employer was not required to bargain prior to deciding to discipline, only after the decision was made. And finally, the employer was permitted to impose serious discipline once bargaining had begun, so long as bargaining continued afterward. The current Board found that none of these rules had any parallel or precedent in law, as the Board does not in any other case look at the “seriousness” of a material unilateral change, nor does it allow employers to unilaterally impose any other material unilateral changes until the parties reach impasse or agreement over the decision to change things. The Board also criticized Total Security’s safe harbor alternative—negotiating an interim grievance-arbitration procedure—as impractical and illusory.

Applying the new standard retroactively (in a case in which the Board had denied the Charging Party’s motion for withdrawal of the pertinent allegation), the Board found the Employer here applied its preexisting disciplinary policy, which included the use of discretion, in disciplining four employees. Accordingly, there was no violation of Section 8(a)(5).

*Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61 (Apr. 21, 2020).

In an issue of first impression, the full Board (Ring, Kaplan and Emanuel) found that the “contract coverage” standard articulated in *MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), for determining whether a contract privileges a unilateral change does not apply to changes made after the contract has expired.
unless the contract contained language explicitly providing that the right at issue would survive expiration.

In *MV Transportation*, the Board overruled *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), to hold that when an employer defends a unilateral change on the grounds that the contract privileged the change without further bargaining, the Board will assess whether the action was “within the compass or scope” of contractual language granting the right to act unilaterally. This standard was based on “ordinary principles” of contract law, harmonizing Board law with the standard used by arbitrators and federal courts to interpret contracts, promoting use of the grievance arbitration procedure, and discouraging forum shopping.

Here, the Board determined that these same principles of contract law dictate that an expired contract ordinarily cannot provide a defense to unilateral change allegations. Contractual obligations cease upon termination of the agreement unless the agreement explicitly states that a particular provision survives expiration. Thus, the Board concluded, contractual *rights* must likewise expire, including provisions granting an employer the right to act unilaterally. (While an employer has a statutory duty to maintain the status quo as defined by the contract, some contractual terms are not imposed by law post-expiration, such as management-rights clauses granting an employer the right to act unilaterally.) Accordingly, an expired contract cannot be used to justify a unilateral change absent explicit language stating otherwise. This approach is consistent with the underlying rationale for the contract coverage standard, by respecting the rights of parties to set the duration of contractual rights and obligations. And it also accounts for the fact that forum shopping is no longer a concern post-expiration since arbitration procedures are generally not available after the contract terminates.

The Board also distinguished D.C. Circuit precedent that applied the contract coverage standard in assessing the lawfulness of unilateral changes post-contract in *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017). The Board noted that the court there did not address the question of whether the contract coverage standard should be applicable in such circumstances, and there was no indication that the question was presented by the parties. The court there also determined that the expired contract did not cover the change at issue, so the outcome would have been the same regardless.

Applying the rule here, the Board found the Employer’s unilateral changes to driver background checks and the posting of work schedules could not be covered by an expired contract that lacked any language extending its provisions post-expiration, and thus the changes were unlawful. In so finding, the Board rejected the Employer’s contention that the changes were consistent with the status quo as defined by the expired contract since they were contrary to past practice.

The full Board (Ring, Kaplan and Emanuel), on remand from the D.C. Circuit, clarified the legal standard for determining whether a Burns successor’s actions constitute a unilateral change from its initially imposed terms and conditions of employment. Specifically, the Board declined to adhere to the “clear and unmistakable waiver” standard or adopt the “contract coverage” standard. Instead, it held that a successor may lawfully take actions that are “reasonably encompassed” by unilaterally implemented initial terms. Applying that standard here, the Board held that the Employer’s refusal to bargain over a layoff’s effects was unlawful.

The Employer here took over a diesel engine factory with a unionized workforce and became a successor employer under NLRB v. Burns Security Services, 406 U.S. 273 (1972). Pursuant to its rights under Burns, the Employer unilaterally implemented certain initial terms, including a new employee handbook. Section 5.5 of the handbook, which addressed layoffs, stated that “[f]rom time to time, management may decide to implement a reduction in force,” and set forth procedures for selecting employees for layoff. However, the handbook did not address what procedures, if any, would apply to the effects of a layoff. At some point after hiring its initial complement of employees, but prior to reaching any collective-bargaining agreement with the Union, the Employer laid off twelve employees using the handbook’s selection criteria. The Union requested bargaining over both the decision and effects of the layoffs and the Employer refused.

In its original decision, 365 NLRB No. 59 (Apr. 7, 2017), the Board held that the Employer violated Section 8(a)(5) by failing to bargain over the effects of the layoff, holding that the “contract coverage” standard could not apply when there was no contract and that the Union had not waived its right to bargain over layoff effects under the “clear and unmistakable waiver” standard. The D.C. Circuit remanded, saying that while the Board was not required to use the “contract coverage” standard in these cases, the court could not see how the waiver standard could apply either, since it seemed impossible that terms unilaterally imposed by an employer could ever effect a waiver of bargaining rights by a union.

On remand, the Board agreed that neither the “contract coverage” nor the “clear and unmistakable waiver” standard could apply to terms unilaterally implemented by a Burns successor. Instead, the Board held that Burns successors would be held to the same standard as non-Burns successors in their obligation to maintain the status quo. Under Burns, a successor employer is not obligated to adopt the predecessor’s collective-bargaining agreement or its terms and conditions of employment or past practices. Instead, a Burns successor may make one-time initial unilateral changes to the status-quo terms and conditions of employment, setting its own terms. However, once those initial terms have been set, the bargaining obligation attaches with respect to any subsequent changes, as required by NLRB v. Katz, 369 U.S. 736 (1962). Yet, under Raytheon Network Centric Systems, 365 NLRB No. 161 (Aug. 26, 2017), the Board interpreted Katz to hold that
an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion. Thus, the Board rejected the suggestion that initial terms imposed by a Burns successor should be narrowly construed for the purpose of determining whether a material change has occurred. So long as a challenged action is “reasonably encompassed” by a successor’s initially imposed terms, there is no material “change” at all and the action is lawful. Thus, a Burns successor’s right to take action reasonably encompassed by its initial terms is equivalent to any employer’s right under Katz to engage in an action that is in line with past practice, even if that action involves substantial discretion.

Applying the new standard here, the Board found that the handbook did not reasonably encompass the effects of the layoff. The handbook did not mention effects; it only referred to selection criteria. Given that layoff-effects was a discrete subject not covered by Section 5.5 of the handbook, bargaining was required under Katz. It was undisputed that the Employer was under no obligation to bargain over the layoff decision itself, and there was no contention that the decision was a change in the status quo established by the criteria set forth in Section 5.5.

**Bethany College, 369 NLRB No. 98 (June 10, 2020).**

The full Board (Ring, Kaplan and Emanuel) overruled the test in Pacific Lutheran University, 361 NLRB 1404 (2014), used to determine jurisdiction over religious educational institutions in favor of the D.C Circuit’s three-pronged test announced in University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). Under Great Falls, the Board must decline to exercise jurisdiction over an institution that (a) holds itself out to students, faculty, and the community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. Applying that test here, the Board found the Employer to be exempt from the Act’s jurisdiction.

The Employer is a nonprofit school of higher education owned and operated by two synods of the Evangelical Lutheran Church in America (ELCA). According to its handbook, the object of the school is to “maintain a Christian institution of higher education to be known as ‘Bethany College’; to serve Jesus Christ and His church by training men and women who seek a liberal arts education under Christian auspices; and to acquaint these students with the cultural, intellectual, and religious forces in the field of higher education.” Job postings noted the affiliation with the ELCA and stated that the school’s mission was “to educate, develop, and challenge individuals to reach for truth and excellence as they lead lives of faith, learning, and service.” Faculty members filed unfair labor practice charges with the Board, and after a hearing in which the Employer did not participate, the ALJ found jurisdiction.
In 1979, the Supreme Court rejected Board jurisdiction over lay teachers at church-run schools in order to avoid the constitutional questions that might arise from inquiring into the good faith position asserted by the clergy-administrators and its relationship to the school’s religious mission as well as deciding what constitutes mandatory subjects of bargaining. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). In response, the Board began determining on a case-by-case basis whether a religiously affiliated school had a “substantial religious character” and was thus exempt under Catholic Bishop. However, this approach was met by criticism in several courts of appeals, since it required the Board to delve into matters of curriculum, teaching, and counseling, entangling the Board in religious matters. Accordingly, the D.C. Circuit in Great Falls, drawing from then-Judge Breyer’s opinion in Universidad Central de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1986) (en banc), came up with its own test, described above. The court held that this new test would allow the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, while still giving some assurance that the school in question is a bona fide religious institution.

