

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE**

HAWAIIAN TELCOM, INC.

and

**Cases 20-CA-069432
20-CA-069433**

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 1357**

Meredith Burns, Atty., for the Acting
General Counsel.

Perry W. Confalone and Michael J. Scanlon, Attys.,
(Carlsmith Ball, LLP) for Respondent.

Scot Long, for IBEW Local 1357.

DECISION

STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge. This case, heard in Honolulu, Hawaii, on June 6, 2012, raises allegations that Hawaiian Telcom, Inc. (Company or Respondent) violated the National Labor Relations Act (the Act) by, inter alia, engaging in activity inherently destructive of employee Section 7 rights. The International Brotherhood of Electrical Workers, Local 1357 (Union or Charging Party), filed both of the captioned charges on November 22, 2011,¹ and amended both charges on February 28, 2012. The Acting Regional Director for Region 20 of the National Labor Relations Board (NLRB or Board) consolidated the cases and issued a consolidated complaint (complaint) and notice of hearing on February 29, 2012, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act.² Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged in the complaint and interposing 21 affirmative defenses.

¹ All further dates refer to the 2011 calendar year unless otherwise indicated.

² Under Sec. 8(a)(1) an employer may not “interfere with, restrain or coerce” employees who exercise rights guaranteed them in Sec. 7. That section gives employees the right to engage in union or other concerted activities for purposes of collective bargaining or other mutual aid and protection or the right to refuse to engage in those activities. Sec. 8(a)(3) bars employers from discriminating against employees in order to encourage or discourage union membership. Sec. 8(a)(5) requires an employer to bargain in good faith with the representative of its employees.

Having carefully considered the entire record together with the demeanor of the witnesses, and after considering the arguments provided in the briefs filed by the Acting General Counsel and the Respondent, I make the following

5

FINDINGS OF FACT

I. Jurisdiction and Labor Organization Status

10

15

The Company, a corporation with an office and place of business in Honolulu, Hawaii, furnishes telecommunications services to commercial and residential customers. During the 12-month period ending January 31, 2012, the Company derived gross revenues in excess of \$100,000 from the conduct of its business at Honolulu. During the period, the Company purchased and received at its Honolulu, Hawaii, facility goods valued in excess of \$5,000 directly from locations outside the State of Hawaii. The Company admits, and I find, that it is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company also admits, and I find, that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

20

A. Relevant facts

25

The Union was initially certified as the exclusive representative of an appropriate unit of employees on September 29, 1943. The evidence establishes that the unit has expanded over the years by agreement of the parties. The complaint alleges, but answer denies, that the current unit represented by the Union consists of the following:

30

All employees employed by Respondent in the State of Hawaii, excluding managerial, supervisory, administrative and professional employees, engineers, confidential employees, guards or security attendants, secretaries to officers and department heads, stenographers (Office Services), stenographers (Special Agent), Security Assistant, Clerks in the Human Resources Department, Communications Consultants, Coin Telephone Promotion Consultants and Telephone Planning Consultants.

35

I find the unit allegation set forth in the Acting General Counsel's complaint amounts to an accurate summary of the unit described in the parties' most recent collective-bargaining agreement. (GC Exh. 2, pp 1-2) For that reason, I find the unit alleged by the Acting General Counsel to be an appropriate unit and further find that the Union is the exclusive representative of the employees in that unit within the meaning of Section 9(a) of the Act.

40

By its terms, the parties' most recent collective-bargaining agreement (agreement) covering the unit was effective September 13, 2008 through September 12, 2011.³ Prior to the end of the agreement, the parties commenced negotiations for a new agreement. During these negotiations for a successor agreement, the parties agreed to extend the term of the 2008-2011 agreement five times. The fifth extension ran through October 24. (GC Exh. 3)

45

³ The agreement includes basic contract terms plus a series of exhibits and memoranda of agreements covering miscellaneous topics.

Under provisions of the agreement, the Company provided the unit employees with medical, dental and life insurance. The medical coverage included health, drug and vision benefits. Typically, a newly hired employee attends an in-house benefits orientation during the first week of employment. Following that, the employee may select and register for specific benefit plans online from any location by using the “PlanSource” enrollment software provided by one of the Company’s vendors. The PlanSource program codes the unit employees as “Union” when they register for their benefit plans.

The contractual provisions for the medical coverage are set forth in Article 28 of the agreement. In relevant part it provides:

28.1 The Company will make available a medical plan to employees covered by this Agreement. The selection of the carrier and the administration of the medical plan will rest with the Company provided the level and quality of the benefits remain the same. The benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union. The following classes of employees may voluntarily enroll under and become members of any of the medical plans provided.

1. Regular employee
2. Probationary employee
3. Temporary employee who has completed six months of continuous full-time service provided tenure of employment is extended by at least six (6) months at the time the employee completed six (6) months of service.

Article 28 provides that the Company will pay the entire plan premium for regular full-time employees and their dependents. Temporary employees selecting coverage pay half of the premium for their own coverage plus the full amount of premium for dependent coverage. The remainder of Article 28 addresses various options and special situations not pertinent here applicable to employees whose coverage is cancelled by the insurance provider, newly married employees, pensioners, dependents of deceased pensioners, and former employees. The final provision in Article 28 provides:

28.12 Effective January 1, 2003, coverage for employees and their dependents will end thirty (30) days after termination of employment. Coverage for dependents will end on the date they become ineligible for coverage. Employees and their legal dependents may have an opportunity to continue to participate in the Plan in accordance with the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Pursuant to these provisions, the Company makes two medical plans available for selection by its employees. One, provided by the Hawaii Medical Services Association, is a Blue Cross–Blue Shield plan. The other is a Kaiser Permanente plan.

Article 38 of the agreement sets forth the parties bargain with respect to dental insurance. It provides:

DENTAL PLAN

39.1 The Company will make available a Dental Plan to employees covered by this Agreement. The selection of the carrier and the administration of the Dental Insurance Plan will rest with the Company provided the level and quality of the benefit remains the

same. The benefits provided by this plan will not be discontinued or amended without the agreement of the Company and the Union.

5 39.2 For all regular full-time employees and their dependents, the Company will pay all of the premium equivalent for the Company Dental Plan.

10 39.3 Effective January 1, 2003, coverage for employees and their dependents will end thirty (30) days after termination of employment. Coverage for dependents will end on the date they become ineligible for coverage. Employees and their legal dependents may have an opportunity to continue to participate in the Company's dental plan in accordance with the Consolidated Omnibus Budget Reconciliation Act (COBRA).

15 The Company also makes two dental plans available for selection by the unit employees. One plan is provided by the Hawaii Dental Service and the other by MetLife. In anticipation of a potential work stoppage during the negotiations for a new agreement, the Company arranged through exchanges with MetLife agents in July and August 2011 to modify that dental plan's rider to provide, in effect, that an employee's dental benefits would end immediately if the employee's active work ceased due to a strike. (GC Exhs. 5 and 17) In other situations, the benefit continues for a period of 30 days following the end of the employee's employment. This changed rider became effective September 1.

20 Admittedly, the Company took this action to obtain a change in the dental plan rider without prior notice to the Union or any offer to bargain about the change to the rider. In doing so, the Company relied on a memorandum of agreement with the Union contained in the agreement that provides:

25 The [Dental] Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, 30 interpretation, administration, or benefits payable shall be determined by and at the sole discretion of the Company.

