
What Every Employer Should Know About the Law of Union Organizing

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With several federal labor law changes on the horizon, the financial stakes for employers may increase dramatically. Prudent employers are well-advised to understand the law of union organizing. This article discusses the early signs of union organizing and details unfair labor practices arising during union organization campaigns.

Many labor relations professionals, lawyers, and non-lawyers alike, have been anxiously watching the growing public debate regarding federal labor law change. While proposals for statutory change have bounced around Congress for many years, the results of the November 2008 Congressional and presidential elections caused a heightened sense that change is imminent.

The November 2008 presidential election ushered in an administration that is sensitive to the needs of organized labor. President Obama, both as a candidate and now as head of the Executive branch, has repeatedly voiced his support for legislation which will “level the playing field” between unions and management.

In the November 2008 Congressional elections, Democrats, who already enjoyed a significant majority in the House of Representatives, initially picked up eight seats in the Senate. After months of litigation, on July 7, 2009, Al Franken was sworn into the Senate as the junior Senator from Minnesota giving Democrats a filibuster-proof majority of 60 seats in the Senate. Less than 24 hours after he was sworn in, Senator Franken became a co-sponsor of the Employee Free Choice Act of 2009.

To many, these political changes are the harbinger of a resurgence of organized labor. Even Wilma Liebman, Chairman of the National Labor Relations Board, speaking for herself, stated in an address to the US Chamber of Commerce on Labor Policy at the Crossroads that a “perfect storm” existed for changes to federal labor law.

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Indeed, since the 111th Congress began on January 3, 2009, there have been no fewer than six bills introduced into the House of Representatives, the Senate, or both proposing changes federal labor law:

- *The Employee Free Choice Act of 2009 (H.R. 1409 and S. 560)*. These bills provide a “card check” process as a substitute to secret ballot elections, mandate mediation, and interest arbitration for first labor agreements and significantly increase penalties against employers for violations of the National Labor Relations Act.
- *The National Labor Relations Modernization Act (H.R. 1355)*. This bill does not include a “card check” provision but requires employers to give unions equal access to the employer’s property to campaign in favor of unionization. This bill also contains mandatory mediation and interest arbitration for first labor agreements and significantly increases penalties against employers for violations of the National Labor Relations Act.
- *Labor Relations First Contract Negotiations Act of 2009 (H.R. 243)*. This bill also makes mediation and interest arbitration mandatory for first labor agreements.
- *The Secret Ballot Protection Act (H.R. 1176 and S. 478)*. These bills would legally prohibit a labor organization from causing or attempting to cause an employer to recognize or bargain collectively with a union that was not selected by a majority of such employees in a secret ballot election conducted by the National Labor Relations Board.

To suggest that some form of change is not imminent is unrealistic. The only real question is what specific changes will survive the political process. The “card check” provision of the Employee Free Choice Act has received the most media attention. However, many of us do not believe that “card check” is politically viable. If there is a demise of “card check,” that means traditional union organizing tactics will continue, albeit on a much faster schedule and much broader scale, after the law changes.

Just as important, are provisions in the proposed laws that would attach significant fines and penalties to labor law violations. In other words, the financial stakes for employers may increase dramatically, and prudent employers are well-advised to understand the law of union organizing.

EARLY SIGNS OF UNION ORGANIZING ACTIVITY

Many employers are under the mistaken belief that the union’s first step in organizing a new employer is to file a petition with the National

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Labor Relations Board (the Board) or to solicit signatures on cards authorizing union representation of the employees who sign. Very often however the union will covertly probe employee interest prior to any larger-scale solicitation of authorization cards. The union may even attempt to place a paid or unpaid union organizer within a target non-union company to organize the non-union company's workforce from the inside. This organizing tactic is known as "salting."

Regardless of how the union first infiltrates the company, there are many telltale signs of union organizing:

- Increase in the number or intensity of employee complaints on wages, hours, working conditions, or management practices;
- Unusual or more frequent employee challenges to management authority;
- Employee demands to revisit employee relations issues that management believed had been resolved;
- Increase in the number of hushed and/or animated employee conversations that stop when management comes near;
- Unusual groupings or congregations of employees (*i.e.*, conversations between employees who typically do not interact);
- Actions taken by groups of employees versus individual action (*e.g.*, groups of employees appearing at the supervisor's door to make a complaint or groups of employees wearing the same article of clothing such as a red T-shirt on the same day);
- Unusually frequent or well-publicized employee meetings during non-work hours;
- Increase in the number of formal complaints to government agencies (*i.e.*, Occupational Health and Safety Administration, U.S. Department of Labor Wage and Hour, state or federal fair employment agencies, environmental agencies, etc.);
- Clothing/buttons imprinted with traditional union organizing themes or union identification; and
- Unusual increase in graffiti or defacement of employer postings.

The above list is not intended to be exhaustive but only illustrative that many early signs of union activity are easy to miss. Because Section 7 of National Labor Relations Act (the Act) applies to all employees, not just

“unionized” employees, employers must be mindful of the law of organizing even in the absence of an obvious union organizing campaign.

COMMON EMPLOYER UNFAIR LABOR PRACTICES DURING A UNION ORGANIZING CAMPAIGN

Introduction

An employer is permitted, and is almost always well advised, to conduct an employee informational campaign when confronted with a union organizing campaign. What the employer is lawfully permitted to do and say in its counter-campaign is the subject of Section 8(a) of the Act and a vast number of Board decisions and judicial opinions.¹

Employers that do not pay careful attention to relevant labor law when conducting a counter-campaign can easily run afoul of the law. There are few easy answers in determining whether the employer’s counter-campaign violated the Act and whether the employer has thereby committed one or more unfair labor practices. The analyses are complex and highly fact intensive. Moreover, outcomes are often influenced on factors beyond the control of the employer, such as the Board Region investigating the charge and the Board’s political composition at the time of adjudication.

