

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**REVISED**

DATE: April 26, 2004

TO : B. Allan Benson, Regional Director  
Region 27

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: C.W. Mining d/b/a  
Co-op Mine  
Case 27-CA-18764-1

506-2017-9300	518-2001
506-4033-0900	518-2067-2100
506-6050-0167-5000	518-4060-0100
506-6050-7580	524-5073-1142
506-6050-6210	524-5073-2200
506-8067	

This case was submitted for advice as to whether (1) the Employer violated Section 8(a)(2) by dominating, assisting, or recognizing and dealing with the incumbent Union, where Union officers are alleged to be statutory supervisors and/or members of a quasi-religious group that is rumored to own the Employer; and (2) the Employer violated Section 8(a)(3) by discharging certain dissident employees who, in the face of a contractual no strike clause and without Union authorization, engaged in a work stoppage to protest the unlawful suspension of their leader and thereafter ignored Employer requests to leave the premises.

We agree with the Region that there is insufficient evidence to support a Section 8(a)(2) violation in this case. First, there is insufficient evidence of any overt Employer conduct upon which to base a finding of Employer domination or assistance. There is also insufficient evidence that the Employer has permitted statutory supervisors to serve as Union officials and/or dealt with statutory supervisors in a collective-bargaining or day-to-day contract administration capacity. Last, there is insufficient evidence at this time that the Union officers' affinity with the quasi-religious group might create such a disabling conflict of interest that the Union could not represent the employees with undivided loyalty to their interests.

We also conclude that the Employer violated Section 8(a)(3) by discharging the dissident employees for engaging in protected concerted activity. The contractual no-strike clause did not clearly and unmistakably waive the dissidents' statutory right to protest their leader's unlawful suspension and, even assuming the no-strike clause covered the work stoppage, under Mastro Plastics<sup>1</sup> the

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<sup>1</sup> Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

unlawful suspension with intent to discharge was sufficiently serious an unfair labor practice to permit the job action despite the no-strike clause. Nor was the work stoppage unprotected under the principles of Emporium Capwell<sup>2</sup> since the dissidents did not act in derogation of any stated Union objective and they did not seek to bypass or replace the Union. Finally, the dissidents' initial failure to heed the Employer's instructions to return to work did not cause them to forfeit the protections of the Act, since their brief, peaceful protest on the Employer's premises did not unreasonably interfere with the Employer's operations or its enjoyment of its property.

#### FACTS

The Employer, C.W. Mining Company, is a Utah corporation that owns and operates the Co-op Mine in Huntington, Utah. The Employer's actual ownership is unclear, but it supposedly is among the holdings of the "Kingston Clan," a large, quasi-religious group comprised of members and close relatives of the Kingston family.<sup>3</sup> The International Association of United Workers Union (the Union) was certified as the Co-op Mine production and maintenance employees' representative on January 17, 1980.<sup>4</sup> At that time, there were about 40 employees in the bargaining unit, 30 percent of whom were described in the December 20, 1979 Decision and Direction of Election as "Mexican nationals." During the events at issue here, there were approximately 177 bargaining unit employees, about 40 percent of whom are Hispanic.

The Employer and Union have negotiated a series of collective-bargaining agreements, the most recent of which will expire on August 10, 2004. The contract contains provisions covering terms and conditions of employment, including wages, hours, vacations, benefits, seniority, job classifications, and a management rights clause. In addition, there is a multi-step grievance procedure that culminates in final, binding review by a five-person

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<sup>2</sup> Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975).

<sup>3</sup> The Kingston Clan allegedly practices a form of fundamental Mormonism, but is unrelated to the "official" American Mormon church, the Church of Jesus Christ of Latter-day Saints. It is unknown whether the Kingston Clan is recognized as a religious entity by federal or state authorities for taxation, or any other, purpose.

<sup>4</sup> Case 27-RC-5947.

committee composed of two members appointed by each party and a fifth member mutually agreed upon by the other four. It does not appear that either party has ever convened a formal grievance review board. However, Employer and Union witnesses cited several examples of grievances that were resolved at lower, informal stages of the grievance procedure. The agreement also contains a no strike-no lockout clause that provides in part:

A. The INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION agree (sic) that no strike will be called against C.W. MINING COMPANY as a means of settling contractual disputes unless not less than thirty (30) days notice of an intent to strike is first given to C.W. MINING COMPANY in writing.

