

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MIKLIN ENTERPRISES, INC., D/B/A JIMMY JOHN'S, Respondent, and INDUSTRIAL WORKERS OF THE WORLD, Charging Party	Cases 18-CA-19707 18-CA-19727 18-CA-19760
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**RESPONDENT MIKLIN ENTERPRISES, INC.'S BRIEF
IN SUPPORT OF EXCEPTIONS TO
DECISION OF ADMINISTRATIVE LAW JUDGE**

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I. CASE No. 18-CA-19727 (Disparagement; Discharges; Warnings)

A. STATEMENT OF THE CASE

MikLin Enterprises, Inc. (MikLin, Respondent, or Employer) owns and operates eight franchised Jimmy John's retail sandwich shops in the City of Minneapolis, Minnesota and two shops in St. Louis Park, a Minneapolis suburb. Michael Mulligan is President of MikLin, and his son, Robert Mulligan, is a co-owner, Vice President and Area Manager (Tr. 37, lines 7, 13).

On October 22, 2010, NLRB Region 18 conducted a representation election among MikLin's in-shop sandwich makers and delivery drivers to determine whether the Industrial Workers of the World (IWW), would become the certified bargaining representatives of those employees. The IWW lost the election, and filed objections. On January 10, 2011, the Regional Director approved an informal Settlement Agreement and Stipulation to Set Aside Election, which resolved the objections as well as some outstanding unfair labor practice charges. The Stipulation provided that the IWW would withdraw the petition, but was free to file a new petition for an expedited election within 18 months of March 10, 2011. No such petition has been filed.

On March 10, 2011 an IWW committee composed of Erik Forman, Davis Ritsema, Max Specktor and Michael Wilklow appeared at the MikLin corporate office. They confronted Robert Mulligan, demanding a meeting regarding paid sick days (Tr. 335 line 16-336), in return for which they would refrain from affixing in public areas near the stores a large number of posters and issuing a press release, both containing disparaging message about MikLin's products and policies.

On March 20, 2012 the IWW launched the threatened posting campaign. To protect its business MikLin management took down as many posters as possible.

On March 22 and 23, the six IWW agents who conceived, created and directed the execution of the plan by IWW supporters, (Erik Forman, David Boehnke, Michael Wilklow, Micah Buckley-Farlee, and Max Specktor,) were terminated for disloyalty and malicious disparagement of product (GC-6, GC-7, GC-8, GC-9, GC-10a, GC-10b, GC-11, and GC-12). Brittany Kopyy, Isaiah Collins and Sean Eddins whose involvement, to MikLin's knowledge, was limited to putting up the posters in public spaces, and believed not to be responsible for conceiving and orchestrating the scheme, received warnings not to repeat this behavior (GC-3, GC-4, GC-5). Those discharges and warnings are the subject of this case.

On March 24, 2011, the IWW filed unfair labor practice charge 18-CA-19727, alleging that the discharges and warnings were in response to activity protected under Section 7 and violated Sections 8(a)(1) and 8(a)(3) of the Act.

On November 9, 2011, the Board issued a Complaint which consolidated this case with 18-CA-19707 and 18-CA-19760. MikLin filed its Answer on November 21, 2011. Trial was held before the Honorable Arthur Amchan, Administrative Law Judge (ALJ) February 14 and 15, 2012. On April 20, 2012, Judge Amchan issued his decision (ALJD.) MikLin has filed exceptions to that decision, and submits this Brief in support of those exceptions.

B. QUESTIONS PRESENTED; ARGUMENT

1. Did the employees' conduct constitute cause for discharge under Section 10(c) of the Act because it was so disloyal as to lose the protection of the Act?

The ALJ states, "The relevant legal framework for this case was set forth in great detail in *Valley Hospital Medical Center*, 351 NLRB 1250 (2007)." (ALJD 9, lines 19-20.) Significantly, the quotation from that decision set forth in the ALJ decision devotes much discussion, and cites numerous cases finding disparaging statements unprotected, not because they are uttered with actual malice, but because they belong to a separate, distinct category,

explicitly recognized by the U.S. Supreme Court in *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953): “There is no more elemental cause for discharge of an employee than *disloyalty* to his employer.” [Emphasis added.]

Current case law makes it clear that “disloyal” statements made with a “malicious motive,” *even if related to a labor dispute*, can be unprotected without being subjected to the “actual malice” analysis. The ALJ devotes only seven lines to disloyalty, and they discuss only the truism that not every act that could be considered “disloyal” as the term is used in everyday parlance is unprotected. (ALJD 10, lines 36-40; 11, lines 1-2).

The ALJ’s quotation from *Valley Hospital Medical Center, Ibid* clearly expresses the distinction:

But finding that employees’ communications are related to a labor dispute does not end the inquiry. Otherwise protected communications with third parties may be “*so disloyal*, reckless *or* maliciously untrue [as] to lose the Act’s protection.” *Emarco, Inc.*, 284 NLRB 832, 833 (1987); accord *Mountain Shadow Golf Resort*, 330 NLRB 1238, 1240 (2000).

To lose the Act’s protection as an act of *disloyalty*, an employee’s public criticism of an employer must evidence “*a malicious motive.*” *Richboro Community Mental Health Council*, 242 NLRB 1267, 268 (1979). Statements are *also* unprotected if they are *maliciously untrue*, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are *maliciously untrue*.

(ALJD, 9-10) [Emphasis added].

The ALJ gave short shrift to a “disloyalty” analysis. Rather, the decision was based on the “actual malice” test of the Sixth Circuit in *TNT Logistics N. Am.*, 347 NLRB 568 (2006), rev’d sub nom. *Jolliff v. NLRB* 513 F.3d 600 (6th Cir.), adopted on remand, 353 NLRB 449 (2008) and by the Board in *MasTec Advanced Technologies, a division of MasTec., Inc.*, 357

NLRB No. 17 (2011). These cases hold that disparaging statements made in connection with a “labor dispute” are protected unless they are made with knowledge that they are false, or are made with reckless disregard for the truth or falsity (“actual malice”). While such statements certainly may be characterized as “disloyal,” the ALJ nevertheless erroneously decided the case based on the *Jolliff/MasTec* analysis.

The disloyalty analysis focuses on evidence of *malicious intent* behind the statements, i.e., a desire to harm the employer, not merely whether the statements were actually made with knowledge that they were false or with reckless disregard of their truth or falsity, or “actual malice.” The *Valley Hospital* opinion clearly sets forth the two categories of unprotected conduct *in the disjunctive*. The distinction was at the core of the Eighth Circuit’s decision in *St. Luke’s Episcopal-Presbyterian Hospitals, Inc. v. NLRB* 268 F.3d 575, 580, 581 (8th Cir. 2001). In that case the Court held that a disparaging statement related to terms and conditions of employment that fails to meet the “actual malice” test nevertheless may be unprotected if it is “materially misleading;” “materially false;” “is contrary to the public interest and serves no legitimate purpose of the Act.”

St. Luke’s dealt with the conduct of a registered nurse first assistant (“RNFA”) in the labor and delivery department of the hospital. She appeared on a local television news broadcast and accused the hospital of “jeopardizing the health of mothers and babies” when it altered the shift assignments and responsibilities of the labor and delivery RNFAs. The Eighth Circuit clearly stated its position:

First, we *reject* the ALJ's legal conclusion that [RNFA]'s public statement was protected activity unless maliciously false. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), prohibits the Board from ordering the reinstatement of any employee "if such individual was suspended or discharged for cause."

Ibid at 579-580. [Emphasis added.] The court noted it had set forth the same views in previous cases:

As we said in *N.L.R.B. v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972), "assuming arguendo that the employees were engaged in protected activity, there is a point where their *methods* of engaging in that activity would take them outside the protection of the Act." Accord *Earle Indus., Inc. v. N.L.R. B.*, 75 F.3d 400, 405-07 (8th Cir. 1996).

Id., 581 [Emphasis added.]

The *St. Luke's* Court found the RNFA's statement unprotected even though it was "not malicious in the sense of being the product of an evil motive." *Id.*,580. The Court found that she "clearly disparaged the quality of patient care being provided by St. Luke's in a way guaranteed to adversely affect the hospital's reputation with prospective patients and the public at large. And St. Luke's proved that the disparagement was *materially* false." *Id.*

The Court found "materially misleading" the RNFA's statement that "her replacement won't have her qualifications." It also found "materially false and misleading" her accusation that the hospital was "jeopardizing the health of mothers and babies" by depleting its staff of labor and delivery RNFAs, reducing the effectiveness of the remaining RNFAs by increasing their duties and providing less qualified replacements. *Id.*, 581.

The chronology of events shows the true motivation for the IWW's malicious linkage of "protecting the public" with the demand for sick days. It appears as a new tactical weapon very late in the game. The timing compels the conclusion that the Union's strategy was *separately* motivated by a desire to harm the company as a way to pressure it into capitulating to the demand for an employee benefit.

The introductory paragraph of the IWW's Collective Bargaining Survey (GC-25) listed 19 issues to which the recipients are asked to respond. While "Time off if you are sick" and "Paid sick days" are included in the list, "Protecting the public against contracting foodborne illness" is not. Clearly, from the launch of the IWW campaign in September of 2010, the demand for paid

sick days, a change in policy that would benefit employees *economically*, was one of the Union's top priorities, were they to become the certified bargaining agent for MikLin's employees.

"Protecting the public" against the risk of contracting foodborne illness by patronizing a Jimmy John's store was *not* part of the mission – until, as Mr. Forman testified, after a campaign to force the Mulligans to *negotiate* over holiday pay failed. (Tr. 105, lines 19-25; Tr. 106, line 2.) The idea to "pick sick days" as the next "demand" to be pursued dawned on the Union leadership only "because it was flu season, and because we'd seen a lot of workers having to work sick, both prior and at that exact time. And we thought *that would be a good time* to bring that up as an issue because it was flu season as people say." (Tr.106, lines 3-7).

The timing clearly indicates that the posters' eye-catching color photos of a "Jimmy John's sandwich made by a sick worker," coupled with the admonition, "We hope your immune system is ready," was a *newly-hatched* tactical weapon to harm MikLin's business, *motivated separately* from the real "labor controversy," the demand for sick days.

The IWW campaign literature and press releases submitted in evidence at the hearing makes this perfectly clear. The IWW issued a series of press releases from September 2, 2010 through October 29, 2010 (GC-29, GC-30, GC-31, GC-32, GC-33, GC-34, GC-35, GC-36, and GC-37). None mentions concern for the public's health as an IWW mission. Nor did the campaign literature submitted as GC-24, GC-26 or GC 27. The March 10, 2011 press release (G-38) that disseminated the ultimatum was the first communication– in the seven months since the beginning of the failed election campaign – to link the Union's "demand" for "sick days" to a supposed health risk.