The remainder of this article is meant to explain the general structure of the Act’s employer-side unfair labor practices provisions and to explain the general principles, often through illustrative examples. Given the complexity of this area of the law, employers that are confronted with an organizing campaign should immediately seek legal counsel.

Review of the General Statutory Structure and Language

Section 8(a)(1)—Interference, Restraint, and Coercion

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”² Section 7 of the Act provides:

Employees 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, and shall also have the right to refrain from any or all such activities[.]³

Section 8(a)(1) is very frequently cited as the statutory authority of unfair labor practice charges and/or complaints.⁴ There are two reasons. First, Section 8(a)(1) covers a very large number of common employer unfair labor practice activities. Threats, promises, coercive questioning,

surveillance, disparagement of the organizing union, and many other employer activities may violate Section 8(a)(1).

Moreover, because Section 8(a)(1) prohibits actions that “interfere with, restrain, or coerce” employees, an employer that violates one of the other statutory sections derivatively violates Section 8(a)(1) of the Act as well.⁵

Section 8(a)(2)—Domination or Interference of a Union

Section 8(a)(2) of the Act provides that it is an unfair labor practice for an employer to “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it[.]”⁶

This section of the Act is often cited in charges and/or complaints alleging that an employer’s use of employee participation programs unlawfully dominates or interferes with the formation of a union. It is also cited in some cases in which two or more rival unions are competing to represent employees and the employer provides assistance to only one of the unions.

Section 8(a)(3)—Discrimination in Regard to Hire or Tenure of Employment or Any Term or Condition of Employment

Section 8(a)(3) of the Act provides that it is an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”⁷

Like Section 8(a)(1), Section 8(a)(3) is the statutory authority prohibiting certain employer conduct under a myriad of fact situations. Discharges for employment, suspensions, segregation of employee-union activists, and failure to hire allegations may constitute Section 8(a)(3) violations.

Section 8(a)(4)—Discrimination for Filing Charges or Participating in Board Proceedings

Section 8(a)(4) of the Act provides that it is an unfair labor practice for an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.”⁸

Section 8(a)(5)—Refusal to Bargain

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of

his employees[.]”⁹ Section 8(a)(5) violations typically occur after a union has been certified as the employees’ exclusive bargaining representative. For that reason, the topic is not covered in this article.

Remedies for Employer Unfair Labor Practices During a Union Organizing Drive

Employer Unfair Labor Practices During an Organizing Campaign May Invalidate an Election and/or Result in a Board Bargaining Order

Generally, in determining whether a party has engaged in objectionable conduct warranting a remedy, the Board will evaluate the parties’ conduct beginning on the date that the certification of representative petition was filed through the date of the election (*i.e.*, the so-called “critical period”).¹⁰ However, the Board may also consider pre-petition conduct in circumstances where such conduct “adds meaning and dimension to related post-petition conduct.”¹¹

As described more fully below, an employer who engages in unfair labor practices during a union organizing campaign runs the risk that the Board will invalidate subsequent election results or order the employer to bargain with the union.

Invalidation of Election Results

Conduct that affects the results of the election may constitute a basis for setting aside the results of the election.¹² Generally, an employer’s post-petition, pre-election conduct must conform to Sections 8(a)(1) through 8(a)(4) of the Act. The Board may set aside the results of an election if, in conducting its counter-campaign, the employer’s tactics are “extreme enough” to create “an atmosphere” that makes employee free choice “improbable.”¹³

A union’s objections to an election need not constitute unfair labor practices in order for the Board to find that they have impermissibly affected the results of the election. The union’s burden is simply to provide sufficient evidence to show with reasonable probability that the employer’s improper acts materially affected the results of the election.

The Board utilizes a nine-factor test to decide whether the improper acts materially affected the results of the election. The nine factors are the:

1. Number of misconduct incidents;
2. Incidents’ severity and the likelihood of causing employee fear;
3. Number of employees subjected to the misconduct;

4. Proximity of the misconduct to the election date;
5. Degree the misconduct persisted in the minds of employees;
6. Extent the misconduct was known by employees;
7. Effect of misconduct by the opposing party in canceling out the effect of the original misconduct;
8. Closeness of the final vote; and
9. Degree to which the misconduct can be attributed to a party.¹⁴

The Board will order and conduct a re-run election in cases where the Board finds that an employer's conduct has disrupted the election process but is not so serious as to warrant a bargaining order.

Bargaining Order

The Board has the authority to order the employer to bargain with a union in cases where the employer's response to an organizing campaign is to commit numerous and/or severe unfair labor practices.¹⁵ The Board will use this extraordinary remedy in cases where the union had lost the representation election but timely filed objections to the election and unfair labor practices charges. Similarly, the Board may also issue a bargaining order without requiring a secret ballot election and, in some cases, without any evidence that the union represented a majority of employees.

Who Can Constitute "The Employer" for Purposes of Determining Employer Liability?

The statutory unfair labor practices proscribe "employer" conduct. Therefore, before describing the types of employer activities that may violate the Act, it is important to discuss which people can constitute "the employer" for purposes of determining employer liability. On balance, liability for the prohibited conduct committed by a person or entity other than the "employer" does not flow to the "employer." But because "employers" do not act except through the conduct of persons, it is usually necessary to determine whether a specific person's conduct can be imputed to the employer.

In some cases it is relatively easy to determine whether a person is acting on behalf of the employer so that the employer is properly liable for the unlawful action(s). The Act defines the term "employer" to include "any person acting as an agent of an employer, directly or indirectly[.]"¹⁶ Generally, because supervisors, managers, company officers,

and executive personnel are the most likely to act for the employer during a union organizing drive, liability for the conduct of those persons usually flows to the employer.

In other cases, such as low-level supervisors, third parties and rank-and-file employees, the determination is more difficult. This section provides general guidelines as to when an employer may be held responsible for the conduct of certain classes of persons.