(GC Exh. 2, p. 75, para. 6)

35 Absent some unusual situation, once a unit employee elects coverage under the medical and dental benefit plans provided for in the agreement, that coverage continues for up to 30 days following the termination of the worker's employment. (Tr. 43)

40 Article 38 of the agreement sets forth the provision providing for a group life insurance benefit. It provides:

GROUP LIFE INSURANCE PLAN

45 38.1 The Company will make available a Life Insurance Plan to employees covered by this Agreement. The selection of the carrier and the administration of the Life Insurance Plan will rest with the Company provided the level and quality of the benefit remains the same. The benefits provided by the plan will not be discontinued or amended without the agreement of the Company and Union. Details of the plan will be described in a pamphlet which will be distributed to all employees.

38.2 Effective January 1, 2003, coverage will end thirty (30) days after termination of employment.

5 The Company pays the premium for a basic level of coverage. Employees may elect higher levels of coverage but must pay the premium charged for the added coverage.

The Company pays the premiums due for its employees' medical and dental benefits on the 15 of the month for the month involved. Hence, the premiums for coverage during the month of November 2011 would have been paid by the Company on November 15, 2011.

10 Following the expiration of the fifth extension of the agreement on October 25, the Union informally told the Company that it was considering a work stoppage. As early as October 30, Sheri Braunthal, the Company's senior benefits manager, notified the agents of the fringe benefit providers about the possibility of a strike. In an email to the providers' agents she said: "As of now we are planning for a walkout at any time which means we will be stopping benefits for our active Union employees (approx. 700 employees) immediately once a strike is called (benefits will continue for Union retirees)." She suggested that the provider agents "revisit the plans that we had previously discussed with you on canceling benefits and COBRA enrollment/billing" and informed them that the Company would prepare COBRA notices internally for distribution no later than the day following the date the strike begins. (GC Exh. 9, p. 2)

20 In a letter dated November 10, the Union notified the Company that it would "engage in strike, picketing and/or concerted activity" at 10:30 a.m. that day. The letter further advised that the striking employees would return to work on November 11 at 8 p.m. (GC Exh. 8) In fact, the work stoppage announced by this letter began and ended at the times set out in the Union's notice to the Company.

30 Braunthal emailed the providers' agents at 10:31 a.m. on November 10 stating that the Company had received notice that the work stoppage would begin at 10:30 a.m. that day. She went on to state: "This email is official notice that we are beginning our process for canceling all benefits for striking union employees effective immediately." (GC Exh. 9, p. 1, emphasis in the original) She instructed Erika Munk, the PlanSource agent, to "begin the process for stopping all benefits for employees in the PlanSource system that have a 'Union' status code." (Id., p. 2) After sending these email notices, Braunthal spoke personally to Munk and the MetLife agent to inform them that her cancellation notice applied only to the dental plan and not to the life insurance plan. All of the benefit providers except Kaiser cancelled benefits for striking employees as instructed.⁴

40 Later that day, the Company mailed COBRA packets to each of the strikers.⁵ This packet consisted of a COBRA rights notice showing the benefits that would be discontinued, the

⁴ No explanation has been provided for Kaiser's failure to cancel benefits as requested.

⁵ Lisa Parran, who was on an approved union leave when the work stoppage occurred, said that COBRA packet she received was postmarked November 10 but she recalled receiving it at her home in the evening of that very day. Company Vice President and General Counsel John Komeiji testified that he gave the direction to send the packets around 11 a.m. on November 10. Despite Parran's recollection concerning receipt, I have no reason to discount the knowledgeable assertions by Komeiji and Braunthal that the COBRA packets were not prepared and mailed until sometime time after the work stoppage commenced on November 10.

employee’s eligibility to continue coverage individually and a COBRA application form. The COBRA packets were not sent to unit employees who continued to work, who were on an approved leave under the Family and Medical Leave Act or an approved military leave. According to Braunthal, the strikers would have become eligible to exercise their COBRA rights on November 11.

When the striking employees began returning for their assigned shifts at 8 p.m. on Friday, November 11, Braunthal notified the carriers to re-enroll those employees in the benefit plans they had previously been enrolled. Because of the intervening weekend, the re-enrollment process did not get underway until Monday, November 14. As far as Braunthal knew, the re-enrollment process was completed by November 15. As the Company made arrangements for the benefits to be restored retroactive to November 11 when the work stoppage ended, the unit employees whose benefits had been cancelled were again able to submit claims, including claims for expenses incurred on November 10 and November 11. (Tr. 74, 85)

Near midday on November 17, Union Financial Secretary – Business Manager Scot Long sent an email to the Union’s negotiating committee that was purportedly blind copied to the Union’s membership. In it Long said that the negotiating committee was “validating information on those that have crossed [the November 10-11 picket line] for the ‘wall of shame.’” The email requests that those having “proof of a scab” contact “us,” an unmistakable reference to the Union’s officials or a member of the negotiating committee. The email also cautions confrontations and states that the recipients should “not engage with members who crossed, be professional but, if at all possible avoid conversation.” The email then concludes with a report on the status of the negotiations with the Company.

Company Vice President and General Counsel Komeiji issued a “Special Alert 2011-62” to all employees in response to the Union’s “wall of shame” email. In his special alert, Komeiji notes that the Union’s negotiating committee has circulated an email to “employees/union members that talks about the Union’s ‘hall of shame’ and urges employees to report each other in retaliation for reporting to work during the Union’s stoppage.” Komeiji’s alert calls attention to the provisions in the Company’s Code of Business Conduct concerning harassment and intimidation as well as its policy on workplace violence. The former provides:

[Respondent] strives to provide a work environment free of sexual or any other kind of harassment whether committed by or against a supervisor, co-worker, customer, vendor or visitor based on a person’s race, color, religion, national origin, citizenship, ancestry, age, disability, marital status, sexual orientation, arrest and court record, military/veteran’s status, or any other classification protected by federal or state law. Employees shall not engage in any behavior that ridicules, belittles, intimidates, threatens or otherwise demeans co-workers or others associated with the Company. [Respondent] will not tolerate harassment in any form—conduct, speech, written notes, photos cartoon or electronic mail.

The latter provides:

[Respondent] strictly prohibits any violent, threatening or abusive behavior, including, but not limited to: brandishing weapons, physically harming another person or property, harassing, intimidating, coercing, threatening harm, or attempting or desiring to engage in any such conduct, or the use of profane, vulgar or offensive language.

Following his reference to these two Company policies Komeiji’s Special Alert 2011-62 goes on to state:

5 Unlawful employee conduct that is intended to intimidate, threaten or demean a fellow employee or others associated with the Company is strictly prohibited under both the Company's Code of Business Conduct and the Workplace Violence guidelines. Facilitating or assisting with unlawful intimidation or threats toward fellow employees - even if planned to be carried out by others- will also not be tolerated. The threats, bullying tactics, and other hostile treatment that have occurred, directed toward a co-worker based on his or her decision to exercise their legally protected right to report to work during a strike, are forms of prohibited threats and harassment.

10 **Violations of the Code of Business Conduct and/or the Company's guideline on Workplace Violence are subject to discipline, up to and including termination of employment.**

15 Employees are required to immediately report any unusual or suspicious activity or incident of violent, threatening or abusive behavior to any supervisor, Corporate Security or the Human Resources Department. Threats or assaults must immediately be reported to Corporate Security at 643-7111 (on all islands) or local law enforcement at 911.

