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MikLin Enterprises, Inc., d/b/a Jimmy John's and Industrial Workers of the World. Cases 18–CA–019707, 18–CA–019727, and 18–CA–019760

August 21, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On April 20, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs and cross-exceptions. The Respondent filed briefs answering the cross-exceptions and briefs in reply to the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions²

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We affirm the judge's conclusion that Mike Mulligan's questioning of employee Micah Buckley-Farlee about employee Mike Wilklow's understanding and viewpoint was not unlawful. Under the totality of circumstances test set forth in *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), we consider all the relevant factors, including those discussed in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although some facts tend to indicate coerciveness, on balance, we find they are outweighed by other facts indicating this incident was noncoercive (both Wilklow and Buckley-Farlee were open and active union supporters; the conversation took place casually, in an open area, rather than in an office or other locus of authority; and the questioning was rhetorical). However, we emphasize that the open and active character of the employees' union support does not by itself prove the questioning was lawful.

We also affirm the judge's conclusion that the removal of the Union's frequently asked questions (FAQ) flyer and a copy of the prior Board charge from the general-use bulletin board at the Riverside store violated Sec. 8(a)(1). There is no dispute that employees were permitted to post literature, including other union literature, on the bulletin boards without limitation. Under these circumstances, an employer may not selectively remove postings based on their content. *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 51 (1997), enfd. 162 F.3d 513, 516 fn. 3 (7th Cir. 1998); and *Jennings & Webb, Inc.*, 288 NLRB 682, 692 (1988). The accuracy of the union's message or the extent of its hyperbole is not relevant. *Roll & Hold*, supra.

except as modified below and to adopt the recommended Order as modified and set forth in full below.³

Background

The Respondent, MikLin Enterprises, Inc., operates 10 sandwich shops in the greater Minneapolis-St. Paul, Minnesota area as a franchisee of Jimmy John's, a nationwide fast food enterprise.⁴ In October 2010, a representation election was held in a unit covering employees in all 10 MikLin shops to determine whether employees wished to be represented by Charging Party Industrial Workers of the World (IWW or the Union). Employees in the bargaining unit included in-shop sandwich makers, delivery drivers, and persons in charge. After losing the election by an 85–87 margin, the Union filed election objections and related unfair labor practice allegations, which were settled on January 10 and 11, 2011, respectively.⁵

The relevant incidents in this case occurred from January to March 2011.⁶ They involve, among other things, the Respondent's discipline of employees in response to the employees' public communications concerning their efforts to achieve paid sick leave.

Analysis

1. Discipline for participation in the Union's "Sick Days" campaign⁷

Employees at MikLin were not provided paid sick leave for their own illnesses. If they were too sick to work, they were required to seek and find replacements for their shift or risk receiving discipline. Lack of paid sick leave was one of the issues employees raised with

Moreover, we find no support for the Respondent's assertion that the literature had a tendency to cause workplace disruption.

³ We substitute a new Order and notice to conform to the violations found and to the Board's standard remedial language. We clarify that the 8(a)(1) allegations referenced in the judge's Conclusions of Law, pars. 1 through 4, were neither alleged nor found to have also violated Sec. 8(a)(3). Consistent with our decision in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Order requires the Respondent to reimburse the discriminatees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

⁴ The record indicates there are approximately 40–50 additional Jimmy John's operations in the greater Minneapolis-St. Paul area, and that there are approximately 1400 stores nationwide, the vast majority of which are also franchises.

⁵ Among other things, the settlement provided for setting aside the election and withdrawing the petition, with the provision that the Respondent would agree to another election to be held within 30 days of a new petition's filing in the period from 60 days to 18 months after the settlement.

⁶ Dates are in 2011, unless otherwise indicated.

⁷ For the reasons set forth in Member Johnson's separate opinion, he dissents from the majority's analysis and legal conclusions in this section.

the Union during the organizing campaign. In late January or early February, the Union placed identical posters about the sick leave policy on community bulletin boards in the Respondent's stores. The poster displayed side-by-side pictures of a sandwich, one described as made by a healthy Jimmy John's worker and the other as made by a sick worker. The poster stated, "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 provided contact information for the Union. The Respondent's managers removed the posters whenever they discovered them in their stores.⁸

On March 10, four employees went to the office of Rob Mulligan, co-owner and vice president of MikLin, to speak to him about the Respondent's sick leave policy. They gave Mulligan a letter from the Union asking for paid sick leave and indicating that MikLin's lack of paid sick leave provided an economic incentive for employees to work when they were ill, which also allegedly posed a risk to public safety. The letter further stated that the Union would like to meet with MikLin to discuss the policy. If MikLin did not show a willingness to meet, the Union would post its Sick Days posters in MikLin's stores and in public places citywide. The Union issued a related press release the same day, which included a copy of the Sick Days poster.

The Respondent declined to meet with the Union.⁹ Consequently, on March 20, employees posted the Sick Days posters in MikLin's stores and in public places in nearby blocks. This version of the poster contained text in place of the Union's contact information stating, "Call the owner Rob Mulligan at [telephone number] to let him know you want healthy workers making your sandwiches." Mulligan and other managers removed as many posters as they could find. Two days later, the Respondent discharged six employees and issued written warnings to three other employees for their participation in the poster campaign.

We agree with the judge, for the reasons further discussed below, that the discharges and warnings were unlawful because the disciplined employees' participation in the Union's Sick Days campaign was protected activity. It is well settled that employees are protected under the "mutual aid or protection" clause of Section 7

⁸ The removal of the Sick Days posters from MikLin's stores and public places was not alleged to have violated the Act.

⁹ There is no allegation that MikLin was under a legal obligation to meet with employees or the Union about their request for changes in the sick time policy.

when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). In the instant case, however, the Respondent and our dissenting colleague contend that the communications were disloyal, and therefore unprotected, under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

In *Jefferson Standard*, the Supreme Court upheld the Board's determination that a broadcast company did not act unlawfully when it fired its technicians for distributing handbills that disparaged the quality of the company's programming at a critical time in the initiation of its television service,¹⁰ where "the attack related itself to no labor practice of the company" and made no reference to working conditions. *Id.* at 476. The Court emphasized that the handbillers took pains to separate their labor dispute from the attack on the company's product, and that the attack focused on "public policies of the company which had no discernible relation" to the labor dispute. *Id.*

In analyzing whether employee communications to third parties exceed the protections of the Act under *Jefferson Standard*, the Board has focused on whether the communications indicate that they are related to an ongoing labor dispute and whether they are "so disloyal, reckless or maliciously untrue as to lose the Act's protection." *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011). As to disloyalty, the Board additionally considers whether the communications were made at a "critical time in the initiation of the company's business" and whether they were so disparaging that they could be seen as "reasonably calculated to harm the company's reputation and reduce its income." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) (quoting *Jefferson Standard*, 346 U.S. at 472), *enfd. sub.*

¹⁰ The handbills read:
Is Charlotte A Second-Class City?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?

Id. at 468.

nom. *Service Employee Local 1107*, 358 Fed. Appx. 783 (9th Cir. 2009).¹¹

Applying the *MasTec* analytical framework we find, contrary to our dissenting colleague, that neither the posters nor the press release were shown to be so disloyal, reckless, or maliciously untrue as to lose the Act's protection.¹²

a. The Communications were Expressly Related to an Ongoing Labor Dispute

The Sick Days posters and press release by the Union were clearly related to the ongoing labor dispute concerning the employees' desire for paid sick leave. The posters announced that "Jimmy John's workers don't get paid sick days," and appealed to the public to "Help Jimmy John's Workers Win Sick Days." While the posters and press release also suggested a potential risk to the public of eating food prepared by a sick employee, the communications clearly connected that risk to issues involved in the labor dispute, and their primary message was to seek support for the workers' position in the dispute. See, e.g., *Mitchell Manuals, Inc.*, 280 NLRB 230, 231 (1986) (although employees' message was "couched in terms of criticism of Respondent's operations, the thrust of the letter is the employees' proposal for increasing the professionalism of their jobs"). Indeed, any person viewing the posters and press release would reasonably understand that the motive for the communications was to garner support for the campaign to improve the employees' terms and conditions of employment by obtaining paid sick leave rather than to disparage the Respondent or its product. See *Jefferson Standard*, 346 U.S. at 468.

Having found that the posters and press release were directly linked to the ongoing labor dispute, the remaining issue is whether they lost protection based on recklessness, disloyalty, or malicious untruth. *MasTec*, 357 NLRB No. 17, slip op. at 5; *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enf. mem. 636 F.2d 1210 (3d Cir. 1980).

b. The Communications were not Reckless or Maliciously Untrue

We agree with the judge that none of the statements in the posters or the press release was maliciously untrue

¹¹ Although the timing of the communication is a factor the Board considers, it is not determinative in itself. The Board has found disloyal communications to be unprotected, even where they were not made at a critical time in a company's business. See, e.g., *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000).

¹² We do not rely on the judge's comments regarding what the Respondent might have done by way of a countercampaign, which we find immaterial.

and unprotected. "Statements are maliciously untrue and unprotected, if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue." *MasTec*, 357 NLRB No. 17, slip op. at 5 (internal quotation marks and citations omitted). See also *Mitchell Manuals*, 280 NLRB at 232 (rejecting contention that the letter was unprotected even if it contained arguably false statements in the absence of evidence that they were deliberately or maliciously so because the "falsity of a communication does not necessarily deprive it of its protected character").

Here, the statement in the posters and press release that "Jimmy John's workers don't get paid sick days" was factually accurate. Although the further statement, "shoot, we can't even call in sick," may not have presented the entirety of the employer's policy on sick days, it was an accurate characterization of the impact of that policy. Significantly, it was an almost verbatim repetition of Jimmy John's employee rule 11 ("We do not allow people to simply call in sick! NO EXCEPTIONS!"). Further, under the Respondent's attendance policy, sick employees who are unable to find a replacement were penalized—they generally were required to work to avoid discipline.¹³

Before commencing the Sick Days campaign, the Union conducted a survey in which the Respondent's employees were asked how often they worked while sick and why. Employees reported that they worked while sick nearly 80 percent of the time, and they overwhelmingly implicated the Respondent's attendance policies as the reason they did so. Thus, 40 percent of employees who responded reported that they worked while sick because they were unable to find a replacement, 30 percent reported that they could not afford to take unpaid time off, and 30 percent cited both factors. Moreover, employees who participated in the Sick Days campaign testified without contradiction that they were personally directed to work while sick by supervisors or managers, when there was no one available to cover their shift.

¹³ On March 16, the Respondent implemented a new progressive disciplinary policy. Under the new policy, no points are assessed if an employee does not report to work but finds a replacement. One point is assessed if an employee calls his or her manager at least 1 hour before their shift without finding a replacement. Two points are assessed if an employee calls his or her manager less than an hour before the start of the shift. Three points are assessed for a no call/no show. Points are also assessed for tardiness. Points accumulate on a rolling 12-month basis, and an employee receives a disciplinary coaching for 1 point, a recorded verbal warning after accumulating 2 points, a written warning for 3 points, and is terminated after accumulating 4 points.

Thus, the poster and press release conveyed, and were intended to convey, the impression that employees felt compelled to work when they were sick because of the Respondent's attendance policies; i.e., they were effectively denied the ability to call in sick. Because that impression is amply supported by the record evidence, the statement "[s]hoot, we can't even call in sick" falls far short of being maliciously false. *MasTec*, 357 NLRB No. 17, slip op. at 6 ("Any arguable departures from the truth were no more than good-faith misstatements or incomplete statements, not malicious falsehoods justifying removal of the Act's protection.")¹⁴ Moreover, any reasonable reader would recognize that the poster's message involves the kind of hyperbole expected and tolerated in labor disputes. *Jolliff v. NLRB*, 513 F.3d 600, 611–613 (6th Cir. 2008) (court considers that members of society generally understand that speech made in public settings such as protests or strikes is likely to be rhetorical and exaggerated); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) ("[T]hird parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.").

c. The Communications were not "So Disloyal" as to Lose the Protection of the Act

Finally, we find that the posters and press release were not so disloyal or recklessly disparaging as to warrant removal of protection for employees who participated in the Sick Days campaign. In *Valley Hospital Medical Center*, supra, the Board summarized the disloyalty standard as follows:

Statements have been found to be unprotected as disloyal where they are made at a critical time in the initiation of the company's business and where they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income. . . . The Board is careful, however, to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues. . . . To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive. [351 NLRB at 1252 (internal quotation marks and citations omitted).]