Supervisors

An employee's title alone cannot establish whether an employee is a statutory supervisor.¹⁷ Section 2(11) of the Act defines the term "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.¹⁸

The Act's list of supervisor indicia is phrased in the disjunctive. Thus, if an individual possesses any one of the listed powers, that individual may qualify as a "supervisor" under the Act.¹⁹

Moreover, the types of authority in Section 2(11) of the Act must be exercised with independent judgment on behalf of management and not in a routine manner.²⁰ The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. For example, the Board has decided that, standing alone, it is not significant that employees report absences to a purported supervisor. That was so because the receipt of absence reports in and of itself is no more than a clerical function.²¹ Similarly, scheduling employee overtime and vacations may be a supervisory function only if the task involves independent judgment. If such tasks are carried out within the relatively fixed parameters established by management, then the performance of those tasks is routine and does not confer supervisory status.²²

Agents

As described above, the statutory definition of the term "employer" includes any person who acts indirectly as an agent of an employer.²³ Many common law agency principles, including the apparent authority doctrine, come into play in determining whether an individual's unlawful conduct can be imputed to the employer. Section 2(13) of the Act makes clear, however, that "[i]n determining whether any person is

acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."²⁴

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the purported agent was reflecting company policy and speaking and acting for management.²⁵ The Board generally applies common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when the employee engages in alleged unlawful conduct.²⁶ Apparent authority results from the manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question.²⁷ Either the principal must intend to cause the third party to believe the agent is authorized to act for the employee, or the principal should realize that its conduct is likely to create such a belief.²⁸

In resolving questions of agency, the Board often considers the employee's position and duties in addition to the context in which the allegedly unlawful conduct occurred.²⁹ For example, the Board found that an employer placed an employee in a position where coworkers could reasonably believe that he spoke on behalf of management where the employee was the only person to direct the work crew, interacted with an admitted statutory supervisor, and attended at least one supervisory meeting.³⁰

Low-Level Company Leadership

Low-level foremen, who do not meet the definition of statutory supervisor, are not *per se* agents of the employer.³¹ Generally, the Board will not find agency status if the alleged agent is not involved in the formulation, communication, or administration of personnel policy.³² In analyzing whether, under all of the circumstances, employees could reasonably believe that the alleged agent reflected company policy and spoke and acted for management, the Board considers whether employees looked to the purported agent for communications regarding personnel policy³³ and whether the purported agent held employee meetings to discuss personnel issues.³⁴

The Board is likely to find agency status when the employer holds the purported agent out to employees as the usual conduit for transmitting information from the company to employees.³⁵ Similarly, low-level foremen who independently acted as the employer's spokesperson on job sites, acted as conduits for the relaying and enforcing of employer policies, and participated in monthly management meetings were found to be agents of the employer.³⁶

Rank and File Employees Are Not Presumed to Be Agents of the Employer

Section 7 provides employees with the right to refrain from forming, joining, or assisting labor organizations.³⁷ Thus, an employee can actively oppose a union's organizational effort. In such circumstances the question often arises as to whether an employee's opposition to unionization is protected under Section 7 or whether the employee was acting as an agent of the employer. It is a question without an easy answer.

The general rule is that the Board will not presume rank-and-file employees who oppose unionization to be agents of the employer. Therefore, the anti-union activities of rank-and-file employees are generally not imputed to the employer.

Even absent a showing of agency, however, an employer cannot assist with or initiate employees' anti-union activities. An employer cannot encourage employees to report back regarding union activities.³⁸ For example, an employer cannot solicit the assistance of employees in reporting union activities,³⁹ such as requesting an employee attend a union meeting and provide the employer with a list of employee names who attended,⁴⁰ requesting an employee join the union and report back regarding union membership,⁴¹ or hiring an undercover agent to pose as an employee and spy on union membership and activities.⁴² Even when an employee voluntarily reports information, the Board may find that the employer acted unlawfully by conversing about protected activities with the reporting employee.⁴³

Third Parties as Agents of the Employer

There is no *per se* rule that employers are liable for the conduct of third parties. However, the Board may find a third party to be an agent of the employer, and therefore impute liability to the employer, if the employer instigated, condoned, or assisted in the third party's unlawful activities.

As examples, the Board held the employer legally responsible for a mayor's anti-union speech held on company time and company property in which the mayor asserted the employer could move out of the city in response to the union organizing activities.⁴⁴ The Board has also found the employer legally responsible when:

- The county sheriff interfered with employee organizing activities by revoking a security guard-employee's commission as deputy thereby making the employee ineligible for employment as a security guard;⁴⁵
- A subcontractor's unlawful interrogation of its customer's employees by questioning the employees about their involvement in union activities;⁴⁶ and

- The employer's labor relations attorney visited an employee's home two days before the election and suggested that the employer would relocate the plant.⁴⁷

Employer Threats

When confronted with a union organizing drive, a natural human reaction is to threaten to retaliate against employees for their perceived disloyalty. Thus, when confronted with organizing activity, many employers colorfully explain the distribution of power within the employment relationship. These employers often violate the Act because employers make threatening or intimidating statements that are calculated to influence an employee in the exercise of his or her right to support a union.⁴⁸ The issue in such cases is whether the employer's remarks impinge on employees' statutory right to organize.

This section provides general guidance regarding employer statements that cross the line of interference, restraint, and coercion and therefore constitute unlawful threats under Section 8(a)(1) of the Act. The rules for election cases are often more stringent than the ones used in unfair labor practice cases. The unfair labor practice cases nonetheless provide a useful analytical framework.

What Is a "Threat?"