There is good reason for egregious disloyalty to remain a separate category of unprotected activity, especially in the food-related industries. In those business environments, the kind of

public reaction intentionally provoked by disparaging comments is qualitatively different from that sparked by allegations of a commercial product's inferiority, improper or unlawful business practices, deceptive sales pitches, or general management incompetence. Fear of becoming physically ill from ingesting an unseen, unknown pathogen is primal. As the U.S. Court of Appeals for the D.C. Circuit observed in dicta in *Diamond Walnut Growers v. NLRB*, 113 F.3d 1259, 1266 (D.C. Cir. 1997):

. . . when a union claims that a food product produced by a struck company is actually tainted it can be thought to be using the strike equivalent of a nuclear bomb; the unpleasant effects will long survive the battle.... The company's ability to sell the product, even if the strike is subsequently settled, could well be destroyed.

In *Firehouse Rest.*, 220 N.L.R.B. 818(1975), the Board denied reinstatement and tolled backpay to three waiters. In that case, a customer of the employer's restaurant claimed, based on information provided by the waiters to their attorney, that he had been served adulterated food, and brought a civil action for damages against the restaurant. When the waiters were deposed, they testified disparagingly about the quality of food served, with frequent allusions to the food as adulterated or contaminated and a cause of food poisoning. One admitted intense personal dislike of the owner of the restaurant as an employer. The ALJ found, and the Board affirmed, that by their testimony the waiters

. . . manifested an attitude of flagrant disloyalty, wholly incommensurate with their grievances against the employer [which included complaining about the quality of the food they were served in the restaurant as a negotiated benefit], culminating in blatant disparagement of the food served Respondent's customers, publicized in the press at the instigation of [the] waiters for the avowed purpose of doing harm to Respondent's business. *We are not concerned with whether the charges made by the employees regarding the quality of the food beings served patrons were true or false.* The right to engage in union or concerted activities does not justify an employee in maliciously disparaging his employer's product or undermining his reputation.

Id., 826 [Emphasis added.]

In *Kitty Clover, Inc.*, 103 NLRB 1665 (1953), *enf'd Kitty Clover, Inc. v. NLRB* 208 F.2d 212 (8th Cir. 1953), the Eighth Circuit enforced the Board's denial of reinstatement to two strikers who had followed the employer's delivery truck to a customer's location, where they importuned a store owner not to buy any potato chips from Kitty Clover because the company employed "diseased girls from North Sixteenth Street" and "from skid row." *Ibid.* at 1688.

The Trial Examiner stated:

The Respondent argues that such an unsubstantiated attack upon the employees engaged in the manufacture of its food products was so serious in character that it cannot be considered protected concerted activity. Although employees involved in a labor dispute are permitted great latitude of expression this does not mean that their attacks may be completely unlicensed. Cf. *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, 1509-1512. Here, I feel that [the employees], by the remarks in question passed the permissible limits of protected activity and that by such conduct they forfeited any rights they had to reinstatement.

Id.

In its brief to the ALJ, MikLin cited *Coca Cola Bottling Works*, 186 NLRB 1050 (1970) for the proposition that the law recognizes disparagement of food products is qualitatively different from statements in other contexts that have been held protected. In that case, the Board affirmed the Trial Examiner's finding that the "main thrust" of a leaflet distributed by employees was "to create fear in the public's mind that drinking Coca Cola would be harmful to the health of the purchaser" because of the presence of foreign objects such as roaches and mice in the bottles. The Trial Examiner held that the leaflet constituted a public disparagement of the quality of the Employer's product, and that those strikers who engaged in the preparation and/or circulation of the leaflet forfeited any right they may have had to the protection of the Act.

The ALJ in the instant matter erroneously concluded that "the part of the *Coca Cola Bottling* decision regarding product disparagement appears to be dicta since the employees in question were not denied reinstatement by the Board." (ALJD 11, note 9). On the contrary, the

Board explicitly affirmed the Trial Examiner's holding that the conduct was unprotected, but ordered the employees reinstated because it found the Employer had condoned the unprotected conduct:

. . . The leaflet which is entitled "Health Warning," advises the public to beware; that empty Coca Cola bottles often serve as collectors of foreign matter; and due to the fact that the regular employees are on strike, the product is being inspected by stopgap employees who do not have the same level of experience as the regular employees [Footnote omitted]. Trial Examiner Youngblood *found* that the main thrust of the leaflet was to create fear in the public's mind that drinking Coca Cola would be harmful to the health of the purchaser because of the presence of foreign objects such as roaches and mice in the bottles. He concluded that the leaflet constituted a *public disparagement of the quality of the Employer's product* and that those strikers who engaged in the preparation and/or circulation of this leaflet *forfeited* any right they may have had to the protection of the Act. . .

We *find* in agreement with the Trial Examiner that the preparation and circulation of the leaflet was *not protected* activity However, we do not agree that the employees who participated in such conduct should be denied reinstatement because the evidence indicates that employee participation in such activity was *condoned* by the Respondent.

Ibid, 1054 [Emphasis added.]¹

MikLin excepts also to the ALJ's holding that *Coca Cola Bottling Works* has been "implicitly overruled" by *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enfd. mem.* 636 F.2d 1210 (3d Cir. 1980) (ALJD 11, n. 9.) That case involved general allegations of a safety risk from not following proper aircraft refueling procedures. It did not involve a personal risk of physical illness from ingesting tainted food. And in MikLin's case, if any serious risk did exist, it would have been created by employees' admitted own disregard of their legal obligation to exclude themselves from the workplace. Minnesota Administrative

¹ Moreover, the D.C. Circuit ordered the Coca Cola economic strikers reinstated for the additional reason that after the strike had ended, the employer failed to take affirmative action to apprise them of their preferential status for rehire, as required by the Board's decision in *The Laidlaw Corporation*, 171 NLRB No. 175 (1968), *enforced* 414 F.2d 99 (7th Cir., 1969), *cert. denied*, 397 U.S. 920 (1970). *Coca Cola Bottling Works*, 186 NLRB 1050 (1970), *enf. sub. Nom. Retail, Wholesale, Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir., 1972).

Rules *personally* obligate food service employees to exclude *themselves* from the workplace if they are ill with vomiting or diarrhea or any enteric bacterial pathogen capable of being transmitted by food, and require food service employers to exclude employees with such conditions. (R-10). On cross-examination, IWW witness Erik Forman and counsel for MikLin had the following exchange regarding the Union's press release of March 25, 2012 (GC-40):

Q . . . You said that you had drafted this?

A At least some of it, yeah.

Q Okay. And, again, you said that -- or in the press release you say "under current policy Jimmy John's workers are disciplined for calling in sick if they can't find a replacement" and then you say that "many workers can't afford to take a day off when they're ill". Did workers who decided to work rather than calling in sick create a public health risk?

A Workers working while sick is a public health risk, yes.

Q So if workers who are making the decision that they needed the money, they were choosing to do that at the public risk according to your information.

A Yes.

(Tr. 135, lines 24-25; 136, lines 1-5).

This exchange alone is sufficient evidence on the record of the malicious motive behind the IWW's assertions on the posters and in the press releases of March 10 (GC-28), March 23 (GC-39), March 25 (GC-40), and March 30 (GC-41). The allegations that customers are *put* at risk of contracting foodborne illness *because* MikLin's attendance policy and the lack of paid sick days "*force*" employees to work while ill is not only disloyal, malicious and false, it is absurd. Those who had a part in developing, drafting and disseminating these messages, clearly intended to harm MikLin's business, and forfeited their protection under the Act.

MikLin submits that to the extent *Coca Cola* stands for the proposition that employee statements disparaging an employer's food product as unsafe are unprotected, it was *not* overruled by *Allied Aviation Services*.

In *Valley Hospital*, *supra*, at 1261, the Board reiterated the admonition articulated in *Professional Porter and Window Cleaning Co.*, 263 NLRB 136, 139 (1982) and *Allied Aviation Services*, *supra*, at 231 that “. . . great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues.” The facts and circumstances of this case dictate that the employees' conduct should be classified as “disloyal disparagement.” Making disparaging allegations *intended* to create a baseless *fear* of contracting foodborne illness from consuming MikLin's sandwiches is an egregiously disloyal act aimed at harming the business, not merely the “airing of a sensitive issue.” Food safety is the life blood of any food service business. In his testimony regarding the importance of food safety President Michael Mulligan stated:

I spent my entire career in the food business, working for -- primarily working for 32 years for Supervalu. If you've been in the food business, you know that there isn't anything that will damage a business any quicker than compromising public health. There is nothing that will cause people to go someplace else quicker than the fear that their health is in danger if they eat your product. Anybody who's old enough to remember the Jack in the Box incident and what it did to that company understands that.

(Tr. 282-283). For his part, Robert Mulligan testified that he “was obviously very, very concerned. I was scared what it might mean for our business” (Tr. 338, lines 12-13). “And I was really concerned that if the public saw these they might think that they were at serious risk of getting sick while working at our – or while eating at our restaurants. And I was concerned for our business.” (Tr. 339, lines 9-13). “What really concerned me the most was that it stated ‘We hope your immune system is ready because you're about to take the sandwich test.’”

David Boehnke, one of the discharged employees demonstrated his personal disdain for food safety by refusing to wash his hands in the hand sink, as required by State regulations and Company policy. Upon receiving a disciplinary warning for this conduct (R-8), he immediately filed an unfair labor practice charge alleging that he had been discriminated against because of his union activity (R-9). He soon withdrew the charge (Tr. 228, lines 13-15; 229. Lines 1-12).

Most of the posters hung in the stores' neighborhoods included Robert Mulligan's cell phone number (GC-45), with a request to call him. The posters and the post-discharge press releases, beginning with the March 23 release (GC- 39), along with media coverage of the situation, produced a deluge of telephone calls, text and email messages to Robert Mulligan, as well as some blog postings accepting at face value the Union's assertions, and indicating that the senders of these messages would cease to be Jimmy John's customers. Robert Mulligan put it this way:

I was bombarded by phone calls and text messages for close to a month from people expressing their outrage over the terminations, indicating that they were scared to eat at Jimmy John's, that they thought that -- you know, they didn't think it was safe to eat at Jimmy John's.

(Tr. 333)

The Ninth Circuit, in *Sierra Publishing Company, d/b/a The Sacramento Union*, 889 F. 2d, 210, 220 (9th Cir. 1989), unlike cases relied on in the ALJ decision, was not in thrall to the "actual malice" analysis. It discussed at length the "disloyalty" category of conduct that can lose its protection, independent of the "actual malice" test. While finding the conduct of the newspaper employees in that case protected, the court articulated a sensible standard for "disloyalty" cases:

In summary, the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were *pursued in a reasonable manner under the circumstances*.

Id. at 220 [Emphasis added].