¹⁴ As we have recognized, the "mere labeling of [a communication] as libelous or slanderous cannot substitute for affirmative evidence of malice." *Cincinnati Suburban Press*, 289 NLRB 966, 967–968 (1988) (while allegedly inaccurate, employee's communication was not sufficiently reckless or maliciously untrue as to lose protection).

Indeed, the Board will not find employee communications to third parties unprotected unless they are "flagrantly disloyal, wholly incommensurate with any grievance which [the employees] might have." *MasTec*, 357 NLRB No. 17, slip op. at 6.

In *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 136, 139 (1982), enf.d. 742 F.2d 1438 (2d Cir. 1983), for example, employees of a custodial company did not lose protection when they wrote to the owners of the nursing home they cleaned complaining that their employer was using inferior products and had taken away necessary supplies, resulting in "the floors [] not really being cleaned" and "th[e] facility [] deteriorating," where their purpose was to appeal to the building owner for support in their labor dispute, rather than to injure the employer by impugning its operations. Similarly, in *Emarco, Inc.*, 284 NLRB 832 (1987), the Board found that remarks made by employees of a subcontractor to the general contractor about their employer, that "these people never pay their bills . . . can't finish the job . . . [are] no damn good" and "this job is too big for them," were not so disloyal or reckless as to forfeit the Act's protection as they were made in the context of and expressly linked to a dispute over their employer's failure to make timely contributions to the union welfare and pension funds. *Id.* at 833. Although the remarks would tend to undermine the business relationship between the general contractor and the employer, the Board nevertheless found that they were protected, reasoning that they were "not in the nature of a personal attack unrelated to the . . . [employer's] labor practices." *Id.* at 834. The Board further stated that "employee speech is often an essential means of achieving group goals and to deny protection to this type of activity would nullify the rights guaranteed by Section 7 of the Act." *Id.*

As these cases demonstrate, "concerted activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976).¹⁵ Even communications that raise highly sensitive issues such as public safety have been found protected where

¹⁵ It is well settled that concerted activity is not denied protection by the Act simply because it could have a detrimental impact on an employer and thus could be characterized as disloyal. Primary strikes and boycotts, for example, are normally within the ambit of Sec. 7's "protected concerted activities" notwithstanding the fact that their purpose is to cause economic harm to employers. As stated in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942): Such activities may be highly prejudicial to [the] employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs, and has pro tanto shorn him of his powers.

they are sufficiently linked to a legitimate labor dispute and are not maliciously motivated to harm the employer. For example, in *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), 11 school bus drivers wrote letters urging a school committee not to award a transportation contract to the company that submitted the lowest bid. The Board found that letters written by six of the drivers were protected – even though they warned that awarding the contract to the low-bidder would compromise student safety¹⁶—because the references to student safety “occurred in the context of the drivers expressing their common employment concerns.” *Id.* at 47.¹⁷ In affirming the Board, the court explained:

It is widely recognized that not all employee activity that prejudices the employer, and which could thus be characterized as disloyal, is denied protection by the Act. . . . Indeed, were harm or potential harm to the employer to be the determining factor in the . . . § 7 protection analysis, it is doubtful that the legislative purposes of the Act would ever be realized. [522 F.3d at 53–54.]

In the same vein, in *Allied Aviation*, 248 NLRB at 230–231, the Board, with court approval, found that letters from a union steward to an airline claiming that his employer’s practices relating to the servicing and

¹⁶ For example, driver Suzanne LeClair wrote, “There are several safety concerns with this company, which you have been made aware of, and you can’t put a dollar sign on safety.” LeClair predicted that if the company was awarded the contract that the drivers would lose all their benefits. She continued, “What will you be left with? . . . School bus drivers that don’t know your children or care if they get home safely, or in a timely fashion and poorly maintained busses!” Driver Caron Rose told the school committee that based on her review of newspaper articles and conversations with former employees of the company that she had concerns about the safety of students if the company was awarded the school bus contract. She then stated: “I know this company had the low bid for the contract, but can a price be put on the safety and well being of our children?” Finally, driver Pauline Taylor stated: “I have heard some stories about Five Stars drivers and how their company is runed [sic]. It really worries me. I am concerned about driving for Five Star and very concerned about letting my children ride on their buses.” *Id.* at 57–58.

¹⁷ In contrast, the Board found that letters written by five other drivers were unprotected because they either failed to raise employment-related concerns or used inflammatory language to describe the company in a manner that suggested that the drivers intended to damage the company’s reputation. *Id.* at 44–47. For example, driver Andrea MacDonald stated that the company was “so reckless that they have employed alcohol abusers, drug offenders, child molesters, and persons that have had their license suspended.” Similarly, driver Patty Grasso voiced her concern over “the incompetence and negligence” of the company’s management, and driver Donald Caouette criticized the company for being “careless” in its hiring and for its poor reputation. *Id.* at 46.

maintenance of ground vehicles created a safety hazard for airline personnel and customers were protected because they were linked to ongoing grievances over employee discipline. In language that is equally applicable to the instant case, the Board held that “absent a malicious motive [an employee’s] right to appeal to the public is not dependent on the sensitivity of [the employer] to his choice of forum,” and the Board emphasized that a contrary ruling “would effectively serve to preclude employees from protesting safety matters through requests for assistance from third parties . . . particularly in the airline industry, [where safety] is by its very nature a potentially volatile issue.” *Id.* at 231.¹⁸ See also *Valley Hospital Medical Center*, 351 NLRB at 1261 (finding protected employee statements at a press conference that due to short staffing at the hospital, “You don’t get medications to patients on time. They could be lying in their excrement for who knows how long. You can’t even do the basic things you want to do,” where the intent was to pressure the employer to increase staffing).

In protecting employee communications that are critical of the employer or its product where the communications relate to a labor dispute, the Board has adhered to the specific holding of *Jefferson Standard*, *supra*, and its approach has been upheld by numerous courts. See, e.g., *Sierra Publishing Co. v. NLRB*, 889 F.2d at 220 (“Product disparagement unconnected to the labor dispute, breach of important confidences and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand suggestions that a company’s treatment of its employees may have an effect upon the quality of the company’s products . . . are not likely to be unreasonable particularly in cases when the addressees of the information are made aware of the fact that a labor

¹⁸ We are not persuaded by the Respondent’s argument that the standard for disloyalty is different in the food industry compared to other businesses. Although customers may be alarmed by a potential health threat in the food industry, we cannot say that the public would be any less sensitive to inferences of safety problems in, for example, school bus transportation, *Five Star*, *supra*, the aviation field, *Allied Aviation*, *supra*, or health care settings, *Valley Hospital Medical Center*, *supra*. In this regard, the Respondent’s (and our dissenting colleague’s) reliance on *Coca Cola Bottling Works*, 186 NLRB 1050, 1054–1055 (1970), enfd. in part 466 F.2d 380 (D.C. Cir. 1972), is misplaced. In *Coca Cola*, statements were unprotected because the Board found they disparaged the quality of the product with the purpose of instilling fear in customers. Since deciding *Coca Cola*, Board law has developed considerably in its approach to the question of employee disloyalty. See discussion, *supra*. Here, where the judge considered that the posters’ message was closely tied to the employees’ interest in obtaining sick days, the labor dispute is made clear in the posters, and the posters were not shown to be maliciously untrue, the posters are protected. We agree with the judge that, to the extent *Coca Cola*’s holding is inconsistent with *Allied Aviation* and subsequent cases, it has been implicitly overruled.

dispute is in progress. . . . Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints.”). Accord: *Five Star Transportation, Inc. v. NLRB*, supra; *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 814–815 (2d Cir. 1980); *Community Hospital of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (distinguishing *Jefferson Standard* on ground that disparaging comments were “directly related to protected concerted activities then in progress”); *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029–1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974) (“[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth, so long as the allegedly offensive actions are directly related to activities protected by the Act and are not so egregious as to be considered indefensible.”) (internal quotation marks and citation omitted). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (interpreting *Jefferson Standard*).

We find that the posters and press release did not constitute disloyalty or reckless disparagement, as previously defined by Board and court precedent. First, there is no evidence that the communications were made “at a critical time in the initiation” of the Respondent’s business. *Jefferson Standard*, 346 U.S. at 472. Further, although the posters and press release shed unwelcome light on issues affecting public safety, they did not use inflammatory language, and their message did not stray from the context of the labor dispute. In particular, the safety issue raised—employees working while they are sick—was directly related to and in furtherance of the ongoing dispute over the Respondent’s failure to provide paid sick leave. While the employees may have anticipated that some members of the public might choose not to patronize the Respondent’s restaurants after reading the posters or press release, there is no evidence that their purpose was to inflict harm on the Respondent, or that they acted recklessly without regard for the economic detriment to the Respondent’s business. Rather, by urging the public to “Help Jimmy John’s Workers Win Sick Days,” the employees demonstrated that they were motivated by a sincere desire to improve their terms and conditions of employment by obtaining a more flexible attendance policy that included paid sick leave. See, e.g., *Professional Porter & Window Cleaning*, 263 NLRB at 139 (employees demonstrated that their purpose was to appeal to the building owner for support in their labor dispute rather than to injure their employer by impugning its operations).

In reaching a contrary conclusion, our dissenting colleague cites a variety of circumstances that, in his view,

allow for the inference that the communications were disloyally and maliciously intended to harm the Respondent, and are therefore unprotected under Board and court precedent. None of the factors, however, withstands scrutiny, as each either lacks evidentiary support or is contrary to established law. First, the dissent maintains that the “central claim” of the posters was the “false claim that it was impossible for employees to call in sick.” As our discussion above makes clear, however, the statement remains well within the permissible bounds set by our case law.

Second, the dissent contends that the posters “greatly exaggerated the potential public health problem” and conveyed the message that “customers are getting sick and will continue to get sick.” Yet the posters and press release did not allege that any sandwiches were actually contaminated—despite our colleague’s gratuitous references to the “contaminated-sandwich campaign”—or that any customers became sick from eating sandwiches made in the Respondent’s shops.¹⁹ Rather, they only suggest the realistic potential for illness resulting from the handling of food by workers who come to work while sick.²⁰

To support his position, our dissenting colleague also asserts that the poster’s claim of a public health danger was not supported by “statistical proof or empirical analysis.” With due respect to our colleague, this argument misconstrues the applicable standard. “Specificity and/or articulation are not the touchstone of union or protected concerted activity. . . . Once the concerted nature of the

¹⁹ Our dissenting colleague claims support for his position that the posters exaggerated the potential public health risk and thereby evidenced a malicious motive in the judge’s statement that “[g]iven Respondent’s record over a 10-year period [of only two food-borne outbreaks] one could regard the risk of becoming ill by eating at one of Respondent’s shops to be infinitesimal.” The dissent omits the sentence that immediately followed: “However, it is also arguable that Respondent’s policies make it somewhat more likely that such an incident could reoccur.” The judge went on to find that employees who are ill are more likely to work while ill if they do not have paid sick leave or are required to obtain a replacement.

