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Executive Management Services, Inc. *and* Service Employees International Union, Local 3 *and* Service Employees International Union, Local 1. Cases 25–CA–30221 Amended, 25–CA–30223 Amended, 25–CA–30226, 25–CA–30266 Amended, 25–CA–30328 Amended, 25–CA–30392, 25–CA–30459, 25–CA–30485 Amended, 25–CA–30486 Amended, 25–CA–30487 Amended, 25–CA–30489 Amended, 25–CA–30533 Amended, 25–CA–30537, 25–CA–30690, 25–CA–30692, 25–CA–30693, 25–CA–30694, 25–CA–30695, 25–CA–30697, and 25–CA–30698

May 11, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN, MEMBERS SCHAUMBER AND PEARCE

On June 23, 2009, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions except as set forth below, and to adopt the recommended Order.[3]

We agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate certain strikers upon their unconditional offer to return to work. In reaching this conclusion, we adopt the judge's findings that the strike was not an unfair labor practice strike, and that the Respondent was entitled not to reinstate the strikers because they engaged in recognitional picketing in violation of Section 8(b)(7)(C) of the Act.[4] As set forth below, however, we do not rely on all of the judge's rationale.

1. The General Counsel and the Charging Party contend that the judge, at various points in his decision, mischaracterized the standard for finding an unfair labor practice strike by implying that the strikers had to have been motivated to strike in a "significant manner" by unfair labor practices, or that unfair labor practices must have been a "substantial part" of the employees' decision to strike. We agree with the General Counsel and the Charging Party that the judge's characterization of the standard did not precisely track extant precedent. See, e.g., *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001).[5] The judge effectively found, however, that the unfair labor practices committed by the Respondent did not *in any way* motivate the employees to strike. Thus, the judge found that the strikers were unaware of the only prestrike unfair labor practice committed by the Respondent and that there was no evidence that the only unfair labor practice committed by the Respondent after the strike began affected the strikers' decisions to remain

[1] The General Counsel excepts to the judge's statement that the Regional Director implicitly revoked the settlement agreement and to the judge's Order that the settlement agreement be "reinstated." Relying on *Outdoor Venture Corp*., 327 NLRB 706 (1999), and *Midwestern Personnel Services*, 331 NLRB 348 (2000), enfd. 322 F.3d 969 (7th Cir. 2003), the General Counsel submits that the Regional Director was not required to, and did not, revoke the settlement agreement in order to litigate presettlement conduct in this case because he is not seeking any additional remedies for the settled allegations, and the reservation of evidence clause in the settlement agreement permits the litigation of presettlement conduct where that conduct is determinative of the nature of a strike. We agree with the General Counsel that the Regional Director did not implicitly revoke the settlement agreement. Therefore, it was unnecessary for the judge to "reinstate" it. To the extent that the judge's decision is ambiguous as to the status of the settlement agreement, we clarify that the settlement agreement is still in effect and has not been revoked.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his brief in support of exceptions, the General Counsel seeks compound interest computed on a quarterly basis for any make-whole relief awarded. In light of our disposition of this case, we find it unnecessary to rule on that request.

[4] In adopting the judge's finding that the Union's picketing was recognitional, Chairman Liebman observes that the Charging Party did not argue that its picketing did not constitute unlawful recognitional picketing under Sec. 8(b)(7)(C) because the purpose of its picketing was solely to obtain a neutrality/card-check agreement. The Board has found that picketing to obtain a neutrality/card-check agreement does not constitute a present demand for recognition within the meaning of Sec. 9(c)(1)(B). *Brylane, L.P.*, 338 NLRB 538 (2002); *New Otani Hotel & Garden*, 331 NLRB 1078, 1082 (2000).

[5] In *Golden Stevedoring*, supra, the Board observed that:

> It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices. . . . It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. In sum, the unfair labor practices must have "contributed to the employees' decision to strike."

335 NLRB at 411 (citations omitted).

on strike.[6] Given the judge's credibility resolutions in this case, we agree with his conclusion that the evidence does not support a finding of a causal connection between any unfair labor practices and the employees' decision to strike. Accordingly, we agree with the judge that the strike was not an unfair labor practice strike.

2. In agreeing with the judge that the strike was not an unfair labor practice strike, we find it unnecessary to pass on his finding that Sallie Mae project manager, Lucas Gronas, did not unlawfully interrogate employees about their union activities in early January 2007 (complaint par. 5(b)).[7] That incident allegedly occurred at the Sallie Mae building, and there is no evidence that it affected the strikers (who did not work at that building) or influenced their decision to strike. No employees testified that they were aware of this incident, nor did any employees testify that this incident was among the reasons they went on strike. Because there is no evidence that this alleged interrogation was a factor in the employees' decision to strike, and the General Counsel is not seeking an additional remedy for it, it is unnecessary for the Board to pass on whether it constituted an unfair labor practice.

3. We also find it unnecessary to pass on whether Supervisor Linda DeJournette's August 2007 conversation with former employee Star Carnell[8] constituted an unlawful interrogation and threat of surveillance.[9] The conversation allegedly occurred at the Guaranty building, and no employees testified that they went on strike because of anything which happened at that building. Even Carnell did not testify that she went on strike because of this incident. Nor is there evidence that Carnell reported the incident to any of the strikers or that it motivated any of the strikers to engage in the strike. Because there is no evidence that this incident was a factor in the employees' decision to strike and the General Counsel is not seeking any additional remedy for it, the Board need not pass on whether the incident constituted an unfair labor practice.

4. We adopt the judge's findings that Project Manager Aurelia Gonzalez and Supervisor Vonda Mathes did not unlawfully prohibit the wearing of union buttons and threaten employees with job loss for wearing them.[10] The judge discredited the employees' testimony concerning those alleged incidents, deeming it "contrived and unreliable" and inherently improbable. In agreeing with the judge that no button violations occurred and that button violations did not motivate the strike, we rely only on the judge's discrediting of the employees' testimony that the button incidents occurred. We find it unnecessary to rely on the judge's alternative rationale, that any button violations at Market Tower had been "cured" before the strike, and his related discussion of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and *Claremont Resort & Spa*, 344 NLRB 832 (2005). Given the finding that no button violations occurred, we necessarily conclude that the button allegations do not demonstrate any causal connection between any unfair labor practices and the strike.

5. The judge found that District Manager Richard Young did not violate the Act when he told employee Sandra Jones at Sky Bank not to complain to the security guard about the Respondent's cleaning supplies.[11] Later in his decision, however, in support of his finding that unfair labor practices did not motivate the employees to strike, the judge stated that even if Young's conduct had violated the Act, he would find that the General Counsel did not establish a causal connection between this incident and the strike. We do not rely on this alternative rationale. Rather, in agreeing with the judge that this incident does not provide a causal connection between any unfair labor practice and the employees' decision to strike, we rely solely on the judge's initial finding that this incident did not violate the Act.

