

**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 REPLY BRIEF  
TO ANSWERING BRIEF OF ACTING GENERAL COUNSEL**

Dated: June 18, 2012

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**I. INTRODUCTION**

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent MikLin Enterprises, Inc. files this Reply Brief to the Answering Brief of the Acting General Counsel filed in response to Respondent's exceptions to the April 20, 2012 decision of Administrative Law Judge Arthur Amchan.

Having fully briefed all issues in this case in its Post-Hearing Brief to the ALJ and its Brief in Support of Exceptions to the Board, this Reply Brief will address only a few issues raised in the Acting General Counsel's Answering Brief. In all other respects, MikLin relies on the arguments and authorities contained in its earlier briefs.

**I. THE ACTING GENERAL COUNSEL'S ASSERTIONS REGARDING "ANALYTICAL FLAWS" IN MIKLIN'S POSITION AND ITS "FUNDAMENTAL MISAPPREHENSION" OF THE ACT.**

The Acting General Counsel's approach is to reject as invalid arguments Respondent has not made. Respondent has never made the absurd argument that "the Act prohibits employee actions designed to harm one's employer economically." That consequence is, after all, the fundamental objective of a strike. The argument MikLin *has* made is expressed in the quotation from *Valley Hospital Medical Center*, 351 NLRB 1250 (2007), which Judge Amchan stated sets forth "the relevant legal framework for analyzing this case" (ALJ Decision, 9, lines 19-20):

Statements have been found to be unprotected as disloyal where they are made "at a critical time in the initiation of the company's" business and *where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."* *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472, 74 S. Ct. 172, 98 L. Ed. 195 (1953); accord *Endicott Interconnect Technologies, Inc. v. NLRB*, 372 U.S. App. D.C. 60, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005).

*Ibid*, at 1252 [Emphasis added.]

Similarly, MikLin’s argument invokes the principles articulated by the Eighth Circuit in *Red Top, Inc.*, 455 F.2d 721 (8<sup>th</sup> Cir. 1972). In that case, an employee committee whose members wanted an unpopular supervisor removed, threatened to take their complaints to the administrator of the Employer’s hospital customer. The Court found this strategy not to be a good faith effort to enlist public support for their underlying grievances:

It is a natural inference that if the hospital is involved in these disputes it could become dissatisfied with the company. Unlawful interference with the employer's commercial interests has been recognized as presenting grounds for discharge . . . [Citation to *Jefferson Standard* omitted.] In the context in which this threat was presented to Lassiter it did not constitute a bid for public sympathy or support, such as peaceful picketing, but was *clearly designed to hit the employer where it would hurt, by interfering with its business relations with its customers.*

*Ibid* at 727 [Emphasis added].

Thus, not only does the Acting General Counsel mischaracterize MikLin’s position, to the extent the statement at page 3 of the Answering Brief applies to economic harm caused by conduct designed to interfere with business relations with customers, it is simply wrong: “It is irrelevant that the employee’s motive is to inflict economic harm on an employer who will not accede to employee demands for improvement in working conditions.”

In the next several paragraphs, the Acting General Counsel essentially argues that the Board’s sole consideration in determining whether the statements in this case were protected is whether they were uttered with knowledge that they were false or in reckless disregard of their truth or falsity. (In the interest of economy of time and space, MikLin hereafter will refer to this standard by its shorthand term, “actual malice.”) In a similar vein, the Acting General Counsel takes issue with MikLin’s argument in its Brief in Support of Exceptions that disparaging statements may be “so disloyal” as to lose protection under the Act, without regard

to whether they are said with “actual malice.”<sup>1</sup> Variations of this criticism appear on pages 11-15 of the Acting General Counsel’s Answering Brief.

In urging the Board to uphold its Exceptions 1, 2, 6, 9-14, and 17-19, MikLin will rely on previously articulated arguments and citations to authority in its Brief in Support of Exceptions and its Post-Hearing Brief to the ALJ. However, these most recent arguments by the Acting General Counsel regarding conduct that can lose its protection by reason of flagrant disloyalty are best refuted by reviewing certain portions of the recent Board decision upon which the Acting General Counsel so heavily relies, *MasTec Advanced Technologies, a division of MasTec, Inc.*, 357 NLRB No. 17 (2011).

In that case, the Board recited the ways employee conduct can lose the protection of Act:

In cases decided since *Jefferson Standard*, "the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so ***disloyal, reckless or*** maliciously untrue as to lose the Act's protection." [footnote citation omitted.]

The Acting General Counsel apparently has failed to note that the categories of such unprotected conduct are expressed in the disjunctive: “disloyal,” OR “reckless,” OR “maliciously untrue.” If these terms do not express different concepts, they would be unnecessary to the discussion. “Reckless or maliciously untrue” would be enough.