20 (Emphasis in the original)

B. The complaint allegations

25 Central to this case is the complaint allegation in paragraph 9 which alleges that Respondent violated Section 8(a)(1), (3), and (5) by cancelling the employees’ health, drug, vision and dental insurance on November 10 because they engaged in a strike on that day and the next. The complaint also alleges that Respondent violated Section 8(a)(1), (3), and (5) by changing the employees dental insurance policy on September 1 to eliminate dental benefits for employees whose employment ends due to a strike.

30 The complaint contains four independent 8(a)(1) allegations. Initially, the complaint alleges that Respondent's harassment and intimidation policy, as written, constitutes a restraint on Section 7 activities. Second, the complaint alleges, in effect, that Special-Alert 2011-62 is unlawful because it applies Respondent’s harassment and intimidation policy and its workplace violence policy to restrict employee communication with the Union. Third, the complaint alleges that the notice to employees who engaged in the work stoppage that their life insurance had been canceled is unlawful. And fourth, the complaint alleges the notice to employees who engaged in the work stoppage that their medical and dental benefits had been cancelled is unlawful. These allegations are set forth in complaint paragraphs 7 and 8

40 ANALYSIS

I. Respondent violated Section 8(a)(1), (3) and (5) of the Act by cancelling accrued benefits of striking employees

45 A. Background Law

Section 8 of the Act declares that “it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization.” As the Supreme Court explained, the words “discrimination” and “to . . . discourage” import a requirement that the employer be motivated by an antiunion purpose. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Thus, ordinarily, the General Counsel must prove an illicit motive to establish a violation. *Id.* In the same opinion, however, the Court recognized that certain employer conduct is so “inherently destructive” of employee rights that it “bears its own indicia of intent.” *Id.* Cases in this category do not require a demonstration of intent. *Id.* Rather, it is the employer who has the burden of coming forward with proof of a legitimate business justification for its conduct. *Id.* That said, even if the employer presents a business justification, the Board may balance the proffered business justification against the impact on employee rights in order to find a violation. *Id.*

Where an employer wrongly withholds health and welfare benefits from striking employees, its conduct is considered “inherently destructive” per *Great Dane*. *E.g., Texaco, Inc.*, 285 NLRB 241, 245–46 (1987). Under the framework outlined in *Texaco*, the General Counsel bears the initial, prima facie burden of establishing some adverse effect on employee rights. *Id.* at 245. “The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.” *Id.* The Board laid emphasis on the accrual requirement, specifying that “accrued” means “due and payable on the date on which the employer denied [it].” *Id.* (alteration in original) (quoting *Emerson Elec. Co. v. NLRB*, 650 F.2d 463, 469 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982)). Absent proof of accrual, no violation can be found without running afoul of the well-worn principle that “an employer is not required to finance a strike against itself.” *Id.* (citing *Gen. Elec. Co.*, 80 NLRB 510 (1948)). The accrual question, the Board offered, would “most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.” *Id.* at 246.

If the General Counsel meets its prima facie burden, then, as *Great Dane* teaches, the burden shifts to the employer to come forward with a legitimate and substantial business justification for suspending benefits. *Id.* *Texaco* identified two ways in which an employer could meet this burden. *Id.* First, it can demonstrate that “a collective-bargaining representative has clearly and unmistakably waived its employees’ statutory right to be free of such discrimination or coercion.” *Id.* This waiver must be explicit and cannot be inferred. *Id.* Second, it can demonstrate that it reasonably relied on a nondiscriminatory contract interpretation that is “reasonable and arguably correct.” *Id.* (quoting *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162, 168 (3d Cir. 1981)). That said, even if the employer proves a legitimate and substantial business justification, the inquiry is not yet ended. Pursuant to *Great Dane*, the Board may still find a violation “if the conduct is demonstrated to be ‘inherently destructive’ of employee rights or motivated by antiunion intent. *Id.*

B. The General Counsel’s Case

On November 10, Respondent asked its providers to cancel benefits for its striking employees, and every provider, with the exception of Kaiser, complied. On its face, this appears to demonstrate the first element of the General Counsel’s case, viz., that a benefit was withheld on the basis of a strike. The complication underneath the surface is that, once the strike ended, benefits were retroactively restored at the company’s request. By November 15, employees were once again able to submit insurance claims, including claims for bills incurred on November 10 and 11 (the dates of the strike). On this basis, Respondent argues that since no employee suffered an actual loss of benefit, no violation will lie from its actions. It quotes the following language from *Texaco* in support of its position:

Even assuming that the medical plan was an accrued benefit, it does not appear that disabled or striking employees suffered any actual deprivation of that benefit. By agreement of the Union and the Respondent, the employees' insurance coverage remained intact, their premium contribution rates remained the same, and for two months of the strike the Respondent's premium contributions were paid from a surplus account created in large part from unused portions of the Respondent's prior contributions.

Id. at 247. Given these facts, the Board refused to find a violation. *Id.*

Whether or not Respondent is correct that no employee suffered out-of-pocket costs as a result of the cancellation, its argument miscarries. The reason is that the facts in *Texaco* are distinguishable from those in the present matter. In *Texaco*, there was never an interlude in coverage under the medical plan, not even a retroactively-filled gap. *Id.* The surplus account referenced in the quoted text guaranteed that premiums would be paid and coverage would continue. *Id.* The striking employees of Respondent faced a different situation. As their employer requested, their coverage, except for life insurance, did in fact cease during the tenure of the strike. The fact that it was eventually restored does not change the reality that it was, for a period of time, taken away from them.

The second element of the General Counsel's prima facie case (accrual) is established by language in the expired agreement that unqualifiedly entitles employees to receive benefits for 30 days after the conclusion of their employment. The portions of the agreement dealing with medical, dental,⁶ and life⁷ insurance benefits all contain the same relevant text. Each includes a guarantee that "coverage for employees and their dependents will end thirty (30) days after termination of employment." It is also promised that "[t]he benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union."

Read together, these two clauses guarantee any employee that the company will provide benefits until either (1) the Union and Company agree to a modification or (2) the employee ceases working for the employer and 30 days have passed. These are the only two conditions under which Respondent could refuse to furnish benefits—in other words, the only two conditions under which benefits would not be *due and owing*. An employee has already earned this entitlement by the end of his first day on the job. *Cf. Gulf & W. Mfg. Co.*, 286 NLRB 1122, 1123 (1987) (finding accrual after explaining that "once an employee meets the eligibility requirement of subsection a, his entitlement to health insurance 'without cost' continues until one of the conditions for termination set out in subsection b is met."). As the General Counsel expresses it, "A unit employee's eligibility for these benefits arises out of the existence of the employment relationship itself and is not dependent on the continued performance of services." (GC Br. 16). Had the employees continued to receive benefits during the work stoppage, the

⁶ The plan documents (not the agreement) for the dental plan contain an exception to the thirty-day principle for striking employees. This was a recent alteration to the plan, one that I find to be unlawful in a later section of this decision. Thus, reliance upon it does not save the cancellation of the dental benefits from illegality.

⁷ Although employees were told that it was being halted, life insurance was never actually cancelled. The ramifications of the Respondent informing employees that life insurance coverage would be stopped are discussed in more detail in the section of this decision addressing the COBRA notice to employees.

company would not have been forced to finance a strike but only to pay what it owes to any employee who leaves work for any reason.

