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THE NLRA AT 80: IS THE STATUTE ADAPTING TO THE MODERN WORKPLACE?

DEVELOPMENTS AT THE BOARD:

The Board's Protection of Facebook Posts and Other (Bad) Behavior

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I. Introduction

- A. Before the internet, email, and social media (Twitter, Facebook, etc.), employees could talk face-to-face or by phone, meet to discuss their concerns or, much less readily, write about them and seek to distribute their writings as best they could. Lawful employer solicitation and distribution policies limited opportunities for both face to face conversations, especially among more than a few individuals, and literature distribution within the workplace. Opportunities to meet and share concerns outside the workplace could be created, but they had to be scheduled in advance and in a suitable location.

Now, with “smart phones” allowing instantaneous access to email and social media, employees can communicate narrowly or broadly, and quickly, with each other and with the public. The Board has recognized that electronic communication provides forums for concerted activity protected by Section 7 of the NLRA. This is good for employees who seek to improve the terms and conditions of their employment either with, or without, assistance from a labor union. Employers, on the other hand, are concerned that profane, hyperbolic, or defamatory electronic communication can disrupt the workplace and workplace relationships, and can also damage the employer's reputation and customer relationships, in ways far more significant than ever before. The Board's application of its traditional rules to electronic communication, whether between employees, or between employees and the public, are having a significant impact on the 21st Century workplace.

- B. Concerted activity and union activity protected by Section 7 can either intentionally or inadvertently impact an employer's reputation and customer relations. With the continuing trend of our economy from manufacturing to service, it is not surprising that some of the Board's most significant recent developments involve the intersection between employee Section 7 rights and employer concerns for reputation and relations with customers.

Section 7 gives employees (whether union or non-union) the right to engage in concerted activity, which includes the right to express concerns to management about their terms and conditions of employment. Sometimes, however, employees go overboard and behave badly while communicating their concerns. The Board has historically used its four factor analysis from Atlantic Steel Co., 245 NLRB 814, 816 (1979), to determine whether conduct otherwise protected is so egregious as to lose protection. The Second Circuit Court of Appeals remanded to the Board a case involving Starbucks, where customers witnessed an employee's bad behavior, asking the Board to consider whether Atlantic Steel should apply in a retail environment shared with customers. On remand, only Member Miscimarra addressed the issue, urging an interpretation of the NLRA that would deprive off-duty employees of protection when they engage in disruptive conduct in the presence of customers.

Section 7 also gives employees the right to communicate to the public about an ongoing dispute concerning the employees' terms and conditions of employment. Section 7 rights of employees are not, however, without limitation. The Supreme Court noted in NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464, 471 (1953) that "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" should result in loss of Section 7 protection. In another case involving a retail environment, the Board found communications to customers suggesting they might become ill from eating the restaurant's food were related to a labor dispute and not sufficiently disloyal, recklessly disparaging, or maliciously untrue to lose protection.

II. The Board's Recent Facebook Cases

A. Three D, LLC d/b/a Triple Play Sports Bar & Grille, 361 NLRB No. 31 (2014)

i. Facts

Jillian Sanzone and Vincent Spinella were employed at Triple Play Sports Bar and Grille, a union-free bar and restaurant. In early 2011, upon filing her tax return, Sanzone discovered that she owed state income taxes, apparently due to her employer's withholding practices. Another restaurant employee informed Sanzone that she also owed taxes. Concerns spread among the employees about their employer's withholding calculations, and the owners arranged for staff to meet with the restaurant's accountant and payroll company.

Sanzone and Spinella never made it to the scheduled meeting, as their social media activity sealed the fate of their employment beforehand. A former restaurant employee posted the following status update on her Facebook page, "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE Money Wtf!!!!" Several of the former employee's Facebook friends, including restaurant employees and customers, joined in. As the dialogue ensued on the Facebook page, Spinella clicked the "Like" button under the former employee's initial status update and Sanzone posted a single comment stating "I owe too. Such an asshole" (referring to one of her bosses). When the restaurant owners learned of these posts, they promptly fired Sanzone and Spinella, construing their participation in the Facebook discussion as disloyalty.

ii. Decision

The Board panel (Hirozawa, Miscimarra, and Schiffer) affirmed the ALJ, and held that Triple Play violated Section 8(a)(3) by discharging Sanzone and Spinella for participating in the Facebook

discussion about their employer's alleged failure to properly withhold income taxes.

