

## Recent NLRB Developments

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### I. INTRODUCTION

Decisions of the National Labor Relations Board ("Board" or "NLRB") during this survey period<sup>1</sup> may be the first indication that the conservative swing in Board policy brought about by Reagan appointees to the Board is slowing. During the last survey period,<sup>2</sup> Chairman Donald Dotson, appointed by President Reagan in 1984, led the way in continuing expressly to overrule numerous prior Board decisions and in significantly departing from the policies underlying those earlier decisions.<sup>3</sup> To be sure, the Board decisions of the current survey period continue to reflect the views of a very conservative Board. Nonetheless, for the most part, these cases do not expressly depart from previous Board holdings. A flurry of decisions in which Chairman Dotson dissented were handed down in late May of 1986, in anticipation of Member Dennis' imminent departure from the Board, and strongly suggest that the labor law pendulum may finally have reached its right-most point.<sup>4</sup>

Because this survey period was not filled with far-reaching changes in Board policy, the cases in this discussion were more difficult to select than those included in last year's survey. Subjective considerations necessarily played a greater role in the selection process. Nonetheless, an effort has been made to select cases which will be of most interest and benefit to *all* attorneys representing clients in labor matters, regardless of whether those clients are employees, unions, or employers. In addition to Board cases, this Article will discuss pertinent United States Supreme

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<sup>1</sup>The survey period extends from June, 1985 through May, 1986.

<sup>2</sup>June, 1984 through May, 1985.

<sup>3</sup>See Swider, *Recent NLRB Developments*, 19 IND. L. REV. 241, 244-56 (1986).

<sup>4</sup>See *Trover Clinic*, 280 N.L.R.B. No. 2 (May 30, 1986), 122 L.R.R.M. (BNA) 1172 (1986); *Dorothy Shamrock Coal Company*, 279 N.L.R.B. No. 174 (May 30, 1986), 123 L.R.R.M. (BNA) 1048 (1986); *Armon Company*, 279 N.L.R.B. No. 158 (May 30, 1986), 122 L.R.R.M. (BNA) 1166 (1986); *Lucky Stores, Inc., d/b/a/ Gemco*, 279 N.L.R.B. No. 153 (May 29, 1986), 122 L.R.R.M. (BNA) 1180 (1986); *Woodcliff Lake Hilton Inn, Inc.*, 279 N.L.R.B. No. 146 (May 22, 1986), 123 L.R.R.M. (BNA) 1061 (1986); *Armco, Inc., Eastern Steel Division, Ashland Works*, 279 N.L.R.B. No. 143 (May 30, 1986); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. No. 134 (May 10, 1986), 122 L.R.R.M. (BNA) 1107 (1986); *Getty Refining and Marketing Co.*, 279 N.L.R.B. No. 126 (May 14, 1986), 122 L.R.R.M. (BNA) 1150 (1986). Of course, depending on who is selected to replace Member Dennis on the Board, future decisions may resume the conservative slide.

Court and Seventh Circuit Court of Appeals decisions which involve recent and important developments under the National Labor Relations Act ("Act" or "NLRA").

## II. AN EMPLOYER'S DUTY TO SUPPLY FINANCIAL INFORMATION DURING BARGAINING

At least twice during the past year, the Board had the opportunity to clarify its position regarding an employer's obligation to release financial information to a requesting union. In *Buffalo Concrete*<sup>5</sup> and *Cowin & Co.*,<sup>6</sup> the Board demonstrated that it will look behind an employer's asserted reasons for requesting concessions at the bargaining table to determine whether the company's position is grounded upon the inability to continue paying present wages and benefits or whether the company is simply basing its request upon an unwillingness to do so.<sup>7</sup> It is clear from the Board's decision in *Buffalo Concrete* that a management request for concessions will not in itself trigger an obligation to release financial information upon a union's request.<sup>8</sup> It is equally plain, however, from *Cowin & Co.* that simply paying lip service to an unwillingness to continue paying at the current levels will not necessarily protect an employer from a union's request for financial data.<sup>9</sup>

In *Buffalo Concrete*, six employer-members of a construction industry bargaining association sought concessions at the bargaining table upon the premise of competition. The employers attempted to convince the union that because nonunion contractors had made such substantial inroads into the concrete industry in their location, unionized contractors had lost the ability to compete effectively. To regain competitiveness in the industry, the employers expressed the need to "narrow the cost gap between the union and nonunion companies."<sup>10</sup>

In response to the employers' requests for concessions, the union asked to see the employers' financial records to determine whether the requests were justified. After repeated requests for the information by the union and after repeated denials by the employers, the union filed refusal-to-bargain charges against the employers. After a hearing on these charges, an Administrative Law Judge (ALJ) held for the union on this issue. The ALJ concluded that an assertion of an "inability to compete" is tantamount to an "inability to pay" bargaining stance, thus triggering

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<sup>5</sup>276 N.L.R.B. No. 40 (Sept. 30, 1985), 120 L.R.R.M. (BNA) 1139 (1985).

<sup>6</sup>277 N.L.R.B. No. 82 (Nov. 26, 1985), 121 L.R.R.M. (BNA) 1029 (1985).

<sup>7</sup>See *infra* notes 10-20 and accompanying text.

<sup>8</sup>276 N.L.R.B. No. 40, slip op. at 7, 120 L.R.R.M. at 1141.

<sup>9</sup>See *infra* notes 18-20 and accompanying text.

<sup>10</sup>276 N.L.R.B. No. 40, slip op. at 3, 120 L.R.R.M. at 1140.

the duty to turn over financial information to the union upon request.<sup>11</sup> Upon appeal, the Board disagreed.

Before overturning the ALJ's decision on this question, the Board expressly agreed with his statement of applicable law: "[W]hen an employer objects to a union's bargaining demands on the basis that it is unable to afford the cost of the proposal, it is under a duty to let the union see its books and records so that the union can verify the truthfulness of the employer's contentions."<sup>12</sup> The Board also concurred with the ALJ's view of the permissible implications of concession bargaining: "[W]hen concession bargaining does take place, an implied major premise of the employer's position necessarily is that it has been paying wages and benefits which it could afford at one time but which it no longer wishes to pay."<sup>13</sup> The Board parted with the ALJ, however, in his effectively equating concession bargaining demands with "inability to pay" assertions. The Board explained, "[W]e will not assume that an employer who no longer *wishes* to pay wages and benefits it once agreed to is *unable* to make such payments."<sup>14</sup> Applying this rationale to the facts before it, the Board concluded that even though the employers had maintained that concessions were needed to increase their competitiveness in their industry and had referred to a general loss of jobs in the unionized sector of that industry, the employers had stopped short of claiming that they were *unable* to afford the union's proposals.<sup>15</sup> Accordingly, the Board held that the employers had not violated sections 8(a)(1) and (5) of the NLRA<sup>16</sup> by refusing the union's request for financial information.<sup>17</sup>

In *Cowin & Co.*, the Board demonstrated that it does not consider an employer's obligation to turn over financial information to a requesting union as simply a matter of semantics. The Board upheld an ALJ's determination that the employer violated sections 8(a)(1) and (5) of the Act by refusing to provide the union with requested financial information,

<sup>11</sup>276 N.L.R.B. No. 40, JD slip op. at 17-18 (quoting *United Steel Workers of Am. v. NLRB* (Stanley Artex Windows), 401 F.2d 434 (1968)).