²⁰ There is likewise no basis for the dissent’s claim that the posters evidenced a malicious motive because they “failed to show any remotely reasonable correlation between the alleged health problem and the employer’s lack of paid sick leave.” We are confident that the correlation was readily apparent to most readers. It is widely recognized that infected food workers can spread a variety of foodborne pathogens. As found by the judge in this case, “[t]he lack of paid sick leave provides a powerful economic incentive for employees to work when ill.” Consequently, by providing paid sick leave or implementing a more flexible attendance policy, employers in the food service industry can reduce foodborne outbreaks. See “Foodborne Outbreaks: Preventing Future Outbreaks,” <http://www.cdc.gov/foodsafety/outbreaks/prevention-education/future.html> (last visited on 6/11/2014) (“[e]ncouraging food workers not to work when they are ill . . . by providing paid sick leave” will reduce foodborne outbreaks).

words is established . . . respondent ha[s] the burden to show that the words were published with the knowledge of their falsity or with a reckless disregard of whether they were true or false.” *Diamond Walnut Growers*, 316 NLRB 36, 47 (1995) (quoting *Springfield Library & Museum*, 238 NLRB 1673, 1673 (1979)). In none of the relevant cases did the Board or courts require empirical evidence in support of the employees’ claim, a new standard urged by our dissenting colleague. See, e.g., *Allied Aviation*, supra; *Five Star Transportation*, supra; and *Valley Hospital Medical Center*, supra. But, even if that were the standard, there is no lack of data establishing that the preparation and handling of food by sick workers poses a danger to public health. A 2011 study conducted by the U.S. Centers for Disease Control and Prevention (CDC) estimates that 48 million people (1 out of 6) get sick from eating tainted food every year, leading to 125,000 hospitalizations and 3000 deaths.²¹ Norovirus is the leading cause of foodborne illness and a leading cause of hospitalizations and deaths.²² “Most often, food is contaminated [with norovirus] by infected food handlers.”²³ Infected food handlers “can easily contaminate food and drinks” causing outbreaks of norovirus and other foodborne illnesses such as *E. coli*, salmonella, and shigella.²⁴

The dissent argues that “[t]he majority should not allow the experience of other employers to serve as an effective justification for an evidence-free allegation against this employer.” However, this ignores evidence that the Respondent’s sandwiches have, on two separate occasions, been cited in State health department reports as the source of a public norovirus outbreak, which investigators determined was most likely caused by sick employees. The dissent also contends that the standard applied by the majority “leads to the Board simply substituting its preferences on the merits of an employer’s sick policies for the employer’s, in violation of the Act.” However, we do not hold that the Respondent was required to give in to the employees’ demands, only that it could not lawfully discharge or discipline employees for engaging in the protected concerted activity at issue in this case.

²¹ See the CDC’s webpage “CDC Estimates of Foodborne Illness in the United States,” <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited on 6/11/2014).

²² *Id.*

²³ “CDC Estimates of Foodborne Illness in the United States: Questions and Answers,” <http://www.cdc.gov/foodborneburden/questions-and-answers.html> (last visited on 6/11/2014).

²⁴ “Norovirus: For Food Workers: Norovirus and Working with Food,” <http://www.cdc.gov/norovirus/food-handlers/work-with-food.html> (last visited on 6/11/2014).

Finally, the Respondent and our dissenting colleague make much of the fact that the posters and press release do not consistently distinguish between franchisor Jimmy John’s and the Respondent, a franchisee. We fail to see how this evidences a malicious motive. Although the sandwich shops are operated by the franchisee, they are held out and known as Jimmy John’s. Our dissenting colleague nevertheless asserts that by failing to distinguish between the Respondent and the franchisor, the employees maximized the threat of substantial and lasting detriment to the Respondent’s reputation, and possibly “even threaten[ed] MikLin’s franchise relationship with Jimmy John’s.” Whatever value such an argument might have in another case, it is inapposite here, for several reasons. First, it is well settled that the protection of the Act extends to employees’ concerted activities undertaken on behalf of employees of a different employer. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F.2d at 505–506. The Sick Days campaign was clearly intended to benefit in part employees of other employers, including employees of other Jimmy John’s franchises, by bringing to the public’s attention a “marked increase in workers unable to take sick leave.”²⁵ The press release thus states, “[t]he issue of working while sick has become a staple concern for countless workers in the service industry and beyond, accelerated by the turn to a fast food model without benefits or job security.” Second, although Owner Michael Mulligan testified that the franchisor was aware of the posters and press release and that the Respondent was in communication with the franchisor on a regular basis throughout the union campaign, the Respondent offered no evidence that the posters or press release undermined or damaged its relationship with the franchisor. Finally, to the extent the franchisor might have been concerned about damage to its brand caused by the posters and press release, the dissent fails to explain why it would retaliate against the Respondent, whose interests in the matter were clearly aligned with its own.

In sum, we find that the employees involved in the poster campaign did not engage in disloyal, reckless, or maliciously untrue conduct. *MasTec*, supra. We therefore affirm the judge’s conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging six employees and disciplining three others because of their participation or perceived participation in the Union’s Sick Days poster campaign.²⁶

²⁵ Although the October 2010 election was held in a unit limited to the Respondent’s employees, the Union campaigned nationwide and its membership was open to all Jimmy John’s employees.

²⁶ We also agree with the judge that Co-owner Rob Mulligan violated Sec. 8(a)(1) when he solicited and encouraged employees to take

2. The Respondent's statements about Boehnke and his involvement in the union campaign

We affirm the judge's finding that the Respondent violated Section 8(a)(1) when Assistant Manager Rene Nichols encouraged employees, supervisors, and managers to harass employee David Boehnke, a strong union supporter, by means of postings on the antiunion Facebook page used by MikLin's employees, including posting Boehnke's phone number and soliciting employees to call him. As set forth in substantial detail in the judge's decision, employees and managers engaged in considerable disparaging, crude, and profane language related to the organizing activities, often at the expense of coworkers who supported the Union. We agree with the judge that much of this banter, if at times distasteful, was not unlawful, because it was either posted by nonsupervisory employees or was the kind of vituperative speech the Act tolerates during the heat of labor relations.²⁷ See *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). But, Supervisor Nichols' encouragement of employees to harass Boehnke in response to his involvement with the un-

down the Sick Days posters, which we find protected. Such conduct by a high-level supervisor chills employees' exercise of their Sec. 7 rights. See, e.g., *Waco, Inc.*, 273 NLRB 746, 749 (1984).

Having found that the six employees were discriminatorily discharged, we find it unnecessary to reach the General Counsel's alternative argument that, even if the posters were not protected, the six were discharged in violation of Sec. 8(a)(3), because, as union leaders, their punishment was more severe than that given to the so-called "foot soldiers" of the poster campaign.

We agree with the judge that the Respondent has not demonstrated that the discriminatees engaged in the kind of flagrant, postdischarge misconduct that might excuse the Respondent from its reinstatement or backpay remedial obligations. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 2-3 (2011), enfd. 677 F.3d 1241 (D.C. Cir. 2012). Moreover, no actions that may have been taken after the employees were terminated would cause the employees' involvement in the pretermination Sick Days poster campaign to lose the Act's protection.

²⁷ In accord with the judge, we find that Nichols' Facebook posting stating that if employees are sick of working sick, then she is sick of working with them, was not shown to be an unlawful threat, as it did not have a tendency to coerce employees; it was instead a response to the Union's campaign slogan. Further, we agree with the judge that the statements by person-in-charge Sam Alarcon were not shown to be unlawful, due to an absence of proof regarding her supervisory status.

In contrast to her colleagues, Member Schiffer would find that the comments by Rob Mulligan on the employees' antiunion Facebook page referring to Boehnke as the "unibrowner" were also unlawful, because they subjected a known union supporter to ridicule by the company co-owner. The Board may find vulgar personal attacks or humiliating insults against union supporters to violate Sec. 8(a)(1), even absent an express call to action. *Rankin & Rankin, Inc.*, 330 NLRB 1026, 1037 (2000). Here, Member Schiffer would find that Mulligan's participation in the ongoing, public humiliation of Boehnke would reasonably interfere with, coerce, and restrain other employees who would fear similar treatment if they openly advocated for the Union. See *Dayton Hudson Corp.*, 316 NLRB 477, 477, 483 (1995).

ion campaign went beyond the bounds of mere opinion or exuberance during the heat of a labor campaign. *Id.*

Moreover, in contrast to the judge, we find the postings by two other supervisors, Eddie Guerrero and Melissa Erickson, were also unlawful, because, similar to solicitations in the postings by Nichols, they encouraged employees to disparage employee Boehnke because of his union activity. As the judge discussed, a former MikLin employee Ben McCarthy, who had been fired for putting excrement in Boehnke's coat pocket months earlier, posted a picture of Boehnke on the antiunion Facebook page that was altered significantly to reflect McCarthy's hostility toward Boehnke and the Union, and McCarthy's excrement theme. On the antiunion Facebook page, Supervisor Eddie Guerrero commented on the altered Boehnke picture by posting, "Bahahaha [sic] omg [sic] this is great [sic] can we please post these everywhere [sic]." Similarly, Supervisor Mellissa Erikson posted, "Bahahahahah! [sic] I love this, [sic] you [sic] should put these up everywhere [sic]." We find *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), which is cited by the judge to excuse these statements as "disparagement alone" of union officials, to be inapposite. Although Boehnke was one of the leaders of the union effort, he was nevertheless an employee, subject to the authority of the Respondent's supervisors and managers.²⁸ The supervisors' encouragement of employees to disseminate widely this degrading picture of an employee leader of the Union would reasonably intimidate both Boehnke and other employees who would not want to be subject to the same kind of humiliation and ridicule, thereby dissuading them from supporting the Union. *Dayton Hudson Corp.*, 316 NLRB 477, 477-478, 482-483 (1995). On this limited issue, we reverse the judge and find these postings encouraging employees to harass Boehnke violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

The Respondent, MikLin Enterprises, Inc. d/b/a Jimmy John's, has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act as follows:

1. By Area Manager Jason Effertz and other agents removing union literature from in-store bulletin boards on which other material was generally posted without restriction at its Riverside store, the Respondent violated Section 8(a)(1).

2. By Assistant Manager Rene Nichols posting an employee's telephone number on Facebook and soliciting other employees, supervisors, and managers to call or

²⁸ In contrast to the judge, we do not find that Boehnke's union activities make him a de facto union official.

JIMMY JOHN'S

text the employee about his protected activities, the Respondent violated Section 8(a)(1).

3. By Supervisors Eddie Guerrero and Melissa Erickson encouraging employees to disparage an employee union supporter on Facebook, the Respondent violated Section 8(a)(1).

4. By Co-owner Rob Mulligan soliciting and encouraging employees to remove union posters from property not belonging to the Respondent, the Respondent violated Section 8(a)(1).

5. By terminating the employment of Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee on March 22, 2011, the Respondent violated Section 8(a)(3) and (1).

6. By issuing final written warnings to Isaiah (Ayo) Collins, Brittany Koppy, and Sean Eddins on March 22, 2011, the Respondent violated Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board orders that the Respondent, MikLin Enterprises, Inc. d/b/a Jimmy John's, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing protected postings from bulletin boards or other areas on the Respondent's property on which other postings are generally allowed without restriction.

(b) Soliciting employees, supervisors, or managers to contact employees who support the Industrial Workers of the World, or any other union, about the prounion employees' protected activities.

(c) Soliciting employees, supervisors, or managers to disseminate disparaging pictures of prounion employees.

(d) Soliciting or encouraging the removal of protected postings from property not belonging to the Respondent.

(e) Discharging, disciplining, or otherwise discriminating against employees because they support the Industrial Workers of the World, or any other union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buck-

ley-Farlee whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Rescind the unlawful written warnings issued to Isaiah (Ayo) Collins, Brittany Koppy, and Sean Eddins.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and written warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and written warnings will not be used against them in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its stores in the Minneapolis, Minnesota area copies of the attached notice marked "Appendix B."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 18, 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 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 du-

²⁹ We shall substitute a new notice to conform with *Durham School Services*, 360 NLRB No. 85 (2014). 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."

plicate 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 February 10, 2011.

(h) 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.

