OUTLINE OF SIGNIFICANT NLRB CASES

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This outline includes significant decisions reported in the NLRB's weekly summaries from October 5, 2012, through April 5, 2013.

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Recess Appointments

Stamford Hospitality, LP d/b/a Stamford Plaza Hotel and Conference Center, 359 NLRB No. 75 (2013)

The 3-member Board (**Pearce, Griffin and Block**) rejected an argument that a certification was invalid because the President's recess appointments of two Board members were constitutionally invalid and therefore Board lacks the authority to act. The Board acknowledged that the D.C. Circuit has concluded that the recess appointments were not valid under *Noel Canning* but stated that this decision conflicts with rulings of at least three other appellate courts. The Board also stated that this question remains in litigation and pending a definitive resolution the Board is charged to fulfill its responsibilities under the Act.

Sub-Acute Rehabilitation Center at Karney, LLC d/b/a Belgrove Post Acute Care Center, 359 NLRB No. 77 (2013)

The 3-member Board (**Pearce, Griffin and Block**) rejected an argument that a certification was invalid because the President's recess appointments of two Board members were constitutionally invalid and therefore the Board lacks a quorum.

ORNI 8, LLC, 359 NLRB No. 87 (2013)

The 3-member Board (**Pearce, Griffin and Block**) rejected an employer's argument that a certification was invalid because the President's recess appointments were constitutionally invalid and therefore the Board lacks authority to act.

Acting General Counsel

Sub-Acute Rehabilitation Center at Kearney, LLC d/b/a Belgrove Post Acute Care Center, 359 NLRB No. 77 (2013)

The 3-member Board (**Pearce, Griffin and Block**) rejected an argument that a complaint should be dismissed because the Acting General Counsel could not properly be appointed under the Federal Vacancies Reform Act and therefore lacked authority to issue the complaint. The employer asserted that the Vacancies Act does not apply to the office of General Counsel because there is a specific procedure under Section 3(d) of the NLRA for filling the vacancy. However, the Board stated that the President may elect either the Vacancies Act or Section 3(d) as the means to temporarily fill the vacancy.

Jurisdiction

Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012)

The four-member Board (**Pearce, Hayes, Griffin and Block**) held that a private nonprofit corporation that operated a public charter school in Chicago was not exempt from the

Board's jurisdiction as a political subdivision of the State of Illinois within the meaning of Section 2(2) of the Act. Furthermore, a 3-1 Board majority (**Pearce, Griffin and Block**) decided that the Board should assert jurisdiction over the school. The union that sought to represent the teachers argued that the Board lacked jurisdiction, while the employer had filed an election petition with the Board and argued that the Act did apply.

The majority explained that an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. The majority found that the nonprofit corporation was not a political subdivision of the State of Illinois under this test. Instead, the corporation was an "employer" within the meaning of Section 2(2) of the Act and therefore was subject to the Board's jurisdiction, and there were no persuasive reasons for declining, as a matter of discretion, to exercise jurisdiction.

The majority stated that this decision was based on the facts of the case and it does not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.

Hayes agreed that the school was not a political subdivision exempt from the Board's jurisdiction but stated that that the Board should decline to assert jurisdiction over the school based on its official status as a public school, its integrated and highly regulated relationship with the State of Illinois and the Chicago Public Schools system, and its fundamentally local nature.

Pilsen Wellness Center, 359 NLRB No. 72 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a private, nonprofit educational services corporation that employed teachers and provided them to a public charter school in Chicago was not a political subdivision of the State of Illinois within the meaning of Section 2(2) of the Act, and therefore it was not exempt from the Board's jurisdiction. The corporation, which asserted that it was not a political subdivision and was subject to the Board's jurisdiction, had filed an election petition with the Board. The union, which sought to represent the teachers under Illinois state law, argued that the Board lacked jurisdiction. The Board explained that under the Supreme Court's *Hawkins County* precedent, an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government or (2) administered by individuals who are responsible to public officials or to the general electorate.

The Board found that the employer was a private corporation engaged in providing educational support services to public charter schools and was not itself a public charter school; the members of the board of directors were appointed and subject to removal only by sitting members of the board and not by public officials; and the method of selection of the board members was dictated by its bylaws and not by any state law or governmental regulation. Thus, the Board found that the corporation was not administered by individuals who were responsible to public officials or the general electorate.

Little River Band of Ottawa Indians Tribal Government, 359 NLRB No. 84 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a federally recognized Indian tribe engaged in the operation of a resort and casino in Michigan was subject to the Board's jurisdiction. The Board stated that the jurisdiction of the Act generally extends to Indian tribes and tribal enterprises because federal statutes of general application apply to Indians absent an explicit exclusion. The federal courts have recognized exceptions if (1) the law touches exclusive rights of self-government in purely intramural matters; (2) application of the law would abrogate treaty rights; or (3) there is proof in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.

As to the first exception, the Board found that application of the NLRA to the resort would not interfere with the tribe's exclusive right of self government in purely intramural matters, such as tribal membership, inheritance rules and domestic relations. Instead, the resort was a typical commercial enterprise operating in, and substantially affecting, interstate commerce, and the majority of the resort's employees and patrons were non-Indians. The second and third exceptions were also found to be inapplicable because application of the NLRA would not abrogate treaty rights and nothing in the statutory language or legislative history of the Act suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes. Finally, the Board found that policy considerations weighed in favor of the Board asserting discretionary jurisdiction over the tribe.

Statutory Supervisors

Brusco Tug and Barge, Inc., 359 NLRB No. 43 (2012)

A 2-1 Board majority (**Pearce and Griffin**) held that a tugboat operator failed to meet its burden of establishing that tugboat mates were statutory supervisors based on the statutory criteria of assignment and responsible direction.

Ocean-bound tugboats were usually staffed by a crew of four—a captain, a mate, an engineer, and a deckhand; and occasionally the crew included a second deckhand. The mate, who was a Coast Guard licensed officer, steered the tugboat when the captain was off watch. On the mate's watch, he was in charge.

The majority stated that instructions the mate gave to the deckhand with respect to making up a tow and docking did not involve designating an employee to a place or time, or giving an employee significant overall duties, as those terms are used in *Oakwood Healthcare*. instead, they involved an ad hoc instruction that the employee perform a discrete task. In this regard, the majority found that the mate did not specifically designate the deckhand to participate in an overall duty such as making up a tow or docking; rather, all crewmembers, including the captain, participated in these procedures as part of their preassigned job duties.

The majority also found that the mate's instructions to the deckhand while making up a tow and docking did not involve the requisite independent judgment. The captain advised the mate in advance how they were going to perform the particular maneuver, and the mate and deckhand remained in constant verbal communication with the captain throughout the process via handheld radios. Both maneuvers were found to be routine.

The majority also found that because captains were stipulated supervisors, not statutory employees, a mate's action in waking a captain and thereby causing the captain to accrue overtime did not constitute a 2(11) assignment.

Furthermore, the majority concluded that the employer did not establish the exercise of independent judgment with respect to the mate's assignment of overtime to the engineer. The mate woke the engineer when the engine alarm sounded or when something relating to the engine looked suspicious, and the engineer was the lone individual on the vessel who was trained in engine functioning and repair. Thus, summoning the engineer in that circumstance was found to be the only choice.

Although the employer asserted that a mate could choose which of the deckhands to perform a specific task based on their skill and ability, the majority stated that evidence was not presented to show this had ever actually occurred.

In addition, although the mate could post a deckhand to keep watch on the bow, the employer presented no evidence suggesting that this was a regular occurrence. Similarly, the employer failed to show that any particular mate served as a relief captain with the frequency necessary to establish supervisory status.

The employer asserted that a mate had the authority to responsibly direct employees because he had command of the tugboat during his watch and was the boss of the deck during docking and making up to a barge, and that mates were accountable under federal law for their own actions and those of their crew. The majority found, however, that the employer offered nothing other than conclusory assertions of the mates' accountability for the deckhands' work, and that the authority to demand obedience on board a vessel under maritime law was related to the protection of life and property.

The employer relied upon pre-*Oakwood* cases in which the Board found mates and pilots to be statutory supervisors. However, in evaluating the supervisory status of the mates at issue in this case, the majority found the pre-*Oakwood* cases to be of limited precedential value.

The majority emphasized that this decision turned on the facts of the case and they were not declaring that tugboat mates are not statutory supervisors in all cases.

Hayes dissented.