<sup>12</sup>276 N.L.R.B. No. 40, slip op. at 6, 120 L.R.R.M. at 1141.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* slip op. at 7, 120 L.R.R.M. at 1141 (emphasis in original).

<sup>15</sup>*Id.*

<sup>16</sup>§ 158 Unfair labor practices.

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. §§ 158(a)(1), (a)(5) (1982).

<sup>17</sup>276 N.L.R.B. No. 40, slip op. at 7, 120 L.R.R.M. at 1141.

despite the employer's repeated assertion that its request for concessions was based only on an unwillingness to provide the wages and benefits of the past.<sup>18</sup> In reaching this conclusion, the Board relied primarily on other statements made by the employer during the course of bargaining which indicated an inability to pay higher wages.<sup>19</sup> The employer also raised as a justification for its bargaining position that it had suffered financial losses during each of the previous three years. Hence, the Board concluded: "Under these circumstances we find that the [employer], despite its assertions to the contrary, was in fact expressing financial inability to pay."<sup>20</sup>

### III. A UNION'S RIGHT TO FINE FINANCIAL CORE MEMBERS

During the last survey period, the United States Supreme Court held that a union cannot impose fines against members whose tendered resignations are invalid under the union's constitution.<sup>21</sup> The Court, in *Pattern Makers' League v. NLRB*,<sup>22</sup> ruled that a union's attempt to so limit a member's right to resign violates section 8(b)(1)(A)<sup>23</sup> of the Act.<sup>24</sup> During the present survey period, the Board extended the *Pattern Makers* rationale to include a union's attempt to impose discipline upon "financial core" members.<sup>25</sup> Previous Supreme Court, Court of Appeals and Board

<sup>18</sup>277 N.L.R.B. No. 82, slip op. at 1 n.1, 121 L.R.R.M. at 1029.

<sup>19</sup>*Id.* For example, at the onset of the bargaining, the employer related to the union that there was "a real question of whether we shall be in business at the termination of this contract unless prior contractual concepts are radically changed." *Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Pattern Makers' League v. NLRB*, 105 S. Ct. 3064 (1985). See Swider, *supra* note 3 at 250.

<sup>22</sup>105 S. Ct. 3064 (1985).

<sup>23</sup>§ 158 Unfair labor practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—  
 (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

<sup>24</sup>U.S.C. § 158(b)(1)(A) (1982) (emphasis in original).

<sup>25</sup>105 S. Ct. at 3071.

<sup>25</sup>A "financial core" union member is one whose only obligation to the union is to pay all initiation fees and dues uniformly required by the union to maintain membership. This enables an employee who does not wish to maintain full union membership status to avoid a threat of discharge under section 8(a)(3) of the Act (*see infra* note 23) while covered by a collective bargaining agreement containing a union-security provision. The following is an example of a typical union-security clause:

All present Employees in the bargaining unit shall maintain membership in good standing in the Union as a condition of employment. All new Employees shall as a condition of employment, become members of the Union within sixty (60) calendar days, to the extent of paying initiation fees and membership dues as required of all Union Members.

decisions have held that a union cannot demand, under section 8(a)(3),<sup>26</sup> that a financial core member take an oath or attend union meetings,<sup>27</sup> fill out application forms,<sup>28</sup> accept membership<sup>29</sup> or do anything other than tender dues and fees.<sup>30</sup> However, until this survey period, the precise question of whether a union can impose discipline on financial core members had not been squarely faced.

In *Tacoma Boatbuilding*,<sup>31</sup> two unions were engaged in an economic strike against the same employer. During the course of the strike, several union members submitted (or tried to submit) a letter to their respective

The failure of any Employee to maintain his Union membership in good standing as required herein, upon written notice to the Company by the union to such effect and to further effect that Union membership was available to such person on the same terms and conditions generally available to other members, shall obligate the Company to discharge such Employee within ten (10) calendar days of such notice.

<sup>26</sup>§ 158 Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3) (1982) (emphasis in original).

<sup>27</sup>Union Starch & Refining Co., 87 N.L.R.B. 779 (1949).

<sup>28</sup>United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979).

<sup>29</sup>Hershey Foods Corp., 207 N.L.R.B. 897 (1973), *enforced*, 513 F.2d 1083 (9th Cir. 1975).

<sup>30</sup>NLRB v. General Motors Corp., 373 U.S. 734, 742-43 (1963).

<sup>31</sup>277 N.L.R.B. No. 20 (Nov. 19, 1985), 120 L.R.R.M. (BNA) 1329 (1985).

unions giving notice of their intent to alter their membership status from "full" membership to "financial core" status.<sup>32</sup> The employees who submitted this letter then crossed the picket line and returned to work. In response, the unions initiated internal charges against the employees and imposed fines against most of them for crossing a sanctioned picket line. The employees responded by filing section 8(b)(1)(A) charges against their unions.<sup>33</sup>

After a hearing, an ALJ dismissed the employees' unfair labor practice charges, finding that the charging parties had never "clearly and unequivocally" resigned from their unions.<sup>34</sup> The ALJ reasoned that the submitted letters did not provide the unions with reasonable notice of resignation and, therefore, that the employees' membership status had not changed. Having made this determination, the ALJ avoided the need to address the issue of whether financial core members can legally be subject to union discipline.