5 The Respondent argues that the health and welfare plans⁸ at issue are governed by ERISA⁹ and that principles of ERISA interpretation establish that benefits under those plans had not accrued to striking employees. (R. Br. 40). Without addressing the issue of ERISA coverage or the relevance of ERISA principles to the interpretation of collective bargaining agreements, I am convinced that Respondent’s argument cannot succeed.

10 Relying on *Geiger v. Hartford Life Insurance Co.*, 348 F. Supp 2d 1097, 1108 (ED Cal 2004), Respondent argues against accrual:

15 Under ERISA, a welfare benefit accrues when it is paid for. As was recently stated by the United States District Court for the District of Northern California, an employee’s rights to a welfare benefit plan under ERISA “do not accrue prospectively. [The beneficiary does] not, upon initial determination of eligibility, accrue a right to benefits indefinitely; instead his right to those benefits accrues as the payments become due.”

20 *Id.* (alteration in the original) (quoting *Hackett v. Xerox*, 315 F.3d 771, 774 (7th Cir. 2003)). The quoted language is misleading, however, as it deals with a different notion of accrual than that at stake in this litigation. *Geiger* dealt with changes to the provisions of an ERISA plan that would affect benefits to be paid thereafter. *Geiger*, 348 F. Supp. 2d at 1106–08. Specifically, the *Geiger* plaintiff was arguing that his benefits had vested under the terms of an earlier iteration of the plan and could not be modified by subsequent changes to the plan. *Id.* at 1108. ERISA prevents such modifications where the benefits are vested. *Id.* In the language cited by Respondent, the court was simply explaining why the plaintiff’s right to benefits had not
25 accrued/vested within the meaning of this area of ERISA law. The issue before the court, whether ERISA barred a plan modification, is distinct from the question of an employer’s obligations under a given plan at a given time under the Board’s definition of accrual.

C. The Respondent’s Business Justification Argument

30 In rebuttal, Respondent claims that its actions were countenanced by a reasonable interpretation of the agreement and relevant plan documents. It argues first from the silence of the agreement on the continuation of benefits during a strike.¹⁰ In this regard, it points out that under Board law, striking workers are still considered employees. As such, their employment has not “terminated” and they do not qualify under the 30-day guarantee. It further points to
35 clauses that grant the Respondent “Administrator” status and seemingly broad discretion in managing the plan. For instance, the agreement states, “The selection of the carrier and the administration of the Dental Insurance Plan will rest with the Company provided that the level and quality of benefits remains the same.” It goes on to declare:

40 The Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection

⁸ That is to say, not the collective-bargaining agreement, but the plan documents.

⁹ Employee Retirement Income Security Act, 29 U.S.C. §1002.

¹⁰ As previously mentioned, the dental plan as modified by Respondent did explicitly address strikes. Respondent’s arguments here relate to the health and life insurance plans.

of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration or benefits payable shall be determined by and at the sole discretion of the Company.

5 (Memorandum of Agreement re Dental Plan (G C Exh. 2, p. 75). The dental plan documents themselves bestow additional interpretive authority:

10 In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the interpretation was arbitrary and capricious.

15 (Dental Expense Benefits, GC Exh. 16, unnumbered page contained in “Additional Information”).

20 Respondent argues that these broad grants of discretion rendered it at least reasonable to believe that it possessed the contractual authority to cancel benefits for the striking workers. The reasonableness of this interpretation, it contends, was further supported by Board law and ERISA principles. With regard to Board law, Respondent cites the adage that an employer is not required to finance a strike against itself. It claims that the existence of this well-known background principle rendered it reasonable to interpret the contract as allowing cancellation. It further argues that the principle stands as an obstacle to the conclusion urged by the General Counsel. In its brief, Respondent states:

25 It cannot be that the Act will impose, as a default term, an obligation to provide welfare benefits to striking workers where a contract is silent as to that issue.

30 To hold otherwise would require an employer in Hawaiian Telcom’s position to provide welfare benefits to even long-term strikers because such strikers maintain their status as employees until they have “obtained ‘other regular and substantially equivalent employment.’” As a consequence, all employers wishing to exercise their statutory right not to finance a strike against themselves would have either (1) to refuse to allow benefits to extend past a bargaining unit employee’s last work day; or (2) to bargain for an explicit carve out for striking workers. This would turn the statute on its head because, instead of requiring a union to bargain for the right of having benefits provided to striking workers, the law would force an employer to bargain to avoid having to pay for the benefits of striking workers.

40 (R. Br. 39 (citations omitted)). In regards to ERISA, the Respondent asserts that, “where the administrator of an ERISA plan has retained the discretion to interpret the plan, the administrator’s exercise of that discretion will not be set aside unless the administrator’s exercise of that discretion is arbitrary or capricious.” (R. Br. 41 citing *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011).

45 I reject Respondent’s business justification argument for several reasons. First, although the agreement does not expressly address the subject of benefits during a strike, its logic encompasses them. Even if the Respondent is correct and the striking employees remained employees whose employment did not “terminate” in the relevant sense, there are still only two

conditions under which benefits can be halted. If the employees were still employees, the agreement does not contemplate a scenario (apart from agreement by Respondent and the Union) under which their benefits could be cancelled.

5 Second, while the text of the agreement and plan documents do grant the Respondent substantial discretion, the agreement also places strict boundaries on that authority. As previously described, the agreement prohibits plan benefits from being “discontinued or amended without the agreement of the Company and the Union” and rigidly sets a thirty-day timetable for halting benefits to those who cease their employment. Thus, while the agreement and plan documents leave the minutiae of a large insurance program to Respondent’s
10 judgment, it gives the Respondent no discretion in the decision whether or not to furnish the benefits in the first place.

15 Third, Respondent’s ERISA argument fails for similar reasons. While I again take no position on the applicability of ERISA principles, I find that, even assuming their relevance, the law cited by Respondent does not establish its point. The case Respondent references does confer great interpretive authority on the administrator of an ERISA plan. However, its own language reveals the limits on that authority, which runs only so far as “the administrator of an ERISA plan has retained the discretion to interpret the plan.” In the present case, the agreement restricts Respondent’s authority to administrative details, denying it the power to cancel benefits
20 outright without the agreement of the Union.

25 Fourth, Respondent’s argument from Board law is overstated. While it may be reasonable to consider background principles of labor law in construing the provisions of collective-bargaining agreements, the principle cited by Respondent in support of its interpretation—i.e., that an employer is not required to finance a strike—in this context unacceptably begs the question. In the absence of express language, the question of whether benefits are due and owing under the terms of a collective-bargaining agreement cannot be decided so easily. Otherwise, every case involving ambiguous language would resolve in favor of the employer who represents that it relied on the principle to read the contract to allow it to cancel benefits. This result would defeat in application a further Board principle, that of *Texaco*,
30 which distinguishes between paying accrued benefits and the financing of a strike. In other words, the principle would swallow the exception under the guise of a reasonable contract interpretation.

35 Respondent’s related argument that a ruling in favor of the General Counsel would turn the strike-finance principle on its head is likewise exaggerated. Refusing to accept Respondent’s proposed interpretation of the contract as reasonable would not establish a duty to finance a strike as “a default term.” At most, it makes it a default term where, as here, the agreement combines a rigid guarantee of continued benefits with a broad promise to continue paying those benefits for a period of time after employment ends. It is this combination of terms that has placed the Respondent in a position where it cannot cancel benefits for persons who
40 have gone on strike. If the agreement instead had only promised 30 days of continued support to employees who were laid-off, retired, or terminated for cause, the Respondent’s legal position would be different. Moreover, even under the agreement as it stands, there is a 30-day limitation to the time Respondent must continue to furnish benefits after an employee has ceased working. That this contract guarantee may also require the inclusion of employees who ceased working concertedly is but the consequence of the *Texaco* decision.

