

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MIKLIN ENTERPRISES, INC. d/b/a  
JIMMY JOHN'S

and

INDUSTRIAL WORKERS OF THE WORLD

Cases 18-CA-19707  
18 CA-19727  
18-CA-19760

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**ANSWERING BRIEF OF ACTING GENERAL COUNSEL  
TO RESPONDENT'S EXCEPTIONS**

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## **ANSWERING BRIEF OF ACTING GENERAL COUNSEL TO RESPONDENT'S EXCEPTIONS**

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, the Acting General Counsel respectfully submits this brief in response to Respondent's exceptions to the April 20, 2012 Decision of Administrative Law Judge Arthur J. Amchan sustaining certain allegations of the complaint in this matter. Specifically, Judge Amchan sustained the complaint allegation that Respondent illegally discharged six employees and disciplined an additional three employees because of the employees' protected concerted activities. Respondent has excepted to this finding. In addition, Judge Amchan sustained certain complaint allegations related to Facebook postings involving admitted agents and supervisors of Respondent, although at one point the decision inadvertently concludes that the postings violate Section 8(a)(3) of the Act (contrary to other parts of the decision where Judge Amchan makes clear that Respondent violated only Section 8(a)(1) of the Act by the postings). Respondent has also excepted to the 8(a)(1) findings of Judge Amchan.<sup>1</sup>

The first section of this brief is a summary of the analytical flaws in Respondent's exceptions and brief in support of exceptions, including in summary fashion some of the principles of the National Labor Relations Act that Respondent appears to misunderstand. These analytical flaws are explained in more detail in the remaining sections of this brief. The second section of this brief is an analysis of the allegations of

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<sup>1</sup> The Acting General Counsel has also submitted, by a separate filing, cross-exceptions and a brief in support of cross-exceptions to Judge Amchan's decision.

the complaint related to the discharge of six employees and discipline of three employees sustained by Judge Amchan. Included in the second section are explanations in support of Judge Amchan's conclusions that the posters in question relate to an ongoing labor dispute, that the content of the posters is neither false nor made with reckless disregard to truth or falsity, that the content of the posters is not otherwise unprotected, that employees involved in the concerted activity neither demanded pre-recognition bargaining nor violated Section 302(b) of the LMRA, and that employees did not attempt to enmesh other Jimmy John's franchisees in their dispute with Respondent. Finally, the brief ends with supporting arguments for Judge Amchan's conclusions that some of Respondent's conduct related to tearing down the posters and Facebook postings violates Section 8(a)(1) of the Act, although at one point in the decision is an apparent inadvertent error suggesting this conduct also violates Section 8(a)(3) of the Act.

## **I. ANALYTICAL FLAWS IN RESPONDENT'S ANALYSIS AND BASIC PRINCIPLES OF THE NATIONAL LABOR RELATIONS ACT**

Respondent's exceptions and brief in support of exceptions fundamentally misapprehends the Act and its policies and, as a result, are analytically flawed. In this regard, the Acting General Counsel respectfully suggests:

A. Contrary to repeated statements in Respondent's brief, the Act does not prohibit employee actions designed to harm one's employer economically. On the contrary, the Act contemplates that employees, unions and employers will take actions harmful to the economic interests of other parties for the purpose of

pressuring one's opponent to capitulate to demands related to terms and conditions of employment;

B. Employees can, however, engage in conduct that is unprotected. In determining whether the conduct is unprotected, it is irrelevant that the employees' motive is to inflict economic harm on an employer who will not accede to employee demands for improvement in working conditions. Nearly every argument Respondent makes is infected with its erroneous belief that because employees threatened to inflict economic harm on Respondent, ipso facto, the employees' conduct is unprotected or malicious, or made with reckless disregard to the truth or falsity of employee claims. However, intending to adversely impact Respondent's business operations is not evidence of a malicious motive;

C. In this case in order to determine whether the employees have a malicious motive or have engaged in unprotected conduct, under Board law the relevant inquiry is whether any of the employees' claims in their posters are maliciously false; i.e., made with knowledge of their falsity or with reckless disregard for their truth or falsity. Because this case arises in the Eighth Circuit, it is also relevant to consider whether the claims in the posters are materially false;

D. The only employee claim in dispute in this case is whether the statement, "shoot, we can't even call in sick," is made with employee knowledge of its falsity or with reckless disregard for the truth or falsity of the statement;

E. Thus, the only issue is whether the undisputed facts that employees do not have paid sick time and that they can be disciplined and ultimately terminated if they call in sick without finding a replacement to work for them, support the statement,

“shoot, we can’t even call in sick.” Thus, is it maliciously false or in reckless disregard of the truth, or even materially false, for employees to reach the conclusion and publicly claim that they cannot call in sick in view of these two undisputed facts;

F. There is no other “disloyalty” test in this case. Either the statement, “shoot we can’t even call in sick” is maliciously false, made in reckless disregard to its truth or falsity, or (in the case of the Eighth Circuit) materially false, or it isn’t. If it is, then the employees have been disloyal to Respondent and were lawfully terminated and disciplined; if it isn’t, then Respondent illegally terminated and disciplined the employees.

