

**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 CHARGING PARTY**

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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 Charging Party, filed in response to Respondent's exceptions to the April 20, 2012 decision of Administrative Law Judge Arthur Amchan.

MikLin previously has fully argued and briefed all issues raised in Charging Party's Answering Brief. Accordingly, this brief will address only certain points raised, and otherwise relies on its previous submissions. In doing so, MikLin does not waive the right to challenge in subsequent proceedings any issue it previously has raised but does not specifically address herein.

**II. THE STATE OF THE LAW REGARDING STATEMENTS THAT ARE "SO DISLOYAL, RECKLESS OR MALICIOUSLY UNTRUE" AS TO LOSE THEIR PROTECTION UNDER THE ACT.**

This Section will address points I.A.1, I.A.3, I.A.4 and I.A. 8. as raised in Charging Party's Answering Brief. While Charging Party asserts that "Respondent mischaracterizes or misunderstands the Board's rule," MikLin submits that Charging Party characterizes the state of the law as it wishes it were, not as it is.

In its exceptions 1, 2, 6, 9-14 and 7-19, MikLin argues that Judge Amchan's determination that the employees' statements were protected activity is not supported by substantial evidence on the record as a whole in that he failed adequately to consider factors in addition to whether the statements were made with knowledge of their falsity or in reckless disregard of their truth or falsity. Charging Party first argues that in *MasTec Advanced*

*Technologies, a division of MasTec, Inc.*, 357 NLRB No. 17 (2011), the Board sets forth, as its “rule,” that disparaging comments made in relation to a labor dispute are unprotected *only* if they are made with knowledge of the statement’s falsity or reckless disregard for its falsity.<sup>1</sup> While Charging Party acknowledges that in *St. Luke’s-Episcopal Presbyterian Hospital*, 268 F.3d 575 (8<sup>th</sup> Cir. 2001) the Eighth Circuit held that statements may be unprotected if they are “materially false,” it fails to note, however, that the *St. Luke’s* Court also found an employee statement unprotected because it was “materially misleading.” *Ibid* at 580.<sup>2</sup>

Charging Party’s statement of this “rule,” however, is refuted by portions of the opinions in the very case upon which it grounds its argument. In *MasTec*, the Board recited the *various* ways employee conduct can lose the protection of the 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.]

*MasTec, Ibid* at 7 [Emphasis added.]

Charging Party 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

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<sup>1</sup> In the interest of economy of space and time, MikLin hereafter will refer to this standard as “actual malice.”

<sup>2</sup> At page nine of its Answering Brief, Charging party notes that in *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9<sup>th</sup> Cir. 1989) the Ninth Circuit specifically rejected the Eighth Circuit’s view in *Red Top*” as contrary to the weight of authority.” However, only the Eighth Circuit, or the U.S. Supreme Court, can overrule its own precedents.

*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 Hospital Medical Center*, 351 NLRB at 1252.] 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).]

*Id.* at 8. [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.

A consideration cannot be "abandoned" unless it is part of current law. This observation by the majority 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.]

Thus, if the only standard for loss of protection is “actual malice,” as preferred by Charging Party and Member Becker, no reference to “disloyal” conduct in this context would be necessary. Underscoring MikLin’s point, 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” standard, 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.*

*MasTec, Id.* at 14. A party cannot request the Board to “revisit” whether some “long established jurisprudence” has been “too expansively applied” unless it has existed for some time, continues to exist, and has in fact been applied in actual cases. A doctrine that does not exist is not susceptible either to “reexamination” in a case not yet identified as “appropriate.” Accordingly, MikLin maintains that Judge Amchan erred in failing even to *consider* whether, under all the facts and circumstances,<sup>3</sup> the statements he found not to have been uttered with “actual malice”

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<sup>3</sup> On page 10 of its Answering Brief, Charging Party states, “Respondent cites *Five Star Transportation v. NLRB*, but that case also contains no discussion of whether employees’ public communications are protected only when “narrowly tailored.” MikLin calls the Board’s attention to the following findings of the *Five Star* Court:

In response to this reasonably perceived threat, the drivers' letter-writing campaign was *narrowly tailored* to effectuate the drivers' aims: the drivers' letters were addressed *solely* to the District, *not the public at*