Appropriate Bargaining Units

Fraser Engineering Company, Inc, 359 NLRB No. 80 (2013)

The 3-member Board (**Pearce, Griffin and Block**) ordered an election in a petitioned-for unit of all pipefitters, welders, plumbers and HVAC service technicians employed by an engineering company. The employer maintained that the smallest appropriate unit must also include the pipefitters, welders and plumbers working for a petroleum services company, which was the employer's wholly-owned subsidiary. The Board stated that the employer had the burden of establishing that the petroleum employees shared such an overwhelming community of interest with the petitioned-for employees that there was no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely.

The Board found that the engineering employees shared the community of interest necessary for them to constitute an appropriate unit. In making this finding, the Board relied on common high-level management, including oversight from the same safety officer and quality control manager; shared status as skilled tradesmen who either must maintain special licenses or certifications or generally did so even though it was not required; occasional functional integration; the same or similar wages and benefits; access to the same website for employees; the same company handbook and policies; participation in a common safety committee; attendance at the same company events and safety meetings; and employment in the same company.

The Board stated that the employer had not met its burden of showing that the petroleum employees shared such an overwhelming community of interest with the engineering employees that there was no legitimate basis upon which to exclude them from the petitioned-for unit. Although the employer cited several common interests of the engineering and petroleum pipefitters, welders and plumbers, the Board found that the two groups of employees had different immediate supervisors, limited contact and interchange, and only rarely performed functionally integrated work. In addition, the Board found that there was a clear demarcation between the employer and its subsidiary, and emphasized that the petitioned-for unit tracked a dividing line—the corporate form—drawn by the employer itself.

The employer also argued that the Board had elevated the extent of the union's organization of employees to controlling weight, relying on the parties' stipulation for a larger unit in a 2010 representation election, which the union lost. However, the Board stated that it is not bound by prior unit stipulations when considering the appropriateness of a petitioned-for unit, and that it had relied on community-of-interest factors that were solely within the control of the employer.

Excelsior Lists

Tractor Company d/b/a CCS Trucking, 359 NLRB No. 67 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that an election should not be set aside although the employer omitted the names of two employees from the Excelsior list in a voting unit of 12 employees. Two Teamster locals had filed separate representation petitions and the tally of ballots showed 4 votes for one local, 8 votes for the other local, and 0 against representation. The Board found that the employer had substantially complied with the Excelsior requirements because the percentage of voters omitted from the list was relatively small (15.4 percent); there was no showing of bad faith on the part of the employer; the number of voters omitted from the list did not constitute a determinative number; the case involved a two-union election in which all employees indicated their preference for representation and both unions were equally affected by the omissions; and there was no showing that the employer intentionally omitted an entire segment of its work force.

Successor Employers

JAG Healthcare, Inc. d/b/a Galion Pointe, 359 NLRB No. 88 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a successor employer was not entitled to unilaterally set initial terms and conditions of employment at a nursing home because, on the day before taking over the operation of the facility, the successor's CEO met with the employees and informed them that starting the next day there would be no union at the facility.

In addition, the Board held that the successor's discriminatory hiring practices independently made unlawful its unilateral setting of initial terms. The ALJ had found that the successor had discriminated against some of the predecessor's employees by limiting its hiring of such employees to ensure that it would be nonunion.

Merger Of Bargaining Units

First Student, Inc., 359 NLRB No. 27 (2012)

A 2-1 Board majority (**Pearce and Griffin**) held that a regional director had properly dismissed a deauthorization petition under Section 9(e) of the Act because the employees covered by the petition had become part of a merged national bargaining unit. The majority explained that the unit for a deauthorization election must be coextensive with the contractual unit.

In dissent, **Hayes** stated that he would grant review to reconsider the Board's merger policy to the extent that it precludes a deauthorization election in an originally certified unit less than a year after that unit had been merged by the parties into a much larger nationwide bargaining unit.

Blocking Charges

Wellington Industries, Inc., 359 NLRB No. 18 (2012)

A 2-1 Board majority (**Pearce and Griffin**) affirmed a Regional Director's decision to hold a union security deauthorization petition in abeyance pending resolution of outstanding unfair labor practice charges.

The majority stated that representation petitions are held in abeyance if there are concurrent unfair labor practice charges alleging conduct which, if proven, would interfere with employee free choice in an election. The Board had previously found that the employer in this case violated Sections 8(a)(5) and (1) by conditioning bargaining with the union on the absence of a local union's president, and the majority stated that this serious unfair labor practice, which the employer had yet to remedy, was the type of violation that was likely to have a lasting and negative impact on employee support for the union.

Moreover, the majority stated that it was not appropriate to reconsider the Board's blocking charge policy in the context of a request for review, and that the subject would be better addressed as part of the current rulemaking concerning Board representation case procedures, in which the Board invited comment on whether it should change this policy.

Finally, the majority rejected a request for a hearing pursuant to *Saint Gobain Abrasives*, which concerned a decertification petition rather than a deauthorization petition. In that case, the Board held that it was an error for the Regional Director to dismiss a petition without a hearing based on the nexus between the employer's alleged unlawful conduct and employee disaffection from the union. The majority stated that unlike that case, where the charges against the employer remained unproven, the Board here had already found that the employer committed multiple unfair labor practices and had not complied with the Board's remedial orders. Moreover, the Regional Director in this case did not dismiss the petition outright, but decided to hold it in abeyance pending the employer's compliance with the remedial order.

Hayes dissented.

Campaign Conduct

Station Casinos, LLC, 358 NLRB No. 153 (2012)

A Board panel (**Hayes, Griffin and Block**) held that an employer did not violate the Act by reading "sound bytes" to employees in campaign meetings. These were written statements that stated facts and arguments supporting the employer's position against unionization and asserted that the union was not being honest. Some concluded with the statement "Don't sign a card with this corrupt union" or "If asked to sign a union card, just say no." The panel found that these statements were lawful antiunion propaganda under Section 8(c) of the Act.

However, a 2-1 Board majority (**Griffin and Block)** found that the employer did violate the Act by using "sound byte alerts" during the campaign. These were were shorter versions that consisted generally of one-sentence anti-union or pro-employer statements followed by the exhortation "Don't sign a union card." They were distributed to managers, posted in designated areas, and printed in newsletters distributed to employees. Some of the newsletters contained only the statement "Don't sign a union card." The majority found that these statements were devoid of any context such as facts, the employer's views or arguments, and they were directly disseminated to employees via physical posting and in newsletters; and that without any context they would reasonably be viewed by employees as direct admonitions not to sign union cards or engage in union activity. **Hayes** declined to decide this issue.

The majority also found that the employer violated the Act by prohibiting employees from discussing issues of common concern at preshift meetings, prohibiting an employee from speaking at a preshift meeting, and disciplining him for disregarding the restriction. **Hayes** dissented, stating that the employees were told that the meetings would be limited to company business and they could no longer voice their opinions or give rebuttals to any manager remarks at these meetings; and that employees would reasonably construe this restriction as a permissible general limitation on the conduct of a work-related meeting that was not selectively targeted at union or other protected activity.

Dish Network Corporation, 359 NLRB No. 32 (2012)

In a procedural decision, a Board panel (**Pearce, Hayes and Block**) decided to leave to another day the issue of whether the Board's *Tri-Cast* doctrine should be revisited. In that case, the Board held that an employer did not violate Section 8(a)(1) of the Act by informing employees that they would be limited in bringing concerns to management if they selected the union as their exclusive bargaining representative.

Pearce and Block said that the Board is not foreclosed from overruling precedent sua sponte, that the Board has done so in the past, and that they would have the authority to revisit the *Tri-Cast* doctrine. Nevertheless, they declined to take up that issue in this case. **Hayes** stated that the Board does not possess broad discretion to reconsider and overrule its precedent sua sponte.

JAG Healthcare, Inc. d/b/a Galion Pointe, 359 NLRB No. 88 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that an employer violated the Act when it issued discipline to an employee for making comments supportive of a union but allowed discussion of other nonwork-related subjects during working time. The Board found that this had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights and thus violated Section 8(a)(1).

Dues Checkoff

WKYC-TV, Inc., 359 NLRB No. 30 (2012)

Reversing a precedent established by the Board 50 years ago in *Bethlehem Steel,* a 3-1 Board majority (**Pearce**, **Griffin and Block**) held that an employer's obligation to check off union dues from employees' wages does not terminate upon expiration of a collective bargaining agreement. The majority stated that the Board has never provided a coherent explanation for the rule that dues checkoff does not survive expiration of an agreement. The majority relied on the Ninth Circuit's refusal to enforce the Board's decision in *Hacienda Resort Hotel & Casino*, in which a four-member Board deadlocked on whether to reverse *Bethlehem Steel*.