G. Minority groups of employees (so long as more than one employee is involved) have the Section 7 right to present grievances to employers, and to press employers to improve terms and conditions of employment. These groups need not establish that they represent the wishes of a majority of employees or that any concerted actions they take in support of their demands represent the will of a majority of employees. Minority groups of employees will not as a matter of law be found to be labor organizations within the meaning of the Act, and therefore cannot be accused (just because of their existence) of demanding recognition or violating Section 302(b) of the LMRA.

## **II. JUDGE AMCHAN CORRECTLY CONCLUDED THAT RESPONDENT ILLEGALLY DISCHARGED SIX EMPLOYEES AND DISCIPLINED THREE EMPLOYEES BECAUSE THE EMPLOYEES ENGAGED IN UNION AND PROTECTED CONCERTED ACTIVITY**

Respondent owns and operates 10 Jimmy John's sandwich shops in the Minneapolis-St. Paul area as a franchisee (ALJD 2:23-24). In the fall of 2010, certain employees of Respondent attempted to organize on behalf of the International Workers of the World, which resulted in a Board-conducted election. The IWW lost by two votes; however, the election was set aside due to IWW objections. (ALJD 2:26-30).

While not fully explained by Judge Amchan, unrebutted record evidence establishes that after the election held in the fall of 2010 was set aside, employees of Respondent who were active in the Union effort decided to begin efforts to improve employee working conditions, but not in the context of a renewed organizing campaign. One of the first issues employees decided to tackle was employee sick leave (Tr. 104-106). Therefore, as fully described in the decision by Judge Amchan, employees began putting up on bulletin boards in the public areas of Respondent's stores posters seeking customer or the public's support for their efforts to get paid sick time. These efforts and the poster are fully described by Judge Amchan (ALJD 3:44 - 4:21). As further noted by Judge Amchan, when those efforts failed to change Respondent's sick leave policy, and when Respondent failed to respond favorably after some employees met with one of the owners (see ALJD 4:22 - 5:13), employees increased the visibility of their campaign for paid sick leave by putting up posters in an expanded area—including at various public areas within two blocks of various of Respondent's stores (ALJD 5:15-24).

There is no question, as found by Judge Amchan, that six employees were terminated, and an additional three employees were disciplined, because the employees were involved in presenting the sick leave issue to Respondent or were involved in putting up the posters (ALJD 5:29 - 6:27).

The employees' primary complaints about Respondent's sick leave policy were that Respondent does not provide paid sick leave and that if employees called in sick but failed to find other employees to replace them, they could be disciplined. Judge Amchan's decision accurately and fully describes Respondent's sick leave policy (ALJD 3:1-42). While Respondent tries to deny that employees cannot call in sick unless they find replacements to work for them, Judge Amchan correctly rejects this denial and concludes that Respondent's sick leave policy, both before and after March 16, 2011 (when Respondent changed the policy), clearly states that employees may be disciplined for failing to find replacements if they are unable to work due to illness. The policy—both before and after March 16—could not be clearer in this regard. Therefore, in effect, according to both the Acting General Counsel's argument and the conclusions of Judge Amchan, employees are forced to work when they are sick and cannot find replacements to work for them because working is the only way to avoid discipline.

Respondent's principal contention is that the employees who engaged in putting up the posters or in overtly supporting the effort to obtain sick leave engaged in conduct unprotected by the Act. However, Judge Amchan engages in a careful and correct analysis of Respondent's contention, and ultimately correctly rejects the contention (ALJD 9:14 - 14:2). In this regard, Judge Amchan makes the following key findings, all supported by the record and Board law.