Triple Play did not dispute that the employees' Facebook activity was concerted activity, nor contend that they had no Section 7 right to discuss their employer's tax withholding calculations on Facebook. Instead, Triple Play contended that Sanzone and Spinella lost Section 7 protection when they wrongfully adopted the former employee's allegedly defamatory and disparaging comments on her Facebook page.

The NLRB addressed the proper framework to apply to the employees' participation in the Facebook discussion. Triple Play urged the Board to apply its standard established in Atlantic Steel Co., 245 NLRB 814 (1979), which balanced the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

The Board rejected the Atlantic Steel test, reasoning that it is not appropriate for analyzing employees' off-duty, offsite use of social media. Focusing on the first factor (the place of discussion), the Board noted that it has traditionally applied the Atlantic Steel standard to face-to-face communications in the workplace, often between employees and supervisors or managers. It found the precedent ill-suited to apply to employees' off-duty, off-site use of social media to communicate amongst themselves and with third parties. Although noting that it was not suggesting that off-duty, offsite social media can never implicate an employer's interest in maintaining workplace discipline, since no manager or supervisor participated in the discussion, the Board determined that the standards applied to communications by employees with third parties or the general public was more appropriate.

Thus, the Board relied upon the analysis set out by the Supreme Court in NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953) and Linn v. Plant Guards Local 114, 383 U.S. 53 (1966). In Jefferson Standard, the Court upheld the

discharges of employees who publically attacked the quality of their employer's product and business practices without relating their criticisms to a labor controversy, which constituted disloyal disparagement outside the protection of the Act. In Linn, the Court limited the availability of state-law remedies for defamation in the course of a union organizing campaign to instances where the complainant "can show that the defamatory statements were circulated with malice" and caused damage. The Board concluded that these cases offered a more appropriate framework for determining whether employee social media commentary "is not so disloyal, reckless, or maliciously untrue to lose the Act's protection."

The Board focused on the precise scope of the social media activity at issue. It found that the only conduct to be analyzed entailed Sanzone's posting ("I owe money too. Such an asshole") and Spinella's clicking of the "Like" button under the former employee's initial comment. The Board concluded that Spinella's "Like" related only to the initial, ex-employee's comment ("Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE Money Wtf!!!!"). Spinella's "Like" was not an expression of approval of any ensuing comments which, as any user of Facebook knows, he could have "Liked" separately.

Triple Play argued that Sanzone and Spinella should be held responsible for all of the comments in the Facebook exchange, some of which implied that the owners pocketed employee funds. Without deciding whether these other comments were protected by Section 7, the Board found that neither Sanzone nor Spinella should lose protection merely by participating in a discussion in which other persons made unprotected statements not adopted by them.

The Board emphasized four aspects of the employees' Facebook activity. First, they participated in a Facebook discussion in relation to an ongoing labor dispute affecting them, and Triple Play was aware of the dispute. Second, the Facebook discussion, including Sanzone's and Spinella's participation, was not directed to

the general public. Although the record did not indicate the privacy settings on the former employee's Facebook page, the Board found that the discussion "w[as] more comparable to a conversation that could potentially be overheard by a patron or other third party," rather than a discussion directed to the public. Third, the Board concluded that the two employees did not disparage (or even mention) their employer's products or services. Fourth, the comments remained protected under Linn because they were not maliciously untrue, i.e., made with knowledge of their falsity or with reckless disregard for their truth or falsity.

In another aspect of its ruling, the Board reviewed the Triple Play's internet and blogging policy, and found it to violate Section 8(a)(1). The policy warned that "engaging in inappropriate discussions about the company management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment... In the event state or federal law precludes this policy, then it is of no force and effect."