The Board reversed the ALJ's decision and concluded that the unions had violated the Act by initiating charges and imposing fines against the employees after they had changed their membership status.<sup>35</sup> The Board characterized its holding as a simple extension of previous limitations imposed on unions with respect to financial core members.<sup>36</sup> The Board also premised its holding on *Pattern Makers'* and other Board decisions that permitted a union member to resign from full membership and, thereby, avoid subsequent union disciplinary attempts.<sup>37</sup> Relying on this latter line of cases, the Board summarily rejected the unions' argument that provisions in the unions' constitutions purporting to limit members' resignation rights precluded giving any effect to the employees' resignation letters.<sup>38</sup> In supporting its holding, the Board also responded to the unions' argument that had the employees wished to avoid subsequent union discipline

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<sup>32</sup>*Id.* slip op. at 2-3, 120 L.R.R.M. at 1330. The letter provided in pertinent part: This letter will serve as notification that I am changing my membership status . . . from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all initiation fees and dues uniformly required of all members for maintaining membership. I am not resigning from the union, I am only changing my membership status. I will not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all . . . members.

*Id.*

<sup>33</sup>*Id.* slip op. at 3, 120 L.R.R.M. at 1330.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* slip op. at 6, 120 L.R.R.M. at 1331.

<sup>37</sup>*Id.* slip op. at 7 n.7, 120 L.R.R.M. at 1331 n.7.

<sup>38</sup>*Id.* slip op. at 6, 120 L.R.R.M. at 1331.

for crossing the picket line they could have resigned completely from their unions. The Board explained:

[W]hile there is a voluntary aspect to the assumption of financial core status, when there is a union-security clause in effect an employee must retain financial core status as a condition for employment. To then say, however, that a financial core member is subject to the same discipline as a full member is to render meaningless the third part of the *Scofield* test, namely, that a member is free to leave the union and escape the rule.<sup>39</sup>

In effect, the Board's holding in *Tacoma Boatbuilding* is an acknowledgment that to permit a union to discipline a financial core member is to countenance an unlawful restraint on an employee's section 7<sup>40</sup> right to refrain from union activity.<sup>41</sup>

#### IV. HIRING TEMPORARY REPLACEMENTS DURING AN OFFENSIVE LOCKOUT

If there was one decision during the survey period which struck organized labor harder than any other, that decision must be *Harter Equipment, Inc.*<sup>42</sup> In *Harter*, the Board concluded that an employer's use of temporary workers during a lockout initiated to bring economic pressure to bear upon legitimate bargaining demands is not unlawful.<sup>43</sup>

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<sup>39</sup>*Id.* In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Court explained that "Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."

<sup>40</sup>Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1982).

<sup>41</sup>*See, e.g.,* *Carpenters District Council (Gordon Construction, Inc.)* 277 N.L.R.B. No. 19 (Nov. 19, 1985), 120 L.R.R.M. (BNA) 1327, 1329 (1985) stating:

Accordingly, we find that because Viskovich notified the Respondent of this change in membership status prior to crossing the picket line and returning to work, the Respondent's bringing charges and imposing a fine against him constituted an unlawful restraint on his Section 7 right to refrain from union activity in violation of Section 8(b)(1)(A) of the Act.

<sup>42</sup>280 N.L.R.B. No. 71 (June 24, 1986), 122 L.R.R.M. (BNA) 1219 (1986).

<sup>43</sup>*Id.* slip op. at 2, 122 L.R.R.M. at 1220. The majority opinion, joined by Chairman Dotson and Members Johansen and Babson, met with a lengthy dissent by Member Dennis.

This decision has given management a powerful new weapon to use in achieving its collective bargaining objectives.

The salient facts of *Harter* are not complicated and are capable of frequent recurrence. The employer and the union, parties to a series of collective bargaining agreements, began negotiating a new agreement in October of 1981. Their existing contract was scheduled to expire on December 1, 1981. When little bargaining progress was made in the face of the employer's demands for concessions and changes in the contract's union security clause, the union offered to extend the existing contract for another six months so that bargaining could continue. The employer replied that it would not let its employees work without a contract and would agree to no extension of the December 1 expiration date. When no agreement was reached by December 3rd, the employer locked out its employees to pressure the union into accepting the employer's "final" offer. In mid-January 1982, with no agreement yet achieved, the employer began hiring temporary employees so that operations could continue during the lockout. The union responded to the employer's hiring of temporary replacements with section 8(a)(1) and (3) charges. After a hearing, an ALJ concluded that the employer's lockout and temporary replacement of the union workers did not constitute a violation of the NLRA.<sup>44</sup>

In reviewing the ALJ's decision, the Board first noted that there was no evidence in the record suggesting that the employer's action was motivated by unlawful union animus. Indeed, the record reflected that the parties had had an amicable bargaining history.<sup>45</sup> The Board also recognized that the record contained no evidence that the employer had engaged in bad-faith bargaining either before or after the lockout.<sup>46</sup> Because the union had adduced no proof of anti-union motivation on the employer's part, the Board's analysis was necessarily governed by principles established by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*<sup>47</sup> There, the Court elaborated guidelines for determining the circumstances in which a 8(a)(3) violation may be found even in the absence of anti-union animus.<sup>48</sup>

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<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>388 U.S. 26 (1967).

<sup>48</sup>*Id.* at 34.

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in

In determining the effect on employee rights of Harter's lockout and subsequent hiring of temporary replacements, the Board looked to two other Supreme Court decisions, *American Ship Building Co. v. NLRB*<sup>49</sup> and *NLRB v. Brown*.<sup>50</sup> In each of these cases the Court "found sufficient business justification for both employer weapons in the course of economic conflicts"<sup>51</sup> and "found that the impact of the employer conduct on employee rights was comparatively slight, rather than inherently destructive."<sup>52</sup>

Accordingly, in holding that an employer does not violate the Act by temporarily replacing employees in conjunction with a lawful lockout in support of legitimate bargaining demands, the Board in *Harter* found that the use of temporary employees reasonably serves the same legitimate business purpose served by the lockout itself, *i.e.*, bringing economic pressure to bear in support of a valid bargaining position.<sup>53</sup> The Board also found that utilizing temporary replacements in conjunction with a lawful lockout is no more destructive of employee rights than locking out employees in the first place.<sup>54</sup> Because of the "temporary" status of the replacements, "[t]he Union or its individual members have the ability to relieve their adversity [in either situation] by accepting the employer's less favorable bargaining terms and returning to work."<sup>55</sup> On these bases, the Board affirmed the ALJ's decision to dismiss the union's complaint.<sup>56</sup>

In dissent, Member Dennis disagreed with the Board's refusal to distinguish between "offensive" and "defensive" lockouts in assessing

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either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

*Id.* (emphasis in original).

<sup>49</sup>380 U.S. 300 (1965). In *American Ship Building*, the Court held that an employer may temporarily lock out its employees during a bargaining impasse for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position without violating either section 8(a)(1) or (3). *Id.* at 318.