45 Fifth and finally, Respondent ignores a prominent limitation that *Texaco* established on the invocation of a reasonable contract interpretation by an employer to defend its conduct.

Namely, the contract interpretation relied upon must not only be reasonable, but it must be nondiscriminatory as well. *Texaco*, 285 NLRB at 246. Rather than subsume striking employees into a broader category, the Respondent’s interpretation simply assumes that the agreement does not contemplate the continuation of benefits for strikers. An interpretation of the contract that singles out striking workers for worse treatment than, for example, employees who leave their tasks independently is not a nondiscriminatory interpretation.

D. Employees on Leave

In its brief, the General Counsel argues that the cancellation of benefits for employees on union leave also violated Section 8(a)(3) of the Act. The Respondent objects to the General Counsel’s position on the grounds that these employees were not mentioned in the complaint. However, as Respondent points out, paragraph 8 of the complaint identifies the wronged employees as “certain employees of Respondent” who “ceased work concertedly and engaged in a strike.” While it could be fairly argued that employees on leave did not “cease work,” Respondent itself admits they engaged in a strike. It writes in its brief, “Here, it is undisputed that each of the employees on union leave joined the strike.” (R. Br. 35), and it cites the testimony of various on-leave employees to support its claim.

Since the complaint at least arguably encompasses the employees on leave, the matter was plainly put in issue at the hearing. Moreover, the matter is predominantly a legal and textual question identical to that regarding the mass of employees who went on strike. Thus, I find it appropriate to consider whether a violation was committed against the employees on leave as well.

In Article 32 of the agreement, the Respondent agrees to cover employees on union leave under the medical and dental plans. The agreement states that they are to be treated in accordance with the sections of the agreement (Articles 28 and 39) governing the plans for active employees. As a result, the case for finding a violation with respect to employees on leave is even stronger than that for the larger group. Not only are these employees the beneficiaries of the same contractual guarantees discussed above in relation to ordinary employees, but they further enjoy the benefit of Article 32’s promise of benefits while on leave. As such, the argument for accrual of benefits is even stronger, and the Respondent’s proffered contract interpretation less powerful and pertinent. I thus find that Respondent violated Section 8(a)(3) with respect to the employees on leave as well as those on active duty. Thus, based on the above analysis, I find that Respondent violated Section 8(a)(1) and (3) of the Act by cancelling health, drug, vision, and dental insurance of employees who participated in the November 10-11 work stoppage.

E. Section 8(a)(1) and (5) Allegation

As I have previously found, the agreement entitled the striking workers to continued benefits. By canceling them, Respondent breached the terms of the agreement, an act tantamount to a unilateral modification forbidden by Section 8(d). *See Nick Robilotto, Inc.*, 292 NLRB 1279, 1279 (1989) (“It is well established that Section 8(a)(1) and (5) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.”).

For its part, Respondent cites *Trading Port, Inc.*, 219 NLRB 298 (1975). There, the Board declared, “[T]he nonpayment of benefits to strikers during their period of striking is not a

matter about which a company has an obligation to bargain.” *Trading Port*, 219 NLRB at 299. The quoted principle, however, is too unequivocal to capture the true state of the law. While a sensible extension of the maxim that an employer need not finance a strike against itself, it fails to account for the exception to that rule for accrued benefits. Indeed, in a case where the
 5 General Counsel established that an employer violated Section 8(a)(3) by withholding accrued vacation pay to striking workers, the Board also found the employer had violated Section 8(a)(5) by deviating from the underlying contractual guarantee. *Glover Bottled Gas Corp.*, 292 NLRB 873, 882 (1989), *enfd.* 905 F.2d 681 (2d Cir. 1990). Thus, I find that Respondent violated Section 8(a)(1) and (5) by failing to adhere to the terms of the agreement.

10 II. Respondent violated Section 8(a)(1), (3), and (5) of the Act by specifically excluding striking workers from the coverage of its dental plan

Without consulting the Union, Respondent modified the terms of its dental plan to provide that “if your employment ends due to strike, all of your benefits will end the date your
 15 employment ends.” (GC Ex. 17). Otherwise, the plan continued to assure employees that “[a]ll of your benefits will end 30 days following the date your employment ends.” *Id.*

According to Section 8, “[I]t shall be an unfair labor practice for an employer . . . by
 20 discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Respondent’s alteration to the dental plan baldly discriminates between employees who leave their posts as union supporters, i.e., those who strike, and those who abandon their tasks nonconcertedly as individuals. This demarcation is inherently destructive conduct within the meaning of *Great Dane*. As the Board has said, “Inherently destructive conduct has been described as action
 25 upon the basis of participation in strikes or union activity” *Montfort of Colo.*, 298 NLRB 73, 78 n.21 (1990), *enfd in part*, 965 F.2d 1538 (10th Cir. 1992) (alteration in the original) (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)).

Respondent, in its brief, does not specifically address the change to the dental plan vis-
 30 à-vis the Section 8(a)(3) allegations. It does, however, attempt to justify the change, as an act within its authority under the agreement and plan documents, *in the context of defending* the Section 8(a)(5) allegations. Therefore, in the absence of a substantial business justification, I find that Respondent violated Section 8(a)(1) and (3) of the Act by modifying the terms of its dental plan to specially exclude striking workers.

Turning to the 8(a)(1) and (5) allegation regarding change in the dental plan, Section
 35 8(d) of the Act forbids a party to a collective-bargaining agreement from modifying the agreement while it remains in effect without offering to bargain with the opposite party. The Board distinguishes those cases in which a unilateral modification of the collective-bargaining agreement is alleged from those in which mere failure to bargain is asserted. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *aff’d sub nom.*, *Bath Marine Draftsmen’s Ass’n v. NLRB*, 475
 40 F.3d 14 (1st Cir. 2007). “In the ‘contract modification’ case, the General Counsel must show a contractual provision, and that the employer has modified the provision.” *Id.* In short, “The allegation is a failure to adhere to the contract.” *Id.* Hence, an employer can defend itself by showing that the alleged “modification” did not run afoul of the contract’s terms. In the Board’s words, “Where an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not ‘motivated by union animus or . . . acting in bad faith,’ the Board ordinarily will not find a
 45 violation.” *Id.* at 502 (alteration in original) (quoting *NCR Corp.*, 271 NLRB 1212, 1213 (1984)).

Respondent defends its change to the language of the dental plan based on what it asserts is a sound arguable basis for interpreting the contract to be consistent with its actions. It cites a memorandum of agreement between it and the Union that confers it with discretionary authority in administering the plan:

5 This Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration, or benefits payable shall be determined by and at the sole discretion of the company.

(GC Ex. 2). It further relies on language in the plan documents vesting the Administrator with interpretive authority:

15 In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the plan and to determine eligibility and entitlement to Plan benefits in accordance with the terms of the Plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the interpretation was arbitrary and capricious.

(GC Ex. 16). Respondent argues that these broad assignments of authority render it at least reasonable to believe that the contract permitted it to make the changes it made to the terms of the dental plan.