The majority stated that the Board's reasoning in *Bethlehem Steel* was flawed in several respects. First, the Board ignored Section 302(c)(4), which is the only provision of the Act that addresses dues checkoff and which contemplates that checkoff normally does survive the contract expiration.

Second, the Board found in *Bethlehem Steel* that "similar considerations"—which were unspecified—prevailed with respect to checkoff. The Board reasoned in that case that because the checkoff provisions in the contract "implemented" the union-security provisions, the proviso to Section 8(a)(3) dictated that dues checkoff, as well as union security, expired upon contract termination. The majority stated that this finding was a non sequitur because although the contracts in *Bethlehem Steel* contained both union-security and dues checkoff provisions, that is by no means true of all or even nearly all collective bargaining agreements. The majority explained that the independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in "right-to-work" states, where parties are prohibited from including a union-security agreement in a contract but contracts may nonetheless include dues-checkoff arrangements.

Third, *Bethlehem Steel* ignored that the proviso to Section 8(a)(3) and Section 302(c)(4)—enacted by the same Congress at the same time—treat union security and dues checkoff differently. The majority stated that the language of the Section 8(a)(3) proviso makes clear that when Congress wanted to make an employment term, such as union security, dependent on the existence of a contract, Congress knew how to do so.

Fourth, *Bethlehem Steel* failed to acknowledge another crucial dissimilarity between dues checkoff and union security—the fundamental difference between their compulsory and voluntary natures. Under a union-security agreement, employees are compelled to pay union dues or agency fees, or face discharge. By contrast, an employee's participation in dues checkoff is entirely voluntary, even where a contract contains a union-security agreement.

The majority stated that because employers have long relied on *Bethlehem Steel* in their dealings with unions, it would be unjust to apply this new holding in pending cases.

Hayes dissented.

USIC Locating Services, Inc., 359 NLRB No. 33 (2012)

A Board panel (**Pearce, Hayes and Griffin**) held that an employer did not violate Sections 8(a)(5) and (1) of the Act by ceasing to honor dues checkoff authorizations after the expiration of a collective-bargaining agreement. The panel stated that in *WKYC-TV, Inc.*, the Board overruled *Bethlehem Steel* and ruled that following contract expiration, an employer must continue to honor a dues checkoff arrangement. The Board also decided in that case, however, to apply the new rule prospectively only, and therefore the panel decided to apply *Bethlehem Steel* in the present case.

Hayes concurred in the decision because the complaint was dismissed.

Nebraskaland, Inc., 359 NLRB No. 35 (2012)

A Board panel (**Hayes, Griffin and Block**) found that an employer did not violate Sections 8(a)(5) and (1) of the Act by unilaterally ending its compliance with the dues checkoff provision of a collective bargaining agreement following the expiration of the agreement. The panel explained that the Board's recent decision overruling *Bethlehem Steel* was not retroactive.

Hayes concurred in the decision because the complaint was dismissed.

C & G Distributing Company, Inc., 359 NLRB No. 53 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that an employer was privileged under *Bethlehem Steel* to cease honoring a dues checkoff arrangement after the expiration of a collective bargaining agreement, and therefore the employer did not violate the Act by ceasing to honor checkoff authorizations, because the Board had decided in *WKYC-TV* not to apply the new rule retroactively.

WHDH-TV, 359 NLRB No. 81 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that an employer was privileged under *Bethlehem Steel* to cease honoring a dues checkoff arrangement after a collective bargaining agreement expired. The Board explained that it had decided to apply its new rule on dues checkoff prospectively only and to apply *Bethlehem Steel* in all pending cases.

Union Access

Fred Meyer Stores, Inc., 359 NLRB No. 34 (2012)

A 2-1 Board majority (**Pearce** and **Griffin**) held that a retail store unlawfully changed a longstanding and contractually-based practice of allowing union representatives to have short conversations with employees on the selling floor. Successive collective bargaining agreements at the store had included this visitation language:

> It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore representatives of the Union when visiting the store or contacting employees on union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

The majority found that the parties had established a past practice as to the interpretation of this contractual provision. Union representatives were allowed to have conversations with employees on the selling floor so long as the employees were not dealing with or assisting store customers at the time and the conversations were kept to a reasonable length. The parties did not have a clearly defined practice with regard to the number of union agents permitted to be in a store at any one time.

The union sent a team of eight representatives to the store during protracted contract negotiations. Two union representatives stopped at the store’s information desk to inform the manager on duty that they were in the store, while the other six representatives spread out in pairs to talk to employees. The store manager summoned the store’s security officer to evict the two lead agents from the store. When the agents refused to leave, the employer contacted the police, who arrested one agent for trespass and two others for refusing to leave the parking lot.

The majority held that the Supreme Court's decision in *Lechmere* was not on point because that case involved initial union organizing, while the parties in this case had a visitation and access policy in the agreement and years of experience applying that policy.

The majority also found that the number of union representatives in the store did not constitute an excessive departure from past practice and that the access provision did not specify any limits on the number of union representatives who may visit the store.

The majority stated that even absent the access provision and the past practice, employees have a right to proper representation that could require allowing union agents access to the employer's property under the Board's precedent in *Holyoke Water Power Co.*

Hayes dissented.

Off-Duty Employee Access

Marriott International, Inc. d/b/a J.W. Marriott Los Angeles at L.A. Live, 359 NLRB No. 8 (2012)

A 2-1 Board majority (**Pearce and Block**) found that two versions of a hotel company's rule restricting access by off-duty employees violated the Act. The original rule stated:

> Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.

The majority found this rule to be unlawful under the Board's precedent in *Tri-County Medical Center*, as recently applied in *Saint John's Health Center* and *Sodexo America.* In those decisions, the Board found that policies barring off-duty employee access to the employer's facility except for hospital-sponsored events (in *Saint John's*) or hospital-related business (in *Sodexo*) violated the Act under the third prong of the *Tri-County* test because the policies did not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose. Similarly, the hotel's rule in this case prohibited off-duty employee access except in certain unspecified circumstances subject to a manager's prior approval, giving the employer unlimited discretion to decide when and why employees may access the facility.

The revised rule was unchanged from the original version except for the substitution of "property" for "hotel" and "employees" for "associates". The majority found that this version of the rule was also invalid under the third prong of the *Tri-County* standard for the same reason as the original rule. In addition, the majority stated that the term "property" in the revised rule might be construed as more expansive than the term "hotel" in the original rule and could further confuse employees about the scope of the access restriction.

The majority also found unlawful two versions of a hotel rule that prohibited employee use of various guest and resident owner facilities. The original rule stated:

> The hotel and its facilities are designed for the enjoyment of our guests. If you wish to use the guest facilities during nonworking hours, you need to obtain prior approval from your manager.

The majority found the term "guest facilities" to be overly broad and undefined and likely to confuse employees into believing that they needed to obtain prior management approval before engaging in protected activity, including activity in parking lots and other outside nonwork areas. In addition, the majority found that there were outside nonwork areas that could be encompassed by the broad term "guest facilities," so the rule also violated *Tri-County* because it did not limit access solely with respect to the interior of the premises and outside work areas.

The company argued that the rule applied to off-duty employees who wanted to use the hotel's facilities as guests, and they have no Section 7 rights. However, the majority stated that an employee who uses the hotel's guest facilities during off-duty hours does not shed his or her employee status and Section 7 rights. For example, an employee who stays after work to discuss union matters with coworkers over supper in a hotel restaurant clearly would be engaged in activity protected under Section 7.

The company also argued that the rule was intended to be read together with the no-access rule and the exclusion in that rule for parking lots and outside nonwork areas would apply to this rule also. However, the majority stated that employees would not necessarily read the use and access rules in conjunction with each other.

The hotel's revised use rule provided:

> The property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or resident floors, rooms, or elevators, in public restaurants, lounges, restrooms or any other guest or resident facility unless on a specified work assignment or with prior approval from your manager. Permission must be obtained from your manager before utilizing any property outlet, visiting family or friends staying in the property, or using any of the above mentioned facilities. Please ensure that the manager of the area you intend to visit is aware of the approved arrangements.