The Union also has a constitution and bylaws; files required disclosure and designation of representative forms with the Department of Labor and the Mine Safety and Health Administration; and holds quarterly membership meetings each year, for which notices are posted at the Employer's premises. The Union has a non-employee International President, and three elected officers who are members of the bargaining unit. The officers are Dana Jenkins, President, Chris Grundvig, Vice President and Warren Pratt, Secretary-Treasurer. Jenkins' mother is apparently a member of the Kingston Clan, but it is unknown whether he, Grundvig, or Pratt are Clan members.

During the summer of 2003,<sup>5</sup> a small group of mostly Hispanic unit employees began discussing their dissatisfaction with working conditions. Led by employees William Estrada, Gonzalo and Jesus Salazar, and Allyson Kennedy,<sup>6</sup> the dissidents' main concerns included the disparity between their contractual wages and the wages paid under UMWA-negotiated contracts,<sup>7</sup> and the perception that the Union was dominated by the Employer and/or the Kingston Clan. At some point, the dissidents contacted UMWA District 22 and planned a meeting to share the

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<sup>5</sup> All dates are in 2003, unless otherwise indicated.

<sup>6</sup> Kennedy had been a member of the United Mine Workers of America (UMWA) in the past.

<sup>7</sup> The contractual base hourly rate ranged from \$5.25 to \$14.00 plus another \$50.00 to \$170.00, or \$1.25 to \$4.25 per hour, in weekly supplements and bonuses. The employees understood that average UMWA wages for comparable underground work exceeded \$20.00 per hour.

dissidents' concerns with other employees. When the meeting organizers realized that the Employer had learned of and intended to surveil the meeting, they hastily rescheduled and moved it from Huntington to District 22's headquarters in Price, Utah. On August 23, between 50 and 70 mostly Hispanic unit employees attended the dissidents' first meeting. The dissidents and their supporters continued to meet at the UMWA offices over the next several weeks. The dissident leaders also visited employees at their homes to discuss their concerns about the Employer and the Union.

Meanwhile, Employer managers and supervisors began interrogating employees about whether they had attended the meetings in Price, and threatened at least one Hispanic employee that the Employer would be bringing an INS agent to an upcoming meeting. During the third week of August, maintenance foreman Cyril Jackson and supervisor Shain Stoddard approached dissident leader Estrada and reprimanded him for failing to fill shuttle batteries with water. Stoddard asked Estrada whether it was true that he was the one who had organized the meetings with the UMWA and warned that anyone who was doing so or making trouble for the Employer would be out of a job.

On September 19, the Employer suspended Juan Salazar, the brother of two dissident leaders, for performing, at his supervisor's behest, certain safety inspection work without proper certification. In response to the Employer's action, about 20 employees engaged in a spontaneous two-hour work stoppage in the employee bathhouse. Dissident leader Gonzalo Salazar accompanied his brother to the mine office to plead Juan's case. The suspension was ultimately revoked after Union officers Jenkins and Grundvig met with Stoddard and argued that Salazar should be allowed to return to work.

The same day, Stoddard gave Estrada a written warning for overlooking a leaking hose on a "miner," a piece of equipment he had been assigned to inspect earlier that day. Estrada had previously complained to Jackson that he did not have enough time to complete all the tasks on his daily assignment checklist. Estrada believed the discipline was unwarranted and refused to sign, despite Stoddard's repeated insistence that he do so. Ultimately, Stoddard allowed Estrada to go home for the weekend, but made a note on the warning of Estrada's refusal to sign.

On Monday, September 22, as Estrada waited with the rest of his regular crew to go down into the mine to begin the morning shift, Stoddard summoned Estrada to his office. Stoddard told Estrada that the Employer was giving him one

last chance to sign the September 19 warning, and that the Employer would consider a further refusal to be insubordination. Stoddard, who was joined by Jackson, also said that refusing to sign the warning would result in additional discipline. Estrada again refused to sign the warning and, a few minutes later, Stoddard and Jackson gave him a notice of suspension with intent to discharge.

Estrada went straight from the office to the bathhouse where the crew was still waiting to enter the mine. Estrada told them about the suspension. Jackson entered the bathhouse with Union president Jenkins. Jackson and Jenkins told Estrada that the Employer would meet with him and his representative the next morning to discuss the suspension. Estrada then left the premises.

After Estrada's departure, Kennedy and Gonzalo Salazar proceeded to their work stations in the mine and discussed what they should do about Estrada's suspension. They decided they would confront management and asked the other crew members in their work area to accompany them to the bathhouse. It appears that they left the mine around 10:30 a.m. and, as they proceeded, other employees joined them when they heard what had happened to Estrada.