25 In order for Respondent to succeed with this argument, it must prove that the Union clearly and unmistakably waived its right to bargain about the existence of dental benefits for strikers. Clearly, the Union did not have any opportunity to do so although the Plan explicitly reserves that right to the Union. The Plan states, “The benefits provided by this plan will not be discontinued or amended without the agreement of the company and the union.” The parties agree, however, that discontinuance of dental benefits for strikers was not the subject of bargaining.

35 In disagreement with Respondent, I find that there is not a sound arguable basis for reading the contract to license—or even to leave open the possibility for¹¹—changing the terms of dental plan to exclude striking workers. The reason is that a change to the language of the plan itself so as to deny benefits outright to a group of employees exceeds the administrative authority bestowed on Respondent and invades the substantive guarantee of the agreement. On brief, Respondent itself only argues that it was allowed to make “non-substantive changes,” but a categorical denial of benefits to persons previously eligible¹² for them crosses out of the realm of ministerial detail and into the domain of substance.

¹¹ As the Board explained under similar facts in *Bath Iron Works*, “[T]he issue here is whether the contract *forbade* the conduct.” *Bath Iron Works*, 345 NLRB at 502.

¹² As I have already stated, the agreement only provided for two conditions under which an employee could be denied benefits: agreement of Respondent and the Union and the passing of 30 days from the date of termination of employment.

Respondent cites *Bath Iron Works* as a case where the Board found the employer had sufficient contractual authority to shelter it from an allegation of unilateral modification. The facts of *Bath*, however, differ instructively from those in the present matter. The plan documents in that case gave the employer the express authority to “modify or amend” the Plan or even to terminate it. *Bath Iron Works*, 345 NLRB at 503. On these facts, the Board had little trouble deciding that a reasonable reading of the contract and plan documents permitted Respondent to merge the pension plan at issue with another one. *Id.* Our case is manifestly different in that the Respondent’s discretionary authority does not extend to modifying benefits or terminating them outright. As Article 39 of the agreement states, “The benefits provided by this [dental] plan will not be discontinued or amended without the agreement of the Company and Union.” (GC Ex. 2). Moreover, the interpretive authority mentioned in the plan documents is just that, *interpretive authority*, which, by definition, does not extend to modification of the terms to be interpreted.

In light of my rejection of Respondent’s proffered interpretation, I find that Respondent’s modification to the terms of the dental plan was prohibited by the agreement. Accordingly, I find the alteration violated Section 8(a)(5) of the Act.

III. Respondent violated Section 8(a)(1) by sending COBRA Packets

The General Counsel separately alleges violations of Section 8(a)(1) with respect to the COBRA packets Respondent mailed on November 10, the date of the strike. The packets included a notice that specified for each category of benefits the date of cancellation and information on continued enrollment under COBRA. Although the letter reports the cancellation of life insurance benefits along with health and dental coverage, life insurance was not actually stopped.

In general, it is an unfair labor practice for an employer to threaten to withdraw wages or other benefits for engaging in concerted activity. *E.g.*, *Prestige Ford, Inc.*, 320 NLRB 1172 (1996) (finding an employer violated Section 8(a)(1) by threatening to prevent salesman from using demonstration car). Of course, where the termination of benefits itself is lawful, announcing their cancellation is also legitimate. *Trading Port, Inc.*, 219 NLRB 298, 300 n.3 (1975). In this case, however, I found *supra* that Respondent violated Section 8(a)(1), (3), and (5) by cancelling the accrued benefits of striking employees. Under these circumstances, the announcement also violates Section 8(a)(1). *See Texaco, Inc.*, 291 NLRB 508, 510 (1988) (finding a prestrike announcement of termination of benefits itself violative of Section 8(a)(1) where the cancellation itself had already been deemed discriminatory).

Generally, when benefits are discontinued, a COBRA notice is mandated by Federal law. Under COBRA, a strike is considered a qualifying event that compels an employer to give notice to its employees of their right to elect continued coverage. 26 C.F.R. § 54.4980B-4 (2012); *see also Comm’n Workers of Am., Dist. One v. NYNEX Corp.*, 898 F.2d 887, 888 (1990) (treating a strike as a qualifying event because it resulted in a reduction of hours). Respondent argues that to find the distribution of the COBRA packets to be a freestanding violation would place it and other employers in an unacceptable legal dilemma.

I disagree. In my view, COBRA does not apply in a situation in which benefits have been unlawfully discontinued. To insist that COBRA mandated reminding employees of Respondent’s unlawful discontinuance of benefits is unwarranted. In such an instance, the notice only served to remind employees of the unlawful discontinuance of benefits.

IV. Respondent did not violate Section 8(a)(1) by maintenance of its Harassment Rule

A. Legal Background

5 According to Section 8(a)(1) of the Act, an employer commits an unfair labor practice if it
 “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in
 Section 7.” A workplace rule violates Section 8(a)(1) if it would “reasonably tend to chill
 employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825
 (1998), *enfd*, 203 F.3d 52 (D.C. Cir. 1999) (unpublished table decision). Where a rule does not
 10 explicitly restrict Section 7 activity, the Board may still find a violation in one of three ways: “(1)
 [E]mployees would reasonably construe the language to prohibit Section 7 activity; (2) the rule
 was promulgated in response to union activity; or (3) the rule has been applied to restrict the
 exercise of Section 7 rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

15 The test for how employees would reasonably construe the language of a rule is an
 objective one; neither the employer’s motivation nor the subjective response of the employees is
 relevant to the inquiry. See *Uforma/Shelby Bus. Forms, Inc.*, 320 NLRB 71, 71 n.4 (1995), *aff’d*
in relevant part, 111 F.3d 1284 (6th Cir. 1997). In evaluating a challenged rule, the Board does
 not read particular phrases in isolation and does not presume improper interference with
 employee rights. *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park*, 326 NLRB at 825,
 20 827). That said, an ambiguous rule must be construed against the employer as the promulgator
 of the rule. *Lafayette Park*, 326 NLRB at 828 (citing *Norris/O’Bannon*, 307 NLRB 1236, 1245
 (1992)).

B. Respondent’s Harassment Rule is Facially Lawful

25 The General Counsel argues that employees could reasonably construe the broad
 provisions of Respondent’s anti-harassment policy to reach protected activity. It points to
 language forbidding “any behavior that ridicules, belittles, intimidates, threatens or otherwise
 demeans co-workers or others associated with the company” and a catch-all provision
 disallowing “harassment in any form.” It asserts that employees could reasonably construe
 30 these words to prohibit protected activities like calling a fellow employee a scab, complaining
 about a manager, or persistently soliciting coworkers.

The Board in *Lutheran Heritage* gave a measure of latitude to employers who establish
 anti-harassment rules. Adopting the position of the Court of Appeals for the District of Columbia
 Circuit, the Board recognized that “employers have a legitimate right to establish a ‘civil and
 35 decent work place.’” *Lutheran Heritage*, 343 NLRB at 647 (quoting *Adtranz ABB Daimler-Benz*
Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 25 (D.C. Cir. 2001)). Reiterating the principle from a
 different perspective, it proclaimed, “[E]mployees have a right to a workplace free of unlawful
 harassment, and both employees and employers have a substantial interest in promoting a
 workplace that is “civil and decent.” *Id.* at 648–649 (quoting *Adtranz*, 253 F.3d at 25). In coming
 40 to its decision, the Board was mindful of an employer’s legal duty to keep its workplace free
 from harassment. Addressing a rule against profane language, it made clear, “[E]mployers have
 a legitimate right to adopt prophylactic rules banning such language because employers are
 subject to civil liability under federal and state law should they fail to maintain ‘a workplace free
 of racial, sexual, and other harassment’ and ‘abusive language can constitute verbal
 45 harassment triggering liability under state or federal law.’” *Id.* at 647 (quoting *Adtranz*, 253 F.3d
 at 27).