In sum, we agree with the judge's conclusion that no causal connection has been established between any unfair labor practices and the employees' decision to strike. Accordingly, we adopt the judge's findings that the strikers were not engaged in an unfair labor practice strike, and that because of their participation in 8(b)(7)(C) conduct, the Respondent was not required to reinstate them. We shall therefore dismiss the complaint.

[6] Supervisor Audrita Kennedy's interrogation of then-employee Darnell Tillman in January 2007 (alleged in par. 5(h) of the complaint) occurred 8 months before the strike, at a location where none of the alleged discriminatees worked. The discriminatees were not aware of the incident, and it was not the stated basis for any of the discriminatees' decisions to strike. The October 11, 2007 DeJournette incident (alleged in par. 5(t) of the complaint) occurred after the strike began, and none of the strikers testified that this incident affected their decision to continue to strike.

[7] Member Schaumber, for institutional reasons, joins his colleagues in not passing on the judge's finding that this incident did not constitute an unfair labor practice.

[8] Carnell was a striker, but she is not an alleged discriminatee in this case.

[9] Complaint pars. 5(p)(i) and (ii). Member Schaumber, for institutional reasons, joins his colleagues in not passing on the judge's finding that this incident did not constitute an unfair labor practice.

[10] Complaint pars. 5(k) and 5(n), (o), (q), and (s).

[11] Complaint par. 5(j).

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C., May 11, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michael Beck and *Belinda J. Brown, Esqs.,* for the General Counsel.

Gregory W. Guevara and *Emily L. Yates, Esqs. (Bose McKinney & Evans LLP),* of Indianapolis, Indiana, for the Respondent.

Leslie J. Ward, Esq., Service Employees International Union, Local 1, of Chicago Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on March 30–April 2, and April 20–22, 2009. The charges herein were filed between January 16, 2007 and March 19, 2009. The consolidated complaint before me was issued on January 8, 2009, and was amended on March 19, 2009.

The General Counsel issued a complaint in those cases listed above in which SEIU Local 3[1] was the Charging Party on February 26, 2008. The parties entered into a settlement of all these matters in May 2008. Pursuant to the settlement, Respondent agreed to the posting of a notice, but did not admit to the commission of any unfair labor practice.

While the Regional Director has not explicitly revoked the May 2008 settlement, I find that in issuing the instant complaint he has implicitly done so. The General Counsel does not seek any additional remedy in this matter for the cases previously settled.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Executive Management Services, Inc. (EMS), provides janitorial services at commercial buildings. It's corporate office is in metropolitan Indianapolis, Indiana, and it does business in many different states, including Indiana. In the 12 months prior to the issuance of the complaint, Respondent, at its Indiana facilities, purchased and received goods valued in excess of $50,000 directly from points outside of Indiana. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Service Employees International Union (SEIU) Local 1, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The essence of this case is found in complaint paragraph 7. The General Counsel alleges that 10 of Respondent's employees who were on strike against EMS from September 25, 2007 until May 9, 2008, were refused reinstatement to their jobs in violation of Section 8(a)(3) and (1) of the Act.

Respondent submits that these employees engaged in picketing which violated Section 8(b)(7)(C) of the Act and that therefore they are not entitled to reinstatement or any other remedy. EMS filed unfair labor practice charges against the Union alleging violation of Section 8(b)(7)(C) on May 21, 2007, and November 14, 2007. On April 11, 2008, the General Counsel issued a complaint alleging that the Union had picketed Market Tower, an office building in downtown Indianapolis at which Respondent's employees worked, since about April 2007, without filing a representation petition within a reasonable period of time in violation of Section 8(b)(7)(C). In May 2008, the Union and the General Counsel settled the matter. The Union posted a notice in which it agreed not to picket EMS in violation of the requirements of Section 8(b)(7)(C), but did not admit that it had committed any unfair labor practices.

In May 2008, at approximately the same time that the General Counsel settled the complaints issued to EMS and the Union, other contractors in Indianapolis signed a collective-bargaining agreement with the Charging Party. While the relationship between this contract, the settlement of the charges against both EMS and the Union and the end of the strike against EMS is not precisely clear in this record, I infer that all these events are connected.

The 10 alleged discriminatees picketed Respondent's worksite at the Market Tower office building in downtown Indianapolis from September 25, 2007, until sometime in January or February 2008, and possibly thereafter until their strike ended in May 2008. Their Union, the Charging Party SEIU, never filed a representation petition with the Board.

The General Counsel and Charging Party allege that the 10 employees were also on strike and picketing to protest unfair labor practices and that therefore Respondent violated Section 8(a)(3) and (1) in refusing the discriminatees reinstatement. Thus, the main issue in this case is whether Respondent committed any unfair labor practices which either caused or prolonged the alleged discriminatees' strike.

[1] SEIU Local 3, which initiated the organizing of EMS, has since merged with SEIU Local 1.

B. The SEIU's Campaign to Organize Janitors in Indianapolis, Cincinnati, and Columbus

The SEIU embarked upon a campaign to organize the janitors in Indianapolis, Cincinnati, and Columbus. It called this campaign "three cities, one future." Organizing in Indianapolis began in 2004. The SEIU identified the larger janitorial contractors in the city and sought to have them sign a neutrality agreement. An example of such an agreement is Respondent's Exhibit 12 executed in November 2005, by the Union and GSF Safeway, the largest cleaning contractor in Indianapolis. GSF signed this agreement after the Union organized a strike by its employees in June 2005, and after it had settled unfair labor practices filed against it by the SEIU.

In that agreement the employer agrees not to take any action or make any statement in opposition to the selection by its employees of a bargaining representative. The employer agreed to provide the Union a list of the names and addresses of bargaining unit employees. The employer agreed to waive its right to file a representation petition in response to a demand for recognition by the Union after the Union had demonstrated majority support at a commercial office building or group of buildings in Marion and Hamilton counties in Indiana.

Employers signing this neutrality agreement agreed that once the Union demonstrated that at least 60 percent of the combined square footage of commercial office buildings and office parks over 75,000 square feet were serviced by contractors who had recognized the Union, they would commence bargaining for a master collective-bargaining agreement for Marion and Hamilton counties.

In late 2005, David Dingow, the contract administrator for the Union, contacted David Bego, the CEO of Executive Management. This led to a meeting in April 2006, in which Dingow asked Respondent to sign a neutrality agreement such as that executed by GFS Safeway.

In an exchange of emails in August 2006, Respondent's Exhibit 15, Dingow essentially demanded that Bego sign the neutrality agreement. In one message Dingow stated:

> We will expect to have an Agreement by the end of this week with EMS. If that is not possible we will target buildings as we have with other contractors.
>
> Later he added,
>
> The signatories also want us to take action against the contractors who have not signed. Just as you were concerned about competition they are concerned about you. We can't hold off the activity in the face of the other contractors who experienced the campaign.