Dated, Washington, D.C. August 21, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

Section 7 of the Act does not confer on employees an unlimited right to disparage the quality of their employer's products with an intent to cause harm to their employer's reputation, or reduce its income, or with reckless disregard for such consequences of their actions, even if their efforts can be linked to a legitimate labor dispute. The doctrine that disloyalty in the context of a labor dispute can remove the Act's protection remains valid. Neither the Board, nor any court, has held otherwise. Here, the Union's "contaminated sandwich" poster campaign purposefully disparaged MikLin Enterprises' signature product in a manner that was out of all proportion to the alleged sick leave dispute involved. The posters were clearly designed to attack the reputation and income of both MikLin and its national franchisor Jimmy John's in the eyes of the public; or, at the very least, the posters demonstrated a reckless disregard for such inevitable, detrimental consequences.¹ Based on well-established precedent, discussed below, MikLin was entitled to discipline employees for their involvement in this unprotected part of the Union's "shock and awe" publicity campaign and to encourage others, including employees, to remove the offending posters from public places. Therefore, I respectfully dissent from my colleagues'

¹ A copy of the Union's poster was admitted as GC Exh. 45. It is reproduced as App. A to this opinion, with Rob Mulligan's phone number redacted. In this opinion, I describe and refer to the poster as the "contaminated sandwich" poster. My colleagues label my description "gratuitous." I shall leave it to the viewers of the poster to determine whether my description is justified.

contrary findings and I would dismiss the complaint allegations based on this activity.²

The Board's disloyalty doctrine is still governed by the Supreme Court's seminal decision in *Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), in which the Court determined that employees discharged for "detrimental disloyalty" to their employer were lawfully discharged for cause within the meaning of Section 10(c) of the Act. In *Jefferson Standard*, television station technicians sponsored or distributed handbills that made "a sharp, public, disparaging attack upon the quality of the company's product and its business practices" at a critical time in the initiation of the station's services, "in a manner reasonably calculated to harm the station's reputation and reduce its income." Id. at 471. The Court affirmed the Board's findings that the handbills made no reference to a labor dispute or appeal for public support in a pending dispute. However, as the Board noted in a decision issued 3 years after *Jefferson Standard*, the "Court concluded that even if the attack were not treated as 'separable' from the labor controversy, but instead were to be treated as a concerted activity of the kind intended to be embraced in Section 7, the means which were used by the responsible technicians (i. e., the public disparagement of the quality of the employer's product), 'deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act.'"³ In sum, the fact that employees' public dispar-

² The General Counsel has argued in the alternative that, even if the posters were unprotected, the Respondent violated Sec. 8(a)(3) by discriminatorily terminating six union leaders for their participation in the contaminated-sandwich sick leave campaign because their treatment was harsher than the discipline warnings given to three union "foot soldiers." I would remand this issue to the judge for a full mixed-motive analysis pursuant to *Wright Line*, 251 NLRB 1083, 1087-1088 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Regarding the allegedly unlawful statements on the antiunion Facebook account, I find most of them to be noncoercive expressions of opinions about the Union's campaign against MikLin, which are protected by Sec. 8(c) of the Act. I agree with my colleagues, however, that the statements made by employer representatives that encouraged employees to mock and ridicule union leader Boehnke were unlawful, because they had a reasonable tendency to coerce and restrain employees from participating in protected activity. However, in agreement with Chairman Pearce, I affirm the judge's finding that Rob Mulligan calling Boehnke a "unibrowner" was not unlawful. Unlike the statements we find unlawful, Mulligan's "unibrowner" remark amounted to name calling that contained no threats, suggestions of futility, or calls-to-action to harass Boehnke. Although distasteful, the name-calling is the kind of "vituperative speech" the Act tolerates in the heat of labor relations. *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004).

In all other respects, I agree with my colleagues.

³ *Patterson-Sargent Co.*, 115 NLRB 1627, 1630 (1956), quoting from *Jefferson Standard*, 346 U.S. at 377-378. Relying on this aspect of the Court's rationale, the Board in *Patterson-Sargent* found that

agement of an employer's product or attack on its reputation is linked to a labor dispute does not totally immunize the employees' conduct from discipline for disloyalty.

In *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5–6 (2011), the Board reaffirmed the standard, developed in cases decided since *Jefferson Standard*, that employee communications to the public in an effort to obtain support in their labor dispute are protected where the communication is overtly related to a labor dispute and “the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protections.” (citing *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)).⁴ As indicated, the Board will first determine whether the communication reveals to the public that it is related to a labor dispute between the employer and the employees. If so, the Board will still address whether the employees used any prohibited means evincing disloyalty, recklessness, or malicious untruth to further their otherwise protected cause.

I agree with my colleagues that the Union's campaign, and the posters in particular, contained sufficient information for the public to surmise that the posters were part of an ongoing labor dispute. The posters referred to the employees' desire for paid sick time, they suggested union involvement,⁵ and they directly appealed for the public's support. Therefore, the contaminated-sandwich posters met the threshold test of communicating to the

striking employees lost statutory protection by distributing handbills to the public expressly referring to the strike and disparaging the quality of paint manufactured by the employer in their absence. Accord: *Diamond Walnut Growers v. NLRB*, 113 F.3d 1259, 1267 fn. 8 (D.C. Cir. 1997)(interpreting Court's statement in *Jefferson Standard* as recognizing product disparagement campaign could be construed as separable unprotected attack on employer “whether or not it references the labor dispute”).

⁴ In *MasTec*, a group of technicians, who installed satellite television connections in customers' homes, spoke on camera to the local news media about their employer's newly imposed pay system that arguably encouraged them to mislead customers in order to receive premium pay and avoid being docked pay. They were terminated for participating in the on-air criticism. Applying the two-step analysis, the Board found that the technicians did not lose the Act's protection. It is clear that all panel members regarded extant law as addressing the second-step analysis of proscribed means in the disjunctive, mandating loss of statutory protection in the event employee product disparagement involved any one of the three proscribed means of pressuring an employer in a labor dispute. Concurring Member Becker effectively conceded this in contending that extant law and the interpretation of *Jefferson Broadcasting* be modified and narrowed to hold that employee speech “expressly and intimately linked” to a labor dispute should be found protected unless statements were untrue and made with actual malice. 357 NLRB No. 17, slip op. at 13–14.

⁵ I note that the posters referred the public to a jimmyjohnsworkers website. The actual name of the union involved here is the Industrial Workers of the World.

public a sufficient link to a legitimate ongoing labor dispute.

I disagree with my colleagues in their contention that “none of the statements in these communications were made with knowledge of their falsity or with reckless disregard for their falsity.” The employees' statement “SHOOT, WE CAN'T EVEN CALL IN SICK,” made prominently on the disparaging posters, was empirically false. (All caps in the original.) Employees could call in sick at any point. The only condition imposed was that an employee calling in sick was required to find a replacement for his or her shift. The publishers of the posters, being employees well-versed in MikLin's rule in this regard, knew that this statement was false and published it anyway.⁶

However, even were I to agree, as my colleagues apparently do, that this one completely and knowingly false statement was permissible, rather than establishing by

⁶ That MikLin's work rule as written did not “simply” allow one to call in sick, which the majority notes, is irrelevant to this analysis. The obvious meaning of the rule is that employees could call in sick if they did something in addition to “simply” calling in sick. More importantly, the rule, as it was administered during the daily work of the MikLin stores—and, as the employees and the Union fully knew—was not a prohibition against calling in sick at all, as opposed to calling in sick without a replacement. In this regard, I note as well the following statement in the March 16, 2011 attendance policy communicated to all employees: “*Absence due to sickness—With regard to absenteeism due to flu-like symptoms, Team Members are **not allowed** to work unless and until those symptoms have subsided for 24 hours.”

The majority references the published results of a telephone survey created and conducted by the Union shortly before its sandwich poster campaign as evidence that the information in the poster and press release was not maliciously false because employees had the impression they were compelled to work when they were sick. The judge did not mention this survey, for good reason. The survey contained questions about how often employees were sick, how often they worked while they were sick, and why they did work when sick. The survey did not distinguish between illnesses such as flu that could be foodborne and any other type of illness, from headache to cancer. Further, there were only 34 respondents from a work force of 200 in 10 stores. Twenty-seven of those respondents stated they were “sick”—again, we do not know from what—six times or fewer annually. Twenty-eight respondents said they worked while ill 75 to 100 percent of the time. Lacking any statistical cross-reference between respondents to the first question and respondents to the second question, the claim that employees work while ill 4 days a year is purely conjectural even as to the sample group, and certainly not valid for the entire multistore MikLin work force. Finally, 26 respondents reported that they worked when sick, either because they could not afford the loss of pay, could not find a replacement, or both. If my colleagues and the Union are looking for some objective justification of the absolute claim that employees cannot call in sick, as opposed to why a small sampling of them chose not to do so, then I believe they need to look elsewhere. Even less persuasive is the majority's passing reference to vague anecdotal testimony, also not mentioned or credited by the judge, that one or two employees who participated in the Sick Day campaign were personally directed to work while sick by supervisors and managers when no one else was available to cover their shifts.

itself malicious or reckless disregard for the truth, I still find the poster and its distribution unprotected for another more fundamental reason. I find that the statements in the poster, considered in their totality, were maliciously motivated with the primary intent to injure MikLin's business reputation and income, rather than to redress the employees' sick leave grievance. The employees involved with the Union in this poster campaign thereby clearly resorted to a means of protest so disloyal as to lose the Act's protection.

In product disparagement cases, the Board takes care to distinguish between disparagement constituting unprotected disloyalty and the airing of what may be highly sensitive issues, such as safety matters, so as not to preclude employees from protesting safety matters through appeals for public assistance. *Allied Aviation Services Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980). To this end, public criticism of an employer in the context of a labor dispute must evidence "a malicious motive" to be found unprotected disloyalty. Nevertheless, it is well established that employees lose the Act's protection if their means of protest are "flagrantly disloyal, wholly incommensurate with any grievances which they may have, and manifested by public disparagement of the employer's product or undermining of its reputation." *Five Star Transportation, Inc.*, 349 NLRB 42, 44-47 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008), citing *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978). In other words, a disloyal malicious intent may be inferred from the circumstances of a particular protest. That is the situation presented here.

It must be borne in mind that, as stated by the court in *Diamond Walnut Growers*, *supra*, "when a union claims that a food product produced by a struck company is actually tainted it can be thought to be using the strike equivalent of a nuclear bomb; the unpleasant effects will long survive the battle The company's ability to sell the product, even if the strike is subsequently settled, could well be destroyed." 113 F.3d at 1266. In this case, unlike in *Diamond Walnut*, there was no strike, and the labor dispute involved a single issue of paid sick leave. Yet, the employees displayed posters alleging serious public health safety dangers in the preparation of Jimmy John's sandwiches, MikLin's signature product and most likely its primary source of revenue. In this context, the Union and employees supporters' use of the tainted food product "nuclear bomb" was so incommensurate with the sick leave grievance as to show that the purpose was to harm the employer in a manner unrelated to the labor dispute.

The malicious motivation for disloyal disparagement becomes even more obvious when considering several

additional factors. First, as noted, *supra*, a central claim of the posters was the false claim that it was impossible for employees to call in sick. Second, the posters greatly exaggerated the potential public health problem. Third, in reference to this exaggeration, the posters failed to show any remotely reasonable correlation between the alleged health problem and the employer's lack of paid sick leave.

As to the foregoing two issues, the administrative law judge himself trenchantly noted:

One could argue that two cases of foodborne disease in 10 years when Respondent has made 6 million sandwiches renders any correlation between Respondent's sick leave policy and foodborne illness to be *so improbable* that the Union's posters should be unprotected. Moreover, there has been *no direct correlation established* between these incidents and the absence of sick leave. Given Respondent's record over a 10-year period, one could regard the risk of becoming ill by eating at one of Respondent's shops to be *infinitesimal*.

See judge's decision, *infra*, slip op. at 23 (notes omitted; emphasis added).

Yet, the judge did not arrive at the logically inescapable conclusion from these incisive observations. A devastating direct attack on an employer's product quality that would fail even the most basic notions of statistical proof or empirical analysis does not suddenly become protected conduct simply because it is made in the context of a labor dispute. Instead, portraying an "infinitesimal risk" as a clear and present danger to public health strongly signals that the motivation for the attack is malice and that the disparagement is unprotected under the Act.