Moreover, in that case, the employees' comments in a letter to some of the newspaper's advertisers were a far cry from the IWW's assertion that MikLin's customers were at risk of contracting foodborne illness because they were "forced to work sick" by reason of not being provided paid "sick days." *Sierra Publishing Company* illustrates what "egregious disloyalty" does *not* mean. The newspaper employees made only such mild allegations as, "the paper's circulation has plummeted;" "good employees have left for better jobs," "advertising has suffered;" "The newspaper as a whole is speeding downhill;" "If something positive doesn't happen soon, we may all be facing the death of The Sacramento Union." *Id.* at 214.

2. *Did the IWW's coercive demand for unlawful pre-recognition bargaining with a minority union cause the conduct to lose protection under the Act because it constituted a means of achieving its objectives that was abusive, improper, unnecessary, or wholly incommensurate with its grievances?*

In determining the protected or unprotected status of statements disparaging an employer, particularly when using the "disloyalty" analysis, many Board and Court decisions have considered whether the "means used" by the union to solicit the support of the public were "improper;" "abusive;" "unnecessary;" and/or "wholly incommensurate" with the employees' grievances.

MikLin excepts to the ALJ's summary rejection of the proposition that the IWW's overall scheme constituted a coercive demand to engage in unlawful pre-recognition bargaining with a minority union. (ALJD 15, lines 11-16.)² The IWW officials presented Robert Mulligan

² The ALJ misapprehends MikLin's argument on this point. The judge states that he rejects "Respondent's argument that the Union *engaged in* unlawful pre-recognition bargaining. But MikLin refused to accede to the IWW's extortionate demands. Accordingly, MikLin's argument is that the Union's conduct amounted to a *proposal* to engage in such bargaining, and because such bargaining, had it occurred, *would have* been unlawful. Accordingly, the statements on the posters and in the press releases lost the protection of the Act because the Union's extortionate proposal was an abusive, improper and unnecessary *means* for achieving the IWW's objective.

with an extortionate offer: They would *refrain* from disparaging MikLin's products and reputation *in exchange for* reaching an agreement on sick days for all of MikLin's sandwich makers and delivery persons. This bears a strong resemblance to the classic "protection racket." Legal principles, as well as logic and common sense, dictate that this interaction can be interpreted only as a proposed *bargain*, a quid pro quo transaction. Thus, the effort to force MikLin to capitulate to a demand to engage in conduct violative of Section 8(a)(2) constituted an abusive and improper means for achieving their legitimate objective of paid sick days.

The ALJ erroneously characterized the coercive effort to force MikLin to negotiate with a minority union over sick days as nothing more than a group of employees exercising their right to "concertedly petition³ their employer for an improvement in terms and conditions of employment," citing *Phillips Petroleum Co.*, 339 NLRB 916 (2003) and Section 9(a) of the Act.

But the generally accepted definition of "petition," as a verb, is "to make a *request* to; to *ask* from; to *solicit*; particularly, to make *supplication* or *application* in writing in a formal manner, to a superior for some *favor* or right." *Webster's New Twentieth Century Dictionary Unabridged*, 2d. ed. This authority lists as synonyms, "appeal, entreaty, prayer, request." In contrast, "bargain," as a verb is defined as "1. to discuss or dispute *terms* for selling, buying, etc.; to haggle. 2. to make a *contract* or *conclusive agreement* for the transfer of property, etc." *Webster's* defines "negotiation" as "a conferring, discussing, or bargaining to reach *agreement*, as in business transactions or state matters."

The testimony of IWW officials shows clearly how they viewed the interaction. On direct examination, IWW Michael Wilklow testified:

And I remember specifically myself at the end of the meeting telling Rob Mulligan that -- like they were reviewing their policies, I guess, all employee policies at the

³ Section 9(a) actually uses the term "present," not "petition."

time, and I remember saying that if he would *put in writing* that workers won't be disciplined for calling in sick that I would, you know -- we were going to -- I didn't say that I could, but we were going to have a meeting and I thought that would be enough for us to just *drop* the issue and consider it a *victory*. That's what I remember saying.

(Tr., 154, lines 22-25; 155, lines 1-6) [Emphasis added.]

On direct examination regarding the March 10 ultimatum meeting with Robert Mulligan, Davis Ritsema's testimony evidences the quid pro quo nature of the IWW's bargain:

Q What, if anything, did Mr. Mulligan have to say during that meeting?

A Not a lot, although I do recall him saying something to the extent of, no one should be getting disciplined for calling in sick. But didn't want to make any *agreements* or anything with us.

Q Was there any reference to any future posting during that 9 meeting?

A Any future posting?

Q Any reference to the possibility of any future postering at that March 10th meeting?

A I believe we alluded to that, yes.

(Tr. 178, lines 3-14) [Emphasis added.]

The ALJ explicitly found the discharged employees had "*threatened*" to distribute the disparaging posters "*if*" Rob Mulligan did not agree to meet with this group of self-appointed employee representatives to discuss sick days. (ALJD 5, lines 46-47; 6, lines 1-2, 5-7). "The act or practice of wresting money, etc. from a person by force, threats, misuse of authority or by any undue exercise of power" is *Webster's* definition of "extortion."

The ALJ's citation to Section 9(a) of the Act as authority for finding the IWW's scheme to be merely protected concerted activity under Section 7 rather than a demand for unlawful pre-recognition bargaining was error. In fact, 9(a) supports MikLin's position. That section first expresses the essential, fundamental principle of the Act:

Representatives designated or *selected* for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .

[Emphasis added.]

Presumably the ALJ's reference is to the proviso which follows:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, *without the intervention of the bargaining representative* . . .

But the proviso continues, and adds another proviso:

. . . *as long* as the adjustment is not inconsistent with the terms of a collective-bargaining contract or *agreement then in effect*: Provided further, That the *bargaining representative* has been given opportunity to be present at such adjustment.

These provisos merely permit employees who, although *represented* by a union, *nevertheless* to deal directly with their employers regarding grievances, within certain parameters. Hence, the provisos do not apply to employees like MikLin's, who do not have an exclusive bargaining representative, and in no way does it accord a minority union bargaining agent status.

Moreover, the case cited by the ALJ for this proposition, *Phillips Petroleum Co.*, 339 NLRB 916 (2003) is clearly distinguishable, and also supports MikLin's position. It involved a *represented* employee who dealt directly with management on an issue of FMLA leave after his efforts "to get the union involved". *Ibid* at 917. This decision relates to the first and second provisos of Section 9(a) and has no applicability to MikLin.

The ALJ's finding that the March 10, 2012 coercive demand for pre-recognition bargaining was merely four individuals seeking, "with the *help* of a union" to "*present grievances*" to Rob Mulligan (ALJD 15, lines 17-27) was error.

The initiative was an *official* IWW effort, ostensibly, on behalf of the *entire* workforce, not just those present, or even as a “members only” proposal. Each press release related to the March 20, 2011 poster campaign was sent *by the Union, on behalf of the Union*, with various combinations of the discharged employees appearing *as IWW* contact persons or being quoted as spokespersons *for the IWW* (GC-38, GC-39, GC-40, and GC-41). The March 10 demand letter was headed with the “*Jimmy John’s Workers Union*” logo and concluded with the valediction, “Sincerely, *The Jimmy John’s Workers Union*.” Finally, the Charging Party is the *IWW*, not, e.g., “Erik Forman, an individual.”

Similarly, David Boehnke’s, March 20, 2011 text message to Robert Mulligan read:

. . . U going to setup a mtg to talk about sick days or should we really put up these 1000’s of flyers? We got the posters & the ppl to do it. Let me know by 2.

David Boehnke *as a representative of the jimmy johns workers union*

(GC-37 [Emphasis added.]

Although permitted by the prior settlement agreement (GC-46) to file a petition for an expedited election within 18 months of March 10, 2011, the IWW has not elected to do so. Instead, it embarked on a strategy to simply arrogate itself to the status of certified bargaining representative, its minority status notwithstanding. Its officials believe they have discovered a way to engage in “piecemeal” negotiations with MikLin over its various long-standing demands by presenting coercive quid quo pro ultimatums, backed by coercive, abusive threats and actions – all under the guise of “protected concerted activity.” The ALJ recognized the pattern:

It may well be that had Respondent acceded to the Union’s demands on sick leave, the *Union* would have moved on to *other demands in its ten-point program*.

(ALJD 11, lines 22-23 [Emphasis added.]) Erik Forman described the strategy in no uncertain terms:

. . . and so we began looking at the issues that we had been organizing around, looking at the collective bargaining survey, . . . and identified things that we thought *we could use, concerted activity, to win*. So the *first* issue we picked was holiday pay because it was towards December . . . and Jimmy John's does not offer any kind of premium pay on -- . . . any of the major holidays. . . . The holidays passed and we decided to continue organizing around *another* issue, and we picked sick days

(TR. 105, lines 15-23; 106, lines 1-3) [Emphasis added.]

Then, after “winning sick days” through these improper, abusive means, the scheme would evolve into an issue-by-issue repetition of the coercive *quid pro quo* strategy to achieve *all* the “demands” on the “Collective Bargaining Survey” – without any collective bargaining whatsoever between a certified union and the employer.

A review of IWW literature and press releases, commencing with the launch of the failed election campaign on September 2, 2010, shows the Union's leaders clearly understood that their right, and MikLin's obligation, to bargain over sick days or any other term or condition of employment was dependent upon victory in an NLRB representation election (GC-24; GC-25; GC-28; GC-27; GC-35; GC-29).

Instead, the IWW conceived the extortionate idea to refrain from distributing the posters *in return for* the Mulligan's agreement on sick days for *all employees* (not just the six involved in the coercion) as a simple substitute for negotiations by certified collective bargaining agent. If this tactic of coercing pre-recognition bargaining were allowed to stand, there simply would be no need for representation elections. Ironically, the IWW's abusive, malicious tactics are emblematic of the kind of destructive conduct the Act sought to channel into the real collective bargaining process, as expressed in the Findings and Policies set forth in Section 1 of the Act:

Experience has proved that protection by law of the right of employees to organize and *bargain collectively* safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest

Experience has further demonstrated that *certain practices by some labor organizations, their officers, and members* have the intent or the necessary effect

of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or *through concerted activities which impair the interest of the public in the free flow of such commerce*. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

[Emphasis added.]⁴

Since *Majestic Weaving*, 147 NLRB 859, enforcement denied, 355 F.2d 854 (2d Cir. 1966) and *Bernhard-Altman Tex. Corp.*, 122 NLRB 1289, enf'd sub nom. *Ladies Garment Workers (ILGWU) v. NLRB* 280 F.2d 616 (D.C. Circuit 1960), aff'd 366 U.S. 731 (1961), it has been axiomatic that an employer who provides significant organizing assistance to a minority union violates Section 8(a)(2) of the Act and a union that accepts such assistance violates 8(b)(1)(A).

Whether or not an explicit “demand for recognition” was ever uttered, and while MikLin has never asserted that any of the individuals at the March 10 meeting actually said something that specific, unlawful *pre-recognition bargaining* clearly was the goal. There are good reasons why aiding a minority union is unlawful.