Bego met again with union representatives in September 2006. The Union demanded that EMS sign the neutrality agreement. Bego declined and suggested that the Union petition the NLRB for a representation petition. The Union's campaign to organize EMS began in earnest in January 2007, at the Sallie Mae building in Fishers, Indiana, in the northeast part of metropolitan Indianapolis and then spread to other EMS locations, including several in downtown Indianapolis. The campaign included picketing, handbilling, rallies, public demonstrations, and the filing of unfair labor practices.[2] On September 25, 2007, the Union's lead organizer, Rebecca Maran,[3] faxed to EMS the following notice, R. Exh. 64:

> We are writing to inform you that, EMS employees at 10 W. Market St. and Sky Bank, as of September 25, 2007 are participating in an unfair labor practice strike until further notice. They are protesting charges of unfair labor practices including those described in NLRB cases:
>
> 25–CA–30221 Amended; 25–CA–30223 Amended; 25–CA–30226; 25–CA–30266 Amended; 25–CA–30328 Amended; 25–CA–30392; 25–CA–30423; 25–CA–30459.

The notice was signed by the following janitorial employees of EMS who worked at the Market Tower office building at 10 W. Market St. in downtown Indianapolis, and who are alleged discriminatees in the instant case:

Shaneka Brown
Christina Stubbs
Desiree Bryant
Harry Webster
Maggie Harwell
Karen Knox

The notice was also signed by employee Neil Miller, who is not an alleged discriminatee and Sandra Jones, who is an alleged discriminatee but worked at EMS' Sky Bank location in downtown Indianapolis.

> On October 1, 2007, Maran faxed another notice to EMS, which stated:
>
> This memo is to inform you that EMS employees at 20 N. Meridian and 1 N Penn have joined in the unfair labor practice strike.

Although not named, two EMS employees who worked at the Guaranty Building in downtown, Star Carnell and Ronicka Evans, joined the strikers/picketers who assembled in front of the Market Tower building regularly and other EMS locations occasionally for a period exceeding 4 months. Two other EMS employees from Market Tower, Antonio Gutierrez and Kevin McClung also joined the picket line outside Market Tower. Although the Union never notified EMS that that Carnell, Evans, Gutierrez, and McClung were on strike, EMS was well aware of their presence on the picket line over a period of months. Three of these four, Evans, Gutierrez, and McClung are alleged discriminatees in this case.

Respondent contends that even if I find that it committed unfair labor practices, I should find that the strike and picketing by the Union had little or nothing to do with these violations. It notes in this regard that except for Charge 25–CA–30423, which the Union withdrew, none of the charges cited by Re-

[2] While the filing of unfair labor practice charges was certainly part of the Union's strategy for pressuring employers to sign a neutrality agreement, the fact that filing charges was a tactical device does not mean unfair labor practices were not committed. Each allegation must be evaluated on the strength of the record evidence.

[3] Maran subsequently married another SEIU organizer, Jonathan Liebowitz, and is referred to in the transcript by both her maiden and married names.

becca Maran in her strike notice of September 25 involved employees at Market Tower. Only, one charge, 25–CA–30392, involved one of the discriminatees. This charge is covered by complaint paragraph 5(j) and involves alleged threats made by EMS District Manager Richard Young to discriminatee Sandra Jones at the Sky Bank in June.[4]

C. General Comments Regarding Witness Credibility

As set forth below, I dismiss most of the complaint allegations in this case. Much of the evidence herein is of the "he said, she said" character. I do not necessarily credit the testimony of Respondent's witnesses, however, at many points it is clear to me that the testimony of the General Counsel's witnesses is contrived and very likely to be untruthful.

The Charging Party was soliciting its supporters to provide material for unfair labor practice charges from the outset of its organizing campaign. This solicitation is particularly evident regarding the many allegations that Respondent prevented or interfered with its employees' Section 7 rights to wear union buttons at work. Alleged discriminatee Ronicka Evans testified in this regard that in her first meeting with SEIU organizer Mindy Reichelt:

> She gave me a button to say if you are getting treated unfair, like, say for instance, we wear our buttons and they tell us not to wear our buttons. . . .

Tr. 642.

Similarly, alleged discriminatee Desiree Bryant testified that when Reichelt gave her a union button to wear at Market Tower, Reichelt told her, "we are trying this thing we do with different buildings to see what they will say . . ., Tr. 671. Reichelt also told Bryant that usually employees are told they can't wear union buttons, Tr. 695.

Of course, the fact that the Union was soliciting material with which to file unfair labor practice charges does not mean that ULPs were not committed. However, this record indicates at least several instances of outright fabrication.

Alleged discriminatee Desiree Bryant testified on direct examination that in July, EMS Supervisor Vonda Mathes told her she was not allowed to wear a union button to work. Bryant then testified that she removed the button, threw it in the trash and never wore a button to work again, Tr. 673. On cross-examination, Bryant conceded that she wore a union button to work every day at least from August 24, 2007, to the beginning of the strike on September 25, Tr. 706–707.

Alleged discriminatee Ronicka Evans testified that her supervisor, Jeanette, told that she would have to take her union button off whenever EMS District Manager Richard Young showed up at her workplace, the Guaranty Building in downtown Indianapolis. She also testified that Young told her that she was not supposed to wear a union button to work. Despite this, Evans wore a union button to work virtually every day at the Guaranty Building and at 1 North Pennsylvania Avenue. In an affidavit she gave to the NLRB on October 24, 2007, Evans told the Board Agent that Young never saw her wear a union button and that Jeanette was the only person who said anything to her about the union button, Tr. 656–658.

Alleged discriminatee Harry Webster testified that EMS Supervisor Vonda Mathes told him that he could not wear a union button in the Market Tower building sometime prior to September 2007, Tr. 603–604. However, in an affidavit given to the NLRB on September 12, 2007, Webster stated:

> Shortly after I signed the card stating I wanted the SEIU to be my representative I began wearing a button that said, 'Justice for Janitors.' I believe I started wearing the button sometime in June. I have worn the button every day since then. No one at EMS has told me that I could not wear a button.

Tr. 605–606.

These witnesses are not credible because when testifying they appeared to be more interested in supporting a litigation theory than in testifying candidly, see, e.g., *In re: Lexus of Concord, Inc.,* 330 NLRB 1409, 1412 fn.9 (2000); *Carruthers Ready Mix, Inc.,* 262 NLRB 739 (1982). The fact that a party proffers several witnesses who testify to less than the whole truth detracts from the credibility of all their witnesses regarding the same subject matters.

D. Allegations of the Complaint[5]

Complaint paragraph 5(a) (threats of job loss by Kelly Bego or Robert Guffey): The General Counsel alleges that on about January 4, 2007, Respondent, by Kelly Bego or Robert Guffey, threatened employees with job loss because they engaged in union activities. This allegation is predicated upon the testimony of Larry Brumback, a former EMS employee, who was fired by Respondent in January 2007, for threatening two of his supervisors, and Frank Frierson, an ex-employee who was demoted from a supervisory position in December 2006.[6]

Brumback testified that Respondent held a meeting for employees conducted by Respondent's then-human resource manager, Kelly Bego, and District Manager Joe Guffey.[7] According to Brumback, Guffey did most of the talking and stated that EMS would lose its contract with Sallie Mae if employees chose to be represented by the Union. Frierson, however, testified that Kelly Bego spoke for Respondent and said that if employees joined the union, "that they would probably lower our pay and give us the expense of union dues, and they would give us high health insurance."