Here, the majority's approach gets the relationship between empirical facts and disloyalty precisely backwards. The majority initially argues that such evidence of truth or untruth of employee allegations is immaterial to a finding of employee disloyalty. But that disavows human experience. An employee who is willing to make up allegations out of whole cloth against his or her employer is obviously far more disloyal, in any meaningful sense of that word, than one who acts upon a reasonable but mistaken belief. Thus, the empirical facts, as related to the actual employer at issue, are extremely important to the disloyalty prong of the *Jefferson Broadcasting* test.

Perhaps understanding that factual accuracy is inextricably tied in with loyalty/disloyalty, the majority then argues that the thrust of the employees' claims is supportable generally. In other words, if some generalized experience (and the guidance of the Centers for Disease

Control (CDC)) shows that sick workers can contaminate food, then that is enough to find that the employees were basically loyal, or at least not disloyal enough to lose the protection of the Act. But there are several major problems with this approach.

First, the fact that, in general, foodborne illness is often transferred by the habits of food handlers is beside the point. There is no record evidence that *MikLin's attendance policy* caused any customer to become ill—ever. The majority should not allow the experience of other employers to serve as an effective justification for an evidence-free allegation against this employer. Second, the majority's allowance of post hoc justifications based on facts unconnected with the employer at issue creates, in effect, a "safe harbor" for disparaging an employer's products or services, no matter how far afield from the reality of the employer at issue, as long as the employees at *some* point afterwards come up with *some* tenuous connection to the employer or its general industry.⁷ Third, divorcing an employer-specific evaluation of factual accuracy from the overall loyalty/disloyalty analysis simply puts the Board in a place where it should not be: evaluating the merits of the employees' demands overall. At best, this leads inexorably to making policy judgments based on appeals to authority (i.e., the Centers for Disease Control studies) or some subjective vision of general industry practices. At worst, it leads to the Board simply substituting its preferences on the merits of an employer's sick policies for the employer's, in violation of the Act.⁸

In defense of their contrary position, my colleagues assert that the posters and the press release "did not state or

⁷ Contrary to my colleagues' assertion, I do not ignore that State health department investigations, occurring in 2006 and 2007 (4 and 5 years before the incidents at issue in this case), determined that food then prepared by the Respondent's workers was likely responsible for gastroenteritis. But these facts do not diminish the completely speculative nature of the employees' sandwich campaign for several reasons. To begin with, incidents that happened that long ago—with millions of sandwiches made in the interim with no problems—do not support an allegation of ongoing, current sandwich contamination, especially when, as the judge related, the most recent health department investigation "noted overall compliance with food code requirements and no critical violations." Moreover, neither investigation implicated the sick leave policy in any way. Finally, and most tellingly, there is no record evidence that the employees created the sandwich campaign actually knowing of and relying upon the 4-5-year-old investigations. See, judge's decision, *infra*, at fn. 11.

⁸ Here, there are two problems. The Board would impermissibly translate the employer's views concerning the perceived disloyalty into an unfair labor practice in violation of Sec. 8(c). Moreover, it would also undermine the policies behind Sec. 8(d), insofar as the Board would be putting a thumb on the scale in favor of the employees' proposal, which it could not do even if they had a *bonafide* 9(a) or 8(f) bargaining representative.

even imply that the health risk was 'serious,'" and that the posters did not allege that any sandwiches were actually contaminated or that any customers had become ill from eating sandwiches made at the Respondent's shops. They further assert that the poster did not use inflammatory language. Their arguments demonstrate that they do not see the forest for the trees. The first sentences of the March 10 press release state, "Sick of working sick, today Jimmy John's Workers Union blows the whistle on unhealthy working conditions and demands a change in sick day policy. As flu season continues, the sandwich makers at this 10-store franchise are sick and tired of putting their health and the health of their customers at risk." The thrust of the message is that the lack of paid sick time actually puts customers at risk for the flu, which is a serious illness. The poster presents images of two sandwiches that occupy half of the page, one of which, the poster asserts, was made by an ill worker. The poster also states, "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST." (All caps in the original.) My colleagues' characterization that the posters "only suggest the potential for illness" from workers who come to work sick is a convenient whitewashing of the facts. The poster does not "suggest" that the second sandwich potentially could have been made by an ill worker—it states that it *was* made by an ill worker. The poster does not "suggest" that the sandwich potentially could pose a risk, it states that the customer's immune system *is* about to be challenged. Finally, the demand letter that the Union presented to the Respondent's owners, the Mulligans, on March 10, which was attached to the press release along with a copy of the poster, asserts anecdotally that employees actually work while they are sick and that they put customers at risk by doing so. It further states that, "Jimmy John's is a restaurant that thrives on a 'clean' image, offering fresher foods, and a sparkling atmosphere. By working sick, we are jeopardizing the entirety of that image and risking public safety." The message of the Union's publicity campaign is purposeful and abundantly clear: MikLin's attendance policy puts customers at risk, and, if it is not changed, customers are getting sick and will continue to get sick. The Union's tactic of making the demand for a change in the attendance policy at the same time it issued the press release attaching the letter and the poster reflects its campaign strategy to inflict harm based on a wholly exaggerated, if not entirely concocted revelation of a public health risk specific to MikLin, without regard to how the Mulligans responded to its demands. In contrast to my colleagues, I find this language unreasonably inflammatory, and the message beyond the Act's protection.

Fourth and finally, the posters intentionally enmeshed the franchisor in the dispute, inaccurately implying that it was the franchisor that was responsible for the issues. The posters identified franchisor Jimmy John's, with a nationwide network of over 1400 stores, rather than the employer MikLin, a local franchise operator of 10 stores, as the target.⁹ Despite having revealed in the March 10 press release that they knew that the Mulligans' operation was a small franchise, the Union had employees plaster the contaminated-sandwich posters around the Twin Cities 10 days' later, knowingly confusing the subject of the posters. Thus, the posters maximized the threat of substantial and lasting detriment to MikLin's reputation and income. The Union would reasonably have understood that the damaging message in the posters could cause tension or even threaten MikLin's franchise relationship with Jimmy John's.

The facts of this case closely parallel those in *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050 (1970), cited by the Respondent, in which the Board determined that preparation and distribution of a leaflet entitled "Health Warning" by striking employees was unprotected, because it consisted of public disparagement of the employer's product. The leaflet advised the public to beware "that empty Coca Cola bottles often serve as collectors of foreign matter" that replacement employees might overlook. *Id.* at 1054. The Board agreed with the judge's finding that "the main thrust of the leaflet was to create fear in the public's mind that drinking Coca Cola would be harmful to the health of the purchaser because of the presence of foreign objects such as roaches and mice in the bottles." *Id.* Likewise, the main thrust of the contaminated-sandwich posters is to shock the public and create a generalized fear that consuming MikLin's sandwiches will cause illness. Although the leaflets in each case were not technically untrue in all respects, they showed a reckless disregard for the effects of their message. In both cases, the communications display a lack of a good-faith concern for public safety, despite their purported warnings. In neither case does Board law permit the employees to hide behind their labor dispute to justify such detrimental disloyalty to their employers when resorting to reckless disparagement of the employers' products.

⁹ Although the Respondent's "Rules of Employment," which refers to the attendance policy, is printed with a Jimmy John's logo, there is no showing that Jimmy John's many franchisees had a standard sick leave policy in common with MikLin. The March 10 press release refers to a 10-store franchise and mentions the Mulligans, but it also repeatedly refers to the employer as Jimmy John's and never identifies MikLin Enterprises.

My colleagues adopt the judge's pronouncement that *Coca Cola* has been effectively overruled by *Allied Aviation*, *supra*. I disagree. I find nothing inconsistent between the holdings of these two cases, and I find the holding in *Coca Cola* to be consistent with the case law as it has been applied both before and after *Allied Aviation*. In that case, a shop steward, acting on behalf of airplane mechanics, complained in two letters to customers (airport and airline representatives) about the employer's work rules that allegedly posed potential safety hazards to the employees and the public. *Id.* at 229–230. The Board found the complaints to customers bore a sufficient relationship to a labor dispute. *Id.* at 231. Then, in determining whether the shop steward's complaints went beyond the Act's protection, the Board considered that, although the employer would no doubt prefer to keep safety issues out of the public eye, nothing in the letters rose to the level of public disparagement necessary to deprive otherwise protected activities of the Act's protection. *Id.* In so doing, the Board implicitly rejected the judge's finding that the safety concerns were not made in good faith. Although the Board took great care to distinguish between disparagement and the airing of what were surely sensitive issues, it certainly did not conclude that any and all appeals to the public that purport to raise safety issues are always protected. *Id.* To the contrary, the Board continues to carefully distinguish between unprotected disparagement and good-faith efforts to protest safety matters and other sensitive issues through requests for assistance from third parties. *Id.*

The Board's holding in *Five Star Transportation, Inc.*, 349 NLRB 42, 44–47 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008), illustrates the careful application of the longstanding test for assessing product disparagement in the context of a labor dispute. In *Five Star*, employees of a predecessor bus company sent letters to the school district during the bidding process for a school bus service contract. The letters were critical of Five Star and urged the school district to either select the predecessor company for the contract or require any new company to honor current terms and conditions of employment. After being awarded the contract, Five Star's owner refused to hire any applicants who had sent letters to the school district. The Board considered the content of each letter and determined that some letters were protected, but that others were unprotected because they "criticize[d] and disparage[d] the business reputation of the Respondent in ways that go beyond complaints about terms and conditions of employment." *Id.* at 45. The employees who lost the Act's protection referred in their letters to stories from 7-year-old newspaper articles using inflammatory and exaggerated language that disparaged Five Star's

JIMMY JOHN'S

reputation by asserting it hired child molesters and alcoholics, and that it had a shoddy safety record. These claims were wholly disproportionate to the issues in their labor dispute. As was the case in *Coca Cola*, supra, the fact that, at its core, the employees' statements in *Five Star* were not shown to be untrue did not save the communications from their loss of protection. The flagrantly disloyal attitude employees demonstrated in attacking the employer's reputation with a predictable harmful outcome, caused the otherwise protected conduct to lose the Act's protection.

The Ninth Circuit has stated that "the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances." *Sierra Publishing Co.*, 889 F.2d 210, 220 (9th Cir. 1989). Contrary to the judge's analysis, the court's reasoning fits squarely within the consistent line of Board precedent holding that there is a point when product disparagement in connection with a labor dispute is so disloyal as to warrant removal of statutory protection. Adherence to this precedent is mandated by Section 10(c), as interpreted by the Supreme Court in *Jefferson Standard*, supra. It is consistent with the Board's overarching policy to maintain labor relations stability. It is con-

sistent as well with the indisputable right of employers to maintain discipline and production in their workplace. When, as here, employees publicly disparage their employer's product in a manner that is not reasonably related to their labor dispute and manifests a primary malicious purpose to inflict maximum harm on their employer's business, the employer is entitled to discipline them for disloyalty. That is what Respondent MikLin legitimately did.

In sum, I would find that MikLin did not violate the Act by disciplining employees because of their participation in this unprotected disparagement, by removing the posters, or by encouraging employees to remove the posters. I respectfully dissent from my colleagues' failure to dismiss the complaint allegations relevant to these actions.

Dated, Washington, D.C. August 21, 2014

Harry I. Johnson, III,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

<p>YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER</p>	<p>YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER</p>
	
<p>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'RE ABOUT TO TAKE THE SANDWICH TEST...</p> <hr/> <p>HELP JIMMY JOHN'S WORKERS WIN SICK DAYS CALL THE OWNER ROB MULLIGAN AT : TO LET HIM KNOW YOU WANT HEALTHY WORKERS MAKING YOUR SANDWICH!</p>	

APPENDIX B
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 remove protected postings from bulletin boards or other areas on our property on which other postings are generally allowed without restriction.

WE WILL NOT solicit employees, supervisors, or managers to contact you about your activities in support of the Industrial Workers of the World, or any other union.