The majority (Hirozawa and Schiffer) applied Lutheran Heritage Village, 343 NLRB 646 (2004), and found the rule unlawfully overbroad because employees would reasonably construe it to prohibit protected activity, particularly in light of the unlawful discharges of Sanzone and Spinella. The Board majority further held that the unlawful discharges also negated any effect the policy's savings clause might have had to assure employees that the rule against "inappropriate discussions" would not be invoked unlawfully.

Miscimarra dissented on this issue. He concluded that the policy did not expressly or implicitly restrict Section 7 activity and, instead, aimed to prevent the release of proprietary information, and unlawful statements about the employer, its management, and employees. He found the policy to be lawful.

B. Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

i. Facts

Richmond District Neighborhood Center, a union-free employer, operated a teen center in a San Francisco high school, offering after-school activities to students. Two employees, Ian Callaghan and Kenya Moore, complained about the teen center and their working conditions in a conversation on Facebook. The teen center operated during the school year, with the employees working in other RDNC programs during the summer. Both Callaghan and Moore received offers to return to the teen center in the fall. Due to a poor performance evaluation, however, RDNC offered Moore an Activity Leader position rather than the Program Leader position she held previously.

The Callaghan/Moore Facebook conversation after receiving their job offers included the following exchange:

Moore: “U gOin back or nO??”

Callaghan: “I’ll be back, but only if you and I are going to be ordering shit, having crazy events at the [teen center] all the time. I don’t want to ask permission, I just want it to be LIVE. You down?”

Moore: “. . . im not doin [the record-keeping and data entry] let them figure it out and when they start loosn kids I aint helpn HAHA.”

Callaghan: “hahaha. Sweet, now you gonna be one of us. Let them do the numbers, and we’ll take advantage, play music loud, get artists to come in and teach the kids how to graffiti up the walls and make it look cool.... Let’s do some cool shit, and let them figure out the money. . . . Let’s fuck it up. I would hate to be the person takin your old job.”

Moore: “. . . the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE. . . . still hella stuck up ppl there that dont appriciate nothing”

Callaghan: “You right. They dont appreciate shit. Thats why this year all I wanna do is shit on my own. . . .”

Moore: “They done be mad cuZ on wednesday im goin there aNd tell theM mY title is ACTIVITY LEADER dont ask me nothing abOut the teen cenTer HAHA we gone have hella clubs and take the kids;)”

Callaghan: “hahaha! Fuck em. field trips all the time to wherever the fuck we want!”

Moore: “U fUckn right see u wednesdaY.”

Callaghan: “I won’t be there wednesday. I’m outta town. But I’ll be back to raise hell wit ya. Dont worry. Whatever happens I got your back too.”

RDNC obtained a screenshot of the exchange from another employee, and rescinded Moore and Callaghan’s rehire offers after reading their exchange. It informed them: “These statements give us great concern about you not following the directions of your managers in accordance with RDNC program goals. . . . We have great concerns that your intentions and apparent refusal to work with management could endanger our youth participants.”

ii. Decision

The Board panel (Johnson, Miscimarra, and Schiffer) affirmed the ALJ, and held that RDNC did not violate Section 8(a)(3) when it rescinded the rehiring of Callaghan and Moore based on their Facebook conversation. The Board concluded the two employees engaged in such outrageous conduct, boasting on Facebook about their plans to disrupt the workplace and flaunt policies and procedures (advocating insubordination), that they lost Section 7 protection.

The Board found Moore and Callaghan's Facebook posts to be concerted activity—they were discussing the terms and conditions of their employment—but found they lost protection because their posts contained “numerous statements advocating insubordination.” Specifically, they said they would refuse to get permission required by the employer's policies before organizing youth events, disregard specific school district rules, undermine leadership, neglect their duties, and jeopardize the future of the program.