Kelly Bego and Joe Guffey testified that Respondent did hold a meeting for employees at Sallie Mae on about January 5,

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[4] The locations of the unfair labor practices in charges cited in Maran's September 25 notice are as follows:

> 25–CA–30221: Sallie Mae location in Fishers, Indiana; 25–CA–30223: Sallie Mae; 25–CA–30226: Sallie Mae; 25–CA–30266: Indianapolis Power and Light location; 25–CA–30328: Indianapolis Childrens' Museum; 25–CA–30392: Sky Bank; 25–CA–30423: Market Tower (withdrawn by the Union, Exh. R-6); 25-–CA–30459: Guaranty Building.

[5] Complaint pars. 5(i) regarding alleged 8(a)(1) violations at the Indianapolis Childrens Museum and 5(l) alleging 8(a)(1) violations by EMS Supervisor Roberto Solorazano at Market Tower in July 2007, were withdrawn by the General Counsel at trial.

[6] Brumback had been fired several times previously and then rehired.

[7] Guffey's given first name is Robert. Bego, the daughter of Respondent's CEO, has since married and now goes by her last name, Simerly.

2007 in response to the organizing drive. However, both stated that Guffey said nothing other than to introduce Bego. Kelly Bego testified that she distributed a new company handbook and had employees sign for it. She read the company's statement on unionism from pages 4–5 of the handbook, R. Exh. 18, pp. 4–5.

> It is our opinion that wherever there are unions, there is also trouble, strife and discord and that a union would not work to our employees' benefit, but to their serious harm. It is our positive intention to oppose unionism by every proper and lawful means.
>
> If union representatives should ever approach you, we would appreciate your seeking advice, counsel, and information from your supervisor or the Human Resources Department on any question you may have on this subject.

Kelly Bego and Joe Guffey denied that either of them said anything about job loss or the potential of EMS losing its contract with Sallie Mae. I conclude that neither Brumback's nor Frierson's testimony is more credible than that of Kelly Bego and Guffey and I therefore dismiss the allegation in complaint paragraph 5(a). For one thing, the credibility of both ex-employees is adversely affected by their inconsistency with one another. Frierson did not testify that Bego threatened job loss and Brumback did not testify about the alleged threats testified to by Frierson.

Complaint paragraph 5(b) alleges that Respondent by its Sallie Mae project manager, Lucas Gronas, unlawfully interrogated employees about their union activities on or about January 5 and 9, 2007. These allegations are also predicated on the testimony of former employee Larry Brumback. Brumback testified that Gronas called his coworker Dustin Austin to inquire about a conversation Austin and Brumback had with union organizer Maran. Brumback did not talk to Gronas himself and only knows what Austin told him. Since this is classic hearsay testimony, I decline to credit it.

Brumback also testified that after another meeting with Maran he went to work wearing a union button that Maran had given him. He testified that Lucas Gronas asked him, "how was the meeting?" He did not testify that Gronas said anything else to him. Gronas did not testify in this proceeding. Given that Brumback was openly supporting the Union and that Gronas didn't ask him anything else, I find that his question did not rise to the level of an unlawful interrogation. Further, I do not think the remark would give an employee the impression that his union activities were under surveillance. It would be a natural assumption for Gronus to believe that Brumback received the union button at "a meeting."

Complaint paragraphs 5(c),(d), (e), and (g) (prohibiting the wearing of union buttons, threats of termination): The allegations also rest on the testimony of Larry Brumback. He testified that the night he wore a union button to work, on about January 9, 2007, he was approached by Joe Guffey and Donzay Patterson, one of Respondent's operations managers. Brumback stated that Guffey and Patterson told him to take the button off, to wear it on his own time, not EMS' time. Patterson also allegedly asked him who else was wearing a union button. Brumback testified further that before he could respond, Patterson interrupted him and said, "never mind. I'll find out for myself."

With regard to complaint paragraph 5(g), Brumback testified that Lucas Gronas told him that he would have been discharged the night he wore the union button had Brumback not removed it when asked.[8]

Neither Patterson nor Gronas testified in this proceeding. Respondent relies completely on the testimony of Joe Guffey to rebut Brumback's allegations. Gronas reported to Guffey; Guffey reported to Patterson. Guffey testified that he and Patterson encountered Brumback and Dustin Austin when they were wearing union buttons. Guffey stated that Patterson asked Brumback to move the union button so that it did not conceal the EMS logo on his shirt. According to Guffey, Brumback did so. Guffey denies that Patterson told Brumback that he was not allowed to wear a union button.

On cross-examination, Brumback admitted that Patterson may have asked him to remove the button from covering the EMS logo, Tr. 853. Given Brumback's uncertainty as to what Patterson said to him and since I find Brumback no more credible than Guffey, I dismiss complaint paragraphs 5(c), (d), and (e).

I dismiss paragraph 5(g) on the grounds that if the General Counsel has not established that Respondent ordered Brumback to remove his union button, it is illogical to conclude that Lucas Gronas told Brumback he would have been fired if he had failed to comply.

Complaint paragraph 5(f) (interrogation by Donzay Patterson): Former EMS employee Frank Frierson testified that on the evening of January 11, 2007, he was approached by Donzay Patterson and Joe Guffey in the mailroom of the Sallie Mae building. Frierson testified that Patterson asked him if he was siding with the Union and if he knew anything about a meeting after work. Joe Guffey, who by Frierson's account was present, denies that any of this occurred. Having no basis for deeming Frierson more credible than Guffey, I dismiss complaint paragraph 5(f).

Complaint paragraph 5(h) (interrogation, threats by Audrita Kennedy): These allegations are based on the testimony of Darnell Tillman who worked for EMS from December 2006 until July 3, 2007, when he was fired.[9] Tillman testified that he met union organizer Becky Maran outside of the Indianapolis Power and Light Building to which he was then assigned just before work in January 2007.[10]

According to Tillman, while he was talking to Maran, his supervisor, Audrita Kennedy, came out of the building and told him that it was time for him to come inside to work.[11] Tillman testified that Kennedy repeatedly asked him to whom he was talking. She asked him if he had been talking to church people

[8] The Union filed an unfair labor practice charge alleging that Brumback's discharge was discriminatory. The General Counsel did not issue a complaint with regard to this allegation.

[9] The General Counsel did not file a complaint with regard to the Union's charge that Tillman's termination violated Sec. 8(a)(3).

[10] Tillman was assigned to several different locations while working for EMS and was assigned to Market Tower when he was terminated.

[11] Respondent has admitted that Kennedy was a supervisor pursuant to Sec. 2(11) of the Act and its agent, pursuant to Sec. 2(13).

and then if they were union people. Tillman stated that Kennedy then said that employees were not allowed to talk to union people because EMS could lose its contract.

SEIU organizer Mindy Reichelt testified that she observed a supervisor telling Tillman and some other employees that they weren't allowed to talk to union representatives. Tillman did not testify to Reichelt's presence and while Tillman testified the incident occurred when he was reporting to work, Reichelt testified that it occurred after Tillman left work and was speaking to her, Maran and another union representative.