WE WILL NOT solicit employees, supervisors, or managers to disseminate degrading pictures of you because you support the Industrial Workers of the World, or any other union.

WE WILL NOT solicit or encourage the removal of protected postings or literature from property not belonging to us.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you, because you support the Industrial Workers of the World, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee for the adverse tax consequences, if any,

of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL rescind the written warnings given to Isaiah (Ayo) Collins, Brittany Koppy, and Sean Eddins.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharges of Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee and the written warnings issued to Isaiah (Ayo) Collins, Brittany Koppy and Sean Eddins.

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or written warnings will not be used against them in any way.

MIKLIN ENTERPRISES, INC. D/B/A JIMMY JOHN’S

The Board’s decision can be found at www.nlrb.gov/case/18-CA-019707 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



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Timothy J. Louris, Esq. (Miller, O’Brien Cummins, PLLP), of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on February 14–15, 2012. The Industrial Workers of the World filed charges on March 7, 24, and April 22, 2011. The General Counsel issued a consolidated complaint and notice of hearing on November 9, 2011. In this complaint, the General Counsel alleges Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by terminating the employment of Erik Forman, Mike Wilklow, Davis Ritsema, David Boehnke, Max Specktor, and Micah Buckley-Farlee on March 22, 2011, and issuing

written warnings the same day to Isaiah (Ayo) Collins, Sean Eddins, and Brittany Kopyy. Respondent contends that it terminated and/or disciplined these employees for conduct that is not protected by the Act. At least part of the conduct in question was posting flyers near Respondent's restaurants suggesting that customers might get sick by eating one of Respondent's sandwiches due to Respondent's lack of paid sick leave.

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act through its agents who posted anti-union messages on a Facebook page that could be accessed by the public, or at least anyone with a Facebook account. Some of these postings disparaged prounion employee David Boehnke. Another, by Co-owner Rob Mulligan, encouraged employees and managers to take down the Union's "sick day" flyers which were posted outside of Respondent's restaurants. Another allegation in the complaint states that one of Respondent's managers removed union literature from a public bulletin board inside one of the restaurants. Finally, the General Counsel alleges that Respondent's owner illegally interrogated an employee about the union sympathies of another employee.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, MikLin Enterprises, a corporation, operates 10 Jimmy John's sandwich shops in the Minneapolis-St. Paul area as a franchisee, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods at these facilities valued in excess of \$50,000 from outside the State of Minnesota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the International Workers of the World (IWW), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent owns and operates 10 Jimmy John's sandwich shops in the Minneapolis-St. Paul area. There are 40–50 other Jimmy John's establishments in this area owned and operated by others and approximately 1400 Jimmy John's shops nationwide. The Union, the International Workers of the World, began to organize MikLin's shops as early as 2007. The campaign went public in September 2010. On October 22, 2010, a representation election was conducted in a unit covering all 10 MikLin stores. Eighty-five votes were cast in favor of representation by the IWW; 87 were cast against representation. The Union filed objections to the conduct of the election. The ob-

¹ Respondent appears to argue at p. 35 of its brief, that its exhibit, R. Br. 13, should have been received. When I pointed out to Respondent's counsel that the exhibit, a *transcript* of a telephone conversation between Rob Mulligan and Davis Ritsema had not been properly authenticated (e.g., who transcribed the conversation and by what means) counsel withdrew the exhibit without making any attempt to properly authenticate it, Tr. 333–335.

jections case was settled on January 10, 2011. The essence of the settlement was that after 60 days but not later than after 18 months, the Union would be allowed to file a petition for a rerun election and that if it did so Respondent would agree to an election within 30 days. (GC Exh. 46.)

Respondent also settled an unfair labor practice case on January 11, 2011. The settlement agreement contained a clause stating that Respondent did not admit to violating the Act as alleged. However, it agreed to read a notice to its employees stating that it would not engage in a number of practices that violate the Act and it agreed to rescind a number of disciplinary measures. (GC Exhs. 59 and 60.)

Respondent's Attendance Policy as it Pertains to Illness

When Respondent hired new employees, at least as late as December 2, 2010, it gave them a list of 27 rules for employment at *Jimmy John's*. Rule 11 stated, "Find your own replacement if you are not going to be at work. We do not allow people to simply call in sick! We require our employees and managers to find their own replacement! NO EXCEPTIONS!" (GC Exh. 63.) Between March 10 and 20, 2011, Respondent posted a letter at one or more of its stores, stating that "for those who 'don't feel good' we have a policy that expects them to find a replacement for their shift . . . the record clearly shows that we have demonstrated flexibility with regard to excusing those who cannot find replacements," (GC Exh. 16.)

The October 2010 version of Respondent's handbook in paragraph 16 similarly stated that "employee responsibility to report to work on time or find a suitable replacement is an essential part of employment. . . . Employees who cannot work their scheduled shift must find a suitable replacement to work the shift. Employees who fail to call when they are either going to be late or are unable to work a shift will be subject to immediate termination," (GC Exh. 13, par. 16.) Respondent does not provide paid leave for employees who miss work due to their own illness. However, it provides paid leave for employees whose children are sick if that parent has worked for MikLin for a sufficient period of time.

On March 16, 2011, Respondent promulgated a new attendance policy. However, the substance of this policy as it relates to this case was identical to its existing policy. Under this policy employees are "expected to be at work on time or find a suitable replacement for their scheduled shifts." Respondent also instituted a disciplinary point system for attendance issues. An employee who does not report to work, but finds a replacement is not assessed any points. An employee who called his or her manager at least 1 hour before the shift without finding a replacement is assessed one point. The employee is assessed two points if they call in less than an hour before or after the start of the shift and three points for a no-call/no-show. Within any rolling 12-month period an employee receives a disciplinary coaching for one point; a recorded verbal warning for two points; a written warning for three points; and is terminated for accumulating four points.

The new policy was posted at least at two of Respondent's 10 stores, Calhoun Square and Knollwood, prior to March 17, 2011. With regard to absences it provided:

JIMMY JOHN'S

Absence due to sickness: With regard to absenteeism due to flu like symptoms, Team Members are **not allowed** to work unless and until those symptoms have subsided for 24 hours. Each day of sickness will count as a separate absence except that an absence of two or more consecutive days for *the same* illness will be counted as one "occurrence" when the Team Member supplies the Company with a medical certification that the Team Member has been seen by a doctor during the illness.

(GC Exh. 18.)

The Posters

In late January or early February 2011, members of the Union put up posters on community bulletin boards in the public area of several of Respondent's stores. (GC Exh. 44.) These posters were removed by Respondent's managers each time they encountered one.² These posters featured two color photographs of a Jimmy John's submarine sandwich side-by-side. The sandwiches looked identical. Both had a little mayonnaise on the top of the upper loaf of the sandwich. Above the sandwich to the left of the poster were the words "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER." The words above the sandwich to the right read, "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." The wording was in the color white on a black background, except that the words HEALTHY and SICK were in red.

Below the pictures of the two sandwiches was the following:

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'RE
 ABOUT TO TAKE THE SANDWICH TEST . . .
 HELP JIMMY JOHN'S WORKERS WIN SICK DAYS
 SUPPORT US ONLINE AT www.jimmyjohnsworkers.org

The second and third lines below "Can't tell the Difference" were printed in red.

The March 10, 2011 Meeting

March 10, 2011, marked the end of the 60-day period in which the Union could not file for a rerun election. On that date, four of the alleged discriminatees, Erik Forman, Mike Wilklow, Max Spektor, and Davis Ritsema went to the office of Rob Mulligan, a co-owner of Respondent. The four had a 10–15-minute discussion with Rob Mulligan regarding Respondent's policies regarding employees who are ill on days they were scheduled to work.

² Complaint par. 5(c) alleges that Respondent through its Area Manager Jason Effertz removed union postings from its Riverside store. The record establishes that Effertz admitted to removing postings other than the sick day posters, but that agents of Respondent routinely took down the sick day posters whenever they encountered them at any of Respondent's stores. (Tr. 167–170, 199, 285.)

At this meeting, the four presented Rob Mulligan a letter from the Union (GC Exh. 43), asking for paid sick days. The letter indicated that the lack of paid sick days provided an economic incentive for Respondent's employees, who are paid the minimum wage, to work when they were ill and thus posed a risk to public safety. The letter also stated:

We would like to meet with you on or before Sunday March 20 at 2:00 p.m. (ten days from the date of this letter.) If you refuse to meet with us, or cannot supply willingness to cooperate to meet with the needs of your employees, we will move forward with our Sick Day posters by posting them not only in stores, but on the University's campus, in hospitals, on street corners, and any other place where postings are common, citywide.

The Union also issued a press release on March 10 (GC Exh. 38), entitled, "Jimmy John's Workers Blow the Whistle on Unhealthy Working Conditions." The press release asserted that Respondent's lack of sick leave put the health of employees and customers at risk. The release did not make any essential distinction between Respondent MikLin and Jimmy John's shops generally. At some points it focused on Jimmy John's generally and at others specifically on the MikLin franchise. It also indicated that the lack of sick leave was an industrywide problem. The press release stated, "The issue of working while sick has become a staple concern for countless workers in the service industry and beyond, accelerated by the turn to a fast food employment model without benefits or job security."

The press release also stated the Union's intention to "plaster" Minneapolis with thousands of sick day posters. A copy of the poster (GC Exh. 44) was attached to the press release as well as the Union's "ten point plan." This plan lists the Union's objectives in organizing Jimmy John's which included wage increases and health insurance, as well as 1 paid sick day per month of employment.

Sunday, March 20, 2011

On Sunday, March 20, 2011, the Union put up posters on lampposts, trash cans, mailboxes, newspaper stands, and other surfaces within two blocks of each of Respondent's stores that were identical to (GC Exh. 44), other than the last two lines which stated:

CALL THE OWNER ROB MULLIGAN AT [TELEPHONE NUMBER] TO
 LET HIM KNOW THAT YOU WANT HEALTHY WORKERS MAKING
 YOUR SANDWICHES

Rob Mulligan's name and telephone number were printed in red.

On the evening of March 20, Rob Mulligan and other of Respondent's managers took down as many of the posters as they could find.

Three of the employees who were subsequently fired on March 22, Mike Wilklow, David Boehnke, and Max Spektor, and the three who were given final written warnings participated in the postings of these placards. Erik Forman and Micah Buckley-Farlee were not in the Twin Cities on March 20.

Davis Ritsema apparently did not help put up posters. However, he called Rob Mulligan several times between March 10 and 20. Thus, he knew that posters would be “plastered” all over the Twin Cities on March 20, if Respondent did not meet the Union’s demands regarding sick leave. Moreover, Ritsema knew of the content of the posters, having posted some which were almost identical previously.

On March 22, Respondent terminated the employment of Erik Forman, Mike Wilklow, Davis Ritsema, David Boehnke, Max Spektor, and Micah Buckley-Farlee and issued written warnings the same day to Isaiah (Ayo) Collins, Sean Eddins, and Brittany Koppy for disloyalty to their employer and disparagement of its product. More specific reasons that Respondent gave for these disciplinary actions are as follows:

Spektor, Ritsema, Buckley-Farlee, Wilklow, and Forman were terminated for being part of the group that presented Rob Mulligan with the letter threatening to post the sick day poster if Mulligan did not meet with the employees about Respondent’s sick leave policy and causing the public posting of hundreds of these posters in neighborhoods near Respondent’s stores.

David Boehnke was terminated for posting a “sick day” poster at the Skyway store and texting Rob Mulligan threatening to put up the “sick day” posters if Mulligan refused to meet with union supporters, thus causing the public posting of hundreds of the “sick day” posters near several of Respondent’s stores.

Eddins, Collins, and Koppy were given a final written warning for posting the sick day posters on March 20.

With regard to the “sick day” posters each of the disciplinary notices contained language identical or similar to the following language in the termination notice for Buckley-Farlee:

The widespread malicious distribution of these posters on March 20 was clearly intended to harm the company and to injure its business and reputation and that of the owners. Its malicious intent is underscored by its failure to identify MikLin Enterprises and its calculated blanket indictment of all other Jimmy John’s stores in the country, none of which has any kind of dispute with the IWW. You clearly intended to damage not only the Jimmy John’s brand image of all franchisees, but that of the franchisor organization as well.