The majority stated that this version of the rule was different from the original rule as it went beyond merely requiring prior approval to use the guest facilities during nonwork hours and restricted employee access to numerous specific parts of the hotel without managerial approval. In addition, the majority found that the term "property" and related terms were ambiguous and could be construed by employees as including the entire premises. The majority also found the rule invalid because employees could construe it as prohibiting activity that is protected by the Act without prior managerial approval, both inside the hotel as well as outside in nonwork areas. Furthermore, the rule did not specify that it applied only to off-duty employees, and the language prohibiting employees from being in certain locations unless on a specified work assignment contemplated otherwise.

The majority stated that their application of *Tri-County* would not prevent the employer from permitting access to the hotel's interior by creating a narrow exception for special circumstances, and they noted that this possibility had been pointed out in the *Saint John's Health Center* decision. In addition, the majority distinguished the holding in *Lafayette Park Hotel*, where the employer's rule had lawfully imposed a limited restriction on employee use of the hotel's restaurant or cocktail lounge for entertaining friends or guests without managerial approval.

The majority rejected an argument that off-duty employees do not have a right under Section 7 of the Act to access the interior of an employer's facility, explaining that under *Tri-County* an employer may lawfully bar access to the interior of its facility but only subject to certain conditions. The majority stated that when those conditions are not met, employees seeking to engage in protected concerted activity are entitled to access to the interior of the employer's facility pursuant to Section 7.

Hayes dissented as to all of the rules involved in this decision.

Rules of Conduct

DirectTV U.S. DirecTV Holdings, LLC, 359 NLRB No. 54 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a work rule regulating employee use of company systems, equipment and resources was lawful under the Board's decision in *Register Guard.* The Acting General Counsel had asked the Board to revisit its decision in *Register Guard,* and **Pearce** and **Griffin** questioned whether that case was correctly decided, but they declined to address the issue in this case.

However, the Board held that several company rules were unlawful because employees would reasonably construe them as prohibiting Section 7 activity. The Board stated that the employer had presented no alternative interpretation of the rules, focusing instead on an attempted repudiation of them, and that the attempted repudiation failed because it was not timely and the employer did not admit wrongdoing.

One of the rules instructed employees: "Do not contact the media." The Board stated that Section 7 encompasses employee communications about labor disputes with newspaper reporters and that employees would reasonably construe the rule as prohibiting all such protected communications. Furthermore, the Board found significant the fact that the rule made no attempt to distinguish unprotected communications, such as statements that are maliciously false, from those that are protected.

For similar reasons, the Board found unlawful a policy stating that "employees should not contact or comment to any media about the company unless pre-authorized by Public Relations." The Board stated that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful because Section 7 protects employee communications with the media concerning labor disputes.

Another rule provided that "if law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments." The Board found this rule was unlawful because employees would reasonably construe Board agents as "law enforcement" with respect to labor matters under investigation. Furthermore, the rule was found to be unlawfully broad because it affected employee contacts with other law enforcement officials about wages, hours and working conditions.

The Board acknowledged that an employer may in some circumstances have a legitimate interest in knowing about law enforcement attempts to interview employees. For example, an employer may wish to ensure that the employees have the opportunity to be represented by counsel during such interviews. The rule was found to be ambiguous, however, because it failed to distinguish those situations from protected employee contacts with Board agents or other law enforcement officials. The Board explained that even if the employer did not intend the rule to extend to such protected communications, that intent was not sufficiently communicated to the employees, and ambiguity in a rule must be construed against the employer as promulgator of the rule.

The Board also found unlawful a confidentiality rule that instructed employees to "never discuss details about your job, company business or work projects with anyone outside the company" and "never give out information about customers or DIRECTV employees." The rule included "employee records" as one of the categories of company information that must be held confidential. The Board stated that the explicit prohibition against releasing information concerning the job or fellow employees as well as employee records would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment; and the fact that the rule also covered information about customers, company business, and other listed items could not save it from condemnation. Finally, the Board stated that because the rule did not exempt protected communications with third parties such as union representatives, Board agents, or other governmental agencies concerned with workplace matters, employees would reasonably interpret the rule as prohibiting such communications, making the rule unlawful for that reason as well.

In addition, a policy on company information stated that "employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record." Although the policy itself referenced only unspecified "company information," the Board found that the employer had promulgated two overlapping sets of rules governing employee conduct—intranet policies and a handbook—and effectively directed employees to read them as one. The Board found that employees who read the two policies in tandem would understand the intranet policy to prohibit disclosure of employee records, which would include information concerning their own or fellow employees' wages, discipline and performance ratings. The Board stated that at the very least, the scope of company information in the intranet policy was ambiguous in light of the handbook provision, and the Board has recognized that employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition.

Protected Concerted Activity

Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, 358 NLRB No. 163 (2012)

A 2-1 Board majority (**Griffin and Block**) held that an employer violated Sections 8(a)(3) and (1) of the Act by issuing a documented "coaching" to a shop steward, which stated that he needed to conduct himself in a manner that is courteous, respectful and polite to all associates, managers, customers, and guests of the dealership.

The steward had observed another employee leaving the restroom without washing his hands, and he discussed the incident with other employees and spoke to the sales manager about it. The manager contacted the county health department to address employees' hygiene concerns, and a health department representative came to the dealership and gave a presentation, which centered on the H1N1 virus. At the end of the meeting, the steward complained to the representative that she had not addressed the problem at the dealership with employees failing to wash their hands after using the bathroom, which resulted in the warning.

The majority found that the steward's remarks were protected because they related to employees' concern about a working condition; it was irrelevant that his comments were not directed to a management official; and his comments furthered protected concerted activity addressing sanitary restroom habits, an employment term and condition. They stated that the warning would tend to inhibit the steward from engaging in protected concerted activities and could be construed as a threat of future reprisal.

Hayes dissented.

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012)

A 3-1 Board majority (**Pearce, Griffin and Block**) held that an employer violated Section 8(a)(1) of the Act by discharging five employees for Facebook comments they wrote in response to a coworker's criticisms of their job performance. The majority stated that although the employees' mode of communicating their workplace concerns might be novel, the appropriate analytical framework for resolving their discharge allegations has long been settled under the Board's precedent.

The employer contended that the Facebook comments constituted bullying and harassment of a coworker and violated the employer's zero tolerance policy prohibiting such conduct. However, the majority concluded that the activity engaged in by the five employees was concerted for the purpose of mutual aid or protection as required by Section 7 of the Act. The majority stated that the Facebook comments could not reasonably be construed as a form of harassment or bullying within the meaning of the policy; and even assuming that the policy covered the comments, the employer could not lawfully apply it without reference to Board law.

The majority also stated that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to discipline on the basis of the subjective reactions of others to their protected activity.

Hayes dissented.

Employment Arbitration Agreements

Supply Technologies, LLC, 359 NLRB No. 38 (2012)

A 2-1 Board majority (**Griffin and Block**) held that an employer violated the Act by maintaining a mandatory grievance arbitration policy, threatening employees with discharge if they did not sign the policy, and discharging 20 employees because they refused to sign it. The majority found that that the policy violated Section 8(a)(1) because employees would reasonably construe its language to prohibit filing Board charges or otherwise accessing the Board's processes.

The employer's arbitration agreement required arbitration of any federal, state or local statutes, including several federal statutes that were specifically named. In addition, the agreement excluded three types of claims—criminal matters, claims for workers' compensation, and claims for unemployment compensation benefits—and emphasized that these were the only claims employees could bring against the employer outside of the arbitration program.

The majority stated that given the agreement's broad scope, the three limited exceptions, and the requirement that federal statutory claims must be brought in arbitration, reasonable employees reading the agreement would understand it to restrict their right to file unfair labor practice charges or otherwise access the Board's processes. Although the NLRA was not one of the specifically named statutory claims subject to arbitration, the agreement stated that the list of statutes subject to the agreement was not exhaustive. Moreover, all of the statutes that were named were, like the NLRA, concerned with workplace rights.

The majority disregarded language in the agreement stating that employees could file a charge or complaint with a government agency and were free to cooperate with a government agency that might be investigating a charge or complaint.

Hayes dissented.

Information Requests

IronTiger Logistics, Inc., 359 NLRB No. 13 (2012)

A 2-1 Board majority (**Pearce and Block**) held that an employer violated Sections 8(a)(5) and (1) of the Act by failing to timely respond in any manner to a union's request for presumptively relevant information. The case arose from a dispute about the apportioning of freight delivery assignments between the employer and a non-union freight carrier that was under common ownership. The employer and the union had entered into a letter of agreement clarifying that loads assigned to the non-union drivers were not the employer's and that their delivery by that company would not be considered subcontracting.