Respondent did not call Audrita Kennedy as a witness nor did it claim that she was unavailable to testify. Thus, despite the variance between Tillman's account and Reichelt's account, his testimony is uncontradicted by Respondent. Therefore, I credit Tillman's account and find that Respondent, by Audrita Kennedy, violated Section 8(a)(1) of the Act by interrogating Tillman about his union activities, instructing him not to talk to union representatives and impliedly threatening him with loss of his job if employees chose to be represented by the SEIU.

Complaint paragraph 5(j) (interference and threats by Richard Young): The allegations in paragraph 5(j) are predicated on the testimony of Sandra Jones, one of the two alleged discriminatees who did not work at Market Tower. Jones worked at a building then occupied by the Sky Bank, a few blocks from Market Tower in downtown Indianapolis.

Jones testified that she complained to a security guard named Darrell at Sky Bank that EMS did not have adequate cleaning supplies at Sky Bank. Darrell worked for a security contractor at Sky Bank, not for EMS. Jones testified that the next day EMS District Manager Richard Young summoned her to a meeting in the basement of the Sky Bank. She states that Young told her she was not supposed to be going around telling people that EMS didn't have adequate cleaners and that Young said either that someone had previously been fired for doing this or that Jones could be fired for doing that.

Young confirmed that he did tell Jones that she should not be complaining to the security guard about EMS' cleaning supplies. Young testified that he told her that if she was unhappy with the supplies she should talk to him. He denied that he told Jones that someone had been fired for complaining to persons outside of EMS about cleaning supplies and that this had not occurred. On this last point, I decline to credit Jones as I deem her testimony no more credible than that of Young.

I dismiss paragraph 5(j) because to the extent that I have credited Jones, her testimony does not establish a violation of Section 8(a)(1). The statements attributed to Young by Jones did not interfere with, restrain, or coerce her in regard to any right protected by Section 7 of the Act. These statements did not pertain to her union activity and there is no evidence that Jones was engaged in concerted protected activity.[12] Thus, there is no evidence that she was complaining about the cleaning supplies on behalf of anyone but herself.

Complaint paragraph 5(k) (threats of job loss for wearing union buttons):

In very garbled testimony, Tr. 246–248, Antonio Gutierrez stated that EMS' project manager at Market Tower, Aurelia Gonzalez, threatened to fire him if he did not remove a union button at some unspecified occasion prior to the beginning of the strike. Gonzalez denies this, Tr. 1029–1030. I have no reason to credit Gutierrez as opposed to Gonzalez.

Karen Knox, who worked as a janitor at the Market Tower building testified that in June 2007, she wore a union button to work. She further testified that Aurelia Gonzalez told Knox that she could not wear a union button at work and that Gonzalez would fire her if she wore it again. Knox stated she did not wear a union button to work afterwards. Knox's testimony is somewhat confusing in that she stated that during her first contact with the Union she told organizer Mindy Reichelt that Gonzalez had threatened to fire her for wearing a button and also testified that Reichelt gave her the button.

Gonzalez denies having any conversation with Karen Knox concerning union buttons. She testified that her supervisor, Brian Wyatt, told her that employees could wear union buttons so long as the button was not covering the EMS logo on their shirts. Gonzalez did not testify as to when Wyatt informed her of this policy. I credit Gonzalez' testimony that she communicated this policy to a number of employees, including alleged discriminatees Maggie Harwell, Antonio Gutierrez, Shaneka Brown, Knox, Christina Stubbs, Desiree Bryant, and Kevin McClung prior to the start of the strike which began on September 25, 2007.

Gonzalez' testimony was corroborated by alleged discriminatee Desiree Bryant, Tr. 696–700. Bryant confirmed that Gonzalez told a group of employees that they could wear union buttons so long as they didn't cover the EMS logo in July.[13] The testimony of several of the discriminatees establishes that by early August 2007, EMS employees at Market Tower wore

[12] Sec. 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7. Sec. 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*. . . ." (Emphasis added.)

In *Myers Industries (Myers I),* 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.,* 289 NLRB 933 (1988); *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3d Cir. 1964).

Additionally, the Board held in *Amelio's,* 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Sec. 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

[13] Bryant was uncertain as to whether Stubbs and Webster were present and testified that Shaneka Brown was not present when Gonzalez told employees that they could wear union buttons. However, it is quite clear that all the discriminatees who worked at Market Tower were well aware that Respondent would not interfere with their wearing of union buttons at work weeks, if not months before the start of the strike on September 25.

union buttons in front of Gonzalez and other supervisors and were never told to remove the buttons or threatened with discipline or discharge for wearing a button.

Alleged discriminatee Kevin McClung testified that shortly after he signed a union authorization card on July 30, 2007, he began wearing a union button to work every day, Tr. 624. McClung saw Gonzalez approximately once a week and saw his immediate Supervisor Roberto Solorazano virtually every day. Neither of them said anything to McClung about his union button.

Alleged discriminatee Christina Stubbs testified that she wore a union button to work every day in the 2 weeks prior to the strike and was never asked to remove it, Tr. 550. Stubbs' supervisor, Vonda Mathes, saw her wearing the button on many occasions and I infer Gonzalez saw Stubbs wearing the button on some occasions as well, Tr. 551.

I dismiss complaint paragraph 5(k) in part because I deem much of the General Counsel's testimony regarding union buttons to be contrived and unreliable. I also conclude, as discussed later in this decision, that by her conversation with employees at the timeclock in July 2007, Gonzalez cured whatever unfair labor practices may have been committed with regard to the wearing of union buttons at Market Tower prior to that date.

Complaint paragraph 5(m) (interrogation by Richard Young): This allegation is apparently based on the testimony of Damon Morrow, who worked at the Guaranty Building as an acting supervisor for EMS. Morrow testified that on July 9, he left work despite contrary instructions from EMS Manager Richard Young. Young, he said, tried to talk Morrow into working that night, but Morrow declined citing grievances he had with EMS. Then Morrow stated that Young asked him, "if he was screaming union." The General Counsel asserts that this was an unlawful interrogation. Young denies that he made the statements attributed to him by Morrow. Having no basis for crediting Morrow's testimony over that of Young, I dismiss complaint paragraph 5(m).

Complaint paragraphs 5(n), (o), (q), and (s) (prohibition of union buttons; threats of job loss by Vonda Mathes): The General Counsel alleges in paragraphs 5(n) and (o) that in July 2007, Supervisor Vonda Mathes instructed employees at Market Tower not to wear union buttons. These allegations are supported by the testimony of Desiree Bryant.[14]

Paragraph (q), predicated on the testimony of Shaneka Brown alleges similar threats by Mathes in September. Paragraph(s) predicated on the testimony of Harry Webster alleges similar threats by Mathes in October after the strike began.

I am unable to credit any of the discriminatees' testimony regarding statements by Vonda Mathes due to its inherent improbability and instances in which their testimony was contradicted on cross-examination and/or by sworn affidavits given during the investigation of the Union's charges.