<sup>50</sup>380 U.S. 278 (1965). In *Brown*, the Court held that members of a multi-employer bargaining association may lock out and temporarily replace employees after their union has commenced a "whipsaw" strike against another association member. *Id.* at 288-90. A "whipsaw" strike is one aimed at a single employer who is part of a group of employers from whom the union is seeking benefits. The objective is to gain favorable terms from the targeted employer, which can then be used as a pattern or a base to obtain the same or better terms from the other employers under the same threat of pressure exerted against the first employer.

<sup>51</sup>280 N.L.R.B. No. 71, slip op. at 3, 122 L.R.R.M. at 1220.

<sup>52</sup>*Id.* slip op. at 4, 122 L.R.R.M. at 1220.

<sup>53</sup>*Id.* slip op. at 10, 122 L.R.R.M. at 1222.

<sup>54</sup>*Id.* slip op. at 9-10, 122 L.R.R.M. at 1222.

<sup>55</sup>*Id.* slip op. at 10, 122 L.R.R.M. at 1222.

<sup>56</sup>*Id.* slip op. at 11-12, 122 L.R.R.M. at 1223.

the relative effect of hiring temporary replacements on employee rights. In *Brown*, the Court permitted the hiring of temporary replacements in the narrow context of a "defensive" lockout,<sup>57</sup> whereas in *Harter*, the majority was now condoning the same action in the context of an "offensive" lockout.<sup>58</sup> Dennis reasoned that this offensive use was "inherently destructive" of employee rights and, therefore, violative of the Act, notwithstanding the absence of improper motivation and the presence of a legitimate and substantial employer business objective.<sup>59</sup>

#### V. HIRING "PERMANENT" REPLACEMENTS DURING AN ECONOMIC STRIKE

In *NLRB v. Mackay Radio & Telegraph Co.*,<sup>60</sup> the Supreme Court held that economic strikers are entitled to immediate reinstatement upon their unconditional offer to return to work, unless their positions have been filled by "permanent" replacements.<sup>61</sup> If permanent replacements have been hired, then the striking employees are placed on a preferential recall list and are called back to work as new job openings occur or as their replacements are separated from employment.<sup>62</sup> The question whether replacements are temporary or permanent was addressed and resolved by the Board during this survey period in a manner that may give organized labor some hope that Chairman Dotson's conservative hold on the Board is weakening.<sup>63</sup>

In *Hansen Brother's Enterprises*,<sup>64</sup> the employer maintained that the strike replacements it had hired during the course of an economic strike had "permanent" status for three reasons. First, the employer relied on a letter it sent to the strikers which provided in pertinent part: "You

<sup>57</sup>*I.e.*, one commenced by members of a multi-employer bargaining association who were defending themselves against a whipsaw strike against another of their members.

<sup>58</sup>*I.e.*, the lockout was commenced for the sole purpose of placing economic pressure on the union to accept the employer's lawful bargaining demands.

<sup>59</sup>*Id.* slip op. at 22, 122 L.R.R.M. at 1226 (Dennis, Member, dissenting).

[A]llowing an employer to take the offensive and temporarily replace locked-out employees renders nugatory the employees' right to strike, and places an unacceptable burden on employees' rights to engage in collective-bargaining and union activities. I therefore find the Respondent's temporary replacement of its employees in these conditions unlawful under Section 8(a)(1) and 8(a)(3) of the Act as inherently destructive of rights guaranteed in Sections 7 and 13 of the Act.

*Id.*

<sup>60</sup>304 U.S. 333 (1938).

<sup>61</sup>*Id.* at 345-46.

<sup>62</sup>*Laidlaw Corporation*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

<sup>63</sup>*See also* note 4 *supra*.

<sup>64</sup>279 N.L.R.B. No. 98 (April 30, 1986), 122 L.R.R.M. (BNA) 1057 (1986).

should further be aware that if a replacement is hired for your position, you may lose your right to reemployment if you later change your mind and wish to come back to work.”<sup>65</sup> Second, the employer supported its position by relating statements made to the replacements to the effect that the employer “wanted” to consider them as permanent employees and “wanted” the replacements to consider themselves as such.<sup>66</sup> Third, the employer cited its repeated refusal of the union’s demand during negotiations to terminate the employment of the strike replacements.<sup>67</sup>

The Board rejected all these arguments, and disagreed with the ALJ’s conclusion that the striking employees’ offer to return to work was conditional because it was, at all times, coupled with a demand of reinstatement to former positions and a demand for the discharge of the replacements.<sup>68</sup> The Board relied upon the employer’s use of the word “may” in its letter to the strikers apprising them that they “may” lose reemployment rights if replacements are hired.<sup>69</sup> The Board also found that the employer’s statements to the replacements were non-committal in that the replacements were never actually told that they were permanent.<sup>70</sup> Rather, the employer had merely told them that it “wanted” to consider them as permanent.<sup>71</sup> The Board was also unconvinced of the permanent nature of the replacements by the employer’s alleged bargaining statements. At most, these statements showed the employer’s *intent* to replace the strikers permanently, but the Board explained: “Such a showing fails to satisfy the employer’s burden; rather, the employer must show a *mutual* understanding between itself and the replacements that they are permanent.”<sup>72</sup> Accordingly, the Board concluded that, because the replacements were not “permanent,” the strikers’ offer to return to work was “perfectly appropriate” in its concurrent demand that the replacements be discharged.<sup>73</sup> The Board ordered the employer, *inter alia*, to offer the strikers immediate and full reinstatement to their former jobs and to make them whole for any loss of earnings suffered as a result of the refusal to honor their “unconditional” offer to return to work.<sup>74</sup>

Chairman Dotson wrote a stinging dissent. He began: “My col-

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<sup>65</sup>*Id.* slip op. at 3 n.5, 122 L.R.R.M. at 1057 n.5.

<sup>66</sup>*Id.* slip op. at 3, 122 L.R.R.M. at 1057 (footnote omitted).

<sup>67</sup>*Id.* slip op. at 2, 122 L.R.R.M. at 1057.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* slip op. at 3, 122 L.R.R.M. at 1057.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* (emphasis in original) (citing *Associated Grocers*, 253 N.L.R.B. 31 (1980)).

<sup>73</sup>*Id.* slip op. at 2, 122 L.R.R.M. at 1057.