The union filed a grievance concerning the dispatch of loads to the non-union drivers, and the union requested information concerning all units of work dispatched to the drivers of both companies over the preceding six months. The employer provided a list of units dispatched to both groups of drivers. The union then requested supplemental information, including the names of the drivers for each unit, their destination and mileage, and all relevant communications from customers about those units. The employer did not provide any of this information.

The majority found that the employer violated the Act by not timely responding in some manner to the union's supplemental request for information. The majority stated that Board precedent requires a timely response even when an employer may have a justification for not actually providing requested information.

Hayes dissented.

Stephens Media, LLC, dba Hawaii Tribune-Herald, 359 NLRB No. 39 (2012)

A 3-member Board panel (**Pearce, Griffin and Block**) held that an employer had a duty to furnish a union with a statement given by an employee in the course of its investigation of a union steward's alleged misconduct.

A manager had asked the employee to accompany him to his office to discuss whether she had violated a company policy. As they began to walk to the manager's office, the employee asked a union steward to accompany her, and the steward followed them toward the manager's office. Along the way, the steward and the manager argued about whether the employee was entitled to have a witness in the meeting, but the manager held firm to his refusal to allow the steward to attend the meeting.

The following day, the employee met with two company managers, who had arranged the meeting at the suggestion of the employer's attorney. At the meeting, the employee was asked to sign a short written account of the incident prepared during the meeting by one of the managers. The employee made several minor corrections and signed the document. After the meeting, the manager wrote on the top of the document, "prepared at the advice of counsel in preparation for arbitration."

The panel stated that the general duty to furnish information under *Anheuser-Busch* does not include a duty to furnish witness statements, but the Board has held that a statement signed by an employee will not be considered a witness statement unless the employee was given an assurance of confidentiality. Thus, the panel found that the document was not exempt from disclosure as a witness statement because the employee did not receive any assurance of confidentiality from the employer.

This decision was issued one day before the decision in in *Piedmont Gardens,* in which a Board majority overruled the bright-line test in *Anheuser-Busch* regarding witness statements.

The panel also found no merit to the employer's contention that the statement was privileged from disclosure as attorney work product. The panel stated that the work product privilege does not apply to documents produced pursuant to routine investigations conducted in the ordinary course of business, as it is limited to documents specifically created in anticipation of foreseeable litigation.

American Baptist Homes of the West d/b/a Piedmont Gardens, 359 NLRB No. 46 (2012)

A 3-1 Board majority (**Pearce**, **Griffin and Block**) held that an employer violated the Act by failing to provide a union with the names and job titles of three individuals who witnessed an employee engaging in work misconduct that resulted in the employee's termination. The majority found that the employer did not establish a legitimate and substantial confidentiality interest in the names and job titles. **Hayes** disagreed with this conclusion but agreed to apply existing precedent in deciding the issue.

With respect to witness statements provided by the same employees, the majority decided to overrule its precedent in *Anheuser-Busch* and apply the *Detroit Edison* balancing test in future cases where the employer argues that it has a confidentiality interest in protecting witness statements from disclosure. The majority rejected the premise of *Anheuser-Busch* that witness statements are fundamentally different from other types of information and stated that if requested information is relevant and necessary to the union's representative duties, it is fundamentally the same for purposes of the Act. The majority stated that the Supreme Court's precedent in *Robbins Tire* did not require or justify a blanket rule exempting witness statements from an employer's duty to provide relevant information because that case involved the Freedom of Information Act and did not involve a union's right under the Act to information relevant to its role in the collective bargaining process. **Hayes** dissented.

The majority decided to apply *Anheuser-Busch* in this case because retroactive application of the *Detroit Edison* test would work a manifest injustice on the employer and others who came to rely on the *Anheuser-Busch* rule. Applying this test, the majority found that two of the statements were exempt from disclosure, but the third did not qualify as a witness statement because the employee was not given an assurance of confidentiality. **Hayes** disagreed that confidentiality should be required under *Anheuser-Busch,* but agreed to apply that precedent in this case.

Walt Disney World Co., 359 NLRB No. 73 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that deferral of a union's information request to arbitration was not appropriate. The Board stated that it has long maintained a policy of refusing to defer information disputes to arbitration. In addition, the Board stated that when an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a request for deferral must be denied. In this case, the information-request allegations were inextricably linked to 8(a)(5) allegations asserting an unlawful change in the scope of the unit and unlawful midterm contract modifications.

Salem Hospital Corporation a/k/a Memorial Hospital of Salem County, 359 NLRB No. 82 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a hospital violated Section 8(a)(5) by failing to provide a union with requested information including the name, department and hire date of disciplined employees, as well as the related personnel files, disciplinary forms, and policies assertedly underlying the discipline, and witness lists and summaries of witness statements. The Board ruled in part on the fact that the hospital had waited for nine months, until the day before the hearing, to assert its confidentiality and overbreadth concerns and suggest an accommodation.

Unilateral Changes

Rose Fence, Inc., 359 NLRB No. 6 (2012)

A Board panel (**Hayes, Griffin and Block**) held that an employer violated the Act by laying off employees without bargaining after losing a union election. **Griffin and Block** found that each of the employer's decisions to lay off an individual employee—made consecutively as work diminished—was a mandatory subject of bargaining, and that as the employer unilaterally made those individual decisions after its bargaining obligation arose, the layoffs violated Section 8(a)(5). Furthermore, the panel stated that even if the employer decided, before its bargaining obligation arose, that it would later lay off employees as necessary, it was still required to bargain over the post-obligation individual layoff decisions—including the number, timing and terms of the layoffs—as effects of that earlier decision.

Hayes stated that the general decision to lay off employees in response to a regularly recurring seasonal decline in business was made prior to the election and therefore it was not a mandatory subject for bargaining. Accordingly, the fact that there would be lawful workforce reductions in later months should be taken into account in compliance proceedings determining what backpay, if any, the employer owed to individual laid-off employees.

Hayes noted that the employer had failed to file exceptions to the ALJ's finding that the number, timing and terms of the individual layoffs were not made in accord with a past practice of limited discretion. He further noted that the employer did not contend that economic exigencies should excuse it from having to bargain to an overall agreement or impasse in the parties' negotiations for a first contract before implementing the individual layoffs.

Hayes stated this situation calls for a balanced approach accommodating the legitimate need for an employer to continue making daily operational decisions necessary to the maintenance of its business during the initial stage of a collective-bargaining relationship. He would have required the employer to give the union adequate notice and opportunity to bargain about the layoffs, but he would have permitted the employer to unilaterally implement individual layoffs prior to reaching agreement or impasse on this issue, subject to continued post-implementation bargaining.

General Die Casters, Inc., 359 NLRB No. 7 (2012)

A 2-1 Board majority (**Pearce and Block**) held that an employer violated the Act when it circulated a memo titled Defacement of Company Property. Prior to the union's certification, the employer had maintained an employee handbook that prohibited the destruction or damage of property belonging to the Company. The handbook did not specify that posting items such as stickers on company property was prohibited, and there was a history of employees posting sports-related and other kinds of stickers on lockers and other company property. However, the memo stated that the destruction of company property would include the placement of personal items such as stickers on company property. Several months later, the employer discharged an employee for placing union stickers on a coffee machine and other company property. The majority found that the memo was a change from the rule contained in the employee handbook and that by unilaterally implementing the new rule and discharging an employee for violating it, the employer violated Sections 8(a)(5) and 8(a)(3). **Hayes** dissented.

The majority also found that the employer violated Section 8(a)(5) by unilaterally withholding merit wage increases. The employer had an established practice of granting periodic merit increases but contended that it also had a past practice of freezing wages when economic conditions warranted. The majority rejected this defense because the employer did not prove the specific circumstances of the practice or that it occurred with such regularity and frequency that employees could reasonably expect it to continue on a consistent basis. **Hayes** dissented.