(GC Exh. 9.)³

³ The Union’s posting of the sick day flyers did not violate Sec. 8(b)(4)(B)(ii) of the Act, as Respondent contends, *Edward J. DeBartolo Corp. v. Florida Building & Trades Council*, 485 U.S. 568 (1988). That provision of the Act does not prohibit secondary handbilling in the absence of picketing. Moreover, the fact that employees were required to sign *Jimmy John’s rules for employment* is sufficient to dispose of Respondent’s argument at p. 38 of its brief that Jimmy John’s is a neutral employer in this matter, *Teamsters Local 560*, 248 NLRB 1212 (1980). Respondent at no time effectively conveyed to employees that they were no longer subject to Jimmy John’s employment rules, assuming this is the case. On the contrary, Respondent’s March 16, 2011 attendance policy states that its approach “is not intended to create anything ‘new.’” (GC Exh. 18.) In fact that policy reiterates that the employees are expected to be at work on time or find a suitable replacement.

The termination notices of Ritsema and Buckley-Farlee also cited their role in the distribution of the March 10 IWW press release (with the “sick day” poster) as grounds for their termination.⁴

Respondent’s CEO, Mike Mulligan, explained that Koppy, Eddins, and Collins were disciplined, but not terminated because they were “foot soldiers” with regard to the posting of the “sick day” flyers. The six employees who were terminated “were the developers and leaders of this entire matter” (Tr. 288).

The day after the terminations and written warnings were issued, the Union issued another press release. (GC Exh. 39.) In that press release, Buckley-Farlee was quoted as follows:

It just isn’t safe—customers are getting their sandwiches made by people with the flu, and they have no idea . . . rather than safeguard public health and do the right thing for their employees and their customers, Jimmy John’s owners Mike and Rob Mulligan are trying to silence us. . . .

In a March 30 press release, Erik Forman was quoted as saying:

Speaking out against the policy of forcing workers to work while sick is not only our right, it is our duty. The unfettered greed of franchise owner Mike Mulligan and Jimmy John Liautaud himself jeopardizes the health of thousands of customers and workers almost every day. We will speak out until they realize that no one wants to eat a sandwich filled with cold and flu germs.

(GC Exh. 41.)⁵

The State of Minnesota has statutes or regulations governing exclusion of employees from workplaces in which they handle food. (GC Exhs. 19, 20; R. Exh. 10.) They require an employer to exclude an employee from a food establishment if the employee is ill with vomiting or diarrhea. A food employee is restricted from working with exposed food, clean equipment, and clean utensils in a food establishment if the employee has an enteric (intestinal) bacterial pathogen capable of being transmitted by food, such as *Salmonella* spp, or *Escherichia coli*.

In addition, MikLin’s October 2010 employee handbook (GC Exh. 13) states that its employees must dress in accordance with Jimmy John’s uniform and personal grooming and dress code policy. It further states that “our employees represent the Jimmy John’s image to every customer they serve.”

⁴ The General Counsel argues in its brief the terminations and disciplinary warnings violate the Act even if the activities of March 20 were unprotected. I need not reach that argument and in any event, I find that Respondent fired the six and disciplined the three for posting the sick day posters near its stores on March 20.

⁵ I would note that an employer has a heavier burden when seeking to be excused from its obligation to reinstate or pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatee’s termination than it does in seeking to justify the original discrimination. Since I find that Respondent did not justify the original terminations, it follows that it did not meet its burden of establishing misconduct so flagrant after the terminations to excuse it from its reinstatement and backpay obligations, *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011).

JIMMY JOHN'S

There is apparently no requirement that an employee who has any other type of illness, such as a cold, cough, runny nose, or sore throat, be restricted from working with food. There is also no evidence in this record that illnesses such as a cold, cough, or sore throat can be transmitted through food. Respondent's employees wear plastic gloves when making sandwiches but apparently do not wear gloves when bagging napkins for an order that is to be delivered. (Tr. 266, 273–274.)

Antiunion Facebook Postings

On October 17, 2010, or earlier, a rank-and-file employee established the Jimmy John's antiunion Facebook page. This page was "open," meaning that it could be accessed by anyone who had a Facebook account via the internet. Unlike a closed Facebook page, it was accessible to people who were not members of the Facebook group. Members of the antiunion Facebook group included rank-and-file employees, a number of Respondent's store managers and assistant managers, area managers, and Co-owner Rob Mulligan. Union supporters Mike Wilklow and Erik Forman were able to access the Facebook page. Wilklow posted comments on it under the name Mike Pudd'nhead. (GC Exh. 2, pp.18–19.)

Sometime in March, Rob Mulligan posted a notice that he had received a text message from David Boehnke regarding the Union's intention to put up the "working sick" poster. (GC Exh. 45.) Rob Mulligan encouraged members of the Facebook group to take the posters down.

Sometime in March 2011, Rene Nichols, the assistant manager at Respondent's Skyway store, where Boehnke had worked, posted Boehnke's telephone number and suggested that Facebook members text Boehnke to "let him know how they feel." (GC Exh. 2, p. 30.) She also posted a message, "Fuck You David Forever." Respondent admits that Nichols was and is one of its supervisors and its agent as defined in Section 2(11) and (13) of the Act.

Also on March 20, Nichols responded to a ranting negative description of Boehnke by another member of the Facebook group, by observing, "You forgot to say unibrow. He just likes things that begin with 'uni' lolz." Co-owner Rob Mulligan added a post shortly thereafter, "I call him, 'The Unibrowner.'" This is apparently a reference to Boehnke's eyebrows and the "Unibomber," Ted Kaczynski, who mailed explosive packages to various people over a period of years. (GC Exh. 2, p. 31.)

On March 31, 2011, Rene Nichols posted a message, "Haaaa Ben—2 David—0 Farbag." This referred to a posting former employee Ben McCarthy had placed on the website depicting David Boehnke with feces on the bill of his cap. Several months earlier, Respondent fired McCarthy after Boehnke complained to Michael Mulligan that McCarthy had put feces in his winter coat.⁶ Melissa Erickson, the manager of Respondent's Franklin store posted her approval of McCarthy's picture of Boehnke and on March 31, suggested they be put up everywhere. Assistant Store Manager Eddie Guerrero made a similar post. (GC Exh. 2, p. 16.)

⁶ Respondent did not contest McCarthy's claim for unemployment insurance. It did contest the claims of the six union members fired for the postings on March 20.

Nichols added a number of Jimmy John's employees to the Facebook group. (Tr. 79.) Some of these appear to have been rank-and-file employees.

Alleged Interrogation (Complaint Par. 5(b))

In January 2011, Mike Mulligan asked Micah Buckley-Farlee if Mike Wilklow knew that Respondent was reimbursing Wilklow for damage to his bicycle. Wilklow was on workers' compensation at this time, having been injured while riding his bicycle making a delivery for Respondent. Buckley-Farlee responded that he believed Wilklow was aware of the fact that he was being reimbursed. Mulligan then asked if Wilklow was happy that he was being reimbursed and whether Wilklow was "ready to support the Company now." At the time it was well known that Wilklow was a very active supporter of the Union.⁷

Removal of Union Literature (Complaint Par. 5 (c))

In January and February 2011, union supporter Travis Erickson posted a copy of the amended charge in Case 18–CA–019551 (GC Exh. 62) and a flyer entitled FAQ (frequently asked questions) about the union election and settlement (GC Exh. 61) at Respondent's Riverside store. On February 10, Jason Effertz, one of Respondent's area managers, told Erickson he had been taking down these union flyers because he was told they were unprotected.

Analysis

The Posting of the "Sick Day" Posters at Respondent's Stores and Outside those Stores on March 20, 2011, are Protected by Section 7 of the Act

The relevant legal framework for analyzing this case was set forth in great detail in *Valley Hospital Medical Center*, 351 NLRB 1250,1252 (2007):

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enfd. mem.* 636 F.2d 1210 (3d Cir. 1980). This includes communications about labor disputes to newspaper reporters. See, e.g., *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995). . . .

⁷ Mike Mulligan testified that he did not recall this conversation. I credit Buckley-Farlee that it occurred. Buckley had also been an open supporter of the Union at least since October 2010. (See GC Exh. 37, *Objections to the Election*, p. 6.)

But finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise protected communications with third parties may be "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987); accord: *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).

Statements have been found to be unprotected as disloyal where they are made "at a critical time in the initiation of the company's" business and where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953); accord: *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005). The Board is careful, however, "to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, supra at 139. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. . . .

The Board most recently addressed this issue in *Mastec Advanced Technologies*, 357 NLRB No. 17 (2011), and *Dresser-Rand Co.*, 358 NLRB No. 34 (2012).⁸ Numerous Board cases establish that virtually any form of protected activity can be subjectively considered disloyal, including forming, joining, or assisting a labor organization, e.g., *RTP Co.*, 334 NLRB 466, 467, 476 (2001), enfd. 315 F.3d 951 (2003). Moreover, protected activity will often adversely impact an employer's reputation and revenue. Indeed, Justice Frankfurter in his *Jefferson Standard* dissent observed that, "Many of the legally recognized tactics and weapons of labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations," 346 U.S. 464 at 479-480.

There is no question that if employees posted or handed out flyers asking the public not to patronize their employer because they did not get paid sick leave, such conduct would be protected, *Kitty Clover, Inc.*, 103 NLRB 1665, 1687-1688 (1953);

⁸ In *Dresser-Rand*, the Board affirming the judge, found that some statements made by the alleged discriminatee to third parties were protected hyperbole but that one in particular, a grossly inaccurate factual misrepresentation about the decline in the workload at one of Dresser-Rand's facilities, was not. The Board found that this statement was made with actual malice and with a reckless disregard for its truth. I conclude this case is distinguishable from *Dresser-Rand* on its facts.

Arlington Electric Inc., 332 NLRB 845, 846 (2000). Appeals to customers that may adversely affect the employer's revenue have been found to be protected by Section 7 in many cases. For example, in *Allied Aviation Service of New Jersey, Inc.*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980), the Board found that the letters of a union steward to his employer's customers were protected. The steward in that case claimed that his employer's practices relating to the servicing and main-tenance of ground vehicles created a safety hazard to customers and resulted in inferior service.⁹

The Posters were Sufficiently Connected to a Labor Dispute to be Protected by the Act

The March 20, 2011 postings clearly meet the first prong of the Board's analysis for determining whether they were protected in that the postings were clearly tied to a labor dispute. Respondent argues that this is not the case in that the Union was not legitimately concerned with the public's health, only with browbeating Respondent into negotiating with it over sick days. However, the poster focused on the employees' lack of sick days, a term and condition of employment. It may well be that had Respondent acceded to the Union's demands on sick leave, the Union would have moved on to other demands in its 10-point program. However, there is no basis on which to conclude that the absence of sick leave was not a real concern of the Union and the discriminatees when they posted the sick day flyers.

The Statement, "Shoot We Can't Even Call in Sick" is not a Sufficient Departure from the Truth to Render the Posters Unprotected

A second factor in the Board's analysis of these types of cases is whether the Union put up the flyers with knowledge of their falsity or with reckless disregard for their truth or falsity. The Union's first factual assertion, that Jimmy John's employees do not get paid sick days, is true, at least with regard to MikLin. The record is silent as to whether or not this is true to all or some other Jimmy Johns stores.

On the other hand, it is not literally true that employees could not call in sick. However, Respondent's argument to the contrary is not entirely accurate either. Employees were and still are subject to discipline if they call in sick without finding a replacement. Moreover, finding a replacement may present a significant burden to an employee who is sick enough to miss work (particularly one who is vomiting or is experiencing diarrhea).