<sup>74</sup>*Id.* slip op. at 5.

leagues' handling of the evidence in this case gives rise to a disquieting concern. Briefly stated, the majority's analytic approach to the evidence reflects an undue taste for verbal analysis rather than a recognition of the real world facts."<sup>75</sup> In addition to its "overconcern for verbal precision," the majority, in Dotson's view, also ignored the effect of the Supreme Court's recent decision in *Belknap, Inc. v. Hale*<sup>76</sup> on the employer's statements to the replacements.<sup>77</sup> In *Belknap*, the Court held that strike replacements who were told by their employer that they would be "permanent" were not pre-empted by federal law from bringing a state court action for misrepresentation and breach of contract when they were subsequently laid off pursuant to a strike settlement agreement reached in the context of an unfair labor practice case.<sup>78</sup> Dotson argued that it was the legitimate concern raised by *Belknap* that caused the employer in *Hansen* to tell the replacements that it "wanted" to consider them permanent and that it "wanted" the replacements also to consider themselves permanent.<sup>79</sup> Dotson concluded:

The preponderance of the evidence in this case demonstrates that the Respondent sought to hire permanent replacements while protecting itself against the adverse possibilities posed by the *Belknap* case, which had issued only a few weeks prior to the strike. Two-and-a-half years later, this Board sits in judgment on the verbal constraints employed to that end and finds them inadequate. Looking only to these verbalisms, the majority imposes a 2-1/2-year backpay remedy essentially because it would have phrased two items in a different way. By so doing, the majority has, in my view, adopted a wholly unrealistic approach to labor matters.<sup>80</sup>

## VI. MISREPRESENTATIONS AND ALTERED BOARD MATERIALS IN UNION ELECTION CAMPAIGNS

During the survey period, the Board continued along its "anything goes" course in dealing with campaign misrepresentations. Also in the

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<sup>75</sup>*Id.* slip op. at 8, 122 L.R.R.M. at 1058 (Dotson, Chairman, dissenting).

<sup>76</sup>463 U.S. 491 (1983).

<sup>77</sup>279 N.L.R.B. No. 98, slip op. at 8-9, 122 L.R.R.M. at 1058 (Dotson, Chairman, dissenting).

<sup>78</sup>*Belknap*, 463 U.S. at 512. The Court suggested that an employer could protect itself from such liability by promising permanent employment subject to the possible contingencies of a Board order or an unfair labor practice settlement agreement. *Id.* at 502.

<sup>79</sup>279 N.L.R.B. No. 98, slip op. at 8-9, 122 L.R.R.M. at 1058 (Dotson, Chairman, dissenting).

<sup>80</sup>*Id.* slip op. at 11, 122 L.R.R.M. at 1059 (Dotson, Chairman, dissenting).

past year, the Seventh Circuit placed its imprimatur upon the Board's liberal approach, by enforcing one of the seminal cases in the Board's recent permissive trend, *Riveredge Hospital*.<sup>81</sup> In *NLRB v. Affiliated Midwest Hospital*,<sup>82</sup> the Seventh Circuit agreed with the Board's *Riveredge Hospital* decision that misrepresentations of Board processes or actions by a party no longer constitutes *per se* grounds for vacating an election.<sup>83</sup>

In *Riveredge Hospital*, the employer sought to have an election set aside on the basis of several alleged misrepresentations made by the union in the time period between the filing of two election petitions and the resulting election. The most controversial piece of union campaign propaganda during this period was a leaflet entitled "U.S. Government Issued Complaint Against Riveredge." In fact no action had been taken by the Board against the employer; rather, a charge that had been filed against the employer had resulted in a settlement agreement containing a non-admission provision. The Regional Director, following *Formco, Inc.*,<sup>84</sup> overturned the election results on the ground that the union's misrepresentations had "injected the Board into the campaign and caused its neutrality to be impaired."<sup>85</sup> The Board, however, reversed.<sup>86</sup> Relying on its new *Midland National Life Insurance Co.*<sup>87</sup> position that "we will no longer probe into the truth or falsity of the parties' campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements"<sup>88</sup> the Board reasoned that there was "no sound reason why misrepresentations of Board actions should be on their face objectionable or be treated differently than other misrepresentations."<sup>89</sup>

In challenging the Board's change of policy announced in *Riveredge Hospital* before the Seventh Circuit, the employer was faced with a difficult onus: "In order to challenge the Board's policies directly, as opposed to its application of those policies, the movant must establish that the NLRB's interpretation of the law is unreasonable."<sup>90</sup> Attempting to sustain that burden, the employer cited the Board's "on again off

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<sup>81</sup>264 N.L.R.B. 1094 (1982).

<sup>82</sup>789 F.2d 524 (7th Cir. 1986).

<sup>83</sup>*Id.* at 529.

<sup>84</sup>233 N.L.R.B. 61 (1977). The Board set aside an election based on the union's false statement that the employer had been "found guilty of engaging in unfair labor practices and was ordered to post a 60-Day Notice." *Id.* at 61. The Board explained: "[A]ny substantial mischaracterization or misuse of a Board document for partisan election purposes is a serious misrepresentation warranting setting an election aside." *Id.*

<sup>85</sup>264 N.L.R.B. at 1094.

<sup>86</sup>*Id.*

<sup>87</sup>263 N.L.R.B. 127 (1982).

<sup>88</sup>*Id.* at 133.

<sup>89</sup>264 N.L.R.B. at 1095.

<sup>90</sup>*NLRB v. Affiliated Midwest Hospital, Inc.*, 789 F.2d at 528 (citing *NLRB v. Action Automotive, Inc.*, 105 S. Ct. 984, 988 (1985)).

again'' treatment of general campaign misrepresentations as compared to the Board's uniform and consistent approach to misrepresentations concerning Board actions or processes. The Seventh Circuit, unmoved by this argument, stated: "The fact that a policy has existed for a long period of time does not alone establish that all alternatives are incorrect or untenable."<sup>91</sup>

The Seventh Circuit also addressed the propriety of the Board's abandonment of its rationale for distinguishing misrepresentation of Board actions from other types of misrepresentations, namely, that the former situation impugns the neutrality of the NLRB. After reviewing the Board's justifications for departing from its rationale, the court concluded: "Given the judicial acceptance of *Midland*, the Board's extension of that policy to the type of conduct involved here cannot be deemed to be unreasonable as a matter of law."<sup>92</sup> Accordingly, the court enforced *Riveredge Hospital* on the issue of mischaracterizations of Board actions by a party in an election campaign.