In 2014, the Board crafted a new standard in Pacific Lutheran. Ostensibly accepting the first prong of the Great Falls test—whether the school holds itself out as a religious institution—the Board went on to also require that the school hold out the “faculty members themselves as performing a specific role in creating or maintaining the college or university’s religious educational environment . . . .” Pacific Lutheran, 361 NLRB at 1414. The Pacific Lutheran Board observed that where faculty members are not expected to perform such a role, they are indistinguishable from faculty at secular colleges. However, in Duquesne University of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir.), petition for rehearing en banc denied, 975 F.3d 13 (D.C. Cir. 2020), the D.C. Circuit rejected this attempt to modify the Great Falls test. The court ruled that the Board may not “dig deeper” than the court did in Great Falls to examine whether faculty have religious or non-religious roles, since doing so would be the impermissible substitution of the Board’s views of what constitutes religious activity for the school’s own views. Id. at 834.

For the reasons outlined by the D.C. Circuit and dissenters in Pacific Lutheran, the Board here overruled Pacific Lutheran and adopted the Great Falls test. Applying the Great Falls test here, the Board easily found based on the Employer’s bylaws, handbook, job postings, and testimony of a single professor that it (a) held itself out as providing a religious educational environment; (b) was a nonprofit institution; and (c) was owned and operated by a recognized religious organization. While the Board noted that the D.C. Circuit had expressed some concerns about the breadth of the third prong, it declined to address that issue here due to the clear religious affiliation in this case.

The full Board (Ring, Kaplan, McFerran and Emanuel) unanimously denied the Employer’s special appeal of the ALJ’s decision to conduct a remote ULP hearing via video technology due to the COVID-19 pandemic. In doing so, the Board rejected the Employer’s arguments that a video hearing would deny it due process or that Board regulations gave it the right to an in-person hearing.

In response to the COVID-19 pandemic, the ALJ directed that the ULP hearing in this case be held completely via remote video technology. The Employer objected and requested special permission from the Board to appeal the ALJ’s decision. The Board granted the Employer permission, but denied the special appeal on the merits, relying on its recent decision in *Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020), which found that COVID-19 constituted “compelling circumstances” warranting a remote pre-election hearing in a representation case. There the Board relied on Section 102.35(c) of the Board’s Rules and Regulations, which states that “[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards,” witnesses in a ULP trial may testify by video. Here, the Board held that the ALJ did not err in following the same approach with regard to conducting a ULP hearing, although Section 102.35 is not strictly controlling where the hearing is entirely by videoconference.

The Board rejected the Employer’s argument that a remote hearing would interfere with its due process rights, characterizing the Employer’s concerns about examining witnesses and potential technical problems as “speculative.” Citing federal cases rejecting arguments that the Fifth Amendment per se precludes videoconference hearings, the Board noted that some federal district courts are themselves currently conducting bench trials via videoconference. The Board also noted that if a case is factually complex, ALJs retain the discretion to decide whether a remote hearing would be appropriate. To the extent concrete problems arise during the course of the video hearing, the Board instructed the Employer to raise them at the hearing and file exceptions to any adverse rulings.

The Board further rejected the Employer’s argument that Section 102.38 of the Board’s Rules and Regulations gave it an absolute right to an in-person hearing. Section 102.38 states that “[a]ny party has the right to appear at the hearing in person, by counsel, or by other representative.” The Board held that this simply gives the party the right to appear at all, not the right to be physically present in a hearing room. In context, the phrase further guarantees the right to appear pro se.

The Board also dismissed the argument that the compelling circumstances that justified *Morrison* are no longer compelling. Even if the Board has conducted some business in person since then, that does not invalidate the ALJ’s conclusions about holding an in-person hearing in this witness-heavy case. Additionally, the ALJ appropriately recognized that waiting until an in-person hearing is feasible would raise serious concerns given that the case involved numerous Section 8(a)(3) and (1) allegations during an organizing campaign.
Finally, the Board found that the ALJ did not abuse his discretion when he set safeguards for the hearing that were “informed but not controlled” by those listed in Section 102.35(c)(2) of the Board’s rules. In *Morrison*, the Board recognized that the safeguards provided by that section may not apply in all respects to a hearing conducted entirely by videoconference, and ALJs have the authority to “regulate the course of the hearing” pursuant to Section 102.35(a)(6).

*See also Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020) (permitting videoconference hearings in representation cases on a showing of good cause based on compelling circumstances and under appropriate safeguards and allowing telephonic hearings without video only where compelling circumstances exist and no witness testimony is involved); *XPO Cartage, Inc.*, 370 NLRB No. 10 (Aug. 20, 2020) (denying special appeal of order directing video ULP hearing in the absence of any party’s request for a remote hearing and finding concerns about credibility assessments with respect to many Spanish-speaking witnesses, witness tampering, and technical issues to be speculative); *Plumbers Local 675 (RPS Mechanical, Inc.)*, Case 20-CB-251372, Unpublished Order dated Sept. 4, 2020 (applying *Morrison* to a CB case); *New York Paving, Inc.*, 29-CA-254799, Unpublished Order dated Oct. 8, 2020 (finding due process concerns with video ULP hearing speculative).

**SECTION 8(a)(1)**

Protected Concerted Activity

*Ohio Bell Telephone Co.*, 370 NLRB No. 29 (Oct. 28, 2020).

The Board panel (Ring, Kaplan and Emanuel) unanimously affirmed the ALJ’s decision that unionized employees who concertedly arrived at work in street clothes to protest a uniform shortage were protected by the Act, but reversed the ALJ to find that statutory protection ended when employees dispersed to put on their uniforms. Accordingly, any discipline for violating the uniform policy violated Section 8(a)(1) and (3), but the Employer’s issuance of “attendance occurrences” to employees not prepared to begin their shifts after the protest ended was lawful.

The Employer, a telecommunications provider, required employees, who were working without a contract, to report to work wearing uniforms displaying the Employer’s logo. The Employer periodically gave employees an opportunity to acquire such clothing, but employees sometimes ran out. After the Employer expanded employees’ work week from five to six days, employees and their Union discussed their concern that the change would cause uniform shortages to become acute and decided to report to work in street clothes to draw attention to the problem. When they did so, the Employer informed them that they would not be permitted to work in that apparel, ordered the employees to change into uniforms, and issued formal warnings for violating the uniform policy. Most employees changed into uniforms without delay, but some had to leave work to retrieve
uniforms and began work late or did not return that day at all. These employees were not paid for that time and were disciplined for attendance infractions.

The Board found that employees engaged in protected concerted and union activity by reporting to work in street clothes, but that the concerted protest ended when employees dispersed. The Board rejected the Employer’s argument that the action was an unprotected slowdown or partial strike, noting that the employees were not performing work inefficiently while remaining on the job, performing some job duties while refusing to perform others, nor attempting to work in street clothes after being directed to change. Nor did the lost work time from the action render it unprotected, since the Board has long recognized that protected concerted activity sometimes has an incidental impact on production. The Board also noted that intermittent strike cases were inapplicable because the protest did not involve a work stoppage given that it was over by the time employees left to retrieve their uniforms and, in any event, there was no plan to repeat the action. Finally, the Board also found union insignia precedent inapplicable because wearing nonbranded attire throughout the workday would not have signaled a work-related dispute since employees were dispatched individually to customer sites. Given the Board’s conclusion that the protected conduct was limited in time, it followed that the discipline imposed for noncompliance with the uniform policy was unlawful (regardless of how consistently it was enforced in the past), however, the attendance-based discipline was legitimately tied to unprotected conduct. Likewise, the Employer was not required to pay employees for missed work time.

Section 7 Scope

Registry of Interpreters for the Deaf, Inc., 370 NLRB No. 18 (Sept. 11, 2020).

The Board panel (Ring, Kaplan and Emanuel) unanimously found, contrary to the ALJ, that a professional association’s rules governing member use of its forums did not implicate Section 7 because there was no employer/employee relationship.

The Registry of Interpreters for the Deaf, Inc. (“Registry”) is a national professional association with 16,000 members, ranging from interpreters to organizations that support the Registry’s mission. None of its members were employees of the Registry, but some members were employees of other employers (“employee members”). The Registry maintained two policies at issue, one which it characterized as its civility policy and the other being its antitrust policy, neither of which applied to the Registry’s own employees. The civility policy applied only to the use of the Registry’s members-only Facebook page and, among other things, forbid posts that threaten or harm the reputation of any person or organization as well as solicitations of any kind. The antitrust policy restricted members who are potential competitors from discussing their fees, wages, salaries, and contract terms at any of the Registry’s events or in its online forums. The policies did not apply to
any non-Registry forums, such as personal social media accounts, forums provided by members’ employers, and other public forums. The Registry had no control over employers in the industry, and none of the employers at issue in this case were members of, or contractors with, the Registry. The Registry applied its policies to remove posts made in its forums about unions and terms and conditions of employment at specific companies.

The ALJ found that both the maintenance and application of the rules violated Section 8(a)(1), relying on the principle that an employer may violate the Act not only with respect to actions taken against its own employees but also actions affecting employees of another employer. As an illustration, the ALJ cited New York New York Hotel & Casino, 356 NLRB 907 (2011), enforced, 676 F.3d 193 (D.C. Cir. 2012), overruled by Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts, 368 NLRB No. 46 (Aug. 23, 2019). There, the Board held that off-duty employees of a contractor had certain Section 7-protected access rights to the facility where they worked even though the facility owner was not their employer.