The full panel also found that the employer violated the Act by sending written updates to employees that expressed the opinion that the union was not living up to its obligation to negotiate a contract; urged employees to sign a "decertification petition"; stated that the only real option was to throw the union out; and stated that "we fully support the decertification of this union and hope that in an NLRB election you will all be given a chance to vote the union out." The "decertification petition" was prepared by a supervisor, who solicited employees to sign it and informed them that the employer would be more willing to address wages if the union no longer represented them. In addition, another supervisor threatened employees with plant closure and job loss if the union continued to represent them. The panel found that that the updates were unlawful because they solicited employees to support a tainted decertification petition and would be viewed by them as part of an unlawful campaign in furtherance of the decertification effort. However, **Hayes** emphasized that an employer is privileged under Section 8(c) to communicate with employees concerning its position in negotiations, the status of the negotiations, or its view of the causes leading to a breakdown in negotiations; and to express views, arguments or opinions on unionization, including an opinion disfavoring a union or supporting a decertification petition after it has been filed with the Board.

Finley Hospital, 359 NLRB No. 9 (2012)

A 2-1 Board majority (**Pearce and Block**) held that a hospital violated Sections 8(a)(5) and (1) of the Act by unilaterally discontinuing annual three percent pay raises on employee anniversary dates after a collective bargaining agreement expired.

After the union won an election, the parties had entered into a one-year collective bargaining agreement, which provided:

Base Rate Increases During Term of Agreement.
For the duration of this Agreement, the Hospital will adjust the pay of nurses on his/her anniversary date. Such pay increases for nurses not on probation, during the term of this Agreement, will be three percent. If a nurse's base rate is at the top of the range for his/her position, and the nurse is not on probation, such nurse will receive a lump sum payment of three percent of his/her current base rate.

Negotiations for a successor agreement were unsuccessful and the agreement expired after one year. On the next day, the hospital announced that the contractual provision had expired and therefore the hospital would be unable to provide increases to nurses whose anniversary dates fell after the date of contract expiration. During the negotiations for the initial agreement, the parties had not discussed what would happen to the annual pay raises if the agreement expired without a successor agreement in place.

The Board majority stated that the term and condition of annual pay increases in specified amounts, and the employer's duty to continue such increases pending negotiation of an agreement, was established by the collective bargaining agreement, but the terms of that agreement did not negate the employer's statutory duty to maintain the status quo by continuing to grant annual pay increases after the agreement expired. The majority explained that although a union may waive its right to maintenance of the status quo as to a particular term or condition, such a waiver must be clear and unmistakable. Thus, although language in a collective-bargaining agreement may intentionally preclude a provision from having any contractual force after expiration of the contract, such language will not permit a unilateral change of a term established by the contract unless it also amounts to a clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo.

The majority acknowledged that the multiple references to the term of the agreement in the contractual provision clearly limited the contractual obligation and precluded the assertion of a contractual right after contract expiration, but they found that these references failed to unequivocally express the mutual intention of the parties to permit unilateral employer action with respect to the annual wage increases. In this regard, the majority distinguished cases in which contract language had expressly provided that the contractual provision would not continue to apply after expiration.

Hayes dissented.

Cofire Paving Corporation, 359 NLRB No. 10 (2012)

In a case involving the status of union trust funds when one union replaces another union as bargaining representative, a Board panel **(Pearce, Hayes and Griffin)** found that an employer did not violate the Act when it permitted bargaining unit employees to participate in a health plan that also covered nonunit employees because the new union had agreed to that plan during negotiations after becoming the representative. However, a 2-1 majority **(Pearce and Griffin)** held that the employer violated the Act with respect to contributions to pension and annuity funds sponsored by the previous union. **Hayes** dissented. The employer had ceased making payments to the welfare, annuity and pension funds sponsored by the previous union when the agreement expired, and there was no allegation that this was unlawful.

The majority stated that when an employer is faced with the discontinuation of existing benefits because of circumstances beyond its control, it is not permitted to unilaterally replace the benefits or remit benefit fund contributions directly to the employees, nor is the employer permitted to do nothing and simply allow employees to be stripped of the benefits. Instead, the employer must provide the union with notice and an opportunity to bargain over the development and its impact on unit employees.

In addition, the majority found that the employer was required to maintain existing contribution levels until it fulfilled its bargaining obligation. Thus, because the trust funds would no longer accept the contributions, the employer was required to continue calculating them according to the established formulas and set them aside for the benefit of the employees until the parties reached a new agreement or bargained to an impasse.

The majority stated that the employer did not fail to bargain over securing alternative benefits because it was bargaining with the union over that subject and had proposed replacing the pension and annuity plans with a 401(k) plan. However, the employer unlawfully failed to maintain existing contribution levels and to provide the union with timely notice and an opportunity to bargain over the disposition of the pension and annuity contributions.

The ALJ had concluded that under Section 302 of the LMRA the employer could no longer contribute to the trust funds after the previous union was decertified because it was no longer the bargaining representative. The panel did not decide the Section 302 issue but noted that the funds would not have accepted contributions in any event after the union was decertified.

Alan Ritchey, Inc, 359 NLRB No. 40 (2012)

A Board panel (**Pearce, Griffin and Block**) held that an employer must bargain with a union before imposing discretionary discipline on an employee during the period after the union has become the bargaining representative but before the parties have agreed upon a first contract. The panel stated that discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline unilaterally. Nevertheless, based on the unique nature of discipline and the practical needs of employers, this bargaining obligation is more limited than that applicable to other terms and conditions of employment.

The panel stated that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment—even where it has previously done so routinely or at regularly scheduled intervals. If the employer has exercised discretion in regard to the unilateral change at issue, it must first bargain with the union over the discretionary aspect. The panel concluded that this established doctrine applies to the unilateral discipline of individual employees, and therefore an employer must bargain before exercising its discretion to impose discipline on individual employees—absent a binding agreement providing for a process to resolve such disputes.

The panel stated that disciplinary actions such as suspension, demotion and discharge have an immediate impact on the employee's tenure, status or earnings, and requiring bargaining before these sanctions are imposed is appropriate because of this impact and the harm caused to the union's effectiveness as the bargaining representative if bargaining is postponed. However, the panel also stated that other actions that constitute discipline, such as oral and written warnings, have a lesser impact on employees, assuming that they do not automatically result in additional discipline based on a progressive disciplinary system, and bargaining over these lesser sanctions may properly be deferred until after they are imposed.

The panel explained that where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, an employer must maintain the fixed aspects of the discipline system and bargain with the union over any discretionary aspects—for example, whether to impose discipline in individual cases, and if so the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge or analogous sanction is imposed, but after imposition for lesser sanctions such as oral or written warnings.

With regard to possible delay that a bargaining obligation may cause in implementing discipline, the panel stated that this decision will not unduly burden employers for several reasons. First, the pre-imposition obligation attaches only with regard to the discretionary aspects of certain disciplinary actions that have an immediate impact on employees' tenure, status or earnings, such as suspension, demotion or discharge. Thus, it is expected that most warnings, corrective actions, counselings and the like will not require preimposition bargaining—assuming they do not automatically result in additional discipline based on an employer's progressive disciplinary system.

Second, where the preimposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This duty entails sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion. It will also entail providing the union with relevant information if a timely request is made, but the scope of the duty to provide information is limited to information relevant to the discretionary aspects of the employer's disciplinary policy. The employer is not required to bargain to agreement or impasse at this stage; if the parties have not reached agreement, the duty to bargain continues after imposition. Moreover, the employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy.

Third, an employer may act unilaterally and impose discipline without bargaining in any situation that presents exigent circumstances—where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.

Finally, an employer need not await an overall impasse in bargaining before imposing discipline, so long as it exercises its discretion within existing standards.

Hayes was recused from this case.

Mid-Term Modifications

Walt Disney World Co., 359 NLRB No. 73 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that Walt Disney World violated Sections 8(a)(5) and (1) by eliminating several job classifications in its catering department and reassigning the work to other employees. Because of a decline in guest satisfaction ratings, the company decided to reorganize the catering department by eliminating the banquet captain, bar captain, and bartender classifications. The duties previously performed by the captains were performed by nonunit managers, and the tasks previously performed by the bartenders were performed by servers.

The Board found a violation of the Act based on two distinct theories. First, the elimination of the captain classifications and the reassignment of work to nonunit managers was found to be an alteration of the scope of the unit. Second, the elimination of the captain and bartender classifications was found to be a midterm contract modification in violation of section 8(d). The ALJ also found that the company had failed to bargain over a mandatory subject of bargaining, but the Board rejected this theory.

Regarding the first theory, the Board stated that once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board. In this regard, the CBA expressly provided that bar and banquet captain positions were included in the bargaining unit.