One of the reasons given by the Board in justifying its change of policy in *Riveredge Hospital* and which the Seventh Circuit found not to be unreasonable in *Midwest Hospital*, was that "misrepresentation was viewed as different from the alteration of a Board document, an action that *Midland* considered to be *per se* objectionable . . . on the grounds that when the speaker is a party rather than the agency itself the voters are less likely to consider the statement truthful."<sup>93</sup> The distinction between the Board's treatment of misrepresentations and alterations of Board documents has narrowed significantly since *Midland*. This is evidenced by three Board decisions on the issue of altered Board documents during the survey period. All three of the cases interpreted and applied the new standards recently established in *SDC Investments, Inc.*<sup>94</sup>

In *SDC*, the Board held that it would no longer find that reproduction of Board documents for partisan purposes is *per se* objectionable conduct.<sup>95</sup> Rather, the Board explained:

[W]e believe that the crucial question should be whether the altered ballot in issue is likely to have given voters the misleading impression that the Board favored one of the parties to the election. When it is evident that the altered ballot is the work of a party, rather than the Board, employees are perfectly capable of judging its persuasive value.<sup>96</sup>

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<sup>91</sup>*Id.* at 528

<sup>92</sup>*Id.* at 529 (referring to *NLRB v. Best Products, Inc.*, 765 F.2d 903, 911-13 (9th Cir. 1985) (detailing the acceptance of the *Midland* rule)).

<sup>93</sup>*Id.* (emphasis in original).

<sup>94</sup>274 N.L.R.B. No. 78 (Feb. 28, 1985), 118 L.R.R.M. (BNA) 1410 (1985).

<sup>95</sup>*Id.* slip op. at , 118 L.R.R.M. at 1412.

<sup>96</sup>*Id.*

Accordingly, the Board adopted as its new position that when the altered material on its face clearly identifies the party who prepared it the alteration is not objectionable and will not serve as the basis for setting aside an election.<sup>97</sup> The Board also expressly embraced a case-by-case analysis for instances in which the source of the alteration is not clearly identified on the document at issue.<sup>98</sup> The case-by-case approach requires an examination of the nature and content of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party over the other.<sup>99</sup> The Board applied the *SDC* standards liberally and in favor of the party altering Board documents during the survey period.

In *Professional Care Centers of North America, Inc.*,<sup>100</sup> for example, the Board found unobjectionable a copy of its sample ballot that had been altered in the following manner: (1) the Board's name and seal had been deleted and replaced by the union's name, address, and seal; (2) the "Yes" box on the ballot had been marked with an "X"; and (3) the phrase "The National Labor Relations Board protects your right to a free choice" had been lifted from another portion of the notice and inserted below the ballot.<sup>101</sup> The Board also found permissible the following modifications to a copy of its "Rights of Employees" publication: (1) The Board's seal and heading had been removed from the top of the page; and (2) the Board's seal and heading had been excised from the lower portion of the page and replaced with, "you have the right to vote by secret ballot—the boss will not know how you vote. Vote union—vote to improve your conditions [—] stand up for your rights" and "Distributed by—Local Union 410—AFSME, AFL-CIO, St. Louis, MO."<sup>102</sup>

The Board majority comprising Chairman Dotson and Member Dennis, concluded that the alterations were not objectionable because the name, address, telephone number and seal of the union appeared on the face of the election notice and because the reverse side of the notice identified the union as the party responsible for its distribution.<sup>103</sup> The Board found that voters were not likely to be misled into believing that the Board favored the union in the election.<sup>104</sup> Member Johansen, dissenting from the majority's conclusion, stated: "The document in dispute fails to note that alterations were made, what the alterations were, and who

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<sup>97</sup>*Id.*

<sup>98</sup>*Id.* (footnote omitted).

<sup>99</sup>*Id.*

<sup>100</sup>279 N.L.R.B. No. 106 (April 30, 1986), 122 L.R.R.M. (BNA) 1076 (1986).

<sup>101</sup>*Id.* slip op. at 3, 122 L.R.R.M. at 1077 (Johansen, Member, dissenting).

<sup>102</sup>*Id.* slip op. at 3-4, 122 L.R.R.M. at 1077.

<sup>103</sup>*Id.* slip op. at 1 n.1, 122 L.R.R.M. at 1076-77.

<sup>104</sup>*Id.*

made them. This can mislead voters who may perceive the document as emanating from the Board in that form."<sup>105</sup>

Even when the name of the party making the alterations is unquestionably omitted from the altered Board documents, the Board has still shown reluctance to find the document objectionable. In *C.J. Krehbiel Company*,<sup>106</sup> with Member Johansen again dissenting, the Board concluded that an altered portion of an ALJ's decision distributed by a union in a representation election was not likely to mislead employees into believing that the Board supported the union.<sup>107</sup> Because the name of the union was not on the flyer, although the flyer had been mailed to employees in envelopes bearing the union's name,<sup>108</sup> the Board had to examine the nature and content of the altered material to determine whether it had the tendency to mislead the employees as to the Board's neutrality in the election.<sup>109</sup>

The remedy section of the ALJ's decision, which was reproduced in the flyer, involved another company in the same industry as the employer. On the same page as the ALJ's decision was a 5-inch "crowing rooster," the words "Vote Yes," a box with an "X" in it, and other prounion cartoons. The union had also undescored certain portions of the opinion. Two days after distributing the first flyer, the union distributed a second flyer that referred to the first flyer as being an "actual copy" of a portion of an ALJ's decision.

Contrary to Member Johansen's view that the "two documents, taken together, were likely to mislead the employees into believing that an administrative law judge, and by extension the Board, was encouraging the employees to 'Vote Yes' in the election,"<sup>110</sup> Chairman Dotson and Member Dennis credited the employees with greater power of discernment:

We cannot find that the 17 June flyer had a tendency to mislead employees into believing that the Board endorsed the Union. No reasonable employee would believe that an administrative law judge would embellish his decision with cartoons, slogans, and crowing roosters . . . . Further, the sheer physical size and placement of the cartoons and slogans on the leaflet support the conclusion that these items were additions made by the preparer of the flyer.<sup>111</sup>

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<sup>105</sup>*Id.* slip op at 3, 122 L.R.R.M. at 1077 (Johansen, Member, dissenting).

<sup>106</sup>279 N.L.R.B. No. 114 (May 7, 1986), 122 L.R.R.M. (BNA) 1105 (1986).

<sup>107</sup>*Id.* slip op. at 3, 122 L.R.R.M. at 1105.

<sup>108</sup>*Id.* slip op. at 2 n.2, 122 L.R.R.M. at 1055 n.2.

<sup>109</sup>*Id.* slip op. at 2, 122 L.R.R.M. at 1105. See *SDC*, 274 N.L.R.B. No. 78, slip op. at , 118 L.R.R.M. at 1412.