The Board continued,

We ***also*** find that none of the technicians' statements constituted ***unprotected disloyalty or*** reckless disparagement of the Respondents' services. Statements ***have been found unprotected*** where they constitute ***"a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."*** [n. 13: *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472, 74 S. Ct. 172, 98 L. Ed. 195 (1953), quoted with approval in *Valley*

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<sup>1</sup> Contrary to the Acting General Counsel’s assertion on page 11 of the Answering Brief, MikLin does support its argument with extensive citation to case law. See pp. 10-18, Respondent’s Brief in Support of Exceptions

*Hospital Medical Center*, 351 NLRB at 1252.<sup>2</sup>] The Board has stated that it will *not* find a public statement *unprotected unless* it is "***flagrantly disloyal, wholly incommensurate with any grievances which they might have.***" [note 14, citing *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008), quoting *Veeder-Root Co.*, 237 NLRB 1175, 1177(1978).]

[Emphasis added.] By these comments the Board makes clear that both it and the Courts have found unprotected statements that were not false because they constituted "flagrant disloyalty."

Footnote 13 to the *MasTec* majority opinion includes particularly compelling comments on this point:

While Member Hayes agrees with Chairman Liebman that it is unnecessary to reconsider this precedent in the circumstances of this case, he would in any event not join Member Becker in ***abandoning*** consideration of whether ***nondefamatory*** disparagement or disloyal remarks related to an ongoing labor dispute warrant forfeiture of the Act's protection.

This observation relates to comments by both Member Becker and Chairman Liebman in their individual concurring opinions. Member Becker says:

I concur with the result reached by my colleagues. I write separately because I believe the Supreme Court's decisions in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 74 S. Ct. 172, 98 L. Ed. 195 (1953), *Linn v. Plant Guards*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), and *NLRB v. Washington Aluminum Co.*, 370 U. S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962), require us to apply *Jefferson Standard* ***in a less expansive manner*** consistent with the facts of that case.

*MasTec*, *Id.* at 11. [Emphasis added.] He continues, at page 12:

My colleagues go on to analyze whether the technicians' statements here are "***so disloyal*** . . . as to lose the Act's protection." Not only is ***that standard*** so vague as to chill the exercise of Section 7 rights, it is in tension with the central purpose of *Section 7*, which is to grant employees a right to engage in concerted activity for mutual aid and protection *even when* the exercise of that right might otherwise be considered disloyalty.

[Bold added; italics in original.]

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<sup>2</sup> Judge Amchan stated in his decision that *Valley Hospital* "sets forth the relevant legal framework for analyzing this case."

Underscoring MikLin's point, which is simply dismissed by the Acting General Counsel as a "misapprehension of the law," Chairman Liebman, at page 14 of the decision makes it clear *current law continues* to contemplate that "disloyal" statements that do not meet the "actual malice" test as solely relied upon by Judge Amchan in this matter can render them unprotected:

I join fully in the Board's opinion. In his concurrence, Member Becker argues-- and he may well be correct--that the Board's case law since *Jefferson Standard* has *too expansively* applied that decision. But no party here has asked us to revisit *this long established jurisprudence*, and *even* under the Board's precedent as it has evolved, the employee statements at issue in this case did not lose the protection of the Act. As he acknowledges, the outcome in this case would be the same under Member Becker's view of the law. Our decision today does nothing to further broaden the Board's reading of *Jefferson Standard*, *nor does it foreclose a future reexamination of our doctrine, in an appropriate case.*

Finally, on this point, MikLin's position is supported by the Acting General Counsel's Memorandum GC-11-11 mandating submission to the Division of Advice "*Cases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent.*" Paragraph 6 of Section B includes in this category:

Cases involving the issue of whether or not employees' conduct was so "disloyal" as to lose the protection of the Act. See TNT Logistics of North America, Inc., Cases 8-CA-33664 et al., General Counsel's Position Statement to the Board on Remand, dated July 24, 2008.

(GC-11-11, 3). The "adverse circuit court law" which requires the "development of a litigation strategy" presumably includes the Eighth Circuit's decisions in *St. Luke's-Episcopal Presbyterian Hospital*, 268 F.3d 575 581 (8<sup>th</sup> Cir. 2001) and *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8<sup>th</sup> cir. 1972).

Accordingly, MikLin maintains that Judge Amchan erred in failing even to consider whether, under all the facts and circumstances, the statements he found not to have been uttered with "actual malice" (or "nondefamatory" defamatory as expressed in *MasTec* footnote 13).