A. *The Posters Are Part of and Related to an Ongoing Labor Dispute*  
(ALJD 11:14-24)

It is difficult to understand Respondent's claim that the posters are not part of an ongoing labor dispute. Somehow Respondent believes that because employees were trying to force Respondent to provide paid sick leave, this fact undermines the legitimacy of employee efforts. Much of Respondent's brief in support of its exceptions takes great umbrage at the uncontested fact that employees did indeed attempt to pressure Respondent to capitulate to the employees' demand for paid sick leave (see, for example, pages 11 and 12 of Respondent's brief). However, that is the very model of labor relations this country adopted when it enacted the National Labor Relations Act. Both sides to a labor dispute have the right to cause harm to the economic well-being of the other side in order to force the other side to accede to its demands. This right extends to employees even when they are not represented by a union.

This matter is very similar to *National Labor Relations Board v. Greyhound Lines, Inc.*, 660 F.2d 354 (1981), where the Eighth Circuit enforced a Board order finding that employees were unlawfully disciplined because of a press release they issued. The Eighth Circuit panel noted that, even though there was no grievance filed (in the case a union represented the employees), one of the employees had met unsuccessfully with the employer regarding scheduling issues prior to the issuance of the press release. The Court concluded that the broad definition of labor dispute included *any controversy* concerning terms and conditions of employment. 660 F.2d at 356.

In any event, Respondent's own conduct belies its claim that this was not a genuine labor dispute. As described by Judge Amchan (ALJD 3:1-42), on March 16, 2011 (six days after some employees confronted one of the owners with employee

demands for paid sick leave), Respondent revised its sick leave policy. The change did not result in a promise to not issue discipline to employees who call in sick without finding a replacement (and thus did not resolve the issue in favor of employees), but it did result in a more explicit explanation of how employees would be assessed and/or disciplined when they call in sick, do not work, and fail to find a replacement employee.

*B. The Content of the Posters Reflects Neither That the Claims Made Are False Nor That They Are in Reckless Disregard to the Claims' Truth or Falsity (ALJD 11:26 - 12:16)*

Judge Amchan correctly rejected Respondent's claim that the employees put up the posters with knowledge of their falsity or with reckless disregard for the truth or falsity of the content. It is at this point that Judge Amchan's detailed description of Respondent's attendance policy as it pertains to illness (ALJD 3:1-42) becomes important. As noted by Judge Amchan, it is in fact true, as claimed in the poster, that employees do not receive paid sick time. On the other hand, it is not literally true that employees cannot call in sick (ALJD 11:35-36). However, as stated by Judge Amchan, 100 percent literal accuracy is not required for employee activity to be protected (ALJD 12:4-8). Judge Amchan instead analyzes the employee claims from their perspective, and correctly concludes that the employees risk being disciplined if they call in sick without finding a replacement (ALJD 11:36 - 12:2). Thus, from the perspective of employees, they can't call in sick. If they do call in sick (and do not find a replacement employee), they are subject to discipline, and ultimately termination.

It is Respondent's burden to demonstrate that the employees' conduct is "so disloyal, reckless or maliciously untrue to lose the Act's protection." (ALJD 9:41 - 10:2, quoting *Emarco, Inc.*, 284 NLRB 832, 833 (1987)). Moreover, the fact that employee

activity potentially adversely impacts an employer's reputation, and/or revenue, is not sufficient to render the activity unprotected (ALJD 10:38-39); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-1253 (2007) (nurse's criticism regarding staffing levels and workloads protected in context of labor dispute). Rather, there must be evidence of a "malicious motive" or that the statements are "maliciously false." ALJD 10, quoting from *Valley Hospital Medical Center*, 351 NLRB 1250 (2007).

Judge Amchan correctly concluded that the employee claims regarding their inability to call in sick are neither "maliciously false" nor with reckless disregard to the truth or falsity of the claims, and his conclusion is supported by Board law. The statement, "shoot, we can't even call in sick" is not even demonstrably false, much less made with knowledge of falsity or reckless disregard for the truth, in view of the fact that employees are required to find replacements if they are too ill to work or they will face disciplinary action that can ultimately lead to dismissal. This claim is almost a verbatim reiteration of the language used by Respondent in its own Employee Rule #11 (GC 51, 53, 54, 56, 57, 63). Moreover, as in *Valley Hospital Medical Center*, the claim that employees could not call in sick is based on their personal experiences involving being ill while scheduled to work for Respondent (Tr. 126-127, 148-150, 174-175, 193-195, 209-211, 231, 237, 259-262, 265-270). These experiences, described in detail by several employees, are by themselves sufficient to conclude that employees' claims that they work when they are sick are not "maliciously false." *Id.* at 1253 (explaining that nurse's statements were not maliciously false because statements were based on her own experiences and the experiences of coworkers); *Mastec Advanced Technologies, a Div. of Mastec*, 357 NLRB No. 17 (2011) (even if employee statements

may have been inaccurate, the inaccuracies are insufficient to remove the statements from the protection of the Act). See also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining standard of “actual malice” as a statement communicated with knowledge it was false or with reckless disregard of its falsity).