By the time the employees got to the bathhouse, it was approximately noon and the group numbered about 45. Jackson and several other supervisors arrived and asked the employees what was going on. On hearing that they were protesting Estrada's suspension, Jackson told them that the decision had been made and that the suspension would stand. Around the same time, Union president Jenkins, who had accompanied the employees out of the mine and was also present in the bathhouse, told the assembled employees that walking off the job was not the way to protest Estrada's suspension, and that if they wanted to do something about it, they should talk to him or one of the other Union officers. As employees arrived for the noon shift, they joined the dissidents in the bathhouse rather than proceeding to the mine.

Around noon, mine superintendent and human resources manager Charles Reynolds arrived at the bathhouse and told the employees to go to work or leave. The employees did not leave. Reynolds did not say anything else until 12:45 p.m., when he repeated the order to go to work or leave. Gonzalo Salazar told Reynolds that the employees wanted to work, and would work, but that they also wanted to resolve their problems. Reynolds responded that they should return to work or leave. At that point, the employees began moving from the bathhouse to the parking lot.

As the employees were leaving the bathhouse, Reynolds told them that if they chose to leave the Employer's premises and did not return to work in three days, they would be considered to have quit their employment. Jackson told the employees to go home. He said that he was going to call the sheriff, and told the employees to call their bosses the next day to see if they still had jobs.<sup>8</sup>

Several sheriff's deputies arrived at the Employer's parking lot shortly after 2:00 p.m. and told the employees that the Employer wanted them to go home. The employees milled about for another 20 minutes. During this time, Jackson told them that management would be meeting with Estrada and Salazar the next morning to discuss Estrada's suspension.

The employees left the Employer's property and regrouped at a local park. That evening, third shift employees who decided not to report for work joined the first and second shift employees at the park, bringing the total number to around 70.

The next morning, September 23, Estrada and Gonzalo Salazar met with management to discuss Estrada's suspension. Grundvig attended the meeting for the Union, but did not participate in the discussion. Estrada apparently spoke on his own behalf and argued that his suspension was unjustified, that he disagreed that he had been insubordinate when he refused to sign the September 19 warning, and that he had done his best to check the miner but that he had not had enough time to complete all the inspections on his checklist. The meeting adjourned and the Employer told Estrada they would be contacting him with their decision. On September 24, Reynolds left a message on Estrada's voicemail that he was terminated.

On October 3, the dissident employees, with assistance from the UMWA, set up a picket line along a public road a short distance from the mine. Although a few of the original 70-odd dissidents have gone back to the mine, most of the dissidents have not attempted to return to work.

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<sup>8</sup> Jackson claims that he suggested employees check with their bosses the next day in order to convince several employees who were claiming that management had fired them that they had not been fired.

ACTION

We conclude that the Section 8(a)(2) allegations should be dismissed, absent withdrawal, because there is insufficient evidence of illegal Employer domination, assistance, or interference with the Union's ability to represent the employees with unfettered loyalty to their interests. We further conclude that a Section 8(a)(3) complaint should issue, absent settlement, alleging that the Employer unlawfully discharged the dissidents because of their protected, concerted protest against its unlawful treatment of Estrada, notwithstanding the contractual no-strike clause, the Union's disagreement with the dissidents' chosen mode of protest, or the dissidents' brief failure to obey the Employer's requests that they return to work or leave the premises.

**A. The Section 8(a)(2) Allegations**

Initially, we agree with the Region that the Union is a Section 2(5) labor organization and thus satisfies one of the necessary prerequisites for a Section 8(a)(2) violation.<sup>9</sup> At a minimum, unit employees participate in the Union by electing and serving as officers and attending its quarterly meetings. The Union has dealt with the Employer by negotiating collective-bargaining agreements covering terms and conditions of employment and by meeting with the Employer to resolve informal employee complaints about working conditions. Most recently, the Union successfully obtained a rescission of Juan Salazar's September 19 suspension. The fact that the Union seems relatively docile and failed to secure UMWA-level wages in bargaining does not detract from its 2(5) status.<sup>10</sup>

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<sup>9</sup> See Electromation, Inc., 309 NLRB 990, 993-994 & n.19 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994) (before a finding of unlawful domination can be made under Section 8(a)(2) a finding of "labor organization" status under Section 2(5) is required).

<sup>10</sup> See Alto Plastics Manufacturing Corporation, 136 NLRB 850, 851-852 (1962) (the fact that a union is an ineffectual representative does not affect the conclusion that the organization is a labor organization within the meaning of the Act).