Shaneka Brown testified that Mathes told her that she was not permitted to wear a union button and could be written up or terminated if she did so. However, Brown continued to wear the button without being written up or disciplined.

Karen Knox wore a visible union bracelet to work every day.

Christina Stubbs testified that she wore a visible union button and a union bracelet to work every day for a month before the strike and was never told to remove either one by anyone, including Vonda Mathes.

Harry Webster testified that Mathes told him he could not wear a union button in August 2007, but neglected to mention this in an affidavit given to the Board on September 12.

Desiree Bryant also continued to wear a union button to work every day for a month prior to the strike.

Mathes denied these allegations under oath and I conclude that it is highly improbable that she threatened some employees with discipline or discharge over their union button but did and said nothing to others who wore the button to work every day.

Complaint paragraph 5(p)(i) alleged interrogation and (ii) threat of surveillance by EMS Supervisor Linda DeJournette: Former EMS employee Star Carnell had a conversation with Linda DeJournette, her supervisor at the Guaranty Building, in August 2007.[15] DeJournette asked Carnell about the Union. The two women had a discussion about the Union and DeJournette indicated that she wasn't interested in being in a union.

A week later, DeJournette told Carnell that, "she felt like she was there to be Richard's [Young] eyes and ears. He asked her to be his eyes and ears and she said that he had his own eyes and ears, and she felt like she was there to do his dirty work, and that she said she didn't see anything wrong with the union, but it just wasn't for her."

Regarding paragraph 5(p)(i), the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the *Bourne* factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

These and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20, *Medicare*

[14] In its posttrial brief, at p. 20, the General Counsel withdrew the allegation in complaint par. 5(n)(ii) that Mathes also threatened employees with loss of their jobs if they engaged in union activities, including wearing union buttons.

[15] I credit Carnell's uncontradicted account of her conversations with DeJournette. DeJournette did not testify. Richard Young did not testify that he did not tell DeJournette that he wanted DeJournette to be "his eyes and ears."

Associates, Inc., 330 NLRB 935, 939 (2000).[16] DeJournette was a low-level supervisor, who did not appear to be seeking information on which to take action against employees. Also, given the informal setting (by the security guard's desk) and nature of the conversation, I conclude the DeJournette's questions to Carnell did not violate Section 8(a)(1).

With regard to paragraph 5(p)(ii), it is clear that DeJournette did not violate the Act when she told Carnell that she was not going to be Richard Young's "eyes and ears." Moreover, I also conclude that the General Counsel has not established that Young's instructions to DeJournette violated the Act. It may be that he was asking no more of DeJournette than, "to keep him informed, as any supervisor would be expected to, of what was happening with the union organizing campaign," *Wayne J. Griffin Electric,* 335 NLRB 1362, 1384 (2001).[17]

Complaint paragraph 5(r) (Aurelia Gonzalez threatens employees with job loss). This allegation is predicated on the testimony of former EMS janitor Antonio Gutierrez. Gutierrez testified with the assistance of an interpreter and even so, his testimony is extremely difficult to understand and it is not apparent at times whether Gutierrez understood what he was being asked (e.g., Tr. 247).

Gutierrez testified that on one occasion in early October, 2 weeks after the strike began at Market Tower, he encountered his Supervisor Aurelia Gonzalez when leaving a Subway restaurant. He testified that in response to his greeting, Gonzalez said, "we're crazy." According to Gutierrez, Gonzalez proceeded to tell him that some strikers had already returned to work, that the materials they were handing out were being thrown away and that "actually all of us [who] were out there were fired."

On cross-examination Gutierrez testified that Gonzalez told him, "we were fired, but if we wanted to return to go to the office." He again stated that Gonzalez told him that other strikers had returned to work.

Aurelia Gonzalez confirmed that she ran into Gutierrez at a Subway. She testified that she asked Gutierrez when he was coming back to work and did not tell Gutierrez that he'd been fired. I find Gonzalez' account of the conversation at least as credible as that of Gutierrez and dismiss paragraph 5(r) of the complaint.[18]

Complaint paragraph 5(t) (Supervisor Linda DeJournette threatens unspecified reprisals): I credit Star Carnell's uncontradicted testimony that on October 11, 2007, several strikers were waiting outside the Guaranty Building waiting for an EMS employee to leave work. When the employee approached the strikers, Linda DeJournette, the EMS supervisor at Guaranty, "pulled at her shirt and pointed at us, and ran he[r] finger across her neck, like to not talk to us." DeJournette's gesture constitutes a threat of reprisal which violates Section 8(a)(1), *Joseph Victori Wines,* 294 NLRB 469, 472–473 (1989).

Complaint paragraph 5(u) (Supervisor Lena Armour threatens job loss): Dana Wilson worked for EMS for 1 day, November 11, 2007, at Market Tower. The Union's strikers were outside the building when Wilson arrived. Wilson testified that Lena Armour, a statutory supervisor, told her that the employees who were on strike were not getting their jobs back. Wilson got locked in a stairwell on her way out of work that night and joined the picket line outside Market Tower the next day.

Armour denies making the statements attributed to her by Wilson. I find Armour to be at least as credible as Wilson and dismiss paragraph 5(u).

Complaint paragraph 6 (discriminatory one-day delay in issuing strikers' paychecks): Several alleged discriminatees (Sandra Jones, Harry Webster, Ronicka Evans) and witness Star Carnell testified that EMS employees were normally paid on Thursday evening but that on October 4, 2007, the first payday after their strike began, they were required to wait until Friday evening October 5, to receive their paychecks.

Respondent's witnesses testified that EMS normally pays its employees on Friday and that the strikers were paid at the same time as nonstrikers. There is a discrepancy between the testimony of Respondent's witnesses Shelton Jones (between 8 and 10 p.m.) and Aurelia Gonzalez (at 11:45 p.m.) as to the time the strikers' checks were passed out. However, EMS's witnesses' testimony that the strikers were paid at the same time as nonstrikers is uncontroverted. Thus, I find that payment to the strikers on Friday was not discriminatory and did not violate the Act. Therefore, I dismiss the allegations in paragraph 6.

Complaint paragraph 7 (alleged refusal to reinstate the strikers): On May 9, 2008, the Union faxed to Respondent unconditional offers to return to work signed by alleged discriminatees Sandra Jones, Harry Webster, Desiree Bryant, Shaneka Brown, Christina Stubbs, Ronicka Evans, Antonio Gutierrez, and Kevin McClung. Alleged discriminatee Maggie Harwell appeared at Respondent's corporate office in order to offer to return to work. Alleged discriminatee Karen Knox appeared in person at Market Tower to attempt to return to work.

On May 15, Respondent sent each of the alleged discriminatees a letter refusing to reinstate them on the grounds that their strike was not an unfair labor practice strike and that they had engaged in picketing which was unprotected because it violated Section 8(b)(7)(C) of the Act.

E. Legal Analysis with Regard to Complaint Paragraph 7

1. Participation in picketing which violates Section 8(b)(7)(C) is, as a general proposition, a valid reason for refusing to reinstate strikers

Unfair labor practice strikers who make unconditional offers to return to work are entitled to immediate reinstatement to their former positions. They are entitled to reinstatement

[16] *Medicare Associates* is frequently cited by the name Westwood Health Care Center.