The Board's test for whether an employer's remarks violate Section 8(a)(1) of the Act does not depend on the employer's motive for making the remarks nor the employer's success in creating a coercive effect.⁴⁹ Instead, the lawfulness of the remark is determined by whether the remark may reasonably be said to have a tendency to interfere with the free exercise of employees' rights under the Act.⁵⁰

Generally, unlawful threats have two components. The first component is that the employer threatens to take an action that would be unlawful under the statute. For example, threatening to discharge an employee because of his or her union membership is unlawful, in part, because it would be unlawful to actually discharge the employee on those grounds.

The second component of an unlawful threat is the employer's message that the employer will, because it so chooses, carry out the threat. The employer's intent to effectuate the threat may be either direct or implied.

By way of examples, the Board found that an employer's statement that employees "would lose their asses if the union came in" was an unlawful threat because it reasonably tended to interfere with the free exercise of employee rights.⁵¹ A statement that employees would lose the "family atmosphere" then in existence at the employer's facility was also deemed a threat.⁵² Both examples threaten employees with certain adverse consequences within the employer's control.

The Employer's Statutory (but Limited) Right to "Free Speech"

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."⁵³ Thus, Section 8(c) of the Act provides a defense to employers accused of unfair labor practices.

The Board analyzes whether a comment is protected by Section 8(c) of the Act within the context in which the comment occurred.⁵⁴ The Board likewise considers the context in which the statement was made in view of the totality of the employer's conduct.⁵⁵ For example, in one case the Board decided that a provision of the employee handbook which stated the employer's "intention to do everything possible to maintain our company's union-free status" was not protected under Section 8(c) of the Act when evaluated in the context of the employer's other unlawful conduct during the union organizing campaign.

The fundamental point of Section 8(c) of the Act is that an employer and its agents may lawfully state their opinions regarding unionization as long as the stated opinion is free of threat or promise of benefit.⁵⁶ Thus, the Board found that a supervisor's statement that "the union probably won't get you anything more than you have now," was a lawful statement of opinion from which no employee could have reasonably perceived a threat.⁵⁷ A supervisor also lawfully expressed opinion when she wondered aloud why employees would want a union given the employer's generous benefits and stated that the union just wanted the employees' money.⁵⁸

Employer predictions of adverse consequences flowing from a successful union organizing drive is perhaps the most complex area in which the Board must determine whether an employer's statement overstepped the bounds of permissible speech and constitute unlawful threats. The Board conceded that "[t]he line between conduct permitted under Section 8(c) and that prohibited under Section 8(a)(1) is often a fine one."⁵⁹

In demarcating the line between lawful prediction and an unlawful threat, the United States Supreme Court has held that an employer may predict its opinion of the precise effects of unionization only as long as the prediction is carefully phrased on the basis of objective fact.⁶⁰ The purpose of the Court's requirement that the employer base its prediction on objective fact is to assure employees that the predicted result would not be taken solely on the employer's own initiative unrelated to economic necessities. In other words, an employer may lawfully predict those objective natural consequences flowing from unionization as opposed to those consequences that the employer would force upon the employees. If, however, an employer's "predictions" of adverse

consequences are not based in fact, the “prediction” will be viewed as an unlawful threat by the NLRB.

It is also important to emphasize that Section 8(c) prohibits the NLRB’s General Counsel from using protected communication as evidence of other unfair labor practices.⁶¹

Threats to Reduce or Freeze Wages

An employer violates Section 8(a)(1) of the Act if the employer states or implies that employees will lose wages because the company will take action on its own initiative in retaliation for the employees’ choice to unionize.⁶² An employer cannot threaten employees to take an action in retaliation for engaging in activities protected by Section 7 of the Act.⁶³ For example, it is an unlawful threat to tell employees that they have lost a planned wage increase because the employees had attempted to organize a union⁶⁴ or that all wages would be frozen if the union won the election.⁶⁵ The Board has also found that an employer violates the Act when it tells organizing employees that it could not give unionized employees more than it gave non-union employees without encouraging the non-union employees to organize.⁶⁶

Other violations occur when the employer attempts to describe the legal meaning of collective bargaining and the effect that the collective bargaining process may have on wage rates. For example, an employer’s announcement that wage increases would be 7 percent without the union or 2 percent with the union was unlawful.⁶⁷ Another employer’s statement that wages “would” revert back to “a minimum” unlawfully threatened that wages “would be” reduced independent of the collective bargaining process.⁶⁸ A statement that wages will be frozen until a collective bargaining agreement is signed also violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases.⁶⁹

Threats to Withdraw Benefits

Like threats regarding wages, an employer may not state or imply that employees will lose benefits as a result of the company taking action, on its own initiative, in retaliation for the employees’ choice of the union. Thus, it was unlawful for an employer to threaten that employees’ existing 401(k) benefits would be lost if the union won the election,⁷⁰ to threaten the loss of existing pension plan,⁷¹ or to withhold processing of apprenticeship papers unless an employee withdrew his union authorization card.⁷²

The Board has also found that an employer threatened employees with loss of benefits during a discussion of retirement benefits when the employer stated it did not want the employees “to lose everything

they've already got."⁷³ Similarly, an employer threatened employees with a reduction in benefits when the employer told employees that the company had stopped the practices of lending money to employees and allowing employees to use company vehicles for personal reasons because the employees supported the union.⁷⁴

Threats to Terminate Employment

Threatening employees with discharge for engaging in activities protected under Section 7 of the Act is unlawful.⁷⁵ For example, the Board found that an employer unlawfully threatened discharge when, following the employer's election victory, the owner told a pro-union employee that his "life expectancy with [the company] was nil."⁷⁶

Few employers today are so unsophisticated as to directly threaten union adherents with discharge. For that reason, the Board is often called upon to determine whether a specific remark had a tendency to interfere with the free exercise of employees' rights under the Act.⁷⁷ For example, the Board found that a supervisor indirectly threatened employees when he recounted his recent meeting in which the supervisor told the company's superintendent "we ought to fire the whole damn bunch" of employees.⁷⁸ Although the supervisor did not directly threaten employees, he effectively did so by his description of the meeting.