To the extent the employees have a complaint about the quality of the Union's representation, they can file a Section 8(b)(1)(A) charge with the Board. However, mere negligence, poor judgment, insensitivity, or ineptitude, without more, will not constitute a breach of the union's duty of fair representation. See Washington-Baltimore

We also agree that there is no basis for a finding of unlawful 8(a)(2) domination or assistance because there is insufficient evidence of Employer support or involvement in the creation, operation or administration of the Union. In this regard, the UMWA has claimed that Union officers Jenkins, Pratt, and Grundvig, are statutory supervisors and that the Employer violated Section 8(a)(2) by permitting those supervisors to serve the Union in representational and contract administration capacities.<sup>11</sup> In support of this contention, the UMWA has presented some anecdotal and documentary evidence that the three Union officers have occasionally exercised such supervisory indicia as preparing evaluations, issuing verbal and written warnings, or otherwise suggesting that the Employer discipline employees. However, we concur with the Region's assessment that the UMWA's evidence, at best, establishes that such actions have been isolated and sporadic in nature and therefore are insufficient to establish that any of the three Union officers are statutory supervisors.<sup>12</sup> Accordingly, the Employer has not violated Section 8(a)(2) by permitting Jenkins, Pratt, or Grundvig to serve as Union officers.

While there is insufficient evidence that the Employer has not violated the Act under any established Section 8(a)(2) theory of violation, we also considered the novel question of whether Jenkins, Pratt, and/or Grundvig's

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Newspaper Guild, 239 NLRB 1321, 1322 (1979); Teamsters Local 692 (Great Western Unifreight System), 209 NLRB 446, 448 (1974).

<sup>11</sup> See Ditzler Mechanical Contractors, 259 NLRB 610, 612 (1981) (permitting supervisor to serve as union president necessarily restrained employees from questioning the supervisor-president's views or otherwise exercising their right to engage freely in union activities); Jeffrey Mfg. Co., 208 NLRB 75, 83 (1974) (permitting supervisor to serve as union president violative of 8(a)(2); mingling supervisory and employee-representative functions deprived employees of their right to union's undivided loyalty to their interests). See generally Nassau & Suffolk Contractors Assn., 118 NLRB 174, 187 (1957) ("[e]mployees have the right to be represented . . . by individuals who have a single minded loyalty to their interests").

<sup>12</sup> See, e.g., E & L Transport Co., 315 NLRB 303, 303, n. 2 (1994) (isolated and sporadic issuance of disciplinary warnings insufficient to confer supervisory status under Sec. 2(11)).

alleged relationship with the Kingston Clan disqualifies them and/or the Union from representing the employees. Such a theory would be based upon arguably analogous cases in which employee-shareholders have been disqualified from representing employees because their ownership interest and accompanying managerial control over the employer necessarily interferes with the employees' right to be represented with undivided loyalty.<sup>13</sup> Even assuming that individual members of the Kingston Clan could have a financial stake in and exert managerial control over Clan holdings akin to the employee-shareholders' ownership and control in Lake Pilots Assn., there is insufficient evidence at this time that the employees have any ownership interest in the Employer, let alone any influence over corporate policy. Nor is there sufficient evidence to support the rumor that the Employer is actually owned by the Kingston Clan. Accordingly, there is insufficient evidence supporting the theory that the Union officers' relationship to the Kingston Clan creates a disabling conflict of interest and the 8(a)(2) allegations of the charge should all be dismissed, absent withdrawal.

#### **B. The Section 8(a)(3) Allegations**

The Region has concluded that the Employer suspended and discharged Estrada because of his prominent role as

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<sup>13</sup> See, e.g., Lakes Pilots Assn., 320 NLRB 168, 168-169, 178-179 (1995) (8(a)(2) violation where employer's union-represented employee-shareholders had voting rights in the employing entity and actively participated in union affairs, thereby creating a disabling union conflict of interest). Cf. Science Applications Corp., 309 NLRB 373, 374-375 (1992) (rejecting employer's contention that petitioned-for unit was inappropriate because it included employee-stockholders; mere employee stock ownership will not preclude unit placement unless the ownership interest gives "an effective voice in the formulation and determination of corporate policy" or results in preferential treatment sufficient to destroy stockholders' community of interest with nonstockholders); Centerville Clinics, Inc., 181 NLRB 135, 139-140 (1970) (where union represented employees of a health clinic funded primarily by union welfare and retirement fund money and whose directors were almost all union representatives, union effectively sat on both sides of the bargaining table, creating a disabling conflict of interest); Brookings Plywood Corp., 98 NLRB 794, 798-799 (1952) (employee-shareholders excluded from bargaining unit of nonstockholders where they effectively influenced corporate policy).

leader of the dissident group in violation of Section 8(a)(3). The Region has further concluded, and we agree, that the Employer terminated the dissidents for engaging in a work stoppage in protest of that unfair labor practice.<sup>14</sup> The submitted question is whether the work stoppage lost the protection of the Act in light of: (1) the contractual no-strike clause; (2) the fact that the strike was not authorized by the Union and arguably conflicted with Union policies and objectives; or (3) the dissidents' refusal to leave the Employer's premises when asked to do so. For the reasons stated below, we conclude that the work stoppage was at all times protected and that a Section 8(a)(3) complaint should issue, absent settlement.