[17] I conclude that the context of Young's instructions are materially distinguishable from those in *Teksid Aluminum Foundry,* 311 NLRB 711 fn. 2, 713 (1993), in which the employer's human resources director instructed supervisors and statutory employees to keep our eyes and ears open because Teksid would not allow a union. The statement in *Teksid* indicated a desire to interfere with employees Sec. 7 rights and invited statutory employees to spy on other statutory employees.

[18] Assuming that this incident transpired as testified to by Gutierrez, there is no evidence that he discussed it with other strikers. Thus, it could not be a factor in prolonging the strike. Moreover, Gutierrez did not testify that this incident convinced him to remain on the picket line rather than returning to work.

whether or not replacements for them have been hired, *Grinnell Fire Protections Systems Co.,* 335 NLRB 473, 475 (2001).

On the other hand, the Board held as long ago as 1972, that an employer may refuse to reinstate economic strikers who engage in picketing that violates Section 8(b)(7)(C), *Local 707, Motor Freight Drivers (Claremont Polychemical Corp.),* 196 NLRB 613, 627–630 (1972). It is also true that an otherwise economic or recognitional strike becomes an "unfair labor practice strike" if an employer's unfair labor practices "had anything to do with causing the strike," *Decker Coal Co.,* 301 NLRB 729, 746 (1991); *Domsey Trading Corp.,* 310 NLRB 777, 791 (1993). Moreover, the Board will not "calculate the degree of importance, or weight to be attached to" the employer's unfair labor practices in characterizing the nature of a strike, *Cal Spas,* 322 NLRB 41, 60 (1996).

However, the General Counsel must prove that the employer's unfair labor practices were causally related to either the employees' decision to strike or remain on strike to establish their status an unfair labor practice strikers, *C-Line Express,* 292 NLRB 638 (1989), *Post Tension of Nevada, Inc.,* 353 NLRB No. 87 at fn. 2 and slip opinion pages 10–11 (January 30, 2009). While substantial weight may be given to the strikers' characterization of their motives, the Board must be wary of self-serving rhetoric which is inconsistent with the factual context of the strike, *Soule Glass Co. v. NLRB,* 652 F.2d 1055, 1080 (1st Cir. 1980); *C-Line Express,* supra.

Conversely, a causal connection between a strike and an employer's unfair labor practices may be inferred even without testimony from the strikers citing the unfair labor practices as motivating their strike, *Child Development Council of Northeastern Pennsylvania,* 316 NLRB 1145 (1995). Thus, the factual context of the strike and the ULPs must be examined regardless of the strikers' testimony. In *Child Development Council*, the fact that a serious unfair labor practice occurred 3 days before the strike began was critical in the Board's decision to infer a causal connection. In *Domsey Trading,* the seriousness of the unfair labor practices and their temporal relationship to the strike (two discharges of organizing committee members within 3 weeks of the strike) were also critical to the Board's determination. In *Cal Spas,* supra, the employer had engaged in illegal video surveillance of employees' protected activities just 14 days prior to the strike. Moreover, union organizers mentioned this unfair labor practice in exhorting employees to strike on the day of the walkout.

The strike and the picketing by the alleged discriminatees in this case was primarily, if not exclusively, motivated by their desire and the Union's desire to pressure EMS into recognizing and bargaining with the Union.[19] By doing so for more for than 30 days without the filing of a representation petition by the Union, the discriminatees and the Union violated Section 8(b)(7)(C), which provides that:

> . . . it shall be an unfair labor practice for a labor organization or its agents:
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.
>
> Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

It is clear from the record, including the testimony of the discriminatees that they went on strike to pressure EMS into recognizing the Union and signing the Union's master collective bargaining agreement. It is uncontroverted that all of the discriminatees picketed EMS for several months. It is also uncontroverted that the Union never filed a representation petition. Thus, the only issue in this case is whether the discriminatees' strike was in substantial part an unfair labor practice strike, as well as a strike for economic and recognitional purposes. I conclude that the General Counsel has failed to meet his burden of proving that the strike was causally related to any unfair labor practice committed by Respondent.

F. The General Counsel Failed to Prove a Causal Connection Between any Unfair Labor Practice and the Strike

1. Alleged ULPs occurring in January 2007

There is simply no reason to believe that the alleged discriminatees in this case were motivated to strike, or remain on strike by Respondent's unfair labor practices, or even the alleged unfair labor practices I have dismissed. Several of these alleged ULPs occurred 8 months before the strike began at locations other than those at which any of the strikers worked.

[19] See, e.g., R. Exh. 192; testimony of discriminatees Gutierrez at Tr. 257–258, 263–264; Jones at Tr. 419–420; Brown at Tr. 472–473; Knox at Tr. 523–524; Stubbs at Tr. 542–543, 549, 554–555; Harwell at Tr. 567; 576; Webster at Tr. 595–595; McClung at Tr. 627, 631; Evans at Tr. 665–666; Bryant at Tr. 679–680, R. Exh. 171.

None of the strikers appeared to be at all familiar with these incidents.

With regard to other prestrike alleged ULPs, there is no evidence that the strikers were motivated to strike or even were aware of the allegation that Richard Young interrogated Damon Morrow in July at the Guaranty Building.

2. *Alleged ULPs occurring at the Sky Bank in June*

At a union meeting at the home of former EMS employee Darnell Tillman, shortly before the strike, Sandra Jones apparently told some other strikers that Young told her not to complain to the security guard at Sky Bank about her cleaning supplies and that he threatened to fire her if she did so. Ignoring for the moment the fact that I declined to find that Young violated the Act, I find that if he did so, the General Counsel has not established a causal connection between this incident and the strike.

I have credited Jones only to the extent that Young told her not to complain about cleaning supplies to the security guard. I have not credited Jones's testimony that Young impliedly threatened to fire her. Young's discussion with Jones occurred 3 months before the strike and there are no other alleged prestrike ULPs either at Sky Bank or involving Jones. Even assuming that Jones discussed Young's admonition with other strikers, it defies credulity to believe that it had anything other than a de minimis effect on the decisions of the strikers. My reasons for declining to draw any casual connection between Jones' interaction with Young and the strike are as follows:

Union literature distributed during the strike contained a full page regarding Sandra Jones' dissatisfaction with working conditions at EMS. The Union made no mention of her interaction with Young regarding Jones' conversation with the security guard in June, Tr. 447–449, R. Exh. 86.

Several of the strikers, Gutierrez, Knox, Brown, McClung, Evans, and Bryant were not present at the meeting at Darnell Tillman's house and there is no other evidence that they were familiar with Jones' interaction with Young or that they went on strike due to anything that occurred at Sky Bank.

Christina Stubbs attended the meeting at Darnell Tillman's house but could not recall any specific incidents that were discussed, Tr. 540. Stubbs testified that she did not go on strike due to anything that occurred at Sky Bank, Tr. 554.