Section 7 protects the right of employees to *refrain* from union activity as well as the right to engage in it. A General Counsel Memorandum regarding *Plastech Engineered Products, Inc.*, Cases 10-CA-35554, 10-RD-1440, 10-CB-8257 dealt with the unlawful implementation of a neutrality agreement that established terms and conditions of employment, not only before the

⁴ MikLin importunes the Board to consider the ramifications of such a wholesale abandonment of time-honored principles and processes. In a plant with 100 employees, the employer could be confronted with this kind of coercive “concerted activity” by ten different unions with ten groups of ten supporters each, all demanding different things for the entire workforce. These demands could be in conflict with each other, and all the groups could seek to pressure the employer for these demands with simultaneous strategies of public disparagement. Efficiency, productivity and plant discipline would evaporate. The employer would be trapped in a perpetual crossfire, with no way to achieve labor peace by engaging in collective bargaining with certified unions representing employees in appropriate bargaining units. The consequences would be an “impairment of the free flow of commerce” “on steroids.” This kind of “concerted activity” would produce industrial anarchy.

Union had attained majority status. The Memorandum clearly explains why premature negotiation with a minority union is unlawful – for both the employer and the union:

. . . premature contract negotiation affords the minority union ‘a *deceptive cloak of authority* with which to persuasively elicit additional employee support,’ thereby tainting any employee support the union subsequently obtains. 2005 *NLRB GCM LEXIS 73*, quoting from *Bernard-Altmann*, 366 U.S. at 736. . . .

[Emphasis added.] The Memorandum goes on observe:

The agreement, for instance, to an interest arbitration provision *in exchange for* the Union’s no-strike pledge *indicates to employees* that the Employer had already *ceded its authority unilaterally to determine working conditions and thus established the Union in a representative capacity with respect to the employees.*

Moreover, real collective bargaining involves proposals, counterproposals and a “total package.” If the MikLin employees were represented by a certified labor organization that engaged in “real” collective bargaining, the “total package” settlement could contain provisions such as wage increases, performance, attendance, or other bonuses, which a majority of unit employees, in a ratification vote, believe offset the value of sick days.

In addition, there is no evidence on the record whatsoever that the IWW actually represents the interests of more than a handful of MikLin’s more than 200 employees. In fact, with respect to the “demand” for sick days, there is strong evidence to the contrary. Erik Forman testified that the Union’s Collective Bargaining Survey (GC-25) showed “paid sick days consistently scored as very important for *most* workers.” (Tr. 96, lines 5-6) [Emphasis added.] Union witnesses testified that in conducting the “phone banking” project, which produced the source data for the survey, the IWW’s callers spoke with only 34 employees, (Tr. 170, lines 22-25; 171, lines 1-12; 172, lines 19-25; 192, lines 1-2.) Thus, the IWW’s “authorization” from “most workers” to demand sick days came

from somewhere between 18 (more than half) to 33 (less than all) of MikLin's 200-plus employees.

Accordingly, a coercive demand for pre-recognition bargaining over sick days constitutes an "abusive and improper" means for achieving the objectives of a handful of IWW promoters, disingenuously representing themselves as the advocates for members of MikLin's workforce.

3. *Did the IWW's communication lose its protection under the Act because the main thrust of the disparaging statements was to harm Respondent's business?*

As discussed in connection with Question 1 regarding the "disloyalty" analysis, the facts clearly show that the main thrust of the IWW posters and press releases to damage MikLin's business. Warning the public that they are at risk of foodborne disease simply can be interpreted in no other way than as an effort to harm the business. It certainly is not an employee-driven plan to *enhance* sales and improve the marketing function.

While obtaining paid sick days as an employee benefit was the legitimate goal of the IWW's efforts to enlist the support of the public, the *primary* purpose – the "main thrust" – of the 11" x 17" posters as designed by Mr. Ritsema (Tr. 167, line 22; GC-44, GC-45) was to instill fear in the public of contracting foodborne illness. The outstanding graphic features of the posters are two juxtaposed, large, brightly color photos of two Jimmy John's sandwiches, with the respective captions, "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER" and "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." The words "healthy" and "sick" appear in bright red, contrasting with the photo captions in white, all on a black background. The next line poses the question (in white letters on the same black background,) "Can't Tell the Difference?" This is followed by the rhetorical answer, again in red, "THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK

DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK.” Below that line, in white on the black background, is the malicious, disparaging warning: **“WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU’RE ABOUT TO TAKE THE SANDWICH TEST. . . .”** These portions of the message comprise approximately **89%** of the total area of the 11” x 17” posters – with no “appeal to the public.” Finally, on the remaining **11%** – in a small band consisting of two lines running lengthwise across the very bottom – are the words, “HELP JIMMY JOHN’S WORKERS WIN SICK DAYS,” and on the final line, “SUPPORT US ONLINE AT www.jimmyjohnsworkers.org.” (GC-44). The other version of the poster, GC-45, substitutes for the “support us online” message: “CALL THE OWNER ROB MULLIGAN AT [cell phone number] TO LET HIM KNOW YOU WANT HEALTHY WORKERS MAKING YOUR SANDWICH.”

As in *Coca Cola Bottling Works, Id.*, the “main thrust” of the poster was to damage MikLin’s business by creating an unfounded fear in the minds of the public of contracting foodborne illness. The physical presentation of the poster, the lack of prominence of the “appeal to the public” portion, along with the disparaging, disloyal press releases, together with the IWW philosophy and the poster designer’s belief in that philosophy leads to the inescapable conclusion that the message was “clearly designed to hit the employer where it would hurt, by interfering with its business relations with its customers.” *Red Top, Inc.*, 455 F.2 721, 727 (8th Cir. 1972)

In many other cases holding disparaging statements unprotected, the Board and the Courts have noted as an important factor (whether or not the statements were related to a labor dispute) that the “main thrust” of the employee message was to harm the employer’s business, rather than designed to elicit the support of the public. In addition to cases discussed earlier, see, e.g., *Patterson-Sargent*, 115 N.L.R.B. 1627(1956) (Distributing leaflet to Employer’s customers

and the general public in front of retail hardware stores which handled paint manufactured by Employer, handbills urging customers not to buy Employer's product because it was being produced by inadequately trained, inexperienced striker replacements.); *Giuffre Medical Center*, 4-CA-14069 (Advice Memo 3/29/84) (Main thrust of statements in leaflet alleging, *inter alia*, the "incompetence" of physicians at Employer's hospital was to "create the impression in the minds of the public that using [medical services] would be injurious to their health."); *Montefiore Hospital*, 621 F.2d 510 (1980) (Picket line statements to patients leading them to fear that they would receive inadequate medical care if they dared to enter the clinic.); *Endicott Interconnect*, 453 F.3d 532 (2006) (Statements in newspaper article and a posting on paper's public comment site accusing new owners of business of "gutting" and "tanking" it by a large layoff that would harm the community into the future); *Mountain Shadows*, 338 NLRB 581 (2002) (Flyers accusing Employer of mismanaging a municipal golf course and openly soliciting competitors to take over Employer's contract with the city.)

4. *Did the IWW's communications lose protection under the Act because they were not narrowly tailored and were not necessary to achieve the Union's objectives?*

The IWW put up 3,000 of the disparaging posters and disseminated multiple press releases (GC-38 through 41) by email⁵ to nearly 130 media contacts world-wide, including many with global audiences, such as Reuters, The New York Times, the Wall Street Journal and dozens of other print, online and television news services. Accordingly, the allegations of a "serious public health risk" were available to anyone on the face of the planet Earth with access to a computer.

MikLin operates 10 franchised sandwich shops in the Minneapolis metropolitan area. MikLin submits that for disparaging statements designed to "enlist the support of the public" to

⁵ The March 10 release (GC-38) was accompanied by a copy of the poster.

be protected, the “public” to whom the appeal is made logically must be “the public” from which the employer draws customers. The IWW’s electronic broadsides had no limit in breadth, range, or scope.

A factor that has figured significantly in Board and Court decisions holding employee messages protected is that the disparaging statements were “narrowly tailored” to achieve the union’s legitimate goals. One example is *TNT Logistics*, 353 NLRB 449 (2008) cited as authority for the ALJ’s determination in this case. The TNT employees sent a *single letter only* to their employer’s senior executive and to the employer’s biggest customer. See, accord, *Five Star Transportation*, 552 F.3d 46 (1st Cir. 2008). (Fifteen Drivers’ “narrowly tailored” letters to school district, “not to the public at large”); *Professional Porter*, 263 NLRB 136 (1982) (Single letter to administrator of hospital that contracted for Employer’s services); *Manor Care*, 356 NLRB No. 39 (2010) (Distribution only to employees and solicitation of other employees to distribute a form letter to a state legislator; not “publicly and indiscriminately distributed to the broader public.”); *Valley Hospital Med. Center*, 351 NLRB 1250 (2007) (Statements at press conference; quote in newspaper article; statement on union website; fliers distributed only at Employer’s hospital); *Emarco, Inc.* 284 NLRB 832 (1987) (Subcontractor’s employees’ verbal comments only to general contractor on jobsite.)

These principles were clearly articulated by the First Circuit in *Five Star Transportation*, 522 F. 3d 46 (2008). In that case a bus service contractor refused to hire or consider for hire six school bus drivers then employed by First Student, another contractor. The employees wrote critical letters and email messages to the district to dissuade it from granting Five Star the bus services contract. The Court stated at 54,

. . . we have held that whether concerted employee activity is deemed to be protected depends on whether the employees' actions "*appeared necessary to*

effectuate the employees' lawful aims." *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982); *see also NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962) (distinguishing *Jefferson Standard* on the ground that the employees in that case were "denied the protection of § 7 . . . because they were found to show a disloyalty to the workers' employer which this Court deemed *unnecessary* to carry on the workers' legitimate concerted activities").

[Emphasis added.]

MikLin submits that the ALJ erred in finding protected the IWW's literally unlimited communications.

5. *Did the IWW's coercive tactics to exact the grant of paid sick days lose protection under the Act because it constituted an abusive, improper demand for a "thing of value" under Section 302 of the Labor Management Reporting and Disclosure Act (LMRA)?*

In its post-hearing brief to the ALJ, MikLin cited *Mulhall v. UNITE HERE LOCAL 355*, 667 F.3d 1211 (11th Cir. 2012) as authority for its position on this point. Without even referencing *Mulhall*, the ALJ summarily dismissed this argument because this statutory provision "has no relevance in this case . . . "[it] is directed at bribery of union officials or employees and extortion, rather than acceding to the demands of employees exercising their Section 7 rights to improve their terms and conditions of employment." (ALJD 15, line 11-16.) While the first part of this sentence is correct, MikLin argues that in *Mulhall* the Eleventh Circuit established the exact opposite with respect to Section 7 and Section 8(b).