### **1. No-strike Clause Issues**

Although the dissidents' work stoppage was concerted and prima facie protected, that protection could be lost if their activity was prohibited by the contractual no-strike clause.<sup>15</sup> To sustain a no-strike clause defense, an employer must show that the contractual provision embodies a "clear and unmistakable" waiver of the questioned conduct.<sup>16</sup> The "clear and unmistakable" standard is an

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<sup>14</sup> See Silver State Disposal Service, 326 NLRB 84, 85 (1998) (work stoppage to protest discharge of dissident employees' spokesperson prima facie protected concerted activity); Bridgeport Ambulance Service, 302 NLRB 358, 358, n. 2, 363-364 (1991), *enfd.* 966 F.2d 725 (2d Cir 1992) (same). See also Accurate Wire Harness, 335 NLRB 1096, 1097 (2001), quoting Ridgeway Trucking Co., 243 NLRB 1048, 1048-1049 (1979), *enfd.* 622 F.2d 1222 (5th Cir. 1980) (employer's statement that it would treat employee walkout as a resignation and posting of "now hiring" sign would reasonably lead employees to believe they had been fired; discharge "does not depend on use of formal words of firing"). See also Kolkka Tables & Finnish-American Saunas, 335 NLRB 844, 846-847 (2001) (reasonable for employees who chose not to abandon concerted protest to believe they were discharged "for continuing their concerted protest and failing to 'get back to work or go home'"). The work stoppage in protest of Estrada's suspension would be protected, even if the suspension did not itself violate the Act. See, e.g., Pepsi-Cola Bottling Co., 186 NLRB 477, 478 (1970), *enfd.* 449 F.2d 824 (5th Cir. 1971) (citations omitted).

<sup>15</sup> Mastro Plastics, 350 U.S. at 277.

<sup>16</sup> Silver State Disposal Service, 326 NLRB at 85-86, citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) and Lear Siegler, Inc., 293 NLRB 446, 447 (1989).

objective standard under which contractual language is to be given its "ordinary and reasonable meaning."<sup>17</sup> The existence of such a waiver is governed by the parties' actual intent as found either in express contractual language, by inferences drawn from the contract as a whole, or in extrinsic evidence concerning the meaning of ambiguous contract language.<sup>18</sup>

We conclude that the no-strike clause contained in the parties' most recent collective-bargaining agreement did not clearly and unmistakably waive the dissident employees' right to walk out in protest of Estrada's suspension. This case is similar to Silver State Disposal Service,<sup>19</sup> where the Board held that the employer failed to meet its burden of proving that the union clearly and unmistakably waived its employees' right to engage in a spontaneous, concerted work stoppage. There, the union had agreed to a no-strike clause that prohibited it from "call[ing], encourag[ing], or condon[ing] strikes" and expressly permitted employees to honor union-sanctioned primary picket lines elsewhere. Relying, in part, upon the fact that the clause did not expressly address unauthorized employee walkouts and the absence of any extrinsic evidence of the parties' intent, the Board concluded that the employees' work stoppage was protected.<sup>20</sup> The no-strike clause here also does not expressly apply to unauthorized employee job actions and there also is no extrinsic evidence that the parties intended the no-strike clause to apply to otherwise protected unauthorized employee work stoppages.<sup>21</sup> Moreover,

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<sup>17</sup> Silver State Disposal, 326 NLRB at 85-86, (citations omitted).

<sup>18</sup> See, e.g., Silver State Disposal, 326 NLRB at 86, quoting IBEW Local 1395 v. NLRB, 797 F.2d 1027, 1036 (D.C. Cir. 1986).

<sup>19</sup> 326 NLRB at 86-87.

<sup>20</sup> 326 NLRB at 86.