Maggie Harwell similarly did not testify to recalling any conversation about Jones' experience and testified that she was not motivated to go on strike by anything that occurred at Sky Bank, Tr. 565, 577–578. The same holds true for Harry Webster, Tr. 591–593, 610.

3. Alleged ULPs re: union buttons

Even assuming that Vonda Mathes and Aurelia Gonzalez told employees that they were not allowed to wear union buttons at work prior to July, it also defies credulity that the strikers were motivated by these incidents since Gonzalez made it clear to them in July that they were free to wear union buttons so long as they didn't cover the EMS logo.

4. There is no evidence that alleged ULPs after September 25 prolonged the strike

Similarly, there is absolutely no evidence that any of the alleged unfair labor practices occurring after September 25, prolonged the strike. For example, none of the strikers alleged that they remained on strike because Respondent delayed paying them their last check for 1 day. Assuming Gonzalez told Antonio Gutierrez that all the strikers were fired in October, there is no evidence that he told any other strikers about the incident and no evidence that it motivated Gutierrez to stay out on strike as opposed to returning to work. Indeed, if the incident occurred, one would expect it to have motivated Gutierrez to go back to work.

There is no evidence that Dana Wilson told other strikers that Lena Armour told her in November that all the strikers had been fired or any evidence that it had any impact on the strikers' motivation to remain on strike. Finally, while several strikers may have witnessed Linda DeJournette draw her finger across her throat in October, there is no evidence that this incident had any impact on the duration of any employee's strike.

5. The Colonial Haven decision relied on by the General Counsel and Charging Party is distinguishable from the instant case

In *Colonial Haven Nursing Home, Inc.,* 218 NLRB 1007 (1975), enf. denied 542 F.2d 691 (7th Cir. 1976), the Board reversed its judge, who had dismissed a complaint allegation regarding *Colonial Haven's* refusal to reinstate strikers. The judge had found that the strikers had violated Section 8(b)(7)(C) and thus the employer did not violate the Act in refusing to reinstate them. The Board found, contrary to the judge, that the employees' strike and picketing were motivated in substantial part by *Colonial Haven's* unfair labor practices. Thus, the Board concluded that the employees did not lose their right to reinstatement upon their unconditional offer to return to work because an object of the strike may also have been to obtain recognition or an expedited election, id. at 1011.

The *Colonial Haven* case is easily distinguishable from the instant matter. First of all, the strike and picketing in that case lasted 34 days, which the Board indicated was a "technical violation" of Section 8(b)(7)(C). In the instant case, the recognitional picketing went on for many months and only ceased when the General Counsel threatened to seek an injunction and then filed a complaint against the Union.

Secondly, the employer in *Colonial Haven* did not rely on picketing beyond 30 days without filing a petition as a reason for denying its employees reinstatement. In the instant case, EMS stated this was *the* reason for its denial of reinstatement.

Finally and most importantly, the Board found that Colonial Haven's unfair labor practices contributed to the employees' motivation to strike. I find that not to be the case herein. A strike is not an unfair labor practice strike simply because the strikers or their union say it is, *Soule Glass Co. v. NLRB,* 652 F.2d 1055, 1080 (1st Cir. 1981); *C-Line Express,* supra.

Out of all the unfair labor practice charges filed by the Union herein, I have concluded that the General Counsel has established a very few ULPs. One was committed by Audrita Kennedy, a low-level supervisor at the Indianapolis Power and

Light Building, who in January interrogated and threatened Darnell Tillman. This occurred 8 months prior to the strike. None of the strikers worked at this location and none of them testified that they were aware of this incident. I find that none of the strikers were motivated by this ULP and the extent to which their Union may have so motivated, this ULP was in the immortal words of Justice Cardozo, not a "proximate cause" of the strike.

The only other unfair labor practice established by the General Counsel is the one committed by another low-level supervisor, Linda DeJournette, on October 11, 2007, 3 weeks into the strike. DeJournette drew her finger across her throat when pointing at several strikers outside the Guaranty Building. There is no evidence that this incident in any way motivated the strikers to continue their recognitional picketing for months afterwards. Thus, I reject the allegation at the end of the complaint that presettlement unfair labor practices prolonged the discriminatees' strike.

Even assuming that the General Counsel had established the many alleged violations pertaining to the wearing of union buttons, I would find that Respondent cured these violations at least with respect to Market Tower, when in July, Project Manager Aurelia Gonzalez informed a group of employees, including many who would go on strike 2 months later, that they were free to wear union buttons so long as they did not obscure the EMS logo.

EMS did not necessarily meet all the criteria set forth in *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), for curing past unfair labor practices. However, in *Claremont Resort & Spa,* 344 NLRB 832 (2005), two of the three Board members stated that they "do not necessarily endorse all the elements of *Passavant.*" In any event, by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation. The *Passavant* case concerned a threat, which was communicated to 30–40 employees, that they would be fired if they engaged in an economic strike. In such a case, the Board found that repudiation must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and 4) free from other prescribed illegal conduct. The Board distinguished the facts in *Passavant* from those in *Kawasaki Motors Corp., USA,* 231 NLRB 1151, 1152 (1978). In *Kawasaki,* it dismissed an allegation of a single incident of supervisor surveillance based upon the employer's simple disavowal of the supervisor's conduct.

Assuming, as I have found, that no button-related violations occurred afterwards, Gonzalez effectively cured any unfair labor practice violations relating to union buttons that may have occurred prior to her talk with employees who supported the Union, *River's Bend Health & Rehabilitation Center,* 350 NLRB 184, 193 (2007).

Finally, Respondent established that the striking employees were not in any significant manner motivated by the alleged unfair labor practices in going on strike or picketing its facilities. Each one of the alleged discriminatees conceded on cross-examination that the reasons they went on strike had nothing to do with alleged unfair labor practices at locations other than those at which they worked: Gutierrez, Tr. 250, 257; Jones, Tr. 419, 428; Brown, Tr. 472, 479–480; Knox, Tr. 522–525; Stubbs, Tr. 548–549, 553–554; Harwell, Tr. 567, 576–578; Webster, Tr. 610; McClung, Tr. 627; Evans, Tr. 647, 665, and Bryant, Tr. 703–704.

CONCLUSION OF LAW

I have found that the alleged discriminatees were not engaged in an unfair labor practice strike and that Respondent was entitled to deny them reinstatement due to their participation in picketing which violated Section 8(b)(7)(C). Therefore, I find that Respondent's refusal to reinstate these employees did not constitute a valid basis for the Regional Director's revocation of the settlement agreement and dismiss the consolidated complaint in its entirety, *Abell Engineering & Mfg.,* 338 NLRB 434, 435 (2002).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The complaint is dismissed and the settlement agreement approved by the Regional Director on May 7, 2008 is reinstated.[21]

Dated, Washington, D.C. June 23, 2009

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] The General Counsel requested that the Board make findings of fact and conclusions of law that Respondent engaged in the unfair labor practices alleged in pars. 5(a)–(u) and 6(a)–(b) without ordering a remedy for any presettlement unfair labor practices.