Before discussing that case, however, it should be noted that long before MikLin filed its post-hearing brief in this case, the relationship between Section 302 of the LMRA and Section 8(a)(2) was raised by Member Cowen in his dissent in *Brylane*, 338 NLRB 538 (2002). The issue in *Brylane* was whether the minority Union's request for a neutrality and card check agreement constituted a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act, and thus violated Section 8(a)(2). The Board held the request did not amount to a demand for recognition. Nevertheless, in its deliberations, the Board's acknowledged that an *actual grant*

of recognition to a union that has not established majority status would be an unfair labor practice, as would be the union's acceptance of recognition. However, it held that a *mere request* for such recognition is not unlawful.

In his dissent, Member Cowen remarked:

Finally, since a neutrality/card check agreement is a "thing of value" to the Union, and no exception appears to apply, its request for a neutrality/card check agreement also appears to be unlawful under Section 302 of the Labor Management Reporting and Disclosure Act, 29 USC 186.

Finally, with respect to Section 302, I recognize that the Board does not have a 302 allegation before it. However, I believe that the Board must be keenly aware of the implications of its actions. As the Supreme Court has repeatedly reminded us, the Board cannot ignore the broader policies of our nation's laws [footnote omitted.] One of those policies concerns the evil of an employer's grant of a "thing of value" to a union. Without passing on whether the agreement sought here would constitute a violation of Section 302, my point is simply that the processing of the RM petition would avoid a potential 302 violation. [footnote omitted.]

Ibid, at 540. In her concurring opinion, Member Liebman responded

To my knowledge, however, no court has ever held that an employer that violates Section 8(a)(2) in such a manner also commits a criminal violation of Section 302.

Id., at 539.

But the Circuit Court's decision in *Mulhall* has changed the legal landscape:

We hold that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302.

Mulhall, supra. *Mulhall* was brought by an individual employee who opposed the unionization of his employer's work force. There the employer *promised* to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees. *In return*, the union promised to lend financial

support to a ballot initiative regarding casino gambling, which would benefit the employer. In its opinion, the 11th Circuit stated:

Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union *or extort a benefit from an employer.*

[Emphasis added.]

In the instant matter, the IWW's coercive offer to *refrain* from its scheme to disparage MikLin constituted a proposal for "valuable consideration" to force the Employer to grant the benefit of paid sick days. Thus, the employees' conduct was unprotected, because it constituted an abusive, improper and unnecessary means for achieving its objective.

6. *Did the IWW posters lose protection under the Act because they improperly pressured employers who were strangers to the labor dispute with Respondent?*

The ALJ misapprehended MikLin's argument in this regard (ALJD 6, footnote 3). MikLin has never asserted that the employees' conduct in this case actually constituted a violation of Section 8(b)(4), because that provision is directed at picketing that constitutes an illegal secondary boycott, and no picketing was involved here. Rather, the statute and case law expresses a general philosophy that under certain circumstances parties who are strangers to a labor dispute should have some protection against becoming "collateral damage."

MikLin submits that the IWW's broad accusation that "Jimmy John's" customers were at risk of contracting foodborne illness reasonably could have been interpreted by the public as referring to any or all of the Jimmy John's stores not owned by the Mulligans.⁶ These other employers were "secondary" IWW targets for the malicious disparagement, and, accordingly,

⁶ Approximately 35 in the Twin Cities, 70 in Minnesota, and 1350 nationwide (Tr. 31, lines 10-4; 279, lines 7-16).

this failure properly to identify the “employer” constituted an abusive, improper , and unnecessary means of getting the Union’s message out to third parties.

MikLin also argues that under these circumstances, the posters failed to meet the most fundamental test for protection – that they were related to terms and conditions of employment. Implicit in this nexus is that the employer with whom the protesters have the dispute is properly identified. By indicting any and all “Jimmy John’s” operations, the stores operated by MikLin were not identified, and this should cause the disparaging statements to lose their protection. The ALJ’s implicit dismissal of this argument by its failure even to acknowledge it was error.

7. Did the disparaging statements in the press release and on the posters lose the protection of the Act because they were made with actual malice?

Under all the facts and circumstances as discussed below, the conduct of the discharged employees clearly supports the conclusion that they did made the disparaging statements with “actual malice.”

The ALJ found that the statement on the posters, “shoot, we can’t even call in sick,” is “not a sufficient departure from the truth to render the posters unprotected,” (ALJD, 11, lines 26-27), amounting only to “protected hyperbole.” (ALJD, 12, line 16).⁷ It also found the posters’ “suggestion that employees’ lack of paid sick days may cause a customer to become ill is insufficient to render the posters unprotected.” (ALJD, 12, lines 19-20). The IWW maliciously distorted two MikLin policies to concoct these false statements. The first is Rule No. 11 of “Jimmy John’s Rules for Employment” (GC-51; GC- 52; GC-53; GC-54; GC-56; GC-57) which provides:

⁷ See Robert Mulligan’s testimony regarding MikLin’s practice in this regard:

It said, “Shoot, we can’t even call in sick!” which is not true. I mean our team members call in sick all the time” (Tr. 339, lines 6-7.)

Find your own replacement if you are not going to be at work. We do not allow people to simply call in sick! We require our employees and managers to find their own replacement! No EXCEPTIONS!

The essence of this policy was reiterated and further explained in the MikLin-created points-based “no fault” Attendance Policy dated March 16, 2011(GC-18), which states in pertinent part:

Team Members are expected to be at work on time or find a suitable replacement for their scheduled shifts. If a Team member is going to be late or absent for their shift, they must notify their manager as soon as possible.

The ALJ found MikLin had failed to show that “any of alleged discriminatees realized the statements in the sick day posters regarding risk to the public were false or entertained serious doubts about the truth therein . . . ” (ALJD 13, lines 34-43.) Authorities specifically relied on for the application of this standard are *TNT Logistics N. Am.*, 347 NLRB 568 (2006), rev’d sub nom. *Jolliff v. NLRB* 513 F.3d 600 (6th Cir.), adopted on remand, 353 NLRB 449 (2008); *Bose Corp. v. Consumers Union*, 466 US 485, 511, n. 30 (1984); ALJD 13, lines 38-39) and *MasTec Advanced Technologies, a division of MasTec., Inc.*, 357 NLRB No. 17 (2011) ALJD 10, lines 34-35.)

The ALJ found “. . . no basis on which to conclude that the absence of sick leave was not a real concern of the Union and the discriminatees when they posted the sick day flyers.” (ALJD 11, Lines 22-24.) This misses the point. MikLin has never asserted that mitigating the loss of wages and the alleged “burden” of finding an employee’s own replacement as a consequence of not having paid sick days was not of real concern to the IWW and its employees. Rather, their concerted activity lost the protection of the Act because of the willful, bad-faith linking of this concern to the malicious assertion that customers are at risk of contracting foodborne illness because of MikLin’s attendance policy.

The testimony of the four IWW officials who were part of the March 10, 2011 ultimatum meeting,⁸ makes it clear that the focus of the discussion was not “protecting the public,” but paid sick days and allegations that employees were being fired or disciplined for “being sick.” There are no references in that testimony that any of them *ever* mentioned “protecting the public” as a reason for wanting sick days. In his five pages of direct testimony about the meeting, only Erik Forman even mentioned customers. His two-line comment had nothing to do with “protecting” them. It was merely a veiled allusion to how the message on the posters would harm MikLin’s business:

And we also said that it’s bad for customers too, you know. People can get sick. People *don’t like seeing sick workers making their food.*

(Tr. 116, lines 18-20 [Emphasis added.]

The issue was, however, referenced in great detail in the scurrilous press release of March 10 (GC-38), alluded to only briefly in the letter of March 10 (GC-43), and then expounded with full fury in the press release of March 30 (GC-41), following the discharges. An excerpt, attributed to Erik Forman:

The unfettered greed of franchise owner Mike Mulligan and Jimmy John Liataud himself *jeopardizes the health⁹ of thousands of customers and workers* almost every day. We will speak out until they realize that no one wants to eat a sandwich *filled* with cold and flu *germs.*¹⁰

⁸ Michael Wilklow (Tr. 154, line 3- Tr. 156, line 8); Erik Forman (Tr. 112, line 5-Tr. 117, line 1); Davis Ritsema (Tr. 177, lines 5-14); Max Specktor (Tr. 195, line 20-Tr. 197, line 4).

⁹ It should be noted that the reference to “jeopardizing health” with is nearly a verbatim reprise of the unprotected statement made by the RFNA in *St. Luke’s-Episcopal Presbyterian Hospital*, 268 F.3d 575 581 (8th Cir. 2001) that her employer was “jeopardizing the health of mothers and babies.” As discussed above, the Eighth Circuit held that statement unprotected because it was “materially false and misleading.”

¹⁰ These statements are not merely “hyperbole” or “exaggeration; they are false. Forman had no rational basis for making such extremely malicious comments. Accordingly, they were made with “actual malice,” are not protected. In addition, they constitute post-discharge misconduct that, in any event, renders him unfit for further employment. This position is reinforced for Mr. Forman – and applies as well to the other five discharged employees – for engaging in the frightening post-discharge trepassory verbal assault on Rob Mulligan in his office on March 25, 2011 (Tr. 343, lines 23-25; 344, lines 1-14).

There is other evidence that those responsible for the disparaging remarks knew they were false because they, themselves, did not actually believe that MikLin's attendance policy created a public health risk. As part of the extortionate quid pro quo deal offered to Rob Mulligan on March 10, the Union was more than willing simply to *abandon* what Forman called in the March 30 release, "our duty" to "advise the public of health risks at the sandwich chain." (GC-41). This means the claims were not made in good faith and is evidence of "actual malice."

In *Jolliff*, the Court analyzed the facts using the "actual malice" test articulated by the U.S. Supreme Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), which was based on the definition articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964). However, neither of those cases focuses on the issue of whether disparaging comments by employees could lose the protection of the Act and constitute cause for discharge under Section 10(c). The latter case, best known for establishing the rule that in a civil lawsuit for libel against a news media outlet, a plaintiff who is a "public figure" has a higher standard of proof than an ordinary citizen, and must prove actual damages, unlike the "presumed damages" which may be awarded to an ordinary citizen who has been injured in his business or profession or brought into disrepute by the defamatory statements of a defendant.

More to the point, the *labor law* precedent set by the Supreme Court in *Linn* was *only* that state court actions for damages arising out of statements made by a union in connection with a labor dispute *are not pre-empted* by the National Labor Relations Act. It had nothing to do with analyzing whether disparaging statements could constitute "cause" for discharge as provided in Section 10(c). The entire discourse about "actual malice" in *Linn* was to make that point, and that point only:

We therefore limit the *availability of state remedies for libel* to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to *pre-emption*. Construing the Act to permit *recovery of damages in a state cause of action* only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against *abuse of libel actions* and unwarranted intrusion upon free discussion envisioned by the Act.