<sup>21</sup> The Employer's failure to take any action in connection with the September 19 work stoppage protesting Juan Salazar's suspension is some indication that the Employer did not believe that unauthorized work stoppages were covered by the no-strike clause. Ibid. (employer's failure to take action with respect to prior employee picketing disavowed by the union "[w]hile not determinative . . . is consistent with interpreting the [no-strike] clause to apply only to picketing or work stoppages that are authorized, encouraged or condoned by the [u]nion").

the clause is patently ambiguous insofar as the phrase "no strikes will be called" begs the question "by whom?" and raises the possibility, but does not make clear, that the clause might apply to strikes called by anyone other than the Union. In these circumstances, the no-strike clause does not embody the Union's clear and unequivocal waiver of the dissidents' right to protest Estrada's suspension. Accordingly, any Employer waiver defense based upon the no-strike clause would be without merit.

Moreover, even assuming that the no-strike clause embodied the Union's waiver of unauthorized employee work stoppages, the September 22 work stoppage would nevertheless be protected. Thus, even a clear and unambiguous clause will not be enforced against a work stoppage in protest of employer unfair labor practices that are "serious" in nature, i.e., "destructive of the foundation on which collective bargaining must rest."<sup>22</sup> Here, Estrada's suspension with threat of discharge arose out of the Employer's pattern of surveillance, interrogations, and threats directed at Estrada and the other dissidents, and therefore was a sufficiently serious unfair labor practice.<sup>23</sup>

## **2. Emporium Capwell/Exclusive Representation Issues**

We also considered whether the walkout lost the protection of the Act because it was not authorized by the Union and arguably conflicted with Union policies and objectives. Although not free from doubt, on balance we conclude that the dissident walkout retained the protection of the Act under Emporium Capwell principles.

It is well established that a union, as the exclusive representative of the employees in dealing with the employer, has a legitimate interest in speaking with one

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<sup>22</sup> Mastro Plastics, 350 U.S. at 281.

<sup>23</sup> See Council's Center for the Problems of the Living, 289 NLRB 1122, 1122 n.3, 1147-1148 (1988), enf. denied on other grounds sub nom. NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238 (2d Cir. 1990) (employer's issuance of disciplinary letters and discharge of several employees were serious unfair labor practices within the meaning of Mastro). See also Cincinnati Penthouse Club, Inc., 168 NLRB 969, 974 (1967), citing Ford Motor Co. (Sterling Plant), 131 NLRB 1462, 1490 (1961) (discharge of employee for engaging in a concerted protest over working conditions "among the most serious and fundamental unfair labor practices prescribed by the Act").

voice and "in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests."<sup>24</sup> Consistent with this principle, otherwise protected dissident employee activity can lose the protection of the Act if it seeks "to usurp or replace the certified bargaining representative" or otherwise is taken in opposition to union policies and positions,<sup>25</sup> whereas dissident conduct that is "more nearly in support of the things which the union is trying to accomplish" will be protected.<sup>26</sup> Significantly, the same

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<sup>24</sup> Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. at 70 (unionized minority employees not engaged in protected concerted activity when they confronted and attempted to bargain with the employer over the terms and conditions of employment as they affected racial minorities; principles of majority rule and exclusive collective representation left no room for separate bargaining by dissident employees).

<sup>25</sup> See, e.g., Energy Coal Partnership, 269 NLRB 770, 770 (1984). See also River Oaks Nursing Home, 275 NLRB 84, 86 (1985) (employer lawfully discharged licensed practical nurses who walked off the job to protest staffing levels where the nurses' demand was inconsistent with the union's bargaining position; fact that the union thereafter attempted to convince the employer to reinstate the employees did not constitute ratification or support for their walkout where union never abandoned its position on the staffing issue). Compare United Cable Television Corporation, 299 NLRB 138, 143 (1990) (employee letter to fellow employees voicing dissatisfaction with wage levels agreed to by the union protected even though its message and tone were arguably inconsistent with employer and union's expressed desire to resolve their protracted dispute; the employee was not seeking to usurp or replace the union, and his message--that the employer could afford to pay higher wages--was not inconsistent with the union's bargaining position and objectives).

<sup>26</sup> See, e.g., Architectural Research Corp., 267 NLRB 996, 996, n. 2, 1005 (1983) (employees engaged in protected activity when they sought a second break period even though the union had previously agreed to the elimination of the break in concessionary bargaining where the union was seeking to negotiate with the employer over reinstatement of the second break); East Chicago Rehabilitation Center, Inc., 259 NLRB 996, 996, n. 2, 1000 (1982) (spontaneous employee walkout protesting unilateral change in lunchtime practice protected where the union had also protested the

"in support of" inquiry applies to the means that the dissident employees adopt, as well as the end that they seek to achieve.<sup>27</sup> Thus, in Energy Coal, the Board found a strike unprotected where the union voiced strong opposition to the strike, and even attempted to persuade employees to later abandon the picketline. The Board focused on the strength and persistence of the union's opposition to the dissident employees' protest in finding their activity unprotected. In contrast, in Northeast Beverage Corporation,<sup>28</sup> the employer claimed that it lawfully terminated employees who left work to attend an effects bargaining session at the union hall in order to obtain information about their future employment following a corporate merger. The administrative law judge rejected the employer's contention that the employees acted in derogation of their majority representative under the principles of Emporium Capwell, notwithstanding that the union considered the employees' appearance at the union hall to be "unwise." Such opposition did not mean that the employees were taking a position in opposition to the union.