The Board here disagreed, rejecting outright the ALJ’s analogy to employees of an onsite contractor and declining to comment on other cases espousing the above principle. Instead, the Board held that the policies specifying the contours of members’ rights as members did not affect the rights of employee members as employees given that the Registry’s relationship with members was not akin to an employment relationship. In this regard, no members performed work for the Registry or for contractors of the Registry, either on the Registry’s properties or on its electronic forums. Nor did members perform work integral to the Registry’s business, and members were not compensated by the Registry (indeed, payments flowed in the opposite direction). Importantly, the Board stated that since the Registry did not, even indirectly, control the members’ wages, hours, or working conditions, it cannot be found to have restricted or interfered with the members’ rights as employees. Thus, because the Registry had neither an employment relationship nor an employment-like relationship with members, its policies that applied to its members did not implicate Section 7.

Severance Agreements

Baylor University Medical Center, 369 NLRB No. 43 (Mar. 16, 2020).

The full Board (Ring, Kaplan and Emanuel) reversed the ALJ and held that confidentiality, non-disparagement, and non-assistance clauses contained in voluntary severance agreements offered to departing employees did not violate the Act. First, the Board disagreed with the ALJ’s application of The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), to the agreements. Second, the Board overruled Clark Distribution Systems, 336 NLRB 747 (2001), to the extent it held that non-assistance clauses are invariably unlawful. Limiting Clark Distribution to its facts,
the Board found that the provisions challenged here did not reasonably tend to interfere with the exercise of rights under the Act given that the Employer offered the agreements to lawfully separated employees and had not been accused of violating the Act in any way aside from the separation agreements themselves.

The severance agreements at issue were voluntary, entitling the departing individuals to severance pay and postemployment benefits to which they otherwise would not be entitled. The agreements included a nondisparagement clause, which prohibited making “any false, disparaging, negative . . . or derogatory remarks . . . concerning . . . [Employer] and the Released Parties . . . .” The confidentiality clause labeled as secret “information concerning operations, finances, . . . employees, . . . personnel lists; financial and other personal information regarding . . . employees.” And the non-assistance clause stated that the signatory “agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any Claim brought by any third party against [Employer] or any Released Party.” There were no allegations the Employer violated the Act in any other way.

As an initial matter, the Board determined that the Boeing standard applied to work rules for current employees, not severance agreements with departing employees. Under the Board’s reasoning, so long as the severance agreement was not mandatory and exclusively pertained to postemployment activities such that it had no impact on terms and conditions of employment or any accrued benefits the Employer would be obligated to pay regardless of the agreement, Boeing was inapplicable.

Under the circumstances of this case, the Board held that the proffer of the severance agreements was lawful. The Board distinguished Clark Distribution and other cases where severance provisions were found unlawful, noting that in those cases the severance agreements at issue were proffered to employees alleged to have been unlawfully discharged. In those circumstances, it was reasonable to believe that a non-assistance clause, for example, would tend to interfere with employees assisting each other in a Board investigation, where the departing employee might well have significant information to share with Regional personnel in connection with other ULP cases. Here, however, there was no reason why it would have the same tendency when offered to individuals lawfully separated and where no other ULPs had been alleged. Thus, to the extent that Clark Distribution categorically forbid non-assistance clauses in separation agreements, the Board overruled it.
The full Board (Ring, Kaplan and Emanuel) reversed the ALJ and held that rules governing confidential information, cell phones, and email were lawful. The Board further indicated that rules prohibiting the use or possession of cell phones in commercial vehicles would generally be found lawful.

The Employer’s confidentiality policy defined “confidential Company information” as “information regarding [the Employer’s] customers . . . production methods . . . earnings, contracts, employee information, subcontractors, business plans, . . . and other business arrangements.” Applying The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), the Board found the confidentiality provision to be a lawful Category 1(a) rule because employees would not reasonably interpret the rule as interfering with Section 7 rights. Read as a whole from the perspective of an objectively reasonable employee, who interprets the rules as they apply to the everydayness of the job and not through the prism of the Act, the rule was construed as applying only to proprietary business information. Because the rule included a long list of obviously proprietary categories of information and referred to the Employer’s “information,” “earnings,” and “employee information” in the possessive, the Board determined that “earnings” would be understood as referring to revenue and profits rather than employees’ wages, and that “employee information” would be understood as referring to staffing information and related items rather than wages or contact information.

The Board also determined that the Employer’s cell phone policy was lawful. The Employer operated a ready-mix concrete facility and employed truck drivers. In recognition of the “danger associated with using cell phones while driving,” the Employer maintained a policy strictly banning the possession of cell phones in the cab of a commercial vehicle. The Board determined that the rule did not restrict drivers’ right to communicate with each other during nonwork time and would not be reasonably understood to do so given the explicit purpose behind the rule—to ensure safety. Given the limited scope of the restriction and recognizing that employees are not guaranteed the use of every method of communication available to them to discuss working conditions, the Board found that the rule did not potentially interfere with Section 7 rights. Thus, the Board designated rules that prohibit the use or possession of cell phones in commercial vehicles as lawful Category 1(a) rules.

In addition, the Board held that the Employer’s ban on personal use of work email was lawful under Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino, 368 NLRB No. 143 (Dec. 16, 2019).
Cott Beverages Inc., 369 NLRB No. 82 (May 20, 2020).

The full Board (Ring, Kaplan and Emanuel) reversed the ALJ and held that a ban on possessing cell phones in work areas was lawful.

The Employer here, a beverage manufacturer, banned the possession of a long list of items in working areas, such as most jewelry, newspapers, medication, and personal cell phones, though work-issued cell phones were allowed. The rule book stated that the reason for the rule was to prevent items from falling into food or onto food contact surfaces or packaging materials, but at the hearing the Employer also argued the need for the ban on cell phones due to their tendency to distract, especially given the use of forklifts in the work area.

In analyzing the rule under The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), the Board first held that the rule in question potentially infringed on employee Section 7 rights by restricting their ability to use mobile phones for communicating about workplace issues, making audio or video recordings, and documenting working conditions. However, since the restriction was limited to working areas, specifically the manufacturing floor and warehouse, the rule’s potential infringement on Section 7 rights was “relatively slight.” The Board distinguished Argos USA LLC d/b/a Argos Ready Mix, LLC, 369 NLRB No. 26 (Feb. 5, 2020), where the Board found no potential infringement on Section 7 activity, because truck drivers there had access to radios and disposable cameras enabling them to discuss and record working conditions while away from the facility, and there the policy clearly laid out the safety reasons for why all cell phones were banned. Here, the reasons for the policy might not be obvious to employees since Employer-issued devices were permitted.

Having found a potential, albeit relatively slight, adverse effect on Section 7 activity, the Board moved to the next part of the Boeing test: whether the Employer’s legitimate justifications for the rule outweigh the adverse impact. Here the Board held that the Employer’s legitimate contamination and safety concerns were paramount. Specifically, the Board found that the blanket prohibition on possessing personal items including cell phones in work areas was a reasonable restriction to ensure the integrity of the beverage production process and to combat the unique distractions cell phones pose, especially where forklifts are in use. The Board specifically rejected the ALJ’s rationale that the Employer could have drafted a less restrictive rule to address its safety concerns, noting that Boeing only requires that the Employer’s justifications outweigh the adverse impact on Section 7 rights, not that the Employer draft the least restrictive rule possible. Accordingly, the Board classified the rule here as lawful under Boeing Category 1(b).
The full Board (Ring, Kaplan and Emanuel) classified rules that restrict employees from releasing information to government investigators and confidentiality rules that prohibit employees from sharing the names and contact information of other employees as Category 2 rules requiring individualized scrutiny under *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). In this case, the Board reversed the ALJ and held that both rules were lawful.

The Employer, a hotel management company, maintained a government investigations policy promoting cooperation with law enforcement and government agencies but requiring official written requests or subpoenas for the release of information in order to protect the rights of third-party guests, suppliers, employees, and others. The policy further stated that “requests from the police, Internal Revenue Service and other regulatory authorities must not be answered without first obtaining clearance from our Legal Department.”

The Employer’s information protection policy stated that “[o]ne of the Company’s most valuable assets is information and the information systems we use to process and store that data. Keeping confidential our Company’s non-public information is important to the success of our Company.” The policy classified as confidential “personal information, which is defined broadly to include any information that can be associated with or traced to any individual, such as an individual’s name, address, telephone number, email address, bank and credit card information, social security number, etc.” The policy further clarified that “[t]he personal information . . . could pertain to a customer, potential customer, associate, former associate, owner or joint venture partner.”