<sup>110</sup>279 N.L.R.B. No. 114, slip op. at 5, 122 L.R.R.M. at 1106 (Johansen, Member) dissenting).

<sup>111</sup>*Id.* slip op. at 3, 122 L.R.R.M. at 1105.

Accordingly, the Board certified the results of the election.<sup>112</sup>

Based on Member Johansen's dissenting opinions in *Professional Care* and *C.J. Krehbiel*, it is difficult to understand why he joined with Chairman Dotson in deciding *Rosewood Manufacturing Co.*<sup>113</sup> in favor of an employer who had altered an official NLRB sample ballot. Johansen's position in *Rosewood* is especially perplexing in the face of Member Dennis' dissent. *Rosewood* is factually very close to *SDC*, in which the Board found objectionable a hand-written facsimile of an official sample ballot altered by the addition of the phrase "remember to vote yes."<sup>114</sup>

In *Rosewood*, the employer altered and then posted official NLRB election documents from an election between the same parties some nine months earlier. The modification consisted of a handwritten caption, "Vote No," on the top half of the election notice with an arrow drawn to the "No" portion of the sample ballot. The union contended that the employer had also placed an "X" in the "No" box on the actual materials posted. Nowhere on the altered documents did the employer identify itself.<sup>115</sup>

Nonetheless, the Board found that the campaign material was permissible reasoning that "the handwritten message . . . as well as the drawn arrow was clearly discernible as [an] addition made by the Employer and sufficiently distinct from the printed notice and sample ballot so as to preclude the suggestion that the Board was endorsing the Employer."<sup>116</sup> The Board also based its conclusion on the fact that the altered documents stemmed from the first election between the parties, and explained that this fact somehow "would have alerted voters that the alteration was not endorsed by the Board."<sup>117</sup>

Relying on *SDC* and *Silco, Inc.*,<sup>118</sup> the latter of which is almost factually indistinct from *Rosewood*, Member Dennis strongly disagreed with the Board's position:

In *Silco, Inc.*, cited with approval footnote 5 of *SDC*, above, the Board found objectionable the Employer's posting of hand-printed facsimile sample ballots with the words "Vote 'No' ON JULY 2!" written just beneath the facsimile and an arrow drawn to the "No" box. The Board observed the document did not show the Employer was responsible, and reasoned that, although

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<sup>112</sup>*Id.* slip op. at 1, 122 L.R.R.M. at 1105.

<sup>113</sup>278 N.L.R.B. No. 103 (Feb. 26, 1986), 121 L.R.R.M. (BNA) 1225 (1986).

<sup>114</sup>274 N.L.R.B. No. 78 (Feb. 28, 1985), 118 L.R.R.M. (BNA) 1410 (1985).

<sup>115</sup>278 N.L.R.B. No. 103, slip op. at 1, 121 L.R.R.M. at 1225.

<sup>116</sup>278 N.L.R.B. No. 103, slip op. at 3, 121 L.R.R.M. at 1225 (footnote omitted).

<sup>117</sup>*Id.* slip op. at 4, 121 L.R.R.M. at 1225-26.

<sup>118</sup>231 N.L.R.B. 110 (1977).

not an exact NLRB ballot replica, "this facsimile necessarily tends to suggest that the material appearing thereon bears the board's approval."

As no meaningful distinction exists between the instant facts and those in *Silco*, a case remaining viable after *SDC*, I would set aside the election.<sup>119</sup>

Because *Rosewood* was a three-member decision, had Johansen agreed with Dennis, as his positions in *Professional Care* and *C.J. Krehbiel* suggested, *Rosewood* would have been decided in favor of setting aside the election.<sup>120</sup>

#### VII. THREATS OF REPRISAL IMPLIED THROUGH AN EMPLOYER'S USE OF COPIES OF BOARD CASES IN ELECTION CAMPAIGNS

In *National Micronetics, Inc.*,<sup>121</sup> the Board changed its view regarding the distribution and highlighting of certain sections of previous Board decisions by an employer during a representation campaign. In an earlier case, *Glassmaster Plastics Co.*,<sup>122</sup> the Board had upheld an ALJ's determination that altering and disseminating the Board's opinion in *Oxford Pickles*<sup>123</sup> was objectionable conduct.<sup>124</sup> The employer had summarized *Oxford Pickles* and marked it up in such a way as to emphasize only certain portions of the decision. The manner in which the employer presented these materials during the election campaign was viewed by the ALJ as "clearly designed and . . . clearly hav[ing] the effect of a not so subtle threat of reprisal . . . ."<sup>125</sup>

<sup>119</sup>278 N.L.R.B. No. 103, slip op. at 5-6, 121 L.R.R.M. at 1226 (Dennis, Member, dissenting) (citations omitted). In response to Dennis' dissent, the majority pointed out that "[i]n *Silco*, the message, 'Vote "No" on July 2!' was hand-printed in the same style as the hand-printed sample ballot posted by the employer. The partisan message was not sufficiently distinct from the facsimile ballot and tended to suggest that the alteration bore the Board's approval." *Id.* slip op. at 3 n.8, 121 L.R.R.M. at 1225.

<sup>120</sup>One must hope that Johansen's apparent inconsistent positions in these three cases were not caused by the fact that *Professional Care* and *C. J. Krehbiel* involved union-altered Board materials and union-won elections, whereas it was the employer who had made the modifications and won the election in *Rosewood*.

<sup>121</sup>277 N.L.R.B. No. 95 (Dec. 9, 1985), 121 L.R.R.M. (BNA) 1035 (1985).

<sup>122</sup>203 N.L.R.B. 944 (1973).

<sup>123</sup>190 N.L.R.B. 109 (1971). *Oxford Pickles* is frequently used by employers during election campaigns because of some of the statements made by the Board in the case in upholding an employer's campaign representations. For instance, in one paragraph of the decision, the Board said: "[T]here is no requirement in the Act that an employer accede to all union demands or, after bargaining, retain all current benefits. Nor does the presence of a union prohibit an employer from moving its plant should economic conditions so dictate. Similarly, an employer may permanently replace economic strikers." *Id.* at 109.

<sup>124</sup>203 N.L.R.B. at 944.

<sup>125</sup>*Id.* at 951.

Similarly, the employer in *National Micronetics* distributed copies of *Oxford Pickles*, as reported in LRRM, but added a handwritten statement at the top saying: "HERE'S THE FACTS from the NATIONAL LABOR RELATIONS BOARD—THEY ARE NEUTRAL. THIS IS THE LAW—READ IT." The LRRM headnotes had been underlined and characterized as follows:

FACT # 1 — *LMRA does not require that employer accede to all union demands or, after bargaining, retain all current benefits;*

. . . .