Linn v. United Plant Guard Workers, 383 U.S. 53, 64, 65 (1966) [Emphasis added]. Thus, the Board is not compelled by these decisions or by their application to reject the disloyalty analysis and adopt the “actual malice” test (as used by the Sixth Circuit in *Jolliff* or by the Board in *MasTec*) as the *only* analytical framework for determining whether the conduct of the MikLin employees lost the protection of the Act. The findings and conclusions on this point in the ALJ decision are error.

The claim in the press releases that employees are fired or disciplined for “calling in sick” is false. It is compelling that the record contains *no documentary evidence*, such as disciplinary action reports or discharge notices, issued to any employees “for being sick” or for “calling in sick.” Various witnesses testified as to their own experiences having chosen to come to work while ill, and they related hearsay anecdotes about others, which are entitled to no weight. In each instance, on cross-examination, they conceded that (except for the Cina and Rodewald cases referenced below, about which they were wrong) neither they, nor the employees they referenced, were ever disciplined or terminated for this reason or were required to stay until the end of their shifts despite being ill. Mr. Forman’s testimony in this regard as to former employee Kate Cina (Tr. 145-147), as well as Brittany Kopyy’s testimony about former

employee Alyssa Rodewald (Tr. 238) were credibly refuted by Rob Mulligan (Tr. 329, lines 24-25; 330, lines 1-25; 331, line 1).

Michael Wilklow, one of the employees who met with Rob Mulligan on March 10, 2012 testified that Mulligan told the group “no one should be disciplined for being sick.” (Tr. 155, lines 17-18). Davis Ritsema, also at that meeting, when asked about what Mr. Mulligan said, commented, “I do recall him saying something to the extent of, no one should be getting disciplined for calling in sick.” (Tr. 178, lines 6-7.) It is therefore crystal clear that, *before* distribution of the March 10 press release, and for *ten days before* the posters went up, the IWW people at the meeting heard, directly from Mr. Mulligan, that the statements they were about to make would be false. That the record contains no evidence of any kind (beyond unverifiable hearsay anecdotes) that employees are disciplined for being sick, together with Wilklow’s and Ritsema’s testimony, absolutely compels the conclusion that the four must be charged with having “subjectively entertained serious doubts about” the truth of the disparaging statements they were about to disseminate.

The ALJ found that while “it is not literally true that employees could not call in sick,” (ALJD 11, line 35), he concluded that the posters’ declaration, “shoot, we can’t even call in sick” “is not a sufficient departure from the truth render the posters unprotected.” (ALJD 11, line 26.). “The lack of paid sick leave provides a powerful economic incentive for employees to work when ill and to conceal illness that would exclude them from work if that is possible.” (ALJD 21-22). Yet in footnote 10, the ALJ opined, “On the other hand, it is also true that if employees have paid sick leave or personal days and use them up, they may also have an incentive to work when ill.” (ALJD 12, lines 41-44)¹¹. Accordingly, this observation would apply equally to

¹¹ It is outrageous to conclude that willfully coming to work in violation of food safety laws in any way is justified by employees’ desire to have improved economic benefits and avoid having to find their own replacements. For the

employees who exhaust their points allowance under the MikLin March 16 Attendance Policy. The logical – and absurd – extension of this analysis is that *any* attendance policy with *any* limit whatsoever on paid sick days, be it five days or five weeks, when exhausted, would serve as “a powerful incentive to work when ill,” and thus could be disingenuously trumpeted by employees or a union as a work rule stating that “employees are fired for calling in sick.” MikLin submits that these findings by the ALJ are an affirmation that the employees in question did *not* believe that what they said about calling in sick was true. The potential (and intended) consequences to MikLin’s business from claiming the policy created a public health risk takes the statement out of the realm of “hyperbole.”

The ALJ also defended the “hyperbolic” statement by concluding that “finding a replacement *may* present a significant burden to an employee who is sick enough to miss work . . . (ALJD 11, line 36; 12, line 1).¹²

Board to find protected disparaging statements asserting that the public is at risk of contracting foodborne illness *because* the “powerful economic incentive” “forces” them to be the *creators* of such risks would amount to incredibly inappropriate micromanagement of the workplace. In *Red Top, supra*, at 726, the Eighth Circuit notes that in *NLRB v. Ace Comb Co.*, 342 F.2d 841, 842 (8th Cir. 1965) it held:

It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatever, or for no reason, so long as the motivation is not violative of the Act.

¹² In *Torlowei v. Target* 401 F.3d 933, 935 (2005), a race discrimination case, the court noted:

Torlowei's complaint seeks to invoke the appellate powers of this court not to right a discriminatory wrong, but to review the fairness of Target's policies and the effectiveness of its computer system. Torlowei would have us decide this case on the basis of fairness, not evidence of racial discrimination. This, of course, we cannot do. We have oft repeated the maxim that "federal courts do not sit as a **super-personnel department** that reexamines an entity's business decisions." *Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) (quotation omitted) (alteration in original).

It is clear from the record that the IWW did create the bogus health scare in part simply because some employees were resistant to finding their own substitutes. As noted above in the discussion of Jimmy John's Rule No. 11(e.g., GC- 51) and the March 16 Attendance Policy (GC-8), the posters conveniently ignored the critical provisions about finding a substitute, which removes any potential for discipline.

Robert Mulligan testified in detail about the "several ways available to our team members to find a substitute." (Tr. 329, lines 5-18).¹³ The procedure as described by Mr. Mulligan is not onerous, forbidding or dysfunctional. None of the employees who testified about difficulties in locating substitutes convincingly explained why the procedures outlined by Mr. Mulligan were so burdensome for them. With so many of MikLin's 200-plus employees working flexible hours by choice, there was no explanation as to why the task of finding a substitute, articulated as one way in which MikLin employees are "forced to work sick," posed such a challenge. Mr. Forman even testified about a texting service he devised in October of 2010 to facilitate this task. The procedure for finding a substitute also is set forth in the March 16 Attendance Policy (GC-18).

The false statements were not the product of a reasonable belief that they were true and they were not made in good faith. Accordingly, they were made with "actual malice," as is apparent from the cross-examination testimony of Michael Wilklow and Davis Ritsema.

¹³ He described the "I Need a Sub" sheet, the list of shifts for which employees are seeking coverage, with the time and date of the shift, and the space where people can indicate their willingness to cover the shift. The "typical" scenario, Mr. Mulligan testified, is that employees call the store in the morning to let store management know they are ill and they need their shifts covered. Managers "typically" provide employees with the phone numbers of those not working at that store, as well as the numbers of other stores they can call to determine whether there are employees at other locations who are available to substitute. He also testified that "generally the managers at the location will call their areas manager or other stores to try to find somebody to cover" the needed shift (TR. 329).

When questioned about an article he had written for the Summer 2011 edition of a publication called “Profane Existence,” Wilklow testified that having “revolutionary ambitions,” he and his friends “had set [their] subversive sights on Jimmy John’s for reasons that included his resentment of performing tasks he considered to be “demeaning corporate bullshit,” such as “wiping down clean tables” and “emptying empty trash cans.” In referring to the Mulligans, he wrote that he “loathed the bastards.” (Tr. 160, lines 14-25; 161, lines 1-25; 162, line 1.) This candid testimony makes it convincingly clear that, like the employees in *Firehouse Rest.*, 220 N.L.R.B. 818(1975) *supra*, whose conduct was held unprotected, Wilklow harbored extremely disloyal and insubordinate feelings toward the Mulligans at the time of the press release and poster campaign.

Davis Ritsema testified that he believed in the principles set forth in the Preamble to the IWW Constitution (R-5), in particular that “the working class and the employing class have nothing in common;” that “the wage system is corrupt and backward,” and that he agreed “strongly” that “it is the historic mission of the working class to do away with capitalism.” (Tr. 188, lines 1-11).

While MikLin in no way challenges the right of these former employees to their beliefs, under all the facts and circumstances and totality of the evidence, it is not a great leap to conclude that such attitudes are consistent with a desire to harm the company under the guise of protecting the health of the public.

This conclusion is further buttressed by the abilities and talents of the discharged employees. In addition to the evidence of actual malice discussed above, MikLin submits there is substantial evidence on the record as a whole that their statements exceed the bound of protected “hyperbole,” (*Jolliffe (TNT)*); “exaggeration” “good faith misstatements ” or “incomplete

statements” (*MasTec*); or “the airing of what may be highly sensitive issues” (*Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250 (2007), *enfd sub. nom. Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009)). The discharged MikLin employees who played a significant role in conceiving the “health risk” strategy, drafted, disseminated and/or endorsed the press releases, cannot be compared to the discriminatees in *Jolliff*. In determining that employees’ statements in that case were not made with actual malice, the Sixth Circuit found persuasive

“ . . . the fact that neither Young nor Jolliff are particularly articulate or eloquent speakers. While lawyers are trained to parse carefully arguments and pay close attention to the meaning of individual words, not everyone is so careful in crafting specific language and ordering ideas . . . it is not unreasonable to believe that Jolliff was careless, or at least inartful in his construction of the complaint and that Young was equally careless or inartful in his retelling of the complaint.

Jolliff at 616.

In sharp contrast here, Erik Forman is a graduate of Macalester College, where he majored in media studies in the department of Humanities and Media and Cultural Studies (Tr. 132). Michael Wilklow attended the University of Minnesota and is currently enrolled at Metropolitan State University [“Metro State”]. His major is English and Political Science (Tr. 159). Max Spektor attended the University of Minnesota (Tr. 201-202). Davis Ritsema’s testimony showed that he is a keen observer and student of the socio-economic world around him, and his design of the posters displays his considerable talents as an effective communicator.

The IWW’s Collective Bargaining Survey (GC-25) is further evidence that the alleged discriminatees’ pursuit of their food safety scare tactic was unreasonable, undertaken in bad faith and motivated by a desire to hurt MikLin’s business. David Boehnke testified on cross-examination that although he and others involved in developing and/or administering the survey

“talked to a couple of people who do statistics,” the project was their own design. (Tr. 226, lines 3-4). They talked to only 34 of MikLin’s 200-plus employees (GC-25; Tr. 226, lines 6-7; 14-15.) While sick days was one of the issues in which some of the 34 employees expressed interest, “protecting the health of the public” was not.

While well-educated and obviously intelligent, Messrs. Forman, Wilklow, Ritsema and Specktor all acknowledge that they are not epidemiologists, food scientists or food safety experts. (Tr. 132, lines 18-23; 159, lines 15-19; 202, line 207). Yet they maliciously disparaged MikLin’s products and its reputation with so little knowledge about foodborne illness as to make their assertions reckless. These men must be presumed to know how to reason from facts to conclusions. They knew exactly what they were saying. The evidence clearly and convincingly compels the conclusion that not only that they “entertained serious doubts” about the truth of their allegations, but that they actually knew they were false and misleading and maliciously intended to harm the Company with their disparaging messages, and not to protect the public from a serious health risk.