The Board cited Neff-Perkins Co., 315 NLRB 1229, 1229 n.2, 1233-34 (1994), and found that RDNC had reasonably concluded that the discharged employees' conduct was so egregious as to take it outside the protection of the Act and render them unfit for further service. Their “pervasive advocacy of insubordination in the Facebook posts, comprised of numerous detailed descriptions of specific insubordinate acts,” was “objectively so egregious as to lose the Act's protection and render Callaghan and Moore unfit for further service.”

In concluding that Callaghan and Moore lost Section 7 protection, the Board focused on the length of the exchange between the employees and the detailed nature of the specific acts they advocated. The Board rejected the argument that the employees' comments shouldn't be taken seriously because neither employee had a history of insubordination at work. This was not, said the Board, a situation where they were presented with “brief comments that might be more easily explained away as a joke, or hyperbole divorced from any likelihood of implementation.” This was not, in other words, the type of case where an employee blurted out, “I'm going to kill you if you do that!” where a reasonable listener would not take the comment as a serious threat of bodily harm. Rather, the threatened actions here were specific and contained in a lengthy, detailed written exchange.

Notably, the Board did not require RDNC to wait for Callaghan and Moore to engage in actual insubordination before taking action. The “magnitude and detail” of the insubordinate acts advocated in the Facebook exchange gave RDNC reasonable concern that

Callaghan and Moore would act on their plans, “a risk a reasonable employer would refuse to take.” The Board concluded the employer “was not obliged to wait for the employees to follow through on the misconduct they advocated.”

C. Pier Sixty, LLC, 362 NLRB No. 59 (2015)

i. Facts

Pier Sixty is a catering company in New York City. The servers at Pier Sixty started a union organizing campaign in 2011. Disrespectful treatment by management was one of the main drivers of the union campaign. Employees voiced complaints to management and eventually presented a petition to the Director of Banquet Services listing various grievances, including complaints that Pier Sixty’s managers “take their job frustration [out on] staff” and “don’t treat the staff with respect.” The petition identified Assistant Director of Banquets Robert McSweeney as one of the managers who treated them disrespectfully.

Pier Sixty opposed the union organizing campaign and in some instances took a heavy-handed approach, including unlawfully enforcing a “no talking” rule only against employees who were discussing the union and employee grievances.

On October 25, 2011 — two days before the scheduled union election — Pier Sixty was catering a fundraising event at its facility. McSweeney directed a group of servers to attend to customers; pointing to arriving guests, McSweeney told servers, in a “loud voice” to: “Turn your head that way and stop chitchatting.” Later during the same event, while the servers were waiting for a signal from the captain to clear the appetizer plates, McSweeney “rushed up” to a group of servers and told them to “spread out, move, move,” using a “raised, harsh tone” audible to guests.

Long-time employee Hernan Perez was upset by McSweeney’s comments. He complained to co-worker Evelyn Gonzalez, the leader of the union organizing effort, that he was “sick and tired of this” and that McSweeney did not know how to talk to employees.

He said he was going to confront McSweeney. Gonzalez urged him to wait for the union election and to take a break to calm down. Perez followed Gonzalez's advice, returning to the floor to get permission to take a break and then going first to the bathroom and then outside. Once outside, he used his iPhone to post a message to his Facebook page:

"Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!!!"

A co-worker who saw the Facebook post informed management, and the Human Resources Manager investigated. Perez initially lied during the interview, claiming the posting had not been about McSweeney, but later admitted McSweeney was the "Bob" he was referring to. Pier Sixty ultimately fired Perez for harassment two weeks after the posting. The Human Resources Manager told Perez his Facebook comments had violated company policy, that they were egregious and inappropriate, disrespectful and potentially defamatory. She also cited the fact that Perez had not taken the posting down right away.

ii. Decision

The Board panel (Pearce, McFerran, and Johnson) affirmed the ALJ, and held that Pier Sixty violated Section 8(a)(3) by discharging Perez for his obscenity-laden Facebook post complaining about McSweeney's manner of addressing employees.