(or “nondefamatory,” as expressed in *MasTec* footnote 13) nevertheless may have been unprotected.<sup>4</sup>

**III. THE IWW REPRESENTATIVES’ COERCIVE, EXTORTIONATE DEMAND WAS AN EFFORT TO COMPEL MIKLIN TO ENGAGE IN UNLAWFUL PRE-RECOGNITION BARGAINING, AND CONSTITUTED AN IMPROPER AND ABUSIVE MEANS OF ACCOMPLISHING THEIR GOALS, CAUSING THE POSTER CAMPAIGN TO LOSE ITS PROTECTION UNDER THE ACT.**

MikLin submits that contrary to Judge Amachan’s findings, this is not a case of a “group of employees” who “previously supported a union” simply exercising their right to “concertedly petition their employer for an improvement in terms and conditions of their employment” (ALJ Decision 15, lines 26-27).

As MikLin previously and exhaustively has argued, the poster/press release campaign was an *IWW* scheme to arrogate itself to the status of bargaining representative for MikLin’s

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*large*; the letters only requested that the award of the contract be reconsidered or rebid to preserve the drivers' then-current pay and work conditions; and the discriminatees' letters "concern[ed] primarily working conditions and . . . avoid[ed] needlessly tarnishing [Five Star's] image," *Mount Desert Island Hosp.*, 695 F.2d at 640.<sup>3</sup>

522 F.3d 46 at 53 [Emphasis added.]

<sup>4</sup> Charging Party argues in general that Board or Court decisions commenting favorably on key aspects of the conduct which clearly influenced the outcome “do not hold” that, *absent* such factors, the conduct would have been *unprotected*. While this fairly characterizes one aspect of those decisions, it is logically fallacious to say that they also compel a conclusion in favor of the *opposite* proposition – that the conduct *always* would have been protected *even absent these considerations*. If factors such as whether the employee communications were “narrowly tailored to effectuate the employees’ aims” or whether the “main thrust” of the message was to damage the employer’s relationships with customers were not important, the decisions would not discuss them so extensively. For example, in *Greyhound Lines*, 660 F.2d 354, 356 (8<sup>th</sup> Cir. 1981), while holding the employee’s press release was protected, the Court, unlike Judge Amchan in the instant matter, did so only *after* considering *all* the facts and circumstances in light of *all* applicable legal principles, rather than based solely on a simple, mechanical application of the “actual malice” test:

Among the unprotected categories of activities are those "characterized as 'indefensible' because they ... show a disloyalty to the workers' employer which ... (is) *unnecessary* to carry on the workers' legitimate concerted activities." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17, 82 S. Ct. 1099, 1104, 8 L. Ed. 2d 298 (1962). See *NLRB v. Local Union No. 1229 (IBEW)*, 346 U.S. 464, 477, 74 S. Ct. 172, 179, 98 L. Ed. 195 (1953).

employees when it had no authority to do so. The extortionate quid pro offer to refrain from harming MikLin's business in return for negotiating over sick days constituted a proposal for *bargaining*, not an exercise in supplication.

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, *e.g. 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>5</sup>

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<sup>5</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.

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).

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>6</sup>

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

#### **IV. THE DISCHARGED EMPLOYEES AS “UNION OFFICIALS.”**

In footnote 2 at page 8, Charging Party’s Answering Brief takes issue with MikLin’s characterization of the employees who master-minded in the poster campaign as “union officials.” MikLin submits that whether the employees in question are “officials,” “representatives or “agents” is inconsequential to the determination of whether the poster/press release campaign was rendered unprotected because it was carried out through “improper, abusive or unnecessary” means as discussed at length in Respondent’s Brief in Support of Exceptions and Post-Hearing Brief to the ALJ.

#### **V. SECTION 302, LABOR MANAGEMENT RELATIONS ACT**

Charging Party’s Answering Brief fails to address or acknowledge MikLin’s arguments on this point as set forth on pages 31-33 of its Brief in Support of Exceptions, including the discussion thereof of *Mulhall v. UNITE HERE LOCAL 355*, 667 F.3d 1211 (11<sup>th</sup> Cir. 2012).

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<sup>6</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).

On this issue, MikLin relies on the arguments and authorities discussed in its Brief in Support of Exceptions and incorporates them by reference herein.

**VI. 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.

Dated: June 18, 2012

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