Applying *Boeing* to the government investigations policy, the Board found that nothing compels an interpretation that employees must refer Board investigative inquiries to the legal department, but that even if it were misread as doing so, legitimate business interests outweighed that slight risk. In the Board’s view, the policy would most sensibly be read as referring to instances where the Employer, not the employee, is being asked to cooperate with a government investigation. In this regard, the rule explicitly protects third-party information, not Employer information, and thus a reasonable employee would not view the policy as shielding the Employer from investigations into its own workplace issues. However, because the policy does not specifically limit itself to situations where employees are asked to provide information on the Employer's behalf, the Board found that it was possible for a reasonable employee to read the rule as restraining cooperation with a Board investigation to some degree. On the other side of the ledger, the Board found the Employer’s justifications for the rule compelling, noting that the Employer operates nationwide and that it is common for hotel employees (who, it noted, are not experts on state and federal laws) to have unexpected interactions with law enforcement requesting information on guests or other employees. Accordingly, the
Employer’s legitimate business interests in safeguarding third-party information, protecting itself from liability when information is disclosed, and ensuring the accuracy of provided information outweighed the slight risk of misinterpretation. However, since the business interests here are specific to a multistate hotel management company, the Board refrained from reaching a broad conclusion about such policies, instead placing this type of rule in Category 2, requiring individualized scrutiny.

As for the information protection policy, the Board viewed the policy as limited to preventing the disclosure of information given to the Employer in confidence and stored by the Employer in its records and databases and not so broad as to prohibit sharing generally known employee contact information collected through personal and working relationships with coworkers. The rule referred to protecting “the Company’s information” in the possessive and included multiple examples of obviously sensitive data the Employer would keep, such as credit cards and passwords, signaling that the privacy concerns relate to matters such as personal security, fraud, and identity theft rather than union organizing or other protected activities. To the extent that employees could misunderstand the rule as prohibiting the sharing of contact information with coworkers or a union, the Board found that the Employer’s legitimate and reasonably obvious interests in protecting personal information from a data breach and in protecting itself from liability for such breach outweighed the slight adverse effect on Section 7 rights. However, the Board determined that confidentiality rules that prohibit employees from disclosing the names and contact information of employees are Category 2 rules under Boeing, requiring individualized scrutiny to determine if an objectively reasonable employee would understand the rule as applying only to private, personal information obtained from an employer’s files, or more broadly as restraining the sharing of coworkers’ names and contact information for organizing or other Section 7-protected purposes.

Union Tank Car Co., 369 NLRB No. 120 (July 17, 2020).

The full Board (Ring, Kaplan and Emanuel), applying The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), found that the Employer violated the Act by, inter alia, banning cell phone use during work hours. A majority (Ring and Kaplan) also found unlawful a nondisparagement rule that restricted employee-to-employee communications. Furthermore, the majority generally announced that rules prohibiting communications between or among employees that are intended to disparage the employer are unlawful.

The Employer maintained two work rules at issue. First, the Employer forbid the use of cell phones “during work hours . . . at any time.” Second, the Employer prohibited statements that “are intended to injure the reputation of the Company or its management personnel with customers or employees.”
Relying on longstanding Board precedent that “work hours” includes lunch and other breaks while at work, the Board agreed with the ALJ that the cell phone ban was unlawfully overbroad, distinguishing Argos USA LLC d/b/a Argos Ready Mix, LLC, 369 NLRB No. 26 (Feb. 5, 2020), and Cott Beverages Inc., 369 NLRB No. 82 (May 20, 2020), which only banned cell phones in work areas.

Reversing the ALJ, the Board also found the nondisparagement rule unlawful. Applying Boeing, the Board first found that employees would reasonably read the rule to ban discussing complaints about the Employer and its managers, activity that lies at the heart of Section 7. The Board next found that no legitimate justifications outweighed this significant impairment of Section 7 rights. While noting that employers are clearly justified in preventing employees from making statements reasonably calculated to injure the company’s reputation to customers or the public under NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), such expectations are inapplicable to a rule governing employee discussions among themselves. Nor is the rule a civility rule, since it bans statements based on the intent of the speaker, not whether the criticism is conveyed in a polite manner. Thus, the Board found the rule unlawful, and placed all such rules in Boeing Category 3.

Member Emanuel dissented in part and would have found the nondisparagement rule lawful.

Motor City Pawn Brokers Inc., 369 NLRB No. 132 (July 24, 2020).

The full Board (Ring, Kaplan and Emanuel), inter alia, affirmed the ALJ that a no-association rule was unlawful and reversed the ALJ to find that rules governing confidentiality and nondisparagement, including an off-duty conduct rule, were lawful. The Board also found that email, internet, and social media rules were lawful.

The Employer’s employment agreement prohibited employees from associating with each other “for [their] own benefit.” Its handbook prohibited the disclosure of trade secrets “or any other confidential or proprietary information of the Company . . . or fellow employees,” and its employment agreement contained a similar confidentiality provision. That agreement also stated that employees “shall refrain from communicating . . . to any customer or third party . . . any disparaging claim, . . . the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing in the community of Customers, Employer and/or Related Entities, and their customers . . . managers, officers, owners, [or] employees, . . . regardless of whether any such communication is or may be true . . . .” Finally, the Employer’s handbook contained a similar nondisparagement provision that prohibited “[o]ff-duty conduct which can affect the Company’s credibility or reputation.”
First, the Board majority (Kaplan and Emanuel) held that the non-association rule was unlawful under longstanding precedent governing association and solicitation rules that The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), left undisturbed. Chairman Ring concurred but would apply Boeing to associational restrictions.

Second, the full Board held that the confidentiality rules were lawful under Boeing. While recognizing employees’ Section 7 right to discuss terms and conditions among themselves and with the public, the Board found that employees would reasonably understand from the numerous examples listed in the confidentiality rules that they are limited to the disclosure of legitimately confidential and proprietary information rather than information about terms and conditions of employment. Thus, employees would not read the reference to “proprietary information . . . of employees” without taking into account the specific examples of genuinely confidential information listed therein. Moreover, the Board noted that the savings clause in the handbook, which conveyed that it would not be enforced so as to infringe upon “employees’ rights under [the Act],” further confirmed this reading of the confidentiality provision. The Board found that the ALJ erred in discounting the savings clause based on its placement in the handbook and its lack of inclusion in the employment agreement. (The Board likewise found lawful a rule labeling various subjects as confidential and “unacceptable” topics for social media because, as above, employees would reasonably understand based on the examples in the rule that it was limited to obviously proprietary information and not information useful for Section 7 activities.)

Third, the full Board found that the nondisparagement and off-duty conduct rules were lawful, superseding pre-Boeing cases on these kinds of rules. Addressing the rules’ effect on Section 7 rights, the Board agreed with the ALJ that the rules would be reasonably interpreted as interfering with employees’ Section 7 right to seek outside support, including from customers and the public, implicitly distinguishing Union Tank Car Co., 369 NLRB No. 120 (July 17, 2020), in finding that the rules would not restrict communications with other employees. However, citing NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), the Board held that the Employer’s countervailing interests outweighed that negative effect. In Jefferson Standard, the Supreme Court noted that Section 7 did not weaken employees’ duty of loyalty to their employer and, therefore, held that disparaging an employer’s product or business without relating the criticism to a labor dispute is unprotected by the Act. Here, the Board held that the Employer had self-evident interests in conveying to employees its expectation that they fulfill that duty of loyalty, noting that the success of any employer is often dependent on maintaining its reputation and building a collaborative environment to advance its business relationships. Deeming these legitimate interests “substantial,” the Board placed the rules in Boeing Category 1(b).
See also Bemis Company, Inc., 370 NLRB No. 7 (Aug. 7, 2020) (finding lawful social media policy requiring that employees “exercise judgment in their communications relating to [Employer] so as to effectively safeguard the reputation and interests of [Employer]” where that general expectation was followed by specific expectations that did not implicate Section 7 rights and where the rule concerned the public’s view of the company rather than private conversations among employees).

In addition, the Board held that the Employer’s ban on using its equipment for sending personal email, internet chatting, accessing social media, and blogging were lawful under Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino, 368 NLRB No. 143 (Dec. 16, 2019).


The full Board (Ring, Kaplan and Emanuel), applying The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), and affirming the ALJ, found the Employer’s confidentiality and government investigations rules lawful. Reversing the ALJ in part, the Board also found portions of a blogging rule to be lawful, namely, a provision protecting employees’ addresses and other personal information and a warning against linking to the Employer’s website.

The Employer maintained a confidentiality policy that covered “information, knowledge, or data concerning . . . associates, . . . Company manuals and policies, . . . [and] compensation schedules . . . .”

The Board affirmed the ALJ’s decision that this rule was lawful under Boeing. The terms that might in isolation be interpreted as referring to contact information, or terms and conditions of employment, were included in a long list of obviously confidential information like profits, costs, and customer histories. Thus, the rule was construed as being limited to private employee information or confidential or proprietary business information rather than widely circulated documents setting forth terms and conditions or contact information voluntarily shared amongst coworkers. Moreover, the Employer testified that employee manuals are not considered confidential, and that compensation schedules did not refer to wage rates but to the proprietary formulae the Employer used to calculate incentive pay. Further supporting this interpretation was a Department of Labor (DOL) notice of employee rights contained in the handbook, even though the notice would be insufficient by itself to save the rule given that it was not prominent or specifically referenced. Thus, in context, the rule would not be reasonably read as interfering with Section 7 rights and was lawful under Boeing.