The Board has found the following employer remarks to be unlawful:

- Telling employees that they "might be out of a job" if the union is voted in;⁷⁹
- Telling employees that the company will not pay union wages and that if the employees did not want to work under those terms, "the door is open;"⁸⁰
- Telling an employee wearing a pro-union button that UAW stands for "You Ain't Working;"⁸¹ and
- Asking an employee whether he was sure he wanted to be with the union then stating, "Well, I don't want you to get into something too deep that you can't get yourself out."⁸²

The Board also found that an employer threatened its employees when, in response to employee concerns about operational changes, it told employees that "if they did not like it, they could get out, leave their jobs[.]"⁸³ The Board reasoned that the employer's comment indirectly threatened employees that further complaints could result in discharge. The Board similarly found an employer's statement that union supporters should "go and get a job at a facility that has a union" was a "thinly veiled" threat to discharge.⁸⁴

Threat to Close the Business

An often-litigated issue is whether an employer unlawfully threatened to close a business or lawfully predicted a closure on the basis of objective fact.⁸⁵ An employer may not state or imply, without objective foundation, that a vote for the union would inevitably lead to plant closure.⁸⁶

An employer's assumption that the union will make extravagant bargaining demands, in the absence of objective fact, will not support an employer's prediction that its costs will increase to the point of requiring the business to close.⁸⁷ Consider, by way of comparison, the Board's conclusion in *Kawasaki Motors Mfg. Corp.* that the employer did not violate the Act.⁸⁸ In that decision, the employer informed employees of the company's financial and competitive situation and supported the statements with undisputed objective economic facts that showed the employer's poor financial condition. The Board found that the employer lawfully informed employees that any decision to close the plant would be based on profitability and competitive status in the world market.

Unlawful threats to close a business occur in a myriad of factual circumstances. Perhaps the most common threat is a supervisor's statement that the business owner will close the business before negotiating with the union. Thus, a supervisor's statement that the owner would "close the doors" was a direct threat to close the business.⁸⁹ Similarly, the Board found that an employer violated Section 8(a)(1) by stating "if the union came in, [he] would have to look at one of [his] other options, and that [other option] would be diverting work to Mexico"⁹⁰ and telling employees that the employer would sacrifice and close the facility to save its other facilities from the union.⁹¹

The Board has also found less obvious employer statements to be unlawful threats of facility closure. For example, the Board found that informing employees that the cost of operating the business increases following unionization and that somebody would have to take a "hard look at it" was an unlawful threat to close the business.⁹²

Telling Employees It Is Futile to Try to Organize a Union

The Board has held that an employer cannot imply that it will unlawfully frustrate employee statutory rights *via* statements that union organizing is futile. Telling employees that they would never get a contract if they selected the union is unlawful.⁹³ Similarly, the Board found that telling employees that the employer would not cooperate with the union in negotiating a contract and would attempt to slow down and delay negotiations unlawfully created the impression that union organizing was futile.⁹⁴

Futility was also found in supervisory remarks, "Is anyone in this meeting stupid enough to believe that [the company's owner is]

going to sign a contract?” and “there’s no way [the company’s owner] would sign no contract.”⁹⁵ The Board has also found a manager’s statement, “as far as [I am] concerned the plant would never be a union shop” was an unlawful threat that voting for the union was futile and that the employer would not recognize and bargaining with the union.⁹⁶

As with the other alleged threats, the Board has been willing to find statements of futility in less obvious circumstances. For example, the Board found that a supervisor violated Section 8(a)(1) of the Act by asking an employee, “Where is your damn UAW protection now?” after the employer had won the union election.⁹⁷ The Board similarly found a statement that the employer would “take the matter to the Supreme Court” to escape a union contract unlawfully indicated that employee support for the union was futile because the employer would take “extraordinary measures” to frustrate the employees’ efforts on behalf of the union.⁹⁸

Telling Employees That a Strike Is an Unavoidable Consequence of Union Organizing or That Striking Employees Will Lose Their Employment

An employer may not tell employees that strikes are an unavoidable consequence of union organizing.⁹⁹ For example, the Board found that an employer unlawfully stated the union “had a lot of strikes and if the Union came in . . . the employees would be out on strike” because the statement threatened employees that a strike was unavoidable if the union was elected.¹⁰⁰

An employer may, however, lawfully discuss strikes or accompanying violence as a possible consequence of unionization. For example, the employer in *Milford Plains* lawfully told employees that bringing in a union may result in a strike and that strike misconduct might then occur.¹⁰¹

An employer also may not tell employees, without explanation, that they could lose their jobs to permanent replacements in the event of a strike.¹⁰² In *Laidlaw Corp.*, the Board held that permanently replaced economic strikers who have made unconditional offers to return to work have the right to full reinstatement when positions become available and the right to be placed on a preferential hiring list until that time.¹⁰³ Thus, an employer may not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with *Laidlaw*. As examples, the Board found that a company president unlawfully stated that striking employees could be “permanently replaced and therefore lose their employment here at Virginia Concrete,”¹⁰⁴ and the Board found that the statement, “if you value your job and your continued future . . . you must come to work regardless of a strike!” was a veiled threat of job loss.¹⁰⁵

Other Impermissible Threats by an Employer

Questioning an Employee's Loyalty to the Employer

An employer may not state or suggest that it considers union support to be inconsistent with loyalty to the company or that only loyalty would be rewarded.¹⁰⁶ Thus, discharging employees for disloyalty is unlawful when the employer's true motive is to forestall and discourage unionization.¹⁰⁷

The Board has also found it unlawful for an employer to state that employees who signed union authorization cards were not loyal.¹⁰⁸ For example, a supervisor unlawfully stated he was personally hurt when a salesman went to the union without presenting the problems to the supervisor first.¹⁰⁹ By doing so, according to the Board, the supervisor unlawfully equated personal disloyalty to him with engaging in protected, concerted activities.