In its brief in support of its exceptions, Respondent makes much of the fact that there is no evidence of employees being disciplined because they call in sick without finding replacement employees, or of being disciplined for leaving work when they are sick. On the other hand, Respondent ignores the substantial testimony provided by a variety of employees that they have come to work sick; have handled food served to customers while sick; and have done so with the knowledge and condonation of supervisors, and even the owners of Respondent.<sup>2</sup>

*C. Employee Claims That Respondent’s Sick Leave Policy Jeopardizes the Health of the Public Does Not Render Employee Conduct Unprotected (ALJD 12:18 - 14:2)*

It is fair to say that Respondent’s brief in support of exceptions devotes a great deal of pages to its point that the employees’ actions in putting up the posters was so disloyal as to lose protection of the Act, regardless of the truth or falsity of the claims. In essence, Respondent argues that the focus of the Board’s analysis should be on the

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<sup>2</sup> On page 42 of its brief, Respondent also cites what can fairly be described as the “political” views of some of the employees as evidence of their intention to harm Respondent. These views, which are not expressed in the posters at issue and which represent the employees’ personal philosophies (and not the philosophies of the employees as a group), are irrelevant to the issues in this case. In addition, Respondent cites Board cases where striking employees were denied reinstatement because they disparaged their employers’ products. However, the Board did not utilize the more recent test whether the claims were “maliciously false” or made with reckless disregard as to their truth or falsity in any of the strike misconduct cases cited by Respondent.

employees' desire to harm Respondent—not on whether the statements made by employees are maliciously false or made with a reckless disregard to their truth or falsity. Thus, for example, Respondent's brief claims that "egregious disloyalty" is a separate category of unprotected activity (page 12); and that "disparagement of food products is qualitatively different from statements in other context that have been held protected" (page 14). Of course, the first problem with this argument is as noted above: The Act itself contemplates that both sides in a labor dispute can and will at times attempt to inflict economic harm on the other side in order to get their way on legitimate bargaining issues.

A more basic flaw with Respondent's analysis is that it conflates the disloyalty standard in *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), with the test used to determine whether employees lost protection of the Act *when engaged in a labor dispute*. For example, on page 9 of its brief, Respondent claims (with no case support) that "'disloyal statements' made with 'malicious motive' even if related to a labor dispute, can be unprotected without being subjected to the 'actual malice' analysis." While this statement does not even make sense, it is clear that Respondent is trying to convince the Board that disloyal statements (even if true) can be unprotected under the Act. However, *Jefferson Standard* contains a key factual distinction from the instant case—and that distinction is that the employees who made the disloyal statement in *Jefferson Standard* did not reveal that they were involved in a labor dispute with their employer. Thus, contrary to Respondent's claim on page 18 of its brief, the Ninth Circuit has not held that there is a category of cases where protection is lost because employee conduct is so disloyal, independent of the "actual malice" test. On

the contrary, the Ninth Circuit states in the same decision cited by Respondent, that the *Jefferson Standard* disloyalty test is not to be read to equate criticism with disloyal product disparagement. Instead, appeals to third parties lose their protection only when remarks are “too attenuated or if they are unrelated to any grievance which the workers may have.” *Sierra Publishing Company d/b/a The Sacramento Union*, 889 F.2d 210, 216 (9<sup>th</sup> Cir. 1989).

To accept Respondent’s position would be to accept the notion that, even if employees make demonstrably true claims during a labor dispute, those employees can be discharged because the statements are disloyal. Since no Board or federal court has ever articulated such a standard (and to do so would make a mockery of Section 7 of the Act), the Board has repeatedly applied a standard of whether claims made by employees during a labor dispute are maliciously untrue; i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity—precisely the test used by Judge Amchan.