We conclude that the dissidents' protest did not lose the protection of the Act under these Emporium Capwell principles because the employees were not acting in opposition to any established Union bargaining position, or in derogation of the Union's representative function.<sup>29</sup> First, we do not view Gonzalo Salazar's statement at the

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change in bargaining; employees were not attempting to deal directly with the employer under Emporium Capwell).

<sup>27</sup> See Energy Coal Partnership, 269 NLRB at 771, distinguishing Western Contracting Corp. v. NLRB, 322 F.2d 893 (10th Cir. 1963) (although undertaken without consulting union, employee strike in support of unsuccessful union bargaining position not in derogation of union goals) and NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964) (employee strike protected notwithstanding initial union opposition where union did not repudiate the strike, assured the strikers their activity was protected, and thereafter assisted them after their protest ended).

<sup>28</sup> 2003 WL 21918597, JD(NY)-43-03 slip op. at 31-32 (2003) (currently pending before the Board on exceptions).

<sup>29</sup> Cf. Villa Edmonds Care Center, 249 NLRB 705, 706 (1980) (where newly certified union had yet to formulate any bargaining position, employees who sought premium pay for working while short staffed were not taking a position in opposition to any union policy or bargaining position).

beginning of the September 22 walkout (that the employees "wanted to talk with [management] about the problems that existed") as an attempt to usurp or derogate the Union's representative role by seeking to negotiate directly with the Employer for their terms and conditions of employment. Based on the timing of this statement, it is clear that Estrada's suspension with threat of discharge was the catalyst for the walkout, and any prior generalized expressions of dissatisfaction were directed more at the employees' frustration with the Employer's "operation and the way they were being treated," than criticism or opposition to the Union or its bargaining position.<sup>30</sup>

A more difficult consideration is that the Union told the employees that "this was not the way to protest Estrada's suspension" and they should talk to the Union if they wanted to do something about it. This statement may be construed as Union opposition to the employees' chosen means of protest and arguably could deprive them of the Act's protection under Energy Coal Partnership. However, the Union's expression of opposition here was not as vehement or persistent as the union's position in Energy Coal Partnership, and was more like the milder form of disapproval manifested by the union in Northeast Beverage Corporation.<sup>31</sup> Therefore, if the Employer raises this defense, we would place before the Board the question of whether the employees' chosen means of protesting Estrada's suspension so conflicted with the Union's position as to render the work stoppage unprotected.

### **3. Failure to Leave Employer Premises on Request**

Finally, we considered whether the September 22 work stoppage lost the protection of the Act because the employees refused to heed Reynolds' instructions to go back to work or to leave the premises and go home. The Board has found similar spontaneous work stoppages to be protected when they occur on employer property for a

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<sup>30</sup> Bridgeport Ambulance Service, 302 NLRB at 358, n. 2, 364 (where employee walkout motivated by discharge of coworker, dissidents' additional discussion of generalized dissatisfaction with the union and working conditions were not in derogation of the union or inconsistent with its bargaining position and therefore did not render the employees' protest unprotected).

<sup>31</sup> See also NLRB v. R.C. Can Co., above, 328 F.2d at 979 (union did not repudiate employees' action and "no real difference" between what the employees wanted and the union sought).

relatively short period.<sup>32</sup> Job actions on an employer's property are also protected where the activity did not disturb plant business or operations,<sup>33</sup> there was no attempt to bar management access to the facility,<sup>34</sup> and the activity was unaccompanied by violence.<sup>35</sup> On the other hand, in-plant employee conduct has been found unprotected where the interest of employees in maintaining a protest on an employer's property is outweighed by the employer's property interests.<sup>36</sup> Thus, striking employees' refusal to

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<sup>32</sup> See, e.g., City Dodge Center, 289 NLRB 194, 194 n.2, 196-197 (1988), enfd. 882 F.2d 1355 (8th Cir. 1989) (employees' 1-2 hour work stoppage protected where it did not involve violence, destruction of the employer's property, or a seizure or occupation of the plant); Pepsi-Cola Bottling Co., above, 186 NLRB at 478, (work stoppage lasted only a few hours and did not extend beyond normal working hours; no showing that the employees held the premises in defiance of the owner's right of possession and employees left immediately when asked to do so by the police).