Disparaging Employees and the Union

The Board has held that "disparagement" of employees and the union is not *per se* unlawful. The Board's analysis focuses on the language the employer used and the employer's statutory right to express its opinion.¹¹⁰

Comments designed to undermine employee support for the union by suggesting that the union would be unable to properly represent the employees are unlawful.¹¹¹ For example, the Board found an employer's comments that the employer "would give [employees] more than the union" and once the employees and the employer "got past this thing, we can move on to something bigger and better" were unlawful. The Board's decision focused on the likelihood that the comments were designed to undermine employee support for the union by suggesting that the union was unable to properly represent the employees.

Similarly, a supervisor's comment that the union could not help a recently discharged worker get his job back because it was too weak, it had no money, it had a lawyer with Alzheimer's disease, and that employees should have voted against the union, was unlawful denigration.¹¹²

Offensive language alone may not be unlawful if it is free of threat. As examples, the Board has found no violation when the employer called employees and/or union representatives "bastards" and "pigs," "trash," "a bunch of pimps and whores," "liars," and other profanities.¹¹³

Questioning Employees About Union Activities

Many employers and persons who act for employers believe that a union organizing drive is a personal affront. Many other employers are surprised or confused that employees would seek to organize. Thus, in

many situations the employer's natural reaction is to seek out employees and ask them why the employees are pursuing unionization.

Section 8(a)(1) of the Act does not *per se* prevent an employer from questioning employees about unionization efforts.¹¹⁴ While some limited questioning of employees is permitted, coercive questioning has been found to constitute unlawful interrogation and thus unlawful interference of statutory employee rights. When it is found to be illegal, questioning employees is considered interference with the right to organize because employees may believe that the employer may attempt to retaliate against individuals who admit to supporting a union.

The Board's test to determine the legality of questioning is whether, under the totality of circumstances, the questioning interferes with the employee's protected rights.¹¹⁵ In analyzing alleged interrogations under the *Rossmore House* test, the Board considers several factors:

- The employer's history of union animus and/or discrimination;
- The nature of the information sought;
- The identity of the questioner;
- The place and method of the interrogation;
- The truthfulness of the questioned employee's reply;
- The validity of the employer's purpose;
- Whether the employer's purpose was communicated by the employer to the employee; and
- Whether the employee was given assurances against reprisal.

The factors are not mechanically applied nor is a strict evaluation of each factor required.¹¹⁶ To the contrary, the Board views the factors as "useful indicia that serve as a starting point" for assessing the totality of circumstances.

Questioning Employees About Their Union Sympathies

It is unlawful to question employees about the status of a union organizing drive.¹¹⁷ Questioning employees as to their opinion about the union or about their union membership is generally found to be unlawful¹¹⁸ as is questioning about employee union affiliations, internal union affairs, union meetings, or whether the employee has signed union cards.¹¹⁹ Asking employees about their opinions of the union or about their opinions of other union members may also be unlawful.¹²⁰

Casual questioning by a supervisor is generally permissible if, under the totality of the circumstances, the conversation is non-coercive, the employee does not have any reason to hide his or her support of the union, the employer does not have a history of animosity toward the union, and the questions are general and non-threatening in nature.¹²¹ However, interrogations that, viewed alone as discrete occurrences, would be lawful can nonetheless violate Section 8(a)(1) of the Act if the conduct is repeated.¹²²

The Board generally affords employers somewhat greater latitude in questioning open and active union supporters but the “totality of circumstances” test nonetheless applies.¹²³ For example, the Board applied the “totality of circumstances” test and found that an employer had unlawfully questioned an open and active union supporter when the questioning took place in a manager’s office immediately following the union supporter’s performance evaluation.¹²⁴

Questioning Applicants About Their Union Sympathies

An employer is also prohibited from questioning applicants for employment concerning their union activities and from discouraging applicants from affiliating with the union by making derogatory, anti-union statements.¹²⁵ An employer need not ask the applicant a prohibited interview question before the Board will find unlawful interference in a pre-employment setting. Questions on job application forms regarding union affiliation may also be unlawful.¹²⁶

Questioning Employees in Preparation for Defense of an Unfair Labor Practice Charge

The Board has determined that, despite the “inherent danger of coercion” in allowing employers to question employees regarding matters implicating the employees’ Section 7 rights, employers may question employees in preparing a defense to unfair labor practice charges.¹²⁷

More specifically, employers may question employees about facts and issues raised in an unfair labor practice charge or a complaint without violating Section 8(a)(1) of the Act when such interrogation is necessary in preparing the employer’s defense for trial of the case. However, the Board and the courts mandate specific safeguards designed to minimize the coercive impact of such interrogation.

Prior to questioning, the employer must:

- Communicate to the employee the purpose of the questioning;
- Assure the employee that no reprisal will take place;

- Obtain the employee's voluntary cooperation;
- Question employees in a context free from employer hostility to union organization;
- Ensure the questioning itself is non-coercive;
- Ensure the questioning does not exceed the necessities of the legitimate purpose by prying into other union matters;
- Ensure that the questioning does not illicit information concerning an employee's subjective state of mind; and
- Ensure that the questioning does not otherwise interfere with employee statutory rights.

An employer who does not provide such safeguards loses the benefits of the privilege and may be found to have violated Section 8(a)(1) of the Act.

Polling of Employees About Their Union Sympathies

Polling employees about their union sympathies after the union has filed a petition is unlawful.¹²⁸ The Board believes that such a poll conducted while the Board election is pending does not "serve any legitimate interest of the employer that would not be better served by the forthcoming Board election."