Respondent also argues that *St. Luke’s Episcopal-Presbyterian Hospitals, Inc. v NLRB*, 26 F.3d 575, 580-581 (8<sup>th</sup> Cir. 2001), supports its claim that the employees’ conduct was disloyal. In this case the Eighth Circuit rejected the Board’s analysis of when employee conduct is unprotected, and therefore is not consistent with extant Board law. More importantly, however, even the Eighth Circuit did not take the position that there is a point where activity is unprotected regardless of what employees claim. Rather, the Eighth Circuit stated it would examine whether the employees’ claims are “materially false.” Yet Respondent does not go on in its brief to explain how the employees’ posters are materially false. Rather, Respondent returns to the argument

that the real desire of employees was to harm Respondent to force it to capitulate to giving employees paid sick leave (page 11 of Respondent's brief). At no time has the Eighth Circuit concluded that all an employer has to show is that employees intend to try to harm the employer in order for conduct to be "materially false" and therefore unprotected.

Moreover, the Acting General Counsel respectfully suggests that the employees' claims in their posters are not even "materially false." First, the fact is employees do not have paid sick leave. Second, as argued in more detail above, employees cannot call in sick unless they find a replacement employee, without the risk of being disciplined. Thus, this case is more like the Eighth Circuit's decision in *National Labor Relations Board v. Greyhound Lines, Inc.*, supra. In the *Greyhound* case the Eighth Circuit enforced a Board order and concluded that employees did not lose the protection of the Act when the employees wrote and distributed a press release advising the public to expect delays over a holiday weekend because employees intended to drive the speed limit, and contending that the only way employees could comply with the company's schedule was to violate the law and speed. While the company claimed that its rule book required drivers to obey posted speed limits, nevertheless the Eighth Circuit upheld the Board's conclusion that statements were not unprotected disparagement and were not maliciously motivated, even though it turned out one of the claims (regarding the dismissal of drivers in Salt Lake City) proved to be untrue.

Judge Amchan also correctly rejected Respondent's argument that the posters put up by the employees are unprotected because the posters claim that the lack of

sick days might cause the public to become ill. As noted by Judge Amchan, “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 . . .” (ALJD 12:21-22).

Respondent does not (and in reality cannot) refute the obviously logical outcome that its sick leave policy results in employees working when they are sick (and, in any event, the record contains a great deal of employee testimony that employees have worked sick – see page 9 above). Rather, Respondent’s focus is on the rather general point that its record of serving the public over a 10-year period is “spotless” (GC 58, Tr. 240). In essence, Respondent argues that even if employees work sick, there is no danger to the public, and that its record for the last 10 years supports this broad statement. While the Acting General Counsel maintains that Respondent’s position defies common sense, the reality is that the Acting General Counsel presented evidence that Respondent’s record is not as spotless as claimed. Judge Amchan succinctly summarizes two instances where Respondent was investigated by the Minnesota Department of Health where the Department concluded that ill employees working for Respondent likely contaminated food leading to an outbreak of illness among customers (ALJD 12:26-42). Of course, no one can know how many other customers became ill due to sick employees working for Respondent because they could not find replacement employees and did not want to be disciplined, where those customers either had no idea what caused their illness, or, even if they suspected it was Respondent’s product, they chose not to officially report the matter.

It is not Acting General Counsel’s claim that evidence of two citations by the Minnesota Department of Health is necessary to support the validity of claims in the

poster. Rather, it is Acting General Counsel's position that employees who prepare food for the consumption of the public and who choose to work when sick, necessarily—as a matter of logic and common sense—endanger the health of the public. While the two citations by the Minnesota Department of Health certainly add objective evidence supporting what common sense would lead anyone (other than Respondent) to conclude, the citations also refute Respondent's claim that its record of serving the public is flawless.

In any event, both the Board and Ninth Circuit Court of Appeals have rejected Respondent's position that employees' concerted activity loses protection merely because of the suggestion that the public's health may be adversely affected. Both the Board and Court held that suggestions that a company's treatment of its employees may have an effect upon the quality of the company's product are not unreasonable, particularly where the public is also made aware of the fact that a labor dispute is in progress. *Sierra Publishing Company d/b/a the Sacramento Union*, 889 F.2d 210, 220 (9<sup>th</sup> Cir. 1989), enforcing 291 NLRB 540 (1988).

Thus, it is Acting General Counsel's position that the record in this case fully supports Judge Amchan's conclusion that Respondent discharged six employees and disciplined three employees because of the employees' concerted efforts to improve their working conditions by pressuring Respondent to grant employees paid sick leave.