The company contended that it could reorganize the catering department and eliminate of the captain position without the union's consent because the reorganization constituted an entrepreneurial change relating to the scope or direction of the enterprise within the meaning of *First National Maintenance.* According to the company, the reorganization involved a major shift in the manner in which it related to its customers, and the mangers' assumption of the captains' duties reduced inefficiencies and increased accountability. In addition, the company's objective in restructuring the department was to improve guest service ratings (and ultimately profitability), and labor costs were not a factor in the decision.

The Board concluded, however, that *First National Maintenance* was not controlling. The Board stated that that when an employer changes only the identity of the employees performing former unit work, while maintaining substantially the same operations or production processes, the decision does not constitute a change in the scope or direction of the enterprise, but instead is a mandatory subject of bargaining under *Fibreboard.* In this case, the company did not eliminate the work previously performed by the captains and the same work continued to be performed by other employees. Moreover, the company offered the same catering services to its guests in the same locations, using the same equipment.

The company also relied on contractual language stating that "management reserves the right to staff functions as deemed appropriate." According to the company, that provision allowed it to make all staffing decisions unilaterally. However, the Board found that this language did not establish the union's consent to the elimination of unit classifications, pointing out that the plain language of the clause indicated that the company's authority pertained to the staffing levels for catering functions, and that the clause made no mention of the elimination of classifications.

In addition, the company relied on a management rights clause that reserved its "right to select and direct the number of employees assigned to any particular classification of work." However, the Board found that this provision necessarily assumed the continued existence of those employee classifications. The Board also relied on contractual language providing that "the job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum A," which specifically included bartenders, bar captains and banquet captains.

Regarding the second theory, the Board stated that Sections 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer party to an existing collective bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union. The Board stated that the provisions of the agreement specifically identified captains and bartenders as classifications that "shall prevail" during its term, and the company's elimination of those positions therefore modified the contract. The company contended that this did not constitute an unlawful midterm modification because it had a sound arguable basis for interpreting the contract as giving it the authority to eliminate the positions. However, the Board stated that the agreement granted the company at most the right to determine the number of employees in particular classifications that would staff a given catering function; and it did not state that the company was vested with the right to eliminate employee classifications.

The Board also concluded that the management rights clause—which gave the company the right to select and direct the number of employees assigned to any particular classification of work—failed to establish a sound arguable basis for the company's assertion of the contractual right to eliminate a particular classification.

Finally, the Board stated that past practices cited by the company did not establish a sound arguable basis for its interpretation of the contract. First, the fact that the company retained the discretion to staff events as it deemed appropriate did not support a conclusion that the contract authorized the company to eliminate job classifications. Second, the fact that the union did not object to the nonunit managers' performance of the captains' job duties at events to which no captains were assigned (or at events where both captains and managers were used and their duties overlapped) did not constitute the union's acquiescence to the elimination of the captains' jobs.

Retaliatory Lawsuits

Federal Security, Inc., 359 NLRB No. 1 (2012)

A 3-1 Board majority (**Pearce, Griffin and Block**) held that an employer violated Section 8(a)(1) of the Act by filing and maintaining a state court lawsuit alleging that 17 former employees had engaged in malicious prosecution and an abuse of process by filing an unfair labor practice charge and providing evidence to the Board. The majority concluded that the Act preempted the lawsuit and that the Supreme Court's decision in *BE&K* did not invalidate the

Board's standard for imposing liability for preempted lawsuits. Because the case was decided on preemption grounds, the majority did not decide whether the lawsuit was baseless and retaliatory.

The majority explained that the Board's standard for imposing liability for the filing and maintenance of a preempted lawsuit derives from the language in footnote 5 of *Bill Johnson's*, where the Supreme Court emphasized that it was not dealing with a suit that was claimed to be beyond the jurisdiction of the state courts because of federal law preemption.

The employer contended that the Supreme Court's decision in *BE&K* invalidated the Board's standard for imposing liability on preempted lawsuits and that the lawsuit was thus insulated from legal sanction under the First Amendment Petitioning Clause. The majority concluded, however, that the exception in footnote 5 of *Bill Johnson's* for preempted lawsuits remains intact because *BE&K* did not affect the exception and the jurisdictional question of preemption is a different matter than the question of whether a lawsuit can be held unlawful as retaliatory. Thus, the majority stated that *BE&K* does not shield preempted state lawsuits because *Bill Johnson's* places them outside of the First Amendment analysis.

Hayes dissented.

J.A. Croson Company, 359 NLRB No. 2 (2012)

A 3-1 Board majority (**Pearce, Griffin and Block**) held that a construction company violated Section 8(a)(1) of the Act by pursuing a state court lawsuit against another contractor alleging that a union's job targeting program, in which the other contractor participated, violated the Ohio prevailing wage law. The union was signatory to an agreement with the Mechanical Contractors Association that provided for the voluntary deduction of two percent of an employee's gross wages as a "market recovery assessment," and the union used that money to fund its job targeting program. The majority explained that job targeting is a strategy utilized by construction unions to aid unionized contractors in bidding successfully on construction projects so that the jobs will go to union-represented workers.

The employer had initially filed charges with the Ohio Department of Industrial Relations alleging that the deduction of the job targeting assessment on county projects violated the prevailing wage statute, and that agency ruled that the signatory contractor had violated the statute. The employer then filed a state court lawsuit against the contractor based on the same theory. However, the Ohio Supreme Court ultimately held that the lawsuit was preempted by the NLRA.

The majority stated that job targeting programs, including those funded by deductions on state-funded public works projects, are clearly protected under Section 7 of the Act, and therefore the lawsuit challenging the program was preempted by the NLRA. The majority distinguished cases involving construction projects that were subject to the Davis-Bacon Act, as the U.S. Department of Labor has prohibited deductions for job targeting programs from wages on such projects, and two federal appellate courts have deferred to the DOL's position as a reasonable interpretation of Davis-Bacon. The Board had previously concluded that, with respect to Davis-Bacon projects, it was bound to defer to the interpretation of the executive branch department with statutory authority to enforce it.

The majority rejected the employer's argument that even if the lawsuit was preempted, it constituted genuine petitioning activity under the Supreme Court's decision in *BE & K Construction,* explaining that this argument had previously been rejected by the D.C. Circuit, which held that the First Amendment concerns expressed in *BE & K* and an earlier decision, *Bill Johnson's Restaurants,* were not relevant because the state court lawsuit was wholly preempted by federal law.

The majority also rejected the employer's defense that its lawsuit did not infringe upon Section 7 rights because it named only an employer as a defendant, and therefore not a person protected by that section, because the lawsuit interfered with the rights of the defendant contractor's employees.

Hayes dissented.

Jurisdictional Disputes

Local 18, Sheet Metal Workers International Association, 359 NLRB No. 56 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a local union of the Sheet Metal Workers did not violate Section 8(b)(4)(D) of the Act by threatening to picket a construction company with an object of forcing it to assign certain work to employees represented by that union rather than to employees represented by a local union of the Steamfitters.

The Board stated that a work dispute under Section 8(b)(4)(D) requires a choice between two competing groups and there must be an attempt to take a work assignment away from another group or to obtain the assignment rather than have it given to the other group. The Board found that in this case there was no attempt or demand to have any particular work reassigned to another group of employees. Rather, at a meeting attended by representatives of the employer and the Steamfitters, the parties merely discussed preliminary issues relevant to their upcoming negotiations for a new local contract. No particular project or work assignment was discussed at the meeting and there was no demand that any particular work be performed exclusively by employees represented by that union.

The employer and the Sheet Metal Workers contended that a work dispute was evidenced by statements made at the meeting regarding the requirements of a multi-employer agreement. A representative of the Steamfitters had stated that the use of employees represented by the Sheet Metal Workers would violate the agreement and that contractors needed to get rid of those employees to stay in compliance with it. However, the Board found that these statements were general and at most they demonstrated an interpretation of the agreement and did not include a reference to any particular work or assignment of work.

The employer and the Sheet Metal Workers also relied on a statement that the Steamfitters would welcome the other employees as members. However, this was found to be in response to a hypothetical question about what would happen if work was assigned exclusively to employees represented by the Steamfitters; and if anything the remark raised a representational issue, which is not the type of matter that Section 10(k) was designed to address. In any event, the Board found that the statement did not convey a demand for an assignment of any particular work.