The Employer’s government investigations rule, which was in a section titled “Handling the Confidential Information of Others,” stated that the “Company and its associates must cooperate with appropriate government inquiries and
investigations. In this context, however, it is important to protect the legal rights of the Company with respect to its confidential information. All government requests for information, documents or investigative interviews must be referred to the Company’s Human Resources Department. No financial information may be disclosed without . . . prior approval.”

The Board also affirmed the ALJ’s decision that this rule was lawful. In context, employees would reasonably read the rule as referring to confidential information held by the company rather than preventing employees from providing evidence or cooperating in an NLRB investigation without the Employer’s authorization. The notice of rights noted above also supported this reading given that it explicitly advised employees of their right to raise work-related issues with a government agency.

Finally, the Employer maintained a blogging policy, certain portions of which were at issue here. (Notably, the Employer admitted that the section discouraging employees from “discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications” was unlawful.) The blogging rule started out by stating that the Employer recognizes that blogs “can be effective tools for sharing ideas” but that the Employer wished to protect its “brand identity, integrity, and reputation while minimizing . . . legal risks.” The second paragraph stated that employees “have a duty to protect associates’ home addresses, social security numbers, birth dates, driver’s license number, and other personal information and the confidentiality of [the Employer’s] trade secrets . . . and other proprietary and nonpublic company information that associates can access.” The tenth paragraph stated that the Employer “discourages associates from linking to [the Employer’s] external or internal Web site from personal blogs.” The policy also contained a savings clause stating that the Employer would not apply the policy “in a manner that interferes with associates’ rights under Section 7 of the NLRA.”

The Board affirmed the ALJ’s finding that the second paragraph was lawful even though it referred to employee addresses and personal information. Considering the blogging policy as a whole, the Board agreed that in context the second paragraph would reasonably be interpreted as applying only to personal, proprietary, and nonpublic information contained in the Employer’s confidential or private files.

The Board then reversed the ALJ and found that the tenth paragraph was also lawful as a Boeing Category 1(a) rule. The Board found that the introductory language adequately explained that the purpose of the policy was to protect the Employer’s brand and reputation while limiting legal risks. Linking a blog to the Employer’s website could create the impression that the Employer is associated with or endorses the blog. Accordingly, reasonable employees would not view paragraph ten as infringing on Section 7 rights, but rather as discouraging against giving the impression that an employee was speaking on behalf of or with the
approval of the Employer. This would be true even without the savings clause and incorporated DOL notice, though the Board found that those sections were broad enough to cover all forms of communications and further signaled that the policy does not pertain to Section 7 activity.

**Nicholson Terminal & Dock Co., 369 NLRB No. 147 (July 30, 2020).**

The full Board (Ring, Kaplan and Emanuel), applying *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), reversed the ALJ and found rules banning illegal work stoppages and moonlighting to be lawful.

The Employer maintained two work rules at issue here. The first banned inappropriate conduct, including “[c]alling, participating in, or encouraging others to call or participate in an illegal slowdown, strike (including a sympathy strike), or walkout.” The second rule, under the heading “Moonlighting,” stated that:

Employees are expected to devote their primary work efforts to the Company’s business. Therefore, it is mandatory that they do not have another job that:

- Could be inconsistent with the Company’s interests.
- Could have a detrimental impact on Company’s image with customers or the public.
- Could require devoting such time and effort that the employee’s work would be adversely affected.

Before obtaining any other employment, you must first get approval from the Company Treasurer.

The Board majority (Emanuel and Kaplan) found that the no illegal-strike rule was lawful under *Boeing*. Finding it to be facially neutral, contrary to the ALJ, the majority determined that any ambiguity as to whether “illegal” only modified “slowdown” or also modified “strike” and “walkout” failed to establish an explicit restriction on protected work stoppages. Furthermore, the General Counsel had failed to prove that an objectively reasonable employee would construe the rule’s prohibition on illegal activity as also applying to legal activity. The Board thus found the rule was a Category 1(a) lawful rule not requiring balancing. Chairman Ring concurred but would have placed the rule in Category 1(b) because there was at least the possibility the rule would cause reasonable employees to hesitate before striking in cases where the legality of the strike was close.

The full Board also found the Employer’s moonlighting rule lawful. While the ALJ held that employees would read the rule as banning working with a union to organize, the Board disagreed. The references to “job[s],” and “work efforts,” indicated to employees that the rule applied to outside employment, not joining or volunteering with a union. The only protected activity the rule arguably reached
would be “salting,” that is, working as a paid organizer, but the Board found that the rule, interpreted in light of its stated purpose of ensuring employees’ primary work efforts are for the Employer, would have no potential to interfere with that activity. Accordingly, the Board placed rules that limit paid, outside employment that would conflict with the employer’s interests or have a detrimental impact on its image in Boeing Category 1(a).

Watco Transloading, LLC, 369 NLRB No. 93 (May 29, 2020).

The full Board (Ring, Kaplan and Emanuel), inter alia, applying Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (Dec. 16, 2019), found that informing an employee in the course of a confidential internal investigation that he was “absolutely forbidden to discuss any of this conversation with anyone” was lawful, despite lacking any language limiting the duration of the instruction.

In Apogee, the Board overruled Banner Estrella Medical Center, 362 NLRB 1108 (2015), to find that under The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), rules that by their terms ban discussion of an investigation only for the duration of that investigation are lawful Category 1(b) rules, as the substantial justifications will predictably outweigh the comparatively slight potential for such rules to interfere with Section 7 rights. This holding did not extend, however, to circumstances where the rule is not limited to open investigations, where it applies to nonparticipants in the investigation, or where it would prohibit discussion of the event giving rise to the investigation (provided that participants do not disclose information they learned or provided in the course of the investigation). Importantly, Apogee held that where an investigative confidentiality policy is silent about the duration of the confidentiality requirement, employees will reasonably interpret the rule as not being limited to open investigations.

Although this case involved an instruction rather than a rule, the Board held that Apogee’s analysis was applicable in all respects except one—specifically, Apogee’s conclusion that an employee would reasonably interpret an investigative confidentiality policy which is silent as to duration to cover investigations both while they are open and after they close. Here the Board looked to the circumstances surrounding the conversation. The Board noted that there was no evidence that the instruction was not limited to the length of the investigation. Moreover, because the Employer’s rationale for the directive—to prevent employee coordination of their stories—would be apparent to the employee who received the instruction, and because that rationale would apply only while the investigation remained active, the durational limit of the directive would also be apparent to the employee. Thus, the Board affirmed the ALJ to find the instruction lawful.

Other cases discussing Apogee in 2020 include First American Enterprises d/b/a Heritage Lakeside, 369 NLRB No. 54 (Apr. 9, 2020) (holding unlawful instruction to employee to keep union-related conversation confidential where
conversation was not part of disciplinary investigation and no legitimate need for confidentiality), and Securitas Security Services USA, 369 NLRB No. 57 (Apr. 14, 2020) (finding lawful email barring interviewed employee “from talking during the time of the investigation in any circumstance” and cautioning that post-investigation conversations may lead to discipline if they become a “distraction to the workplace”; declining to decide whether confidentiality policy was overbroad because it might have applied to nonparticipants where issue was not fully and fairly litigated).

**Threats**

*FDRLST Media, LLC, 370 NLRB No. 49 (Nov. 24, 2020).*

The Board panel (McFerran, Kaplan and Ring) unanimously upheld the ALJ’s finding that the executive of an online magazine violated Section 8(a)(1) when he tweeted that he would send employees “back to the salt mine” if they tried to unionize.

The Employer is a web magazine focused on culture, politics, religion, and controversial topics. In response to a walkout by employees at another media company, which caused the Employer’s magazine to “go dark” for some period, the Employer’s executive officer and publisher, a prominent media personality, sent a tweet from his personal Twitter account directed at his web magazine’s employees. The tweet stated: “FYI @fdrlst first one of you tries to unionize I swear I’ll send you back to the salt mine.” At least one employee viewed this tweet.

The panel unanimously found that the tweet was a threat of unspecified reprisal should employees engage in union activity. As an alleged Section 8(a)(1) threat, the Employer’s motive for the statement and evidence about how employees may have subjectively viewed the statement, e.g. as a joke, are irrelevant to determining its legality. The Board only looks at whether the statement would objectively be read as a threat by a reasonable employee. Here, the Board agreed that the tweet would objectively be viewed as a threat to take swift action against any employee who tried to unionize. Additionally, while the tweet was sent from the publisher’s personal Twitter account, the Board held that the wording of the tweet leaves no doubt it was directed at the Employer’s employees and that, in any event, a threat seen by employees violates the Act even if it was not intended for their eyes.