The Board ultimately upheld the challenged rules in *Lutheran Heritage* which prohibited employees from:

5 Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises).

10 Harassment of other employees, supervisors and any other individuals in any way.

15 Verbally, mentally or physically abusing a resident, a member of a resident's family, a fellow employee or a supervisor under any circumstances. This includes physical and verbal threats.

20 *Id.* at 654–55. Examining these rules, the Board concluded that a reasonable employee would understand them only to embrace activity of a certain magnitude, i.e., actions that rise to the level of harassment, leaving Section 7 activity unrestricted. *Id.* at 648 (“We see no justification for concluding that employees will interpret the rule unreasonably to prohibit conduct that does not rise to the level of harassment . . .”).

25 Subsequent cases in which the Board has applied the *Lutheran Heritage* standard are instructive. In *Hyundai Shipping Agency, Inc.*, 357 NLRB No. 80 (2011), the employer’s rule barred “[t]hreatening, intimidating, coercing, harassing or interfering with the work of fellow employees or indulging in harmful gossip.” The challenge to the rule centered on the prohibition of “indulging in harmful gossip. Citing the dictionary definition of “gossip” (“rumor or report of an intimate nature’ or ‘chatty talk”), the Board found employees would not reasonably construe the rule to prohibit Section 7 activity. *Id.*, slip op. at 2-3. Turning to *Palms Hotel & Casino*, 344 NLRB 1363 (2005), the rule in that case banned “any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons.” *Id.*, 344 NLRB at 1367-1368. Upholding the rule against challenge, the Board explained that the type of bad behavior named, like the profane language proscribed in *Lutheran Heritage*, was not “inherently entwined” with protected activity. *Id.* at 1368. It further noted, “Nor are the rule’s terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace.” *Id.*

35 On its behalf, the General Counsel cites to cases in which the Board reached the opposite conclusion. These also serve to define the contours of a permissible anti-harassment rule. *Advance Transportation Co.*, 310 NLRB 920, 925 (1993)(rule barring “harassment, intimidation, distraction, or disruption of another employee unlawful because “it is vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying Respondent with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act. “citing *Great Lakes Steel.*, 236 NLRB 1033 (1978), *enfd.* 625 F.2d 131 (6th Cir. 1980)). More recently, the Board had little trouble finding that a rule banning “derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation” infringed on Section 7 rights. *HTH Corp.*, 356 NLRB No. 182, slip op. at 26 n.21 (2011). The Board also rejected a rule that prohibited “negative conversations about associates or

managers.”¹³ *KSL Claremont Resort, Inc.*, 344 NLRB 832, 832 (2005). It thought the rule could reasonably be construed to forbid employees from discussing complaints about supervisors with their coworkers. *Id.*

5 Considering the above cases, a few guiding principle can be gleaned. First, the Board is tolerant of language that connotes severe or extreme behavior, words like “abuse,” “intimidating,” or “coercing.”¹⁴ It believes that employees will understand these terms to restrict only words and actions that constitute mere ad hominem aggression or exceed the bounds of basic decency and decorum (four-letter words for instance). *See Lutheran Heritage*, 343 NLRB at 648. Second, terms that are ambiguous, generic, and mild, e.g., “derogatory statements,” “negative conversations,” and “distraction or disruption of other employees,” spell a rule’s doom. Significantly, these rules “fail to define permissible conduct” leaving the employer with a threatening power to apply them as it sees fit. *Advance Transp.*, 310 NLRB at 925. Third, rules that protect supervisors are less likely to be found lawful than those that merely ban harassment of employees. *Compare Claremont Resort*, 344 NLRB at 832, with *Hyundai Shipping*, 357 NLRB No. 80 (2011).

Respondent’s harassment policy is as follows:

20 [Respondent] strives to provide a work environment free of sexual or any other kind of harassment whether committed by or against a supervisor, co-worker, customer, vendor or visitor based on a person’s race, color, religion, national origin, citizenship, ancestry, age, disability, marital status, sexual orientation, arrest and court record, military/veteran’s status, or any other classification protected by federal or state law. Employees shall not engage in any behavior that ridicules, belittles, intimidates, threatens or otherwise demeans co-workers or others associated with the Company.

25 [Respondent] will not tolerate harassment in any form—conduct, speech, written notes, photos, cartoons or electronic mail.

30 I find that a reasonable employee would not understand this rule to prohibit protected activity. First, I note that the initial sentence (the laundry list of protected categories) sets the tone of the policy. In the eyes of the reasonable employee, the opening sentence makes the policy appear to be, in a manner of speaking, a mini Civil Rights Act. In other words, it gives the appearance that the policy’s concern is with those forms of identity-based discrimination (like racial or gender prejudice) that are rightly regarded as taboo in modern society. In addition, the words used in the second sentence—“ridicule,” “belittle,” “intimidate,” “threaten,” and “demean”—possess negative connotations that inform employees that mere criticism or aggressive advocacy, as opposed to threats and bullying, do not fall within the rule’s scope. Put another way, these words, unlike words like “criticize” or “protest,” are rarely used to praise a person’s behavior in the workplace setting. For example, it is never a compliment to call someone a “bully.” By the same token, it is the workplace bully who “ridicules” and “belittles” a fellow employee. Admittedly, a word like “demean” is less clear-cut than a word like “threaten.”

¹³ I should mention here that the Board in *Hyundai Shipping* distinguished the case before it from *Claremont Resort* on the grounds that the rule in *Claremont* barred comments about supervisors and not just fellow employees. *Hyundai Shipping*, 357 NLRB No. 80, slip op. at 2.

¹⁴ On the other hand (but for similar underlying reasons), the Board is also tolerant of bans on “gossip,” an activity that while petty, also carries with it integral negative connotations sufficient to adequately restrict its meaning for employees.

Nevertheless, the Board has given its imprimatur to a rule barring “gossip,” an activity also considered mean and malignant that likewise falls short of threats or intimidation.

5 For these reasons, I find that the rule as a whole would not be reasonably understood by employees to prohibit protected concerted activity. Consequently, I reject the General Counsel’s facial challenge.

V. Respondent violated Section 8(a)(1) by sending the “Special Alert”

10 General Counsel argues that the Special Alert issued by Respondent on November 17 unlawfully restricted unit members’ communication with the Union by threatening disciplinary action against employees who assisted the Union in compiling the names of those who worked during the strike for its “Wall of Shame.” As noted in *United Techs. Corp.*, 274 NLRB 1069, 1079 (1985), *enfd sub nom.*, *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.3d 121 (2d Cir. 1986), publishing such a list is protected activity. Respondent’s Special Alert stated:

15 The Company is aware that [the Union’s] negotiating committee has circulated an email to employees/union members that talks about the Union’s ‘hall of shame’ and urges employees to report each other in retaliation for reporting to work during the Union’s work stoppage. Employees should review the Company’s Code of Business Conduct and Guideline 201.G11:Workplace Violence immediately to avoid committing any violations or misconduct.