Section 8(f)

Carr Finishing Specialties, Inc. 358 NLRB No. 165 (2012)

A 2-1 Board majority (**Pearce and Block**) held that a construction employer violated Sections 8(a)(5) and (1) of the Act by failing to follow the terms of two successive multiemployer agreements. **Hayes** agreed as to the first agreement but dissented as to the second.

In September 1997, the employer became a member of a multiemployer association when it executed a designation of bargaining agent. This document provided that no member of the association could resign during the 90-day period prior to the expiration of an agreement between the association and the union; and that the applicant would become a party to all agreements between the association and the union then in effect or negotiated thereafter.

In May 2006, the association and the union executed a new 3-year agreement. In September 2006, the employer signed an individual letter of assent agreeing to the terms of the agreement, although it was already bound to the agreement by its 1997 agreement with the association. However, in October 2008, the employer ceased applying the terms of the agreement, although it did not notify the association or the union at that time that it was terminating the agreement or its delegation of bargaining authority. The panel found that this was a violation of Section 8(a)(5).

In February 2009—prior to the expiration of the agreement but well after the deadline to terminate—the employer notified the association and the union that it was revoking the letter of assent and any authority of the association to bargain on its behalf and withdrawing from any collective bargaining relationship with the union. Thereafter, the association and the union executed a three-year agreement that became effective in May 2009 and remained in effect through April 2012. The majority concluded that the employer was bound to this agreement based on its agency agreement with the association; that the agreement was governed by Section 8(f) of the Act; and that an agreement permitted by Section 8(f) is enforceable for its term. The majority stated that once the agreement expires, the employer may lawfully withdraw from the bargaining relationship if it is not otherwise legally bound. However, a construction employer may become bound to successive 8(f) contracts if it has given continuing consent to a multiemployer association to bind it to future contracts and has taken no timely action to withdraw that consent. **Hayes** dissented.

Austin Fire Equipment, LLC, 359 NLRB No. 3 (2012)

A Board panel (**Pearce, Griffin and Block**) held that a construction company's relationship with a union was governed by Section 8(f) of the Act rather than Section 9(a). The panel explained that the recognition agreement between the employer and the union did not meet the test set forth in *Staunton Fuel* to establish 9(a) status because it failed to demonstrate that the employer's recognition of the union was based on majority support among unit employees. Because the union relied only on the recognition agreement to support its assertion of 9(a) status and did not rely on any other evidence, the panel found that 9(a) status had not been demonstrated.

G&L Associated, Inc. d/b/a USA Fire Protection, 359 NLRB No. 59 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a union's bargaining relationship with an employer was governed by Section 8(f) of the Act. The Board found that an acknowledgement form executed by the parties did not establish that their relationship was governed by Section 9(a) because it failed to satisfy the three-part test in *Staunton Fuel & Material.* The form did not confirm that the employer's recognition of the union was based on the support or authorization of a majority of unit employees. Rather, the form stated only that the employer had, on the basis of objective and reliable information, confirmed that a clear majority of the employees were members of and represented by the union, a statement that could equally apply to an 8(f) relationship. Although the form stated that the union was the exclusive bargaining representative of the employees pursuant to Section 9(a), the Board concluded that this did not satisfy the test in *Staunton*.

Austin Fire Equipment, LLC, 359 NLRB No. 60 (2013)

The 3-member Board (**Pearce, Griffin and Block**) held that a union's bargaining relationship with an employer was governed by Section 8(f) of the Act. The Board relied on the rationale in a companion case involving similar facts, *G&L Associated dba USA Fire Protection*.

<u>Beck Objectors</u>

United Nurses and Allied Professionals (Kent Hospital), 359 NLRB No. 42 (2012)

A 3-1 Board majority (**Pearce, Griffin and Block**) held that a union did not violate the Act by failing to provide nonmember objectors with an audit verification letter. The union gave the objectors a letter that provided reduced fee amounts, as well as charts setting forth the major categories of expenses for the union, and asserted that the categories had been verified by a certified public accountant. The union's accounts had been examined and verified by an independent auditor and a verification letter had accompanied the report. However, the union did not provide the letter to the objectors.

The Acting General Counsel contended that the union had violated Section 8(b)(1)(A) by failing to provide the objectors with the verification letter. Moreover, the Ninth Circuit had previously imposed such a requirement in a public sector case. However, the majority stated that unlike public sector cases, in which a union's conduct is evaluated under a First Amendment standard, the union's conduct in this case was properly analyzed under the duty of fair representation. Furthermore, a union violates that duty only if its actions are arbitrary, discriminatory or in bad faith; and its actions are arbitrary only if its behavior is so far outside a wide range of reasonableness as to be irrational. The majority concluded that the union had acted reasonably by providing the objectors with its major categories of expenditures along with an assurance that the figures were independently verified. **Hayes** dissented.

The majority also concluded that the union could lawfully charge the objectors for expenses incurred while lobbying for bills pending in the Rhode Island and Vermont legislatures. The majority stated that like all other union expenses, lobbying expenses are chargeable to objectors to the extent that they are germane to collective bargaining, contract administration or grievance adjustment.

In addition, the majority held that a union may charge objectors for extra-unit lobbying expenses as long as they are for services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization. The majority emphasized that a union can make this showing where the charge was reciprocal in nature, i.e., where the contributing local reasonably expects other locals to contribute similarly to the parent union's resources used for costs of similar activity on behalf of the contributing local if and when it takes place.

The majority invited briefs on the extent to which lobbying expenses are germane for the purposes of chargeability, and they proposed to approach this question by using rebuttable presumptions of germaneness. In this regard, the majority explained that as to certain kinds of lobbying expenses there may exist such a direct and positive relationship between the union's representational duties and its goals in pursuing legislative or other action that a rebuttable presumption of germaneness is warranted, while some lobbying activities may bear a relationship to the union's representational duties so attenuated that a presumption of germaneness would seem difficult to justify. **Hayes** dissented.

Subpoenas

Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, 358 NLRB No. 155 (2012)

A Board panel (**Pearce, Griffin and Block**) held that an employer violated Section 8(a)(1) of the Act by serving subpoenas on several current and former employees prior to a Board hearing. The subpoenas demanded confidential witness affidavits the employees had provided to the Board during its investigation of unfair labor practice charges.

The employer contended that its subpoenas were a direct petition to the government for the redress of a grievance under the *Noerr-Pennington* doctrine because it had petitioned the Regional Director for the subpoenas to help defend itself against a complaint alleging violations of the Act. However, the panel stated that the employer's request for the subpoenas was not the basis for the unfair labor practice. Rather, the violation rested on the employer's prehearing use of those subpoenas to attempt to compel employees to produce their confidential Board affidavits.

Furthermore, the panel stated that the employer's communications with the Regional Director did not constitute direct petitioning. Consistent with the Board's standard subpoena process, the employer had requested the subpoenas from the Regional Director and they were issued by the Board's Executive Secretary. The panel stated that the involvement of those agency officials did not make them petition-receivers for the purposes of *Noerr-Pennington* immunity because they acted in a ministerial capacity and processed the subpoena requests in a nondiscretionary manner, and thus they had no policymaking authority in responding to the requests. Moreover, there was no evidence that the employer sought the subpoenas from the Board in an effort to influence the passage of any laws or regulations, and the employer's request did not involve a significant policy determination in the application of the Act.

The panel also rejected the employer's alternative argument that its conduct was incidental to a direct petition. The employer's argument was that its defense of the allegations in the complaint constituted direct petitioning and thus its subpoena requests during that litigation constituted conduct incidental to direct petitioning. However, the panel stated that the Supreme Court has not extended *Noerr-Pennington* immunity to protect incidental conduct under federal labor law; and even assuming that the incidental-conduct aspect of the *Noerr-Pennington* doctrine was applicable, the employer could not claim immunity because it acted with an illegal objective in obtaining the subpoenas from the Board and serving them on the employees.

Remedies

Latino Express, Inc., 359 NLRB No. 44 (2012)

The 3-member Board (**Pearce, Griffin and Block**) decided that the Board, in connection with an award of back pay, should routinely require an employer to (1) submit appropriate documentation to the Social Security Administration so that the back pay will be allocated to the appropriate calendar quarters and/or (2) reimburse the employee for any additional federal and state income taxes he or she may owe as a consequence of receiving a lump-sum award covering more than one calendar year. The Board stated that this will better serve the remedial policies of the Act by ensuring that discriminatees are truly made whole for the discrimination they have suffered.