**III. THE IWW'S COERCIVE SCHEME TO REFRAIN FROM DISPARAGING MIKLIN'S PRODUCTS AND REPUTATION AS THE QUID PRO QUO FOR MIKLIN'S AGREEMENT TO PROVIDE PAID SICK DAYS AS AN ECONOMIC BENEFIT WAS AN EFFORT TO FORCE MIKLIN TO ENGAGE IN UNLAWFUL PRE-RECOGNITION BARGAINING WITH A MINORITY UNION, THUS AMOUNTING TO AN "IMPROPER, ABUSIVE AND UNNECESSARY MEANS" FOR SOLICITING THE SUPPORT OF THE PUBLIC.**

The Acting General Counsel's Answering Brief curiously states – categorically – that “[m]inority groups of employees will not as a matter of law be found to be labor organizations within the meaning of the Act and there cannot be accused (just because of their existence) of demanding recognition . . .” (GC Answ. Brief at 4). While MikLin surmises that this sentence is meant to convey that minority unions cannot as a matter of law be the exclusive representative of all employees in a bargaining unit, Section 2(5) of the Act defines “labor organization” as

. . . *any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.*

[Emphasis added.]

In determining whether a “group of employees” constitutes a “labor organization,” the Board and the Courts have held that groups far more informal than the IWW in this case meet this statutory definition without ever having negotiated a formal collective bargaining agreement. Even organizations without written constitutions, by-laws, dues or initiation fees are labor organizations within the meaning of the NLRA if they are organized, or exist, even in small part, for the purpose of dealing with employers concerning grievances or disputes, or conditions of work. *See, Sahara Datsun v. NLRB*, 811 F.2d 1317, 1320 (1987) and cases cited therein.

Both elements are present here. The “employee” status of the individuals who conceived, designed and executed the poster/press release campaign over sick days is not an issue. Neither is whether the “Jimmy John’s Workers Union/IWW” was formed and existed on March 10, 2012

for the purpose of “dealing with” MikLin concerning “conditions of work or other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.” *Danite Holdings, Inc.*, 356 NLRB No. 124 (2011).<sup>3</sup>

The Board and the Courts have held that even committees established *by management* for the purpose of interacting regarding employee proposals regarding terms and conditions of employment, where the employer “intended to consider employee sentiment” can constitute an unlawful management-dominated “labor organizations” in violation of Section 8(a)(1) and (2) (because it interferes with employees’ free choice of their representatives. In *Polaroid Corporation*, 329 N.L.R.B. 424, (1999), the Board found that where the exchange of proposals and counterproposals between an employee committee and management exchanged created a “bilateral mechanism” that constituted a “pattern of dealing” with each other over terms and conditions of employment, thus making it a “labor organization” dominated by management in violation of Section 8(a)(2). The Board explained why this arrangement was unlawful:

Section 8(a)(2) of the Act is designed to ensure that employer-dominated groups do not rob employees of their right to select a representative of their own choosing. *Electromation, Inc.*, 309 NLRB 990, 993-994 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). [\*\*3] "Congress' goal [in enacting Section 8(a)(2)] was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion[.]" *Id.*, 309 NLRB at 994 *fn.* 18. Section 8(a)(2) thus implicates the fundamental concepts that are integral to national labor policy: the right to engage in--or refrain from engaging in--self-organization and other concerted activities, and the right of employee free choice in selecting bargaining representatives. *Novotel New York*, 321 NLRB 624, 640 (1996). . . .We are ever mindful, when called upon to distinguish between a lawful employee participation process and an unlawfully dominated labor organization, of the Board's fundamental statutory responsibility to "insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973).

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<sup>3</sup> The Administrative Law Judge who found the *Danite Sign Co.* committee to be a “labor organization” was Arthur Amchan, the judge in this case. See ALJD at 2010 NLRB LEXIS 218, August 9, 2010.

Yet in *Danite Holdings, Inc., Id.*, neither Judge Amchan nor the Board required an established pattern of bargaining between the Employer and the committee known as the “Moving Forward Team” (MFT), even though as a “labor organization” the MFT met only three times, and the record did not establish actual back-and-forth dealings between it and the Employer.

There is substantial evidence on the record that the IWW, by and through its representatives who master-minded the disparaging poster campaign, proposed a “bilateral mechanism” whereby it would metamorphose into a *de facto* bargaining representative of MikLin’s employees without obtaining Board certification. Judge Amchan opined that such a “pattern of dealing” was exactly what the representatives of the IWW had in mind in this case.<sup>4</sup>

Accordingly, its coercive proposal to refrain from disparaging MikLin and its products to force Respondent into this unlawful arrangement constituted an “improper, abusive or unnecessary means” for enlisting the support of the public in its demand for sick days. Accordingly, MikLin urges the Board to find that this conduct lost its protection under the Act because it was flagrantly disloyal.

#### **IV. CONCLUSION**

With respect to other matters raised in the Acting General Counsel’s Answering Brief, MikLin relies on the arguments set forth in its Brief in Support of Exceptions and Post Hearing Brief to the ALJ, in respectfully urging the Board to uphold its exceptions and does not waive any arguments on any issues not specifically addressed herein.

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<sup>4</sup> “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.” (ALJ Decision 11, lines 21-22).

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