The Board did not undertake any First Amendment analysis other than to affirm the ALJ’s finding that the First Amendment does not protect threats of reprisal, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). However, the Board did analyze the statement under Section 8(c), which by its express terms also excludes threats of reprisal from the protection it otherwise affords to the
expression of opinions. Accordingly, the threat was not protected by Section 8(c), and was therefore unlawful.

SECTION 8(a)(3)

Waiver of Reinstatement


The full Board (Ring, Kaplan and Emanuel) agreed with the ALJ that the Employer did not violate Section 8(a)(3) by offering a pro-Union activist a settlement that included a substantial cash payout in exchange for waiving reinstatement, but expressed concerns about the practice.

The Employer had unlawfully discharged an employee during an active Union organizing campaign. Employees picketed and distributed flyers protesting his discharge. A district court judge issued an interim reinstatement order under Section 10(j). The Employer initially offered the employee reinstatement in compliance with the court order, but then offered a monetary settlement in exchange for a waiver of his right to reinstatement instead. After negotiating over the amount of the settlement and after the ALJ issued a decision finding the discharge to be unlawful, the Employer offered the employee a settlement amount equivalent to more than four times the amount of remedial backpay he had accrued. The employee accepted the offer.

The Board found that the totality of the evidence, including the Employer’s knowledge of the importance of reinstatement to the organizing drive, the fact that the Employer’s potential financial liability was essentially limited to the backpay amount, and that the Employer made no effort to demonstrate that it would have offered the employee the substantial settlement amount in the absence of his Union activity, raised a colorable basis for finding that the settlement offer was aimed at preventing the employee from continuing his Union activity in the workplace. However, the Board determined that such evidence must be considered against its longstanding policy in Independent Stave Co., 287 NLRB 740 (1987), encouraging settlements. The settlement did not include any prospective waiver of Section 7 rights. The employee negotiated over the amount, was not coerced into the settlement, and had the option of refusing and requiring the Employer to comply with the 10(j) order. Additionally, the settlement also resolved a separate claim the employee had filed with the EEOC. Therefore, there was an equally credible argument that the settlement was a bona fide resolution of the claims that the employee had asserted against the Employer. In these particular circumstances, the Board held that the public policy favoring settlements warranted allowing the settlement to stand.
SECTION 8(a)(5)

Successorship

County Agency Inc. and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership d/b/a The Esplanade Hotel, 369 NLRB No. 62 (Apr. 29, 2020).

The full Board (Ring, Kaplan and Emanuel), affirming the ALJ, determined that a successor Employer inherited a bargaining obligation in circumstances where a city worker-retention law did not actually affect the composition of the successor’s workforce.

The Employer purchased a senior living residence in New York City, the workers at which had been represented by a Union. The Employer hired thirty-six of the predecessor’s employees and four new employees when it commenced operations. Fifteen of the predecessor employees hired were covered by the city’s Displaced Building Service Workers Protection Act, which required that the Employer retain those workers for at least ninety days after the sale. However, conclusive evidence was presented at trial that the Employer hired most of the predecessor’s employees, including the covered building-service workers, for their experience and training and not simply to comply with the local law.

Ordinarily, where a successor employer commences normal operations with a substantial and representative complement of employees, the relevant measuring day to determine if it retained a majority of the predecessor’s unit employees is the initial date it began operating. However, here the Employer and the General Counsel both argued that under Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), and NLRB v. Burns Security Services, 406 U.S. 273 (1972), an employer should only be considered a successor where it makes a “conscious decision” to hire a majority of the predecessor’s employees. So, they argued, the more appropriate date would be after the law’s ninety-day obligation expired in order to give the Employer a chance to voluntarily choose its workforce. The Board found that this question was not presented in the case at hand for two independent reasons.

First, the record evidence conclusively showed that the Employer voluntarily chose to hire the workers it hired, including those covered by the worker-retention law. Because the Employer intended to take advantage of its predecessor’s trained workforce regardless of the law, the argument that the law interfered with the Employer’s ability to choose its workforce failed. Second, even if the Employer had been able to replace the fifteen building-services workers with new hires, twenty-one predecessor employees would have still been hired—more than half of the 40-person labor force. Thus, even assuming the law prevented the Employer from hiring different building-services workers, the Employer would still have consciously chosen to hire a majority of its workforce from the predecessor.
Accordingly, there was no need to reach the question of whether the law interfered with the Employer’s hiring, and the Employer was thus a successor employer under *Burns* and *Fall River*. However, the Board did suggest it would consider addressing the General Counsel’s argument in a future appropriate case.

**Everport Terminal Services, Inc., 370 NLRB No. 28 (Sept. 30, 2020).**

The Board panel (Kaplan, Emanuel and McFerran) unanimously agreed with the ALJ that the successor Employer discriminatorily refused to hire some predecessor employees and then unlawfully recognized the International Longshore and Warehouse Union (ILWU) at a time when it did not represent a majority of employees and unlawfully imposed the ILWU’s collective-bargaining agreement. The panel majority (Kaplan and McFerran) further agreed that due to the successor Employer’s general discriminatory hiring plan, it lost its right under *NLRB v. Burns Security Services*, 406 U.S. 273 (1972), to set initial terms and conditions of employment, distinguishing the recent case of *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (Apr. 2, 2019).

The Employer here oversaw operation of a marine terminal in Oakland, California. It initially contracted out maintenance and repair work at the terminal, but in 2015 decided to take over those operations directly, joining the local employer association and adopting its collective-bargaining agreement with the ILWU. The predecessor maintenance contractors employed twenty-seven mechanics between two units represented by a Machinists local. The Employer then engaged in what the ALJ found to be a scheme to ensure it hired no more than 49 percent of the predecessors’ employees, and attempted to acquire at least 51 percent of its employees from the ILWU hiring hall, so as to avoid a bargaining obligation with the Machinists. In this regard, the Employer first posted the job openings at the ILWU hall and planned to exhaust the hall before hiring others, made little effort to notify the predecessor employees of available positions or schedule interviews, told interviewees that they must accept ILWU representation, and tracked union affiliation during the hiring process.

The Board panel unanimously agreed that the Employer engaged in an unlawful scheme to avoid a bargaining obligation with the Machinists but split as to the remedy for that violation. Under *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), enforced sub nom. Kallmann v. NLRB, 640 F.2d 1094 (9th Cir. 1981), a successor employer that discriminatorily refuses to hire predecessor employees to avoid a bargaining obligation must, inter alia, restore the predecessor’s terms and conditions of employment, in effect, losing its *Burns* right to set initial terms. In *Ridgewood*, the Board clarified that the *Love’s Barbeque* remedy does not apply every time an employer engages in such a discriminatory scheme. Reasoning that the *Love’s Barbeque* remedy essentially renders an employer a “perfectly clear” successor under *Spruce Up Corp.*, 209 NLRB 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975), the Board determined that it would be unduly punitive to order such a
remedy where there was no possibility the employer would have been a perfectly clear successor had it not discriminated. Under *Spruce Up*, an employer is a perfectly clear successor that loses the ability to set initial terms and conditions of employment when, by active or tacit inference, it misleads employees into believing that substantially all of them will be retained without change in their terms and conditions of employment. Thus, in *Ridgewood*, the Board held that a successor employer only loses its *Burns* right to set initial terms where the discriminatory conduct makes it impossible to tell whether the employer would have hired substantially all of the predecessor’s employees.

Here, the panel majority (Kaplan and McFerran) agreed that *Ridgewood* was distinguishable, since here the successor Employer’s discriminatory scheme to keep the predecessor employees to less than 49 percent of its workforce applied to all applicants from the predecessor workforce, not just a few at the margin. Accordingly, the panel found that it was impossible to know if, absent that scheme, the workforce would have consisted of substantially all of the predecessors’ employees, and thus the Employer forfeited the right to set initial terms. In any event, rescission of the unilaterally imposed ILWU contract terms was appropriate to remedy the unlawful recognition of ILWU.

Member Emanuel, dissenting in part, agreed with the Board’s remedy based on the Section 8(a)(2) violation, but argued that since the Employer here only discriminatorily refused to hire some of the predecessors’ employees, there was no uncertainty as to whether the Employer planned to retain substantially all of the predecessors’ employees.

**SECTION 8(b)(3)**

*Duty to Bargain*


The full Board (Ring, Kaplan and Emanuel) granted partial summary judgment in favor of the Employer and held that where a union local decided to disaffiliate, but then filed an RC petition with the name of a new union and won a contested election, the old collective-bargaining agreement became void and the newly certified union had a duty to bargain a new one.

The Employer’s employees voted in an internal union election to disaffiliate from the Utility Workers Union of America, System Local 537 (“previous union”). A new union, with the same officers, members, and representatives, named Utility Workers United Association, Local 537 (“Respondent union”), filed representation petitions for two relevant units, and the previous union intervened. The Respondent union won and was certified as the exclusive representative of both units. The
Employer eventually requested bargaining with the Respondent union for new contracts. The Respondent union took the position that the old contracts were still in force, arguing that it was the same union as the previous union, but had simply changed its affiliation. The Respondent union also argued that the Employer had waived bargaining by not changing any terms and conditions after the elections.