FACT # 2 — *. . . in fact employer may permanently replace economic strikers and presence of union does not prohibit an employer from moving its plant should*

FACT # 3 — *economic conditions dictate;*

. . . .

FACT # 4 — *. . . that all union promises of improved benefits are not attainable without prior employer assent;*

. . . .<sup>126</sup>

The text of the decision had also been bracketed, underlined, and characterized as "TRUE" in certain places.

Applying *Glassmaster*, the ALJ in *National Micronetics* found the employer's alteration and distribution of *Oxford Pickles* objectionable because it constituted an unlawful threat of reprisals against employees if they selected the union as their bargaining representative.<sup>127</sup> The Board reversed the ALJ on this issue and expressly overruled *Glassmaster Plastics* to the extent that it was inconsistent with the Board's new view.<sup>128</sup> The Board concluded:

The highlighted portions of the LRRM report are accurate statements of the law, and the Respondent had a right to disseminate such information, especially when the Union had misstated the law on these points during the election campaign. . . . We find that distributing accurate copies of a Board decision with portions highlighted and characterized as "true" can in no way be construed as an illegal threat or as objectionable conduct.<sup>129</sup>

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<sup>126</sup>277 N.L.R.B. No. 95, slip op. at 4, 121 L.R.R.M. at 1037.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.* slip op. at 5, 121 L.R.R.M. at 1037.

<sup>129</sup>*Id.*

VIII. EMPLOYER'S RIGHT TO REFUSE TO BARGAIN AFTER UNION AFFILIATION ELECTION IN WHICH NONUNION EMPLOYEES WERE NOT PERMITTED TO VOTE

In *Amoco Production Co.*<sup>130</sup> the Board held that all employees in a bargaining unit, not just union members, must be given the opportunity to participate in a union affiliation election.<sup>131</sup> Otherwise, the Board explained, it will not amend the union's certification or require the employer to bargain with the reorganized union.<sup>132</sup> The Fifth Circuit upheld the Board's decision in *Amoco*,<sup>133</sup> and the Seventh Circuit later followed suit by upholding the Board's new rule in *United Retail Workers Union Local 811 v. NLRB*.<sup>134</sup> During the survey period, the Supreme Court, in "one of those rare departures from [the] Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees,"<sup>135</sup> struck down the Board's new policy.

In *NLRB v. Financial Institution Employees of America*,<sup>136</sup> an employer-bank refused to bargain with a reorganized union purporting to represent the bank's employees because nonunion employees in the bargaining unit had been excluded from participating in the union affiliation election. In dismissing the new union's sections 8(a)(1) and (5) charges against the bank, the Board held that because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards and the affiliation was therefore invalid.<sup>137</sup> Upon the union's petition for review, the Ninth Circuit reversed and remanded the case, and thus created a conflict between itself and the Fifth and Seventh Circuits.<sup>138</sup> The appellate court concluded that the Board's requirement that nonunion employees be permitted to vote on affiliation questions "[was] irrational and inconsistent with the National Labor Relations Act."<sup>139</sup> The Supreme Court agreed with the Ninth Circuit.<sup>140</sup>

The Court acknowledged that there are instances in which employee

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<sup>130</sup>262 N.L.R.B. 1240 (1982).

<sup>131</sup>*Id.* at 1241.

<sup>132</sup>*Id.*

<sup>133</sup>Local Union No. 4-14, Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 721 F.2d 150 (5th Cir. 1983).

<sup>134</sup>774 F.2d 752 (7th Cir. 1985).

<sup>135</sup>*NLRB v. Financial Inst. Employees of Am., Local 1182*, 106 S. Ct. 1007, 1017 (1986) (Burger, C.J., concurring).

<sup>136</sup>106 S. Ct. 1007 (1986).

<sup>137</sup>*Seattle-First National Bank*, 265 N.L.R.B. 426 (1982).

<sup>138</sup>752 F.2d 356 (9th Cir. 1984).

<sup>139</sup>*Id.* at 362.

<sup>140</sup>106 S. Ct. at 1017.

support for a certified union may be eroded by changed circumstances.<sup>141</sup> The Court also recognized an employer's right to allege these changed circumstances and effect an election to determine whether a union representing its employees continues to enjoy majority support.<sup>142</sup> But to accomplish this result the Court added that the employer "must 'demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status.'" <sup>143</sup> The Court noted that one such objective consideration might be an independent union's affiliation with a national or international organization.<sup>144</sup> However, the Court explained that affiliation has long been considered an internal matter that does not affect the union's status as bargaining representative and emphasized that the employer remains obligated to recognize the reorganized union if the affiliation election is conducted with adequate "due process" safeguards and there is substantial continuity between the pre- and post-affiliation union.<sup>145</sup>

Finding that the Board's new rule "dramatically changes this scheme,"<sup>146</sup> because it permits an employer to challenge a union's continuing majority support even if the organizational changes resulting from the affiliation are not substantial enough in themselves to raise a question of representation,<sup>147</sup> the Court held that the rule exceeds the Board's statutory authority. Rejecting the Board's arguments that the new rule minimized industrial strife and was a reasonable means of protecting employees' rights to select a bargaining representative, the Court reasoned that the new rule "violated the policy Congress incorporated into the Act against outside interference in union decision-making."<sup>148</sup> Accordingly, the Court concluded that the Board must determine under traditional standards whether union affiliation raises a question of representation.<sup>149</sup> If the question is raised, then an election must be held to decide whether the new union is still the choice of the majority of employees in the unit. Neither the Board nor the employer will any longer be permitted to circumvent this procedure simply by relying on the fact that nonunion employees were denied participation in the affiliation election. Conversely, the Board may no longer interfere in internal union affairs by requiring that nonunion employees be allowed to vote in affiliation elections for such elections to be valid.

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<sup>141</sup>*Id.* at 1011.

<sup>142</sup>*Id.* (citing 29 U.S.C. § 159(c)(1)(A)(ii); 29 C.F.R. §§ 101.17, 102.60(a)(1985).

<sup>143</sup>106 S. Ct. at 1011 (quoting *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966)).

<sup>144</sup>*Id.* (footnote omitted).

<sup>145</sup>*Id.* at 1012.

<sup>146</sup>*Id.* (footnote omitted).

<sup>147</sup>*Id.* at 1017.

<sup>148</sup>*Id.* at 1014.

<sup>149</sup>*Id.* at 1014-15 (footnote omitted).