The Board easily found that Perez's Facebook post was part of a sequence of events of employees protesting rude and demanding treatment by Pier Sixty managers, including McSweeney. According to the Board, Perez's Facebook post asserted "mistreatment of employees" and sought "redress through the upcoming union election." Therefore, it constituted both concerted activity and union activity protected by Section 7.

The more difficult question for the Board was whether Perez's conduct was so egregious as to cause him to lose Section 7

protection. The Board panel applied its “totality of the circumstances” test, first articulated in Triple Play Sports Bar & Grille. Chairman Pearce and Member McFerran found that Perez’s comments were not sufficiently egregious to lose protection.

In finding that Perez’s comments were not so egregious as to cause him to lose legal protection, the Board considered the following factors under Triple Play: (1) whether the record contained evidence of anti-union hostility on the part of the employer; (2) whether the employer provoked Perez’s conduct; (3) whether Perez’s conduct was impulsive or deliberate; (4) the location of Perez’s Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the employer considered language similar to that used by Perez to be offensive; (8) whether the employer maintained a specific rule prohibiting the language used; and (9) whether the discipline imposed on Perez was typical of that imposed for similar violations or was disproportionate to his offense.

The Board majority reached the following conclusions as to the nine relevant factors: (1) Pier Sixty had engaged in multiple unfair labor practices in the weeks leading up to the election, which established its anti-union animus; (2) Perez posted his comments in response to McSweeney’s remarks, which he found offensive. The panel considered this to be “provocation,” even though they found McSweeney’s comments were not an unfair labor practice; (3) despite the time that elapsed between McSweeney’s second comment and Perez’s Facebook post, Perez’s comments were an “impulsive reaction . . . to McSweeney’s commands” and “reflected his exasperated frustration and stress after months of concerted protesting distrustful treatment by managers”; (4) Perez made the post alone, on break, outside the employer’s facility. There was no evidence Perez’s comments interrupted the work environment or the employer’s relationship with its customers; (5) the subject matter of the post reflected employees’ previous complaints about management’s treatment of them and encouraged employees to vote for the union; (6) Perez’s references to McSweeney’s mother and family were not enough to cause him to lose legal protection. Perez’s comments “were not a slur against McSweeney’s family but,

rather, an epithet directed to McSweeney himself”; (7) Pier Sixty “tolerated the widespread use of profanity in the workplace, including the words ‘fuck’ and ‘motherfucker.’” Those uses of profanity were not qualitatively different from Perez’s use of similar language; (8) Pier Sixty cited its “Other Forms of Harassment” policy as the basis for discharging Perez, however, the policy did not prohibit “vulgar or offensive language in general.” Moreover, Pier Sixty did not assert Perez’s comments were directed at any protected classification, as was prohibited by the policy; and (9) Pier Sixty had never before discharged an employee solely for foul language.

The Board majority concluded that “an objective review of the evidence under the foregoing factors establishes that none of them weighs in favor of finding that Perez’s comments were so egregious as to take them outside the protection of the Act.” They declined to find that Perez’s comments, by their very nature, constituted insubordination.

Member Johnson dissented, contending that Perez lost section 7 protection by the offensive nature of his comments: “In condoning Perez’s offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager’s mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act’s protection.”

Johnson noted that Perez’s use of profanity went beyond the more “casual” references tolerated in the workplace (“Are you guys fucking stupid?”; “Why are you fucking guys slow?”). He also noted that none of the examples of workplace profanity offered in evidence referred to the targeted person’s family members, as Perez’s did: “I cannot believe that Perez’s profane, personally-directed tirade, going after his supervisor and his supervisor’s mother and family, was what the drafters of the Act intended to protect.”