8. *If “actual malice” is the applicable standard, did the ALJ fail properly to apply it in determining that MikLin had not proved actual malice?*

The ALJ failed to apply properly to the facts of the instant matter the stringent test for “actual malice” he cited as precedent.

Finally, Board precedent recognizes that statements linked to a labor dispute which were uttered with actual malice may be unprotected. However, the burden of proving ‘actual malice’ requires the party asserting actual malice to demonstrate with clear and convincing evidence that the accused party realized that his or her statement was false or that he or she *subjectively entertained serious doubt as to the truth of the statement*, Bose Corp. v. Consumers Union, 466 US 485, 511, n. 30 (1984); Jolliff v. NLRB, 513 NLRB 600, 613 (2008). This would require Respondent to prove that a particular discriminatee realized the statements in the sick day posters regarding risk to the public were false or entertained serious doubts about the truth therein, in order to justify the termination of that individual employee. Respondent has not made this showing with regard to any of

the alleged discriminatees. It has at best demonstrated that *each one had insufficient knowledge to know whether or not the statements in the posters were true.*

(ALJD, 13 [Emphasis Added]).

This test as articulated by the ALJ, fails to include even a “reasonableness” qualification for “subjectively entertaining serious doubt.” Such a “test” is actually *license* for employees to say whatever they want. There are people who do not “subjectively entertain serious doubt” that President Obama was not born in the United States or that the issue of climate change is a hoax perpetrated by ambitious academics. Paranoid schizophrenics entertain no serious doubts that they hear voices and that there are people “out to get them.” Furthermore, the ALJ cites as authority for this standard *Bose Corp. v. Consumers Union*, 466 US 485, 511, n. 30 (1984). Neither *Bose*, nor *New York Times v. Sullivan*, the case that created the “reckless disregard” standard, involved labor law or relations issues of any kind.

Bose Corp. could not be further removed from the instant matter. *Bose* sued Consumers Union alleging that it was defamed by a media review of certain audio speakers it produced. The arcane dispute was whether the reviewer’s statement that instruments heard through the speakers tended to wander “along the wall,” rather than “about the room” as reported by the reviewer. The Supreme Court shared some concern with the Court of Appeals as to whether the principles of *New York Times* were even applicable to this case of commercial defamation. *Bose Corp.* at 514. Moreover, the *Bose Corp.* Court cited for its “clear and convincing/entertained serious doubts” standard *Gertz v. Welch*, 418 U.S. 323 (1974) and *St. Amant v. Thompson*, 390 U.S. 727. Both involved defamation actions against news media outlets. The *St. Amant* Court held:

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. *The finder of fact must determine whether the publication was indeed made in good faith.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product

of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are *so inherently improbable that only a reckless man would have put them in circulation*. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.

Ibid at 732 [Emphasis added.] In *New York Times*, the Court considered both the “reasonableness” and the “good faith” of defendants’ belief that their statements were accurate to be critical factors. 376 U.S. 254, 286 (1964).

The ALJ found that MikLin has “at best demonstrated that each one had *insufficient knowledge* to know whether or not the statements in the posters were true.” The decision cites no authority for the “insufficient knowledge” test— which obviously means more than “no knowledge” and at least “some knowledge”. The decision includes no explanation of the difference between what it means for intelligent, educated persons to act willfully, realizing they have “insufficient knowledge” of truth or falsity as opposed to “subjectively entertaining serious doubts” that their statements were “true.” The employees clearly intended their statement, “shoot, we can’t even call in sick” to be *incomplete*, omitting the reference to finding a substitute and conveying the message that MikLin employees who call in sick will be fired, thus putting the public at risk. MikLin submits that creative, clever, argumentative hair-splitting, which clearly was at the heart of this communication campaign, is the same thing as “subjectively entertaining serious doubts” as to a statement’s truth or falsity. Otherwise, the words would not have been so carefully chosen in an effort to see if the employees could construct something they could “get away with.”

In *Red Top, Inc.* 455 F.2d 721, 725-726 (8th Cir. 1972) the Eighth Circuit underscored that employees’ good faith is a critical element in determining whether disparaging statements lose the protection of the Act:

. . . the Board seems to be acting on the theory that the motivation of the employees is not determinative of the issue of whether they were engaged in a protected activity. This is not the case. It is difficult to even imagine that Congress intended the National Labor Relations Act to protect employee conspiracies against an unpopular manager. Thus the question of whether or not the three employees pressed their alleged grievances *in good faith* becomes vitally important.

[Emphasis added.]

There is a mountain of evidence and many erroneous ALJ findings compelling the conclusion that the declarations on the posters were made in bad faith, were unreasonable and, accordingly, were made with “actual malice.”

The ALJ observed:

One could argue that two cases¹⁴ of food-borne disease in 10 years when Respondent has made 6 million¹⁵ sandwiches renders any correlation between Respondent’s sick leave policy and food borne illness to be *so improbable* that the Union’s posters should be unprotected. Moreover, there has been *no direct correlation established* between these incidents and the absence of sick leave. Given Respondent’s record over a 10-year period one could regard the risk of becoming ill by eating at one of Respondent’s shops to be *infinitesimal*.

¹⁴ The ALJ found that “. . . *it is at least arguable* that Respondent’s sick leave policy subjects the public to an increased risk of foodborne disease, in part due to the two prior incidents described below.” (ALJD, 12, lines 23-24). The incidents referred to were two Minnesota Department of Health investigations that concluded a few customers likely had contracted a neurovirus *from infected employees* who apparently had reported for work in violation of the law. One incident occurred in January of 2006 (GC-14) and the other in 2007 (GC-15). The ALJD correctly finds that “The MDH investigator noted overall compliance with food code requirements and no critical violations.” (GC-15; ALJD 12, lines 35-36).

¹⁵ From Michael Mulligan cross examination testimony, Tr. 302, lines 4-23. See also Rob Mulligan testimony on direct examination:

Q It’s on the record now that MikLin Enterprises has been 18 operating Jimmy John’s sandwich shops for 11 years. By this time, how many sandwiches would you estimate that you’ve served over that period of time?

A Something on the order of more than 8 million.

Q And aside from the two instances of complaints of foodborne illness that we’ve heard about, are you aware of any others?

A I’m not aware of any others, nor any investigations.

(Tr. 331, lines 18-25.)

(ALJD 13, lines 1-8 [Emphasis added].)

Yet the decision continues:

However, it is also *arguable* that Respondent's policies make it *somewhat more likely* that such an incident could reoccur.

This record is *silent* as to whether the absence of sick leave leaves the public and/or Respondent's employees more vulnerable to *other* maladies, which are *not* transmitted through food, such as the common cold. However, it is clear that Respondent's employees work in very close proximity to each other while making sandwiches.

Employees can make sandwiches with a cold, cough or running nose and are *more likely* to do so without paid sick leave. They are also *more likely* to do so if they must obtain a replacement or be faced with discipline.

ALJD, 13, lines 14-19.)

MikLin respectfully submits that "arguable" means "I have serious doubts, but I can construct an argument for the validity of this position." That is actual malice. Accordingly, such findings and conclusion regarding premises that are "arguable," or of courses of action employees are "may be" "somewhat more likely" to embark upon, or reflecting on data that does not support the conclusion proffered, or that would suggest a risk is "infinitesimal" do not constitute substantial evidence on the record as a whole that the employees in question acted reasonably and in good faith, and thus without "actual malice," in making the assertions in the March 10 letter and the posters. Rather, they are simply speculation.

9. Does the post-discharge misconduct of the discharged employees bar them from reinstatement and limit any backpay which otherwise may be ordered?

On March 25, 2011, the six discharged employees burst into Robert Mulligan's office to confront him about their discharges. Their conduct was abusive and intimidating. As they left the office, they continued loud chanting in the customer area. MikLin submits this conduct (together with Erik Forman's outrageous accusation the March 30 press release (GC-41)) has

rendered them unfit for further service, should bar them from any order of reinstatement and toll any backpay award. See footnote 10. *See, Human Servs. Projects*, 2011 NLRB Lexis 311, aff'd and adopted, 358 NLRB No. 2 (2012); *Firehouse Rest.*, *supra*.

C. CONCLUSION

For the foregoing reasons, Respondent MikLin Enterprises, Inc. respectfully requests the Board to dismiss all allegations of the Complaint regarding the discharges and warnings arising out of the IWW's sick day poster campaign.

II. CASE No. 18-CA-19707 (FACEBOOK POSTINGS)

A. STATEMENT OF THE CASE

Sometime during the unsuccessful IWW organization campaign¹⁶, a MikLin delivery driver who was opposed to the Union created a Facebook page where like-minded employees could exchange their views, opinions and beliefs (Tr. 11, lines 24-25). As time went on, especially following the March 22 and 23 discharges of the six employees for their involvement in the disparaging poster campaign, Facebook group members made increasingly intemperate remarks about the Union and some of its leaders.¹⁷ While originally designed as a forum for statutory employees, some management persons, including Assistant Store Managers René Nichols and Melissa Erickson, as well as Robert Mulligan heard about the page and asked to become members. They testified that they thought it was a "private page" to serve as

¹⁶ The campaign began on or about September 2, 2010 (Tr. 91, line 23) and ended with the October 22, 2010 election, which the IWW lost 87-85. (Tr. 105, lines 24-25.)

¹⁷ The ALJ dismissed all allegations arising out of the Facebook page, "with one exception" (ALJD 14, lines 30-31. The exception was identified René Nichols' postings encouraging employees and managers to text Boehnke "without any specification of what they should communicated to" him. The ALJ found that these posts "encouraged other employees and managers "to harass Boehnke for activities that were protected, as well as some that were arguably unprotected." The ALJ also *commented* that "Rob Mulligan's posts on Facebook condoned such harassment," but he did not make a specific finding that this activity constituted a violation of the Act. Given that the ALJ decision speaks in terms of "one exception," and then references Nichols comments, MikLin assumes that the ALJ did not find Mulligan's actions unlawful.

a place where like-minded people to share their views about the Union and its activities. (Tr. 80, lines 6-7; 84, lines 11-19).

IWW activist David Boehnke had made himself immensely personally unpopular with his coworkers at the Skyway store,¹⁸ to the point that he became the victim of a disgusting prank by a co-worker. This employee placed feces in Boehnke's jacket pocket, and MikLin fired the employee for such unacceptable conduct. (Tr. 288, lines 22-25; 289, lines 1-2). Nichols' posts indicated approval of these comments, and the ALJ found that she encouraged other Facebook page members to call Boehnke "without any specification of what they should communicate to [him] . . ." The ALJ found this conduct encouraged others "to harass" Boehnke" constituted a violation of 8(a)(1). (ALJD 14, lines 32-33.)

B. QUESTIONS PRESENTED; ARGUMENT

1. Did René Nichols'¹⁹ postings on a Facebook page regarding David Boehnke contain a threat of reprisal that caused her comments to lose the protection of Section 8(c) of the Act?