<sup>33</sup> See, e.g., Chrysler Corporation, 228 NLRB 486, 490 (1977) (silently walking through plant during break carrying signs was neither disruptive nor disorderly); Farah Manufacturing Co., 202 NLRB 666, 666 (1973) (lunchtime speech in hallway did not disturb plant business or operations).

<sup>34</sup> See, e.g., Advance Industries Division, 220 NLRB 431, 431 (1975), enf. denied 540 F.2d 878 (7th Cir. 1976) (45-minute employee protest protected where employees actively sought to meet with management rather than to oust it from the plant); Pepsi-Cola Bottling Co., 186 NLRB at 478 (no effort to oust management).

<sup>35</sup> See, e.g., Roseville Dodge, Inc. v. NLRB, 882 F.2d at 1359.

<sup>36</sup> See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (employees who seized and retained possession of employer's plant for several days engaged in illegal trespass); Calliope Designs, 303 NLRB 65, 65 n. 2, 72 (1991) (employees' refusal to leave supervisor's office and return to work exceeded the protections of the Act by interfering with the employer's immediate interest in investigating an accident and attempting to obtain medical attention for an injured employee); Waco, Inc., 273 NLRB 746 (1984) (3-1/2 hour work stoppage unprotected where employees had no plan to give up occupation of lunchroom); Peck, Inc., 226 NLRB 1174, 1174, n. 1 (1976) (after-hours employee sit-in unprotected where employees' refusal to leave employer's premises was not predicated on any

leave the production floor or other areas inside the employer's facility, after a reasonable employer request to do so, may convert protected activity into unprotected activity.<sup>37</sup>

We conclude that the employees' work stoppage was protected notwithstanding their initial refusal to leave the bathhouse.<sup>38</sup> At most, the employees were present inside the bathhouse for approximately 1-1/2 hours before Reynolds first requested that they leave,<sup>39</sup> and they left for the parking lot within 45 minutes of Reynolds' first request. In these circumstances, the means utilized by the employees to demonstrate their displeasure at Estrada's suspension, when balanced against the Employer's property interest in the bathhouse, a non-work area, are entitled to the protection of the Act. The employees gathered spontaneously to express their immediate concern involving a fellow dissident, their conduct was peaceful with no violence or threats of violence, and there is insufficient evidence of any attempt to obstruct Employer representatives' access to the bathhouse or any other part

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necessary immediacy of action and did not outweigh employer's immediate need to secure property).

<sup>37</sup> See Cambro Mfg. Co., 312 NLRB 634 (1993) (otherwise protected pre-dawn, in-plant work stoppage lost the protection of the Act when employees were assured by their supervisor that their complaints would be considered in a few hours when management arrived, and there was no further interest served by continuing their occupation).

<sup>38</sup> Once the employees left the bathhouse, their gathering in the parking lot would clearly be protected. Thus, if they were discharged effective within three days of not returning to work as Reynolds said, they were at worst off-duty employees (see Tri-County Medical Center, 222 NLRB 1089 (1976)). If they were discharged when Jackson told them in the bathhouse to "go home," we would argue that they retained their Tri-County rights to be in the parking lot because they were not appealing to the public (compare A-1 Schmidlin Plumbing Co., 312 NLRB 201 n. 3 (1993) (Jean Country rather than Lechmere applies to employee-discriminatee handbilling the public in the employer's parking lot)).

<sup>39</sup> The evidence suggests that the initial group of employees left the mine around 10:30 and the gathering in the bathhouse commenced around noon. We assume that it took that long for the large gathering of employees to take shifts up the manlift and proceed over to the bathhouse.

of the mine property. Nor is there any indication that the job action interfered with the ongoing work of any non-dissident employees in the mine and therefore did not constitute an occupation or seizure of the Employer's operations. In these circumstances, the dissident employees' concerted protest in the bathhouse did not rise to the level of the disregard of property rights and defiance of law associated with the unprotected conduct at issue in NLRB v. Fansteel and the other cases cited above.<sup>40</sup>

For these reasons, we conclude that the work stoppage did not lose the protection of the Act and that complaint should issue, absent settlement, alleging the Employer violated Section 8(a)(1) and (3) by discharging the dissidents for engaging in a protected work stoppage.

B.J.K.

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<sup>40</sup> See n. 36, above.