III. Two Recent Board Cases Involving (Bad) Behavior

A. Starbucks Corp. d/b/a Starbuck Coffee Co., 360 NLRB No. 134 (2014)

i. Facts

Joseph Agins was a Starbucks employee and a known supporter of the Industrial Workers of the World. The IWW was seeking to organize employees working in four Starbucks located in New York City. Agins engaged in several acts of misconduct in the span of several months. The first incident occurred when he asked a manager for assistance during a busy time at the store. When the manager eventually came to help, Agins exclaimed “about damn time”, “this is bullshit”, and then he told his manager to “do everything your damn self.” Agins was suspended for several days because of the incident, and apologized for his outburst upon returning to work.

About six months later and still during the union campaign, a Starbucks manager ordered some employees to remove union pins from their uniforms. The following day, Agins came to the store with other pro-union employees while off-duty. Agins and his co-workers wore union pins to protest the union pin prohibition.

Shortly after arriving, Agins got into an argument with an off-duty manager from another store, Yablon, who was there as a customer. Yablon confronted Agins about the IWW and asked about his union button. After some back and forth, Agins brought up that Yablon had previously insulted Agins’ father. A heated confrontation ensued, which included both men speaking loudly, making gestures, and using obscenities in front of customers. Agins told Yablon “You can go fuck yourself, if you want to fuck me up, go ahead, I’m here.” Agins and Yablon were then separated, and Yablon left the store. Agins was admonished by the manager on duty and left shortly thereafter with his co-workers.

Agins was terminated several weeks later for disrupting business. The memorandum documenting his discharge stated he was

insubordinate, had threatened a manager, and was a strong supporter of the IWW. Yablon was not disciplined for his use of profanity or his role in the confrontation with Agins.

ii. Decision

The Board panel (Miscimarra, Hirozawa, and Schiffer), on remand from the Second Circuit Court of Appeals, reaffirmed its prior conclusion that Starbucks unlawfully discharged Agins, but this time because he was an IWW supporter.

In its first decision (355 NLRB 636 (2010)), the Board affirmed the ALJ, and held that Agins' behavior with Yablon was not sufficiently egregious to lose protection under the Board's four factor Atlantic Steel test applicable to workplace confrontations. Although the ALJ had also found the discharge unlawful under a Wright Line analysis (applicable to mixed motive cases), the Board had affirmed without addressing the Judge's alternative ground for finding Agins' discharge unlawful.

On appeal by Starbucks, the Second Circuit declared the Atlantic Steel analysis inappropriate to determine whether an employee lost Section 7 protection because of an outburst in front of customers. "We think the analysis of the ALJ and the Board improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." 679 F3d 70, 79 (2d Cir 2012). The Court remanded the case so that the Board could decide what standard should apply to employee outbursts in the presence of customers.

Members Hirozawa and Schiffer accepted the Second Circuit's opinion, as the law of the case, that Atlantic Steel was inapplicable to Agins' outburst and, accordingly, assumed his conduct towards Yablon was not protected. They then concluded, in agreement with the ALJ, Agins' union activity was a motivating factor in his discharge, and that Starbucks had failed to carry its burden under Wright Line of establishing it would have terminated Agins absent his union activity. The Board majority noted that other employees had been treated more leniently in the past for similar misconduct,

and that Yablon was not discharged or even disciplined for his role in the incident. Additionally, a discharge form completed by Agins' store manager stated he was ineligible to be rehired, in part, because of his union support.

Member Miscimarra concurred separately. He agreed that Starbucks failed to meet its burden under Wright Line. Unlike the majority, however, he addressed the standard the Board should apply to employee outbursts in front of customers. Miscimarra agreed with the Court that the four factor test from Atlantic Steel is inappropriate to evaluate an off-duty employee's outburst that could harm an employer's retail business. Instead, Miscimarra asserted the proper analysis should be whether an employee's conduct causes disruption of, or interference with, the business. Restaurant Horikawa, 260 NLRB 197 (1982). Under this standard, Miscimarra would find that retail employees lose their Section 7 protection if, while off-duty, they enter a retail establishment and engage in disruptive conduct in the presence of customers. He, accordingly, concluded that Agins' outburst was unprotected.