In holding that a management representative's comments about a union leader did not violate the Act, the Board said in *Success Village Apartments*, 347 NLRB 1065 (2006):

It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, '[words] of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).'" *Trailmobile Trailers, LLC*, 343 NLRB No. 17, slip op. at 1 (2004), quoting from *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Such statements by an employer constitute protected free speech under Section 8(c) of the Act unless conveyed in a *coercive context*.

¹⁸ At all material times, Nichols was the Assistant Manager of the Skyway store.

¹⁹ The ALJ dismissed the complaint allegations regarding the Facebook postings "with one exception" – René Nichols' posts about Boehnke. Yet the final sentence of that paragraph, page 14, line 35, comments, "Rob Milligan's posts on Facebook condoned such harassment." Thus, it is uncertain whether Mulligan's posts were found to be a violation. In the event that is the case, MikLin makes the same arguments regarding Mulligan's posts.

[Emphasis added.] In *Sears, Roebuck & Co., Ibid*, the Board unequivocally stated, “[I]t is well established that in order for a party to make a threat in violation of Section 8(a)(1) the action threatened *must be within its power to carry out.*” [Emphasis added.]

The ALJ found that Nichols encouraged others to harass Boehnke “for activities that were protected, as well as some that were arguably unprotected”²⁰ by texting him, but “without any specification of what they should communicate. . . .” (ALJD 14, lines 33-35). The only “action plan” conveyed by Nichols²¹ was that “Everyone should text David and tell him how they feel . . .”²² While it may be within the power of managers to carry out a threat, in this case there is nothing to “carry out.” There is no doubt that some of the things said about Boehnke on the Facebook page were outrageous and even disgusting. But Nichols was not the author of any of these. One of her two postings in question was simply responsive to those of others who bore personal animosity toward Boehnke, and the other was her own expression of negative sentiment.

²⁰ The record contains no evidence directly linking Nichols’ posting with any protected activity of Boehnke.

²¹ Compare, *Beverly California Corp.*, 227 F.3d 817 (7th Cir. 2000) (Instigation of a decertification petition or active employee promotion or establishment of a true management-dominated labor organization, a/k/a anti-union “employee councils”); *Wagner Iron Works*, 220 F.2d 126 (1955) (Employee-agents carried out unlawful assistance to a favored union); *Farris Fashions, Inc.*, 312 NLRB No. 89 (1993) (Comments constituted very direct and serious threats, such as to “close the plant” for the purpose of influencing the outcome of an election); , 2004 GCM LEXIS 90 (2004) re *Sebring Associates* (Employer agent (not an employee) drafted, circulated, and solicited signatures on an anti-union petition); *Shen Automotive Dealership Group*, 321 NLRB 586 (1996) (Employee-agent, at the explicit instructions of management, drafted, circulated and solicited signatures on an informal petition advising management that employees no longer wanted union representation, which led to employer’s withdrawal of recognition); *Beverly California Corp.*, 326 NLRB 232 (1998) (Employer “plants” at captive audience meetings); (*Farris Fashions, Inc., supra*); Employee-agent, designated by management to be a “speech maker” and “planted” to deliver unlawful comments in informal employee gatherings Employer had knowledge that single-company union would engage in unlawful conduct (excluding rival union supporters from the premises), and *did nothing* to prevent it (*Detroit Gasket & Mfg. Co.*, 78 NLRB 670 (1948)).

²² She also posted a declarative statement, “Fuck you David Forever” (Tr. 74, lines 16-22; GC-2, at 30).

In *Children's Center for Behavioral Development*, 347 NLRB No. 3 (2006), the Board noted that *Trailmobile Trailers*, 343 NLRB 95 (2004) held "flip and intemperate" remarks intended to make fun of some union representatives did not violate the Act.

As the Board said in *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708-709 (1992), enfd. mem. 991 F.2d 786 (1st Cir. 1993), "Section 8(c) "does not require fairness or accuracy, and does not seek to censor nastiness."

Among the most important factors in determining whether management disparagement of a union proponent reasonably could interfere with the exercise of employees' Section 7 rights is the context in which the statement was made, "the totality of circumstances." *The Kroger Co.*, 339 NLRB No. 88 (2003). In the instant matter, the "context" and "circumstances" consisted merely of sharing crude comments about a disgusting photo over the Internet via what Nichols thought was a private Facebook page. It did not take place during an active organizing campaign, the run-up to an election, a grievance meeting or a testy collective bargaining session.

In summary, the theoretical route of interference with Section 7 rights, commencing with Nichols' expression in cyberspace of her "views, arguments, and opinions," and terminating in a "threat of reprisal" delivered to David Boehnke, is too tortured to take.

C. CONCLUSION

For the foregoing reasons, Respondent MikLin Enterprises, Inc. requests the Board to dismiss the one remaining allegation regarding the Facebook postings.

III. Case No. 18-CA-19760 (Removal of Union Literature; Interrogation)

A. STATEMENT OF THE CASE

The ALJ concluded that the posting of the sick day and FAQ posters on store bulletin boards and in public areas constituted protected activity. Accordingly, he found that Rob

Mulligan's encouragement of others to remove the sick day posters from the public areas was unlawful. (ALJD 14, lines 9-11).

B. QUESTIONS PRESENTED; ARGUMENT

1. Did Robert Mulligan's encouragement of others to take down the sick day posters violate Section 8(a)(1) of the Act?

MikLin submits that if the Board reverses the ALJ and finds the sick day posters unprotected, as discussed at length above in connection with Case No. 18-CA-19706, Mulligan committed no violation.

2. Did the removal of the IWW's "FAQ" posting by Area Manager Jason Effertz violate Section 8(a)(1) of the Act?

On January 10, 2012 the Regional Director of Region 18 approved a Settlement Agreement (GC-59) and Stipulation to Set Aside Election (GC-46) that resolved four outstanding unfair labor practice charges. The ULPs alleged, collectively, more than 40 separate allegations of violation. The investigation determined that approximately half were without merit. The IWW filed several objections to the election. Pursuant to the settlement, further processing of the objections was terminated.

Immediately following the settlement, MikLin posted in its stores a summary of the substance of the resolution (GC-17). Shortly thereafter, the Union responded to the MikLin summary with its own posting, referred to as the "FAQ" (Tr. 254, line 8.); (GC-61). Many of the FAQ statements were false, and Michael Mulligan ordered them removed (Tr. 277, line 25; 278, lines 109.)

The false statements made by the IWW in the FAQ are: (a) "Mike and Rob **broke** the law;" (b) the Board "**threw out**" the election; (c) the Mulligans "are accepting to be **punished for the laws they broke**, based on the **government's ruling** that they **broke the law**;" (d) the

Mulligans’ “**illegal** actions . . . were **intentional and illegal** practices . . . (e) “The Labor Board only **investigated 22 charges**, less than half of what were filed. 21 of these charges were found to have merit. They **didn’t investigate** the other charges because these 21 were significant enough to set aside the election.” In addition, the FAQ asserted that “for Mike and Rob to say that over half of our **charges** were thrown out is . . . quite misleading and **dishonest.**” (GC-61).

The facts are: (a) the Settlement Agreement included a *non-admission of liability* provision and a recitation that its approval by the Regional Director was *not a determination of violation*; (b) the parties *stipulated* to set aside the election; (c) and (d) there was no “government *ruling*” that MikLin had violated the Act; (e) Region 18 investigated *each* of the more than *40 allegations* set forth in the *four* unfair labor practice *charges*, and determined that approximately 21 had merit; it was the investigation of the pending *objections to election* that was suspended pursuant to the settlement.²³

One can reasonably infer from Michael Mulligan’s reaction that MikLin believed that the false statements and the allegation of dishonesty would seriously disrupt store discipline and compliance with everyday work instructions, thus impairing production and customer service.

The ALJ found that MikLin’s assertion that the information in the FAQ posting misleading was insufficient grounds to declare it unprotected (ALJD 14, lines 16-18.)

However, regarding the allegations in the FAQ charging that he and his son had “broken the law,” Michael Mulligan also testified, “That’s a *falsehood.*” (Tr. 296, line 16.) As MikLin argued in its brief to the ALJ, many statements in the FAQ posting were in fact *false* and the

²³ Despite the long and confusing colloquy that ensued during Michael Mulligan’s cross-examination it is clearly discernible that *he* understood the difference between “charges” and “allegations” within charges (Tr. 291, line 8 through 296, line 16. As parties and signatories to the Settlement Agreement, the IWW officials who drafted the FAQ must be charged with the same knowledge.

Union officials responsible for drafting them knew they were false. They purport to be reports of the provisions of the Settlement Agreement and Stipulation to Set Aside Election. Union officials participated in negotiations for these documents, agreed to them and signed them. Accordingly, IWW officials and agents must be charged with knowledge of what they actually say. At the very least, before posting the FAQ, there is *no way* they could not have had “subjectively entertained serious doubts” about the truly or falsity of the statements. Thus, having been made with “actual malice,” the FAQ’s false characterizations of the settlement terms for the purpose of undermining store discipline and sufficient respect for management authority to productively operate the stores caused it to lose the protection of the Act.

As discussed at length above in the section regarding the posters, discharges and warnings, statements by employees that disparage their employer may lose their protection under the Act (a) if they are so disloyal as to lose the protection of the Act; or (b) if, when related to terms and conditions of employment, are false, and uttered with knowledge of the falsity or in reckless disregard of whether they are true or false.

With respect this charge, however, no employee was disciplined for posting the false statements; the FAQ was merely removed. However, the statements in this situation were directed to employees, for the obvious purpose of undermining management’s authority and ability to run the business.

The Supreme Court has held that any employer has the right to remove *union literature* upon a showing that doing so was necessary to maintain plant discipline or productivity.

In *Republic Aviation [Corp. v. NLRB]*, 324 U.S. 793 (1945) and *NLRB v. Babcock & Wilcox Co.* 351 U.S. 105 (1956), the Court upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, *absent a showing by the employer that a ban is necessary to maintain plant discipline or production....* [I]f the material distributed on the

premises of the employer were inflammatory to the point of threatening disorder or other interruption of the normal functioning of the business, the exception noted in *Republic Aviation* with respect to interference with discipline or production would be fully applicable.

Eastex, Inc. v. NLRB, 437 U.S. 556, 570-573 (1978) [Emphasis added.]

As stated by the Second Circuit, “[t]hese provisions [of Section 7] have been construed to protect an employee's right to distribute union literature in non-working areas of the employer's property during non-working times, *absent a showing by the employer that a ban is necessary to maintain plant discipline or production.* [citing *Eastex*].” *United States v. International Bhd. of Teamsters*, 968 F.2d 1472, 1477 (2d Cir. 1991) (emphasis supplied).

Accordingly, MikLin’s removal of the FAQ did not violate the Act.

C. CONCLUSION

For the foregoing reasons, Respondent MikLin Enterprises, Inc. respectfully requests the Board to dismiss the allegations of the Complaint regarding the removal of the FAQ posting.

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