20 Unlawful employee conduct that is intended to intimidate, threaten or demean a fellow employee or others associated with the Company is strictly prohibited under both the Company’s Code of Business conduct and the Workplace Violence guidelines. Facilitating or assisting with unlawful intimidation or threats toward fellow employees—even if planned to be carried out by others—will also not be tolerated. The threats, bullying tactics, and other hostile treatment that have occurred, directed toward a co-worker based on his or her decision to exercise their legally protected right to report to work during a strike, are forms of prohibited threats and harassment.

25 **Violations of the Code of Business Conduct and/or the Company’s guideline on Workplace Violence are subject to discipline, up to and including the termination of employment.**

30 Employees are required to immediately report any unusual or suspicious activity or incident of violent, threatening or abusive behavior to any supervisor, Corporate Security or the Human Resources Department. Threats or assaults must immediately be reported to Corporate Security at 643-7111 (on all islands) or local law enforcement at 911.

35 (GC Exh. 18). The Code of Business conduct includes the harassment policy discussed in the preceding section. The underlined terms were web links to the named policies.

40 I find that a reasonable employee could understand the Special Alert as a threat of discipline for assisting the Union in compiling its “Wall of Shame.” A reasonable employee would notice from the outset what prompted the Alert to be sent, namely, the Union email dispatched the same day soliciting support for the Wall. Although the Alert does not expressly declare assisting the Wall project to be a punishable offense, it implies as much. After mentioning the Union email, it reminds employees about the Code of Conduct, stating that employees should read it “immediately to avoid committing any violations or misconduct.” The implication is that

the action suggested by the email (reporting fellow employees for the Wall of Shame) is at least potentially misconduct that employees should think twice about committing. In the next paragraph, the Alert decries “[f]acilitating or assisting with unlawful intimidation or threats toward fellow employees.” An employee could understand this to prohibit the mere communication of an employee’s name to the Union for listing on the Wall.

The Respondent makes several points in defense of the Alert. Of tangential relevance is the fact that the Alert uses the past tense, speaking of “the threats, bullying tactics, and other hostile treatment that have occurred,” when the Union letter had been sent the same day. I do not read very much into this particular detail however; the Wall of Shame campaign may well have preceded the Union’s email. Another detail, the fact that the Alert speaks of “*unlawful* employee conduct,” weighs in favor of reading the prohibitions to only encompass unprotected activity. In this regard, Respondent argues that it was past reports of harassment that prompted the letter and that it was this harassment which the Alert was aimed at remedying. It quotes the testimony of its Vice President and General Counsel, John Komeiji:

So after the strike concluded, I would get daily reports of employees complaining that someone would make snide comments to them or threatening comments under their breath or talk to someone else. We actually had a physical confrontation between a couple of employees a couple of days before the 17th. So we were getting a lot of complaints from people who had crossed the line who were getting—who believed that they were getting threatened and bullied.

(Tr. 119:24–20:7). Based on this testimony, Respondent analogizes to *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005), *vacated in relevant part sub nom., Int’l Union, United Auto., Aerospace, and Agric. Implement Workers v. NLRB*, 520 F.3d 192 (2d Cir. 2008). In *Stanadyne*, the employer told its employees the following:

[I]t has come to my attention that some union supporters, not all, but some, are harassing fellow employees. You can disagree with the Company position; you can be for the Union. You can be for anything you want to, but no one should be harassed. Harassment of any type is not tolerated by this company and will be dealt with.

Stanadyne, 345 NLRB at 86 (alteration in original). Despite the express references to “union supporters,” the Board found the statement lawful. *Id.* at 87. It emphasized that the statement was made in the context of unsolicited employee reports of mistreatment and that it reassured employees they were free to support the Union.

Although the details Respondent cites do support an interpretation of the Alert as aimed at collateral, past threats and harassment, I am convinced that a reasonable employee would view the Alert as a *whole* as a message about the Wall of Shame and the Union’s email. As for the analogy to *Stanadyne*, I find that it is incomplete. The *Stanadyne* Board emphasized that the employer indicated that employees were free to support the Union. No such explicit, equivalent qualifying language appears in the Alert. Furthermore, the *Stanadyne* statement made clear that it was addressing reports of harassment that it had received. While Respondent argues it had received similar reports of bad behavior, it is not clear from its message that this is the target of the Alert. Rather, it appears that it is the Wall of Shame and the Union email which prompted Respondent to take action.

VI. Respondent violated Section 8(a)(1) by threatening to apply its harassment rule to restrict protected activity

5 The text of the Special Alert references the Respondent's Code of Business Conduct, which contains its harassment policy. The Alert treats the Code, and the Guideline on Workplace Violence¹⁵ more specifically, as the authoritative basis for the discipline it threatens. As *Lutheran Heritage* teaches, an otherwise lawful rule may be applied in an unlawful manner to restrict Section 7 activity. *Lutheran Heritage*, 343 NLRB at 647. Although I found that mere maintenance of the harassment rule did not constitute a violation of Section 8(a)(1), the Respondent threatened to unlawfully apply it when it sent the Special Alert. Accordingly, I find that the application of the harassment policy as applied against the Wall of Shame campaign violates Section 8(a)(1).

Conclusions of Law

15 1. By cancelling health, drug, vision and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

20 2. By changing its dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike, Respondent violated Section 8(a)(1), (3), and (5).

3. By informing employees who participated in the work stoppage that their life, health, drug, vision and dental insurance were cancelled, Respondent violated Section 8(a)(1).

25 4. By email dated November 17, 2011, Respondent applied its Harassment and Intimidation Policy and its Workplace Violence Policy to restrict employee communication with the Union in violation of Section 8(a)(1).

Remedy

30 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having unlawfully cancelled health, drug, vision and dental benefits of employees and changed employees' dental insurance benefits and having unlawfully eliminated dental benefits for employees whose employment ended due to a strike, must make employees whole, with interest, for any accrued benefits denied them as a result of the strike to the extent they have not already been made whole.

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

¹⁵ This rule is distinct from the harassment policy at issue.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Hawaiian Telcom, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

5 1. Cease and desist from

(a) Cancelling health, drug, vision and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011.

10 (b) Changing its dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike.

(c) Informing its employees who participated in the work stoppage that their life, health, drug, vision and dental insurance were cancelled.

15 (d) Applying its Harassment and Intimidation Policy and its Workplace Violence Policy to restrict employee communication with the Union.

(e) In any other like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

20 2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Make whole with interest all former strikers for any accrued health, drug, vision and/or dental benefits denied them as a result of their participation in the strike.

25 (b) Upon request, rescind the unilateral change eliminating dental benefits for employees whose employment ends due to a strike.

30 (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35 (d) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the

45

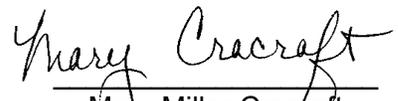
¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 5, 2012



Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT cancel health, drug, vision and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011.

WE WILL NOT change our dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike.

WE WILL NOT inform our employees who participated in the work stoppage that that their life, health, drug, vision and dental insurance were cancelled

WE WILL NOT apply our Harassment and Intimidation Policy and our Workplace Violence Policy to restrict employee communication with the Union.

WE WILL NOT in any like or related manner, interfering with, restraining, or coercing you in the exercise of their Section 7 rights.

WE WILL make whole all former strikers who were denied health, drug, vision and dental benefits which accrued before the November 10-11, 2011 strike.

WE WILL, upon the Union's request, rescind the change to our dental benefits for employees whose employment ends due to a strike.

HAWAIIAN TELCOM, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400

San Francisco, California 94103-1735

Hours: 8:30 a.m. to 5 p.m.

415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.