*D. Claims by Respondent That Employees Unlawfully Demanded Pre-Recognition Bargaining with a Minority Union and/or Violated Section 302(b) of the LMRA (ALJD 15:9-27)*

Respondent complains in its brief in support of exceptions that Judge Amchan gives these claims rather short shrift. However, Respondent's claims are indeed

specious. In essence, both arguments rest on the unsubstantiated premises that the employees seeking paid sick leave during the spring of 2011 were acting as a union and that minority groups of employees are precluded under the Act from pursuing demands for improved working conditions. Neither premise is accurate. For example, Respondent acknowledges in its brief that there is no evidence the employees ever requested recognition of the IWW in the spring of 2011 (page 25). Rather, Respondent rests its positions on the facts that the employees involved in the sick pay matter were key supporters of the IWW, and used IWW stationery. As succinctly stated by Judge Amchan, “. . . any group of employees, with or without a Union, may concertedly petition their employer for an improvement in terms and conditions of their employment . . .” Moreover, employees “do not lose this right by supporting a Union which loses a representation election.” (ALJD 15:23-27). Respondent in essence challenges the right of unrepresented employees to engage in Section 7 activity, by claiming that this “kind of destructive conduct” (by which Respondent apparently means any Section 7 activity an employer does not like) is what “the Act sought to channel into the real collective bargaining process” (page 24). Thus, what Respondent is really complaining about is the fact the Act allows employees—even minority groups of employees—to engage in activity to improve their working conditions.

While it is certainly true, as Respondent argues on page 24 of its brief, that Respondent had no obligation to bargain over sick days with employees and would only have the obligation with a certified union, it does not follow (and in fact is inimical to the Act) that employees do not have the right to press their demands even though there is no obligation by an employer to respond.

*E. Employees Did Not Lose Protection of the Act Because They Enmeshed Other Jimmy John's Stores*

With little or no analysis, in 18 lines of its brief in support of exceptions, Respondent contends that the employees lost protection of the Act because they enmeshed other Jimmy John's stores in the dispute. Respondent provides no record evidence that anyone was in fact confused by the posters or thought that the employees' dispute was with the entire Jimmy John's chain of stores. In fact, the only testimony on this subject is by owner Robert Mulligan, who stated that he was bombarded by calls and text messages from people expressing their outrage with Respondent's conduct (see Respondent's brief page 18). Respondent also does not cite any record evidence regarding how geographically close a Jimmy John's store not owned by the Mulligans is to those owned by Respondent. The record reflects that employees put up their posters no more than two blocks from the Jimmy John's stores owned by the Mulligans, and asked supporters of their quest for sick leave to call the Mulligans—even giving the cell phone number of Robert Mulligan. Thus, there is *no evidence* that employees either deliberately or inadvertently involved Jimmy John's stores owned by other franchisees.<sup>3</sup>

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<sup>3</sup> Finally, Respondent argues, with little explanation or analysis of Board law, that the six discharged employees engaged in post-discharge misconduct. However, Respondent fails to identify what about the employees' post-discharge conduct (confronting Robert Mulligan about their discharges, chanting as they left the facility, or repeating claims about the need for sick pay in an email sent to the media) renders the employees "unfit for further service." See *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011).

### **III. JUDGE AMCHAN CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT**

In view of his conclusion that putting up the posters dealing with sick pay constituted protected activity, Judge Amchan also concluded that Respondent's supervisors and agents illegally encouraged employees to remove the posters, and illegally removed the posters, from Respondent's bulletin boards in violation of Section 8(a)(1) of the Act (ALJD 14:4-18). Respondent does not deny that its agents/supervisors engaged in this conduct; the sole question is whether the posters are protected, and Judge Amchan correctly concludes that they are protected.

Judge Amchan also correctly concluded that Assistant Manager Rene Nichols' Facebook posts violate Section 8(a)(1) of the Act (ALJD 14:31-35). Again, there is no dispute as to the facts because the Facebook posts are in evidence. Judge Amchan describes the content of the posts in his decision at page 8, lines 16-20. Respondent's only argument in its brief in support of exceptions is that significant vituperative speech is allowed under the Act, including disparagement of a union or its officials (page 50). Respondent leaps to the conclusion (with no case support) that if an employer can disparage a union or official of the union, therefore Respondent can disparage its employees who engage in protected concerted activity.

Acting General Counsel asks the Board to only amend Judge Amchan's Conclusions of Law that inadvertently suggest that the above conduct violates Section 8(a)(3) of the Act (ALJD 15:31-32).

Dated at Minneapolis, Minnesota, this 1<sup>st</sup> day of June, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Answering Brief of Acting General Counsel to Respondent's Exceptions was electronically filed on the NLRB's website, and emailed to the parties listed below on June 1, 2012:

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