⁹ Although *Coca Cola Bottling Works*, 186 NLRB 1050, 1054-1055 (1970), cited by Respondent at pp. 38-39 of its brief, has never been explicitly overruled, I infer that it has implicitly been overruled by *Allied Aviation Service of New Jersey*. On the basis of *Allied Aviation*, I conclude that disparagement of the employer's product may, at least in some situations, be insufficient justification for an employee's termination—if connected to a labor dispute. Moreover, the part of the *Coca Cola Bottling* decision regarding product disparagement appears to be dicta since the employees in question were not denied reinstatement by the Board. The reason for this was that the employer had not relied on the employees' disparagement in refusing to reinstate them.

The fact that a statement may not be 100-percent accurate does not necessarily lose the protection of Section 7. As noted by the United States Court of Appeals for the Ninth Circuit in *Sacramento Union*, 889 F.2d, 210, 220 (9th Cir. 1989), “third parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.”

More recently the United States Court of Appeals for the Sixth Circuit observed that, “Society generally distinguishes between the kind of statements made in private or semiprivate communications from those statements made in more public setting such as protests, strikes or organizing campaigns,” *Jolliff v. NLRB*, 513 NLRB 600, 611–613 (2008). The court opined that speech in the latter setting is more likely to be rhetorical and exaggerated. I thus conclude that the wording of the poster, “workers don’t get paid sick days, shoot, we can’t even call in sick,” constitutes protected hyperbole.

The Suggestion that Employees’ Lack of Paid Sick Days
May Cause a Customer to Become Ill is Insufficient to
Render the Posters Unprotected

The lack of paid sick leave provides a powerful economic incentive for employees to work when ill and to conceal illness that would exclude them from work if that is possible.¹⁰ Furthermore, it is at least arguable that Respondent’s sick leave policy subjects the public to an increased risk of food borne disease, in part due to the two prior incidents described below.

In January 2006, the Minnesota Department of Health (MDH) investigated complaints of gastrointestinal illness among four Jimmy John’s employees at Respondent’s Block E store. The MDH concluded that ham was likely contaminated by an ill or recently ill person that cut or handled the ham and caused the outbreak. (GC Exh. 14.)

The MDH also investigated an outbreak of norovirus gastroenteritis at one of MikLin’s stores in January 2007. (GC Exh. 15.) The MDH investigation concluded that sub style sandwiches were like contaminated by a previously ill foodworker. This employee experienced 13 hours of vomiting, which ended on January 26, 2007. She returned to work on January 29, when she apparently contaminated the sandwiches. The MDH investigator “noted overall compliance with food code requirements and no critical violations.”

Thus, if this employee in fact caused the food poisoning, neither compliance with the Minnesota food regulations nor Respondent’s new policy prohibiting employees from working until flu symptoms have subsided for 24 hours would have prevented this outbreak. Moreover, the record is silent as to whether Respondent has taken any precautions in addition to those in place in 2006 and 2007 to prevent a recurrence of food poisoning.¹¹

One could argue that two cases of foodborne disease in 10 years when Respondent has made 6 million sandwiches renders

¹⁰ On the other hand, it is also true that if employees have paid sick leave or personal days and use them up, they may also have an incentive to work when ill.

¹¹ The record is also silent as to whether any of the discriminatees were aware of these incidents when the March 20 flyers were posted.

any correlation between Respondent’s sick leave policy and food borne illness to be so improbable that the Union’s posters should be unprotected. Moreover, there has been no direct correlation established between these incidents and the absence of sick leave. Given Respondent’s record over a 10-year period one could regard the risk of becoming ill by eating at one of Respondent’s shops to be infinitesimal. However, it is also arguable that Respondent’s policies make it somewhat more likely that such an incident could reoccur.

This record is silent as to whether the absence of sick leave leaves the public and/or Respondent’s employees more vulnerable to other maladies, which are not transmitted through food, such as the common cold. However, it is clear that Respondent’s employees work in very close proximity to each other while making sandwiches.

Employees can make sandwiches with a cold, cough, or runny nose and are more likely to do so without paid sick leave. They are also more likely to do so if they must obtain a replacement or be faced with discipline.

Also, Respondent was hardly defenseless with regard to the Union’s postings. It could have waged its own publicity campaign which could well have generated sympathy for it and indeed possibly attracted consumers. If Respondent were to accede to the Union’s demands with regard to paid sick leave, wage increases, etc., it is quite likely that Respondent would have to raise its prices. The public may well choose to patronize Respondent and other Jimmy John’s stores as opposed to paying a higher price for lunch.

Moreover, Respondent could have waged a publicity campaign, by posting flyers or other means, criticizing the Union and its tactics. It could have appealed, for example, to the anti-radical sentiment of much of the public as it did at trial and in its posttrial brief, citing radical statements and articles attributed to some of the discriminatees. It is conceivable that such a campaign would have increased the patronage of Respondent’s stores.

Finally, Board precedent recognizes that statements linked to a labor dispute which were uttered with actual malice may be unprotected. However, the burden of proving “actual malice” requires the party asserting actual malice to demonstrate with clear and convincing evidence that the accused party realized that his or her statement was false or that he or she subjectively entertained serious doubt as to the truth of the statement, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 US 485, 511 fn. 30 (1984); *Jolliff v. NLRB*, 513 NLRB 600, 613 (2008). This would require Respondent to prove that a particular discriminatee realized the statements in the sick day posters regarding risk to the public were false or entertained serious doubts about the truth therein, in order to justify the termination of that individual employee. Respondent has not made this showing with regard to any of the alleged discriminatees. It has at best demonstrated that each one had insufficient knowledge to know whether or not the statements in the posters were true.

In conclusion, I find that Respondent violated Section 8(a)(3) and (1) in terminating Erik Forman, Mike Wilflow, Davis Ritsema, David Boehnke, Max Spektor, and Micah Buckley-Farlee on March 22, 2011, and issuing written warnings the

same day to Isaiah (Ayo) Collins, Sean Eddins, and Brittany Kopyy.¹²

Removal of Union Posters from the Public Bulletin Boards
and from Property not Belonging to Respondent

Removal of Other Union Literature by
Area Manager Jason Effertz

Since I have concluded that the posting of the sick day posters constituted protected activity, I also conclude that Rob Mulligan violated Section 8(a)(1) as alleged in complaint paragraph 5(g), by encouraging others to take them down, *Muncy Corp.*, 211 NLRB 263, 272 (1974); *St. Louis Auto Parts Co.*, 315 NLRB 717, 720 (1994).

Respondent, by Area Manager Jason Effertz also violated Section 8(a)(1) in removing union literature from a bulletin board used freely by its employees and others, without any limitation, *Jennings & Webb, Inc.*, 288 NLRB 682, 692 (1988). The fact that Respondent believes that some of the assertions in the literature to be inaccurate does not entitle it to remove the material from a bulletin board on which it allows virtually anything else to be posted.

Disparagement of Union Supporters

“It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations,” *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). An employer generally violates the Act if the disparagement conveys explicit or implicit threats, suggests that employees’ union activities are futile, or constitutes harassment that would reasonably interfere with employees’ Section 7 rights. Words of disparagement alone concerning a union, its officials or supporters are insufficient for finding a violation of Section 8(a)(1), *Sears, Roebuck & Co.*, 305 NLRB 193 (1991).

I therefore dismiss the complaint allegations regarding the Facebook postings with one exception. I find that Assistant Manager Rene Nichols’ posts violated Section 8(a)(1). By encouraging employees and managers to text David Boehnke without any specification of what they should communicate to Boehnke, Nichols was encouraging other employees and managers to harass Boehnke for activities that were protected, as well as some that were arguably unprotected. Rob Mulligan’s posts on Facebook condoned such harassment.

¹² I reject the argument of the General Counsel and the Charging Party that Respondent violated the Act even if the posters were unprotected. I find no illegal discrimination in treating the employees who planned and organized the flyer postings more harshly than those “foot soldiers” who did the posting. An analogous situation would be terminating an employee who fomented strike misconduct but did not participate in the misconduct. However, it is possible that Micah Buckley-Farlee’s involvement in planning the postings is too attenuated to justify his termination even if the posting was unprotected, *Patterson-Sargent Co.*, 115 NLRB, 1627, 1630–1631 (1956). I do not believe I need to analyze whether or not this is so. Buckley-Farlee did not attend the March 10 meeting and did not participate in the flyer posting. His only connection to this activity was being listed as a contact in a press release which mentioned the Union’s intention to post the sick day flyers.

Alleged Illegal Interrogation

I dismiss complaint paragraph 5(b) alleging that Respondent, by Mike Mulligan, illegally interrogated Micah Buckley-Farlee about Mike Wilklow’s union sympathies. Since the alleged interrogation involved two very open union supporters, I conclude that it did not violate the Act, *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985); *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002).

Other Arguments in Respondent’s Brief

I also find that Section 302(b) of the LMRA, cited by Respondent at pages 36–38 of its brief, has no relevance to this case. The LMRA is directed at bribery of union officials or employees and extortion, rather than acceding to the demands of employees exercising their Section 7 rights to improve the terms and conditions of their employment. *Arroyo v. U.S.*, 359 U.S. 419, 425–426 (1959). *Caterpillar, Inc. v. Auto Workers*, 107 F.3d 1052, 1057 (3d Cir. 1997) (en banc).

I also reject Respondent’s argument that the Union engaged in unlawful prerecognition bargaining. The Union did not ask for recognition in March 2011, nor did it ask Respondent to sign a collective-bargaining agreement with it. Employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, “and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [Emphasis added].” They do not lose this right by supporting a union which loses a representation election. Any employee on behalf of himself or herself and others, and any group of employees, with or without a union, may concertedly petition their employer for an improvement in terms and conditions of their employment, see, e.g., *Phillips Petroleum Co.*, 339 NLRB 916 (2003); Section 9(a) of the Act.

CONCLUSIONS OF LAW

Respondent, MikLin Enterprises, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act as follows

1. By removing union postings from its Riverside store.
2. By Assistant Manager Rene Nichols in posting an employee’s telephone number on Facebook and soliciting other employees, supervisors, and managers to call or text the employee about his protected activities.
3. By Co-owner Rob Mulligan in encouraging employees to remove union posters from property not belonging to Respondent.
4. By Area Manager Jason Effertz and other agents in removing union posters and other union literature from in-store bulletin boards on which other material was generally posted without any restriction.
5. By terminating the employment of Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee on March 22, 2011.
6. By issuing final written warnings to Isaiah (Ayo) Collins, Brittany Kopyy, and Sean Eddins on March 22, 2011.

THE REMEDY

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall reimburse the discriminatees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatees' backpay to the proper quarters on their Social Security earnings records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, MikLin Enterprises, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the Industrial Workers of the World, or any other union.

(b) Soliciting antiunion employees, managers, and supervisors to contact prounion employees about the prounion employees' protected activities.

(c) Removing union postings from property not belonging to Respondent and from bulletin boards or other areas on Respondent's property on which other postings are generally allowed without restriction.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Max Spektor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Rescind the illegal written warnings issued to Isaiah (Ayo) Collins, Brittany Kopyy, and Sean Eddins.

¹³ 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.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and written warnings and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and written warnings will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its stores in the Minneapolis, Minnesota area, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 18, 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 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 February 10, 2011.

(g) 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.

Dated, Washington, D.C. April 20, 2012

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

¹⁴ 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."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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 discharge or otherwise discriminate against any of you for supporting the Industrial Workers of the World, or any other union.

WE WILL NOT solicit antiunion employees, supervisors, and/or managers to contact prounion employees about their protected union activities.

WE WILL NOT remove or encourage others to remove union postings or literature from property not belonging to us or from areas in our stores on which we generally allow the posting of material without restriction.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee full reinstatement to

their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL rescind the written warnings given to Isaiah (Ayo) Collins, Brittany Kopyy, and Sean Eddins.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Max Specktor, David Boehnke, Davis Ritsema, Mike Wilklow, Erik Forman, and Micah Buckley-Farlee and the written warnings issued to Isaiah (Ayo) Collins, Brittany Kopyy, and Sean Eddins.

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or written warnings will not be used against them in any way.

MIRLIN ENTERPRISES, INC. D/B/A JIMMY JOHN'S