The Board held that the prior contracts were no longer in effect and did not relieve the Respondent union of its duty to bargain for an initial contract. First it noted that under *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), any contract executed with an incumbent union will be null and void if a challenging union prevails in an election. Thus, the Board rejected the suggestion that the Respondent union had the option of retaining the prior contract or bargaining a new one. As for the argument that this was a case of disaffiliation, not a new union, the Board found dispositive the fact that the Respondent union had filed RC petitions seeking elections and certification as a new representative rather than AC petitions to amend its certifications to reflect disaffiliation. Finally, the Board noted that merely honoring certain provisions of one prior contract did not constitute waiver by the Employer because it had an obligation to abide by the then-existing terms, i.e. the now-nullified agreement, until agreement or impasse. Accordingly, the Board found that as a new bargaining agent, the previous agreements were void and therefore could not relieve the Respondent union of its bargaining obligation. The Board remanded the unfair labor practice allegations, which were not included in the partial summary judgment motion, to the ALJ.

**SECTION 8(b)(4)**

**Coercion**

*International Brotherhood of Electrical Workers, Local 98 (Post Brothers)*, 370 NLRB No. 51 (Nov. 25, 2020).

The Board panel (Kaplan, McFerran and Emanuel) unanimously affirmed the ALJ’s finding that the Union’s audio broadcast of a loud crying baby at a construction site was unlawfully coercive, and thus violated Section 8(b)(4)(ii)(B).

The Employer, a general contractor, was gutting and rehabilitating a Philadelphia high-rise building. For about a month, the Union engaged in regular protests against the Employer’s use of a particular electrical contractor. The protests consisted of distributing handbills on the front sidewalk, as well as the operation of an amplified sound system. The speaker system played a looped recording of a crying baby, with a separate voice occasionally stating, “your community is crying for jobs, participation and fair wages.” The speakers were pointed directly in front of the entrance, near where contractors and employees entered the building. The recording was played at a high volume continuously for about four to six hours per day. The loud noise interfered with activity at the site.
For example, some employees used ear plugs to mute the sound, some workers had to relocate their work areas because of the noise, and speaking to delivery drivers was difficult, requiring the manager to relocate away from the speakers or use hand gestures to be understood. Pedestrians covered their ears as they passed and neighboring residents complained that the crying could be heard inside their apartments twenty floors up even with all windows and doors closed. Neighbors described the crying as “horribly blasting,” “very distressing,” a “constant barrage,” and “torture,” likening it to the sound warfare tactics allegedly used against Panamanian dictator Noriega. Despite neighbors’ complaints to the onsite Union officials, the noise did not subside. While the city Air Management Department declined to issue the Union any citations for noise violations, the official who made that determination did not testify, his reports were contradicted by credible testimony, and the official was only present two days. Furthermore, the ALJ found that the Union manipulated the volume and direction of the recording to avoid proper readings by the authorities.

The Board agreed with the ALJ’s finding that broadcasting the crying baby recording at a high volume was coercive and, therefore, violated Section 8(b)(4)(ii)(B) since the Union admitted that it had a secondary object of forcing neutral parties to cease doing business with the electrical contractor. Under *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB 797 (2010)*, non-picketing conduct will be found coercive when it directly causes disruption of the neutral employer’s operations or could be reasonably expected to do so, and the Board has found loud broadcasts coercive before. *See Carpenter’s (Society Hill Towers Owners’ Assn.), 335 NLRB 814 (2001), enforced, 50 F. App’x 88 (3d Cir. 2002).* Here the crying baby recording was found to be coercive given that it was a disturbing sound, mostly lacked a relevant verbal message, was not in compliance with local noise regulations, and impacted those working at the site.

The General Counsel had urged the Board to overrule *Eliason & Knuth* to find that the crying baby recording rose to the level of unlawful picketing, but the Board declined to reach that question as it would not affect the remedy.

**MISCELLANEOUS**

**Jurisdiction**

*KIPP Academy Charter School, 369 NLRB No. 48 (Mar. 25, 2020).*

The full Board (Ring, Kaplan and Emanuel) refused, for now, to exercise its discretion under Section 14(c)(1) to decline jurisdiction over charter schools as a class.

The Employer is a charter school in the Bronx, New York that was converted from a public school in 2000. Its employees have been represented by the Union.
since it was a public school. In 2017, employees filed a decertification petition under Section 9(c) seeking to oust the Union as the collective-bargaining representative of a schoolwide unit. The Union moved to dismiss, arguing that since the school was a conversion from a public school, the proper unit was the citywide unit of all public school employees of the New York City Department of Education, with whom the Employer's employees shared a community of interest. Alternatively, the Union argued the Board should exercise its discretion under Section 14(c)(1) of the Act to decline jurisdiction over this school in the interest of labor stability.

The Regional Director rejected the Union's arguments, finding that the Employer was not a political subdivision pursuant to NLRB v. National Gas Utility District of Hawkins County, 402 U.S. 600 (1971), that the employees did not share a community of interest with the public-school workers, and that the Board should not decline jurisdiction. The Regional Director accordingly directed that an election be held to determine if employees at the school wished to continue being represented by the Union. The Union requested review with regard to whether the Board should overrule Hyde Leadership Charter School—Brooklyn, 364 NLRB No. 88 (Aug. 24, 2016), and Pennsylvania Virtual Charter School, 364 NLRB No. 87 (Aug. 24, 2016), and decline jurisdiction over charter schools altogether. The Board accepted the request for review and invited amici curiae briefs.

In a one-page decision, without elaboration, the Board determined not to exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) at this time. It accordingly affirmed the Regional Director’s Decision and Direction of Election.

Remedies / Coronavirus


The full Board (Ring, Kaplan and Emanuel) announced a temporary change in its standard notice-posting remedy to adapt to the ongoing Coronavirus pandemic. Specifically, the notice provision will now indicate that where the involved facility is closed due to COVID-19, the notice must be posted within 14 days after the facility reopens and is staffed by a substantial complement of employees. Any delay in the physical posting also applies to electronic notices.

Pursuant to a motion for default judgement, the Board found that the Employer engaged in various violations of Section 8(a)(1) and (5) and, as part of the remedy, the Board held that a notice posting was appropriate. However, the Board did not order a standard notice-posting remedy. Relying on its broad discretionary authority under Section 10(c) of the Act to fashion remedies sua sponte, the Board found that the standard notice-posting remedy that requires employers to post the notice within 14 days of service may not be effective since so many businesses are temporarily closed due to COVID-19. Closed employers may not be able to comply
with the order, and even if they could, employees (or union members in CB cases) would not see it. Thus, the Board altered the notice-posting language as specified above. The Board noted that it will reinstate the standard notice language when "conditions warrant."

Section 10(k)

Machinists Lodge No. 160 (SSA Terminals, LLC), 369 NLRB No. 126 (July 16, 2020).

In this Section 10(k) jurisdictional dispute case, the full Board (Ring (recused), Kaplan and Emanuel) awarded the work in dispute to Machinists-represented mechanics based, in part, on evidence of Employer preference, even though the Employer explicitly refused to express a preference at the hearing.

The Employer manages marine cargo terminals and provides stevedoring services at various ports along the Pacific Coast. It was a member of the Pacific Maritime Association and party to its multi-employer collective-bargaining agreement with the International Longshore and Warehouse Union (ILWU), covering its stevedoring workers and some units of maintenance and repair workers at various terminals, including several at the Port of Seattle. The Employer also had a collective-bargaining agreement with the International Association of Machinists, District Lodge 160 (Machinists), covering maintenance and repair work at several different terminals, including three at the Port of Seattle. Terminal 5 at the Port of Seattle was originally operated using Machinists, but the owner shut it down for several years. A new owner took over and leased operations to the Employer. Due to a Letter of Understanding the Employer had signed with ILWU that required it to give maintenance and repair work at any newly-operated terminals to ILWU labor, it informed the Machinists that Terminal 5 would use ILWU-represented mechanics when it reopened. In response, the Machinists informed the Employer it would take economic action, including picketing and strikes, unless the work at Terminal 5 was assigned to the Machinists.

Finding reasonable cause existed that Section 8(b)(4)(D) had been violated in a jurisdictional dispute and there was no means of voluntary adjustment, the Board found it could proceed with awarding the disputed work under Section 10(k). The Board then applied its balancing test to determine which group of workers would be assigned the work, examining: (1) certifications and collective-bargaining agreements; (2) employer preference and past practice; (3) current assignment; (4) area and industry practice; (5) relative skills and training; (6) economy and efficiency of operations; and (7) job loss, which, the Board noted, is not always a factor. Of these factors, employer preference is given substantial weight.