B. MikLin Enterprises, Inc., d/b/a Jimmy John's, 361 NLRB No. 27 (2014)

i. Facts

MikLin Enterprises, Inc., is a franchisee operating 10 Jimmy John's restaurants in the Minneapolis-St. Paul area. Industrial Workers of the World attempted to organize these restaurants in 2010. MikLin employees were dissatisfied with its sick leave policy. It did not offer paid sick leave, and it required employees to find their own replacements when they were ill and unable to work.

The IWW lost a close NLRB election in October 2010 and thereafter still enjoyed substantial employee support. In late January or early February 2011, the IWW placed identical posters about the MikLin's sick leave policy on community bulletin boards in the MikLin's restaurants. The posters displayed side-by-side pictures of a sandwich, one described as made by a healthy employee and the other as made by a sick employee. The caption

read, “Can’t tell the difference? That’s too bad because Jimmy John’s workers don’t get paid sick days. Shoot, we can’t even call in sick. We hope your immune system is ready because you are about to take the sandwich test.... Help Jimmy John’s workers win sick days.” The poster then listed contact information for the IWW. MikLin removed all of the posters.

The following month, four employees approached one of MikLin’s owners and gave him a letter from the IWW requesting changes to the sick leave policy, and asking that MikLin discuss the matter with the IWW. The IWW also issued a press release entitled “Jimmy John’s Workers Blow the Whistle on Unhealthy Working Conditions” which included a copy of the poster. MikLin refused to meet with the IWW.

Later that month, employees posted additional posters in the restaurants and also in public places near the stores. These posters were identical to the earlier copies except that in lieu of the IWW’s contact information, it contained an owner’s telephone number. Shortly thereafter, MikLin discharged six employees and issued written warnings to three others for their participation in the poster campaign.

ii. Decision

The Board panel majority (Pearce and Schiffer) affirmed the ALJ, and held that MikLin’s discipline and termination of employees for posting the “Sick Days” poster violated Section 8(a)(3). The Board majority applied Jefferson Standard (NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953)) and MasTec Advanced Technologies, 357 NLRB No. 17 (2011), and concluded that the poster was related to a labor dispute, was not reckless or maliciously untrue, and was not so disloyal as to lose Section 7 protection.

The Board majority began by noting employees are protected when they seek to improve their working conditions through communication with third parties, including the public. Eastex, Inc. v. NLRB, 437 US 556 (1978). MikLin argued that under Jefferson

Standard, the posters were disloyal, and recklessly and maliciously untrue and, therefore, not protected.

The Board majority first determined that the posters expressly indicated they were related to an ongoing labor dispute. MikLin did not contend otherwise. Second, the majority concluded that none of the statements contained in the poster were maliciously untrue or reckless, since the statements that employees don't receive sick days and cannot call in sick were, to the majority, fairly accurate characterizations of the impact of MikLin's policy. Finally as to the question of disloyalty, the Board considered whether the posters were made at a critical time during the start of MikLin's business, and whether the posters were so disparaging that they could be seen as reasonably calculated to harm MikLin or reduce its income.

The Board determined that the posters were not "so disloyal" because they were not published at a critical time in the initiation of MikLin's business, and they were not designed to inflict economic harm on MikLin. Additionally, the Board majority concluded the employees were motivated by a sincere desire to improve their working conditions, and raised the potential safety hazard of sick employees making sandwiches in direct furtherance of that aim. Accordingly, by disciplining and terminating employees because they engaged in the poster campaign, MikLin violated Section 8(a)(3).

Member Johnson dissented. He found the posters to contain maliciously untrue statements, since employees could, in fact, call in sick without discipline if they found a replacement. Member Johnson also found the posters disparaged MikLin's products, with the primary aim of injuring MikLin's business and income, rather than primarily seeking redress of the employees' work-related grievances. In his view, the implication that MikLin's sandwiches were a public health risk was so grossly disproportionate to the employees' single issue of unpaid sick leave, as to establish the employees' malicious motivation. For these reasons, Johnson concluded that the employees lost protection and were, therefore, lawfully disciplined and terminated.