Absent unusual circumstances, an employer may poll employees prior to the union's filing a petition provided the employer adheres to all of the following safeguards:

- The purpose of the poll is to determine the truth of a union's claim of majority;
- This purpose is communicated to the employees;
- Assurances against reprisal are given;
- Employees are polled by secret ballot; and
- The employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.¹²⁹

An employer's pre-election poll in which individual employees were asked whether they intended to vote for the union and the employer recorded the names and answers was unlawful.¹³⁰ Similarly, an employer violated Section 8(a)(1) of the Act when it conducted its own election after the official election was canceled, and the employer did not comply with the *Struksnes* safeguards.¹³¹

Promise, Grant, Denial, or Withdrawal of Wages or Benefits During an Organizational Campaign

It is unlawful to promise wage increases, promotions, improved working conditions, additional benefits, or special favors if employees either refuse to join, or vote against, the union. As examples of the classic cases, the Board found a company owner's suggestion that the company could provide an employee with a raise but not until "this is all over" was unlawful.¹³² It is also unlawful to promise increased wages and benefits if union is not elected.¹³³

Promising or Granting Wages or Benefits to Influence Potential Employee-Voters

An employer may not promise or grant anything of value to attempt to influence employees during a union organizing drive. The Board has determined that it is unlawful to:

- Increase general wages to forestall unionization;¹³⁴
- Promise improved pension benefits if the union lost the election;¹³⁵
- Offer to increase individual wages and/or provide additional benefits in return for abandoning union support;¹³⁶
- Change the manner of calculating overtime worked by including holiday hours as hours worked;¹³⁷
- Tell an employee that the employer could assist the employee in buying a house in the same conversation in which the employer question the employee about union organizing and her support for the union was unlawful;¹³⁸
- Grant Christmas bonuses for the first time during the course of a unionization campaign;¹³⁹ and
- Promise wage increases in return for rejection of union one day after the first union meeting constitutes interference.¹⁴⁰

It is also unlawful to offer to promote an ardent union-supporting employee to a higher-paying supervisory position when the employer did so for the purposes of attempting to prevent the employee from voting in an impending secret ballot election.¹⁴¹

Promising unspecified benefits is also unlawful. As examples, it was unlawful for an employer to promise that it would "give [the employees] more than the union,"¹⁴² to tell an employee-union supporter,

“take the badge off and stop all of your union activities and keep your mouth shut and you might just get what you want,”¹⁴³ to tell employees that if the union got in conditions would be the same, but if the union did not get in conditions would improve.¹⁴⁴ Given totality of circumstances, the Board also found that a company president’s statement to employees to give him a chance and he “will deliver” was unlawful.¹⁴⁵

However, granting wage increases or improved benefits during an organizing campaign is not *per se* unlawful. The Board presumes that such action is objectionable and/or unlawful unless the employer establishes that the timing of the action was governed by factors other than the pending election.¹⁴⁶ When such allegations are made, the General Counsel need not prove that the employer’s motive in granting the pre-election benefit was to influence votes. Instead, the General Counsel need only prove by a preponderance of the evidence that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation. Evidence that the employer granted benefits during the pre-election period is sufficient objective proof to warrant a presumption of unlawful effect. The employer may rebut the presumption by demonstrating a legitimate business reason for the timing of the raise.¹⁴⁷

The Board’s careful evaluation of the timing of the employer’s action is evident in numerous cases. For example, the Board found a violation when an employer’s introduction of an employee insurance plan and grant of an additional paid holiday occurred after employee organizing activity had begun but before the election.¹⁴⁸ Similarly, although the employer deliberated the possibility of granting paid sick days and personal holidays “on and off” for a year, the final decision to grant the new benefits was unlawful when it was made after employees sought unionization, and the employer failed to produce convincing evidence of a legitimate business reason to explain the timing.¹⁴⁹ Issuing a revised employee handbook that detailed new vacation, sick leave, and funeral leave benefits four days before a union election was unlawful.¹⁵⁰

Employers have had varying success in demonstrating a legitimate business reason for the timing of its action. In one case an employer was able to prove that its distribution of a revised employee handbook with improved medical benefits fewer than ten days before the election was lawful.¹⁵¹ Another employer rebutted the presumption of unlawful effects by proving that the changes were the result of legitimate business reasons, and not the union’s organization campaign, and were planned for nearly one year before implementation. The Board also determined that an employer’s announcement that it intended to make improvements to its existing insurance program was lawful, in part, because it was made at a time when no election was scheduled or even petitioned

for and there was no indication that a better time existed to announce the company-wide improvement.¹⁵²

Denying, Delaying, or Withholding Wages or Benefits to Influence Employee-Voters

Reducing wages or eliminating benefits because employees engaged in union organizing efforts is unlawful.¹⁵³ An employer may not deny payment of bonuses,¹⁵⁴ curtail privileges such as coffee breaks or restroom breaks,¹⁵⁵ withdraw insurance and pension benefits,¹⁵⁶ discontinue paid vacations or sick leave,¹⁵⁷ or eliminate overtime pay.¹⁵⁸

The more difficult issue arises when, prior to union organizing activity, an employer had planned a wage or benefit adjustment to take place on a date that subsequently falls within a pre-election period. On the one hand, the Board will likely view the timing of the increase as sufficient to trigger the presumption of unlawful effect. On the other hand, the employer may not deny or delay implementing the planned adjustment because of the organizational campaign.

With respect to planned increases, the Board has long maintained that an employer is required to proceed with an expected wage or benefit adjustment as if the union “were not on the scene.”¹⁵⁹ An exception to this rule is that the employer may postpone such a wage increase or benefit adjustment as long as it makes clear to the employees that the increase or adjustment would occur whether or not they select a union and that the sole purpose of the postponement is to avoid the appearance of influencing the election’s outcome.