The Board here found that the first factor favored neither union, since there was no evidence of a Board certification and both contracts arguably covered the
work in dispute. Under factor two, the Board determined that while the Employer explicitly refused to give a preference for either union, the Board could still infer the Employer’s preference from evidence adduced at the hearing. In doing so, the Board distinguished cases where employers have stated they did not have a preference—in which case that factor carries no weight—from cases where employers only refused or neglected to give a preference. Thus, looking at the evidence here, the Board found that the Employer’s preference was for the Machinists. Although the Employer had assigned the work to ILWU, this was not determinative of preference because a manager testified that had it not been for the ILWU contract, the Employer would have assigned the work to the Machinists. The Board found this testimony to be a better indication of the Employer’s preference. The Board also inferred this preference from other factors favoring the Machinists, namely, skills and training as well as economy and efficiency. As for the other half of the second factor, the Board found that past practice weighed in favor of the Machinists since they had previously handled the cranes at Terminal 5, albeit for a different employer, and the Employer had a practice of assigning repair work at other terminals at the port to Machinists-represented mechanics.

While ILWU argued that factor three, current assignment, should be determinative, the Board disagreed. While that factor did favor ILWU here, this case was distinguishable from precedent relied upon by ILWU where employer preference aligned with current assignment. Factor four favored neither union, as both worked terminals in the area. Factor five, the skills and training of the groups, favored the Machinists, even though a manager testified that both were qualified to perform the work, because the Machinists operated a certified apprenticeship program, whereas ILWU had no comparable program, and Machinists-represented mechanics had more experience with Terminal 5’s cranes. The Board found the sixth factor, economy and efficiency, slightly favored the Machinists. Although wage differentials themselves are not factors for consideration, here a manager testified that the Machinists were less costly and more efficient to use since fewer Machinists were needed to do the same amount of work in a shorter workday. ILWU also maintained an expensive hiring hall, while Machinists-represented mechanics provided their own tools and could be moved between terminals without the Employer having to spend time interviewing candidates. Finally, the Board found that the last factor, job loss, favored ILWU, since awarding the work to the Machinists would result in at least fifteen layoffs.

Weighing these factors, the Board awarded the work to mechanics represented by the Machinists, as three factors—including Employer preference—weighed in their favor compared to two factors that weighed in favor of the workers represented by ILWU.

Of note, while Chairman Ring recused himself from consideration of the dispute, he was a member of the panel for quorum purposes.
R-Cases

Aspirus Keweenaw, 370 NLRB No. 45 (Nov. 9, 2020).

The Board majority (Ring, Kaplan and Emanuel) created a framework for determining when mail-ballot elections may be appropriate during the COVID-19 pandemic.

While reiterating the Board’s longstanding preference for manual elections, the Board majority outlined six situations, any one of which may be sufficient basis for a Regional Director to direct a mail-ballot election during the pandemic. These situations include: (1) the Agency office tasked with conducting the election is operating under “mandatory telework” status; (2) either the 14-day trend in new COVID-19 cases is increasing or the 14-day testing positivity rate is at or above 5 percent, generally to be measured based on the county where the facility is located; (3) the proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size, taking into account how circumstances may have changed since the original mail-ballot determination.

Member McFerran, concurring, argued in favor of a default presumption that mail-ballot elections are appropriate during the pandemic and signaled an interest in reconsidering manual elections as the default method generally.

Providence Health & Services—Oregon d/b/a Providence Portland Medical Center, 369 NLRB No. 78 (May 13, 2020).

The full Board (Ring, Kaplan and Emanuel) overruled precedent governing dual-marked ballots and held that when a ballot includes markings in more than one square or box, it is void. In adopting the bright-line rule for dual-marked ballots, the Board also revised the official ballot language to provide voters with clearer guidance. Applying the new rule, the Board voided the ballot in question, resulting in a tie vote, and therefore vacated the Union’s certification.

Under prior precedent, a dual-marked ballot would be treated as void unless the voter’s intent could be ascertained from other markings on the ballot, such as an attempt to erase or obliterate one mark. The ballot at issue in this case contained an “X” in the “Yes” box and a single, slightly smudged diagonal line in the “No” box. The Regional Director determined that the voter attempted to erase the line in the “No” box and therefore the voter’s intent to vote “Yes” was clear.
The Board reviewed prior precedent on dual-marked ballots, concluding that variable fact patterns and nuanced analysis had led to inconsistency in adjudications. The Board agreed with criticisms from the Ninth Circuit and concluded that attempts to discern voter intent based on additional markings, suspected erasures, smudges, or other ostensible “corrections” are impermissibly subjective and a waste of agency resources. For example, here it was unclear whether the smudging was due to an attempted erasure or caused by a sweaty hand or the way the voter folded the ballot. Accordingly, the Board adopted an objective, bright-line rule that treats any ballot that includes markings in more than one square or box as void and overruled any cases in conflict with this principle. This new approach broadly encompasses situations where there are markings in both the “Yes” and “No” squares, including when there are additional markings near the boxes, such as circling the word “Yes” above the “Yes” square.

Additionally, the Board modified the ballot language on the actual and sample ballots in order to convey that markings in multiple boxes will cause the ballot not to be counted and that voters should ask for a new ballot if markings are made in or around more than one square.

Applying the new standard retroactively, the Board voided the ballot in question, resulting in 383 votes cast for the Union and 383 votes cast against representation at this acute care hospital. Accordingly, the Board certified the results of the Union’s election loss.

**SIGNAL CASES**

**Union buttons**: Member Emanuel would, in an appropriate case, support expanding the concept of immediate patient-care areas to include ambulances for the purpose of finding bans on union insignia in those areas presumptively valid. *American Medical Response of Southern California*, 370 NLRB No. 57, slip op. at 1 n.4 (Dec. 10, 2020).

**Successorship—Advanced Stretchforming**: The Board (Ring, Kaplan and Emanuel) is willing to reconsider the holding in *Advanced Stretchforming International*, 323 NLRB 529 (1997), enforced in relevant part, 233 F.3d 1176 (9th Cir. 2000), that a successor employer forfeits its right to set initial terms and conditions of employment when it declares at the outset that it would be non-union. *Stein, Inc.*, 369 NLRB No. 10, slip op. at 3 n.10 (Jan 28, 2020).

**Duty to provide information**: Chairman Ring and Member Kaplan express interest in reconsidering the rule articulated in *Disneyland Park*, 350 NLRB 1256 (2007), that an employer has a duty to provide non-unit information where “the relevance of the information should have been apparent to the Respondent under the circumstances.” *McLaren Macomb*, 369 NLRB No. 73, slip op. at 1 n.1 (May 11, 2020).
**Employer RM petition:** The Board (Ring, Kaplan and Emanuel) expresses interest in considering whether and under what circumstances a decline in union membership may be relied upon to support a good-faith reasonable uncertainty of an incumbent union’s continuing majority support for purposes of an employer’s RM petition under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). *ASARCO, LLC*, Case 28-RM-255301, Unpublished Order dated July 6, 2020, at 1 n.1.

**Supervisory status:** The Board (Ring, Kaplan and Emanuel) noted that it is open to reconsidering its test for whether putative supervisors may effectively recommend discipline. *BluePearl Vet, LLC*, Case 19-UC-239832, Unpublished Order dated Apr. 10, 2020, at 1 n.1.

**Election critical period:** Members Kaplan and Emanuel note that there may be an important issue to be considered in a future case about whether the Board’s critical-period policy, established in *Ideal Electric and Mfg. Co.*, 134 NLRB 1275 (1961), adequately protects employees from election interference by coercive threats made immediately prior to the filing of an election petition. *Wayne/Scott Fetzer Co. d/b/a Wayne Combustion Systems*, Case 25-RD-256161, Unpublished Order dated Sept. 24, 2020, at 1 n.2.

**Electioneering zone and union special agents:** The Board (Ring, Kaplan and Emanuel) passes on whether union supporters who “stationed” themselves throughout the Employer’s facility on the day of the election were special agents of the Union. Member Kaplan also notes that many of the issues in this case could have been avoided by the designation and enforcement of a no-electioneering zone and believes the issue should be addressed in the future. *NP Sunset LLC d/b/a Sunset Station Hotel & Casino*, Case 28-RC-242249, Unpublished Order dated Apr. 13, 2020, at 1 n.1.

**Mail ballot solicitation:** The Board (Ring, Kaplan, McFerran and Emanuel) granted the Employer’s request for review of the Regional Director’s Decision and Certification of Representative as it raises questions concerning the Board’s policy regarding whether a union’s offer to mail employees’ election ballots is objectionable conduct, as addressed in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004). *Professional Transportation, Inc.*, Case 32-RC-259368, Unpublished Order dated Dec. 2, 2020.

**Mail ballot elections:** The Board (Ring, Kaplan and Emanuel) is open to addressing the criteria for mail balloting due to the “many potential problems inherent in mail ballot elections.” *EIHAB Human Services, Inc.*, Case 29-RC-245133, Unpublished Order dated Apr. 15, 2020, at 1 n.1.