In making such announcements, however, an employer must avoid attributing “the onus for the postponement of adjustments in wages and benefits” to the union or disparaging or undermining the union by creating the impression that the union stood in the way of the employees getting the planned wage increases and benefits.¹⁶⁰ Thus, the Board has decided that an employer’s statement that it “could not implement any new benefits while union organizing efforts were active” was overly broad and unlawful because the statement effectively blamed the delay on the mere presence of a union campaign.¹⁶¹

Soliciting and Resolving Employee Complaints About the Employer for the Purpose of Influencing Employee-Voters

It is not unlawful, during a pre-election period and organizing campaign, for an employer to continue its pre-existing practice of soliciting employees’ grievances and complaints provided the employer does not vary from the past manner and methods of solicitation.¹⁶² Thus, the Board found that an employee opinion survey distributed to all employees was not unlawful solicitation of grievances, in part, because

the employer had a past practice of conducting employee surveys.¹⁶³ Similarly, the Board found that an employer did not unlawfully solicit grievances when an employee initiated the conversation in which the employee requested that a grievance be remedied.¹⁶⁴

When an employer undertakes to solicit employee grievances during an organizational campaign, the Board finds a “compelling inference” that the employer is implicitly promising to correct the grievances.¹⁶⁵ For example, the solicitation of employee grievances at pre-election meetings raises a rebuttable inference that the employer is making a promise to remedy the grievance.¹⁶⁶ The Board has decided that “the vice in such violation lies not in the solicitation itself but rather in the promise, inferred or explicit, that the grievance will be corrected without union representation.”¹⁶⁷ The Board finds such conduct unlawful because it may influence employees to vote against union representation.

A promise to resolve the complaint may also be implied when it appears that the solicitation of opinions had never been done before and the solicitation occurs in the context of an organizational campaign.¹⁶⁸ Thus, the Board found that an employer, with no history of asking employees to express their complaints, violated Section 8(a)(1) of the Act when the owner called an employee meeting following a union’s demand for recognition and asked the employees to air their grievances and suggested or implied that the employees’ grievances would be resolved without need for a union.¹⁶⁹

The Board has found implied promises to remedy grievances in a myriad of circumstances. For example, asking employees to state their complaints and promising to “look into the complaints” was unlawful¹⁷⁰ as was a district manager’s request to know the nature of employee complaints “because she wanted to be given an opportunity before it went as far as the Union[.]”¹⁷¹

Employer Surveillance of Employee Union Organizing Activities

Generally

It is unlawful for an employer to spy on employees engaged in union activities and to lead employees to believe that union activities are being monitored. While not *per se* unlawful, this employer conduct has a reasonable tendency to discourage union activity.

The test of lawfulness is whether there was proper justification to monitor and whether the monitoring reasonably tended to coerce employees.¹⁷² Examples of surveillance that may constitute interference, restraint, or coercion include spying on union members, their meetings, and their organizers by management.¹⁷³ For example, the Board determined that the employer unlawfully spied on a union meeting when the employer’s human resources administrator and production manager were observed driving by a park recreation area that was accessible only

by a dead-end road.¹⁷⁴ The Board determined that neither coincidence nor chance brought the employer representatives to that location and the only reasonable explanation that they went there was for the purpose of monitoring employees' union activity.

Creating the Impression That Employee Union Activities Are Being Monitored

It is also unlawful to create the impression that the employer is monitoring the union or employee union activities. The Board's policy behind finding "impression of surveillance" as unlawful is "that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways."¹⁷⁵

Thus, the Board often finds employer remarks or activities when it implies that the employer is watching union activities or has specific knowledge of union activities. As examples, the Board found all of the following employer remarks and actions unlawful:

- An employer's statement that it was attempting to identify union supporters;¹⁷⁶
- A employer's statement that employees should raise a contested campaign issue with the union organizer "the next time you have a meeting . . . in Malarkey's [restaurant];"¹⁷⁷
- Asking an employee who hosted a union meeting at her home about her duties as hostess;¹⁷⁸
- A statement that implied the employer knew the date and location of union meetings;¹⁷⁹
- Appearing to purposefully follow workers to overhear their conversations;¹⁸⁰
- A supervisor's statement that the supervisors had been instructed by the employer "to watch for anyone involved with union activities;"¹⁸¹ and
- Using video cameras to record employee activities.¹⁸²

Lawful Surveillance by an Employer

The Act's prohibition against monitoring employee union activities and creating the impression of surveillance may not apply in three general situations. First, employers have the right to supervise employees

during work time. Observation of union activity in the course of work supervision is not unlawful surveillance.¹⁸³ However, the Board has placed limits on an employer's right to supervise. An employer may not follow an employee closely and constantly during working hours until the employee vents his anger.¹⁸⁴ Continuous scrutiny over substantial periods of time may constitute coercive surveillance.¹⁸⁵

Second, an employer may lawfully observe union activity if the activity is open, obvious, and occurs on or very near to the employer's premises.¹⁸⁶ The Board generally acknowledges that an employer's "mere observation of open, public union activity on or near its property does not constitute unlawful surveillance."¹⁸⁷ Thus, the Board found that a company president did not engage in unlawful surveillance when he observed employees distributing literature at the company gate while he was smoking a cigarette outside the company's tobacco free administration building.¹⁸⁸ An employer's observation of handbilling activity that had occurred openly for two months was not unlawful.¹⁸⁹

Third, in limited circumstances, the Board may find that employer comments directed toward an open and active union supporter do not create an impression of surveillance.¹⁹⁰

Asking Employees to Monitor Union Activities on Behalf of the Employer

The Board has long maintained that an employer cannot collaborate with employees to engage in surveillance.¹⁹¹ Thus, an employer cannot encourage an employee to report back regarding union activities,¹⁹² instruct employees to spy on union activities,¹⁹³ solicit the assistance of employees in reporting union activities,¹⁹⁴ or request that an employee obtain a copy of union literature.¹⁹⁵

Unlawful Employment Discrimination Based on Union Activities

Section 8(a)(3) of the Act provides that it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."¹⁹⁶

Some Allegations of Discrimination Require Proof of Union Animus to Be Unlawful

To establish a *prima facie* case of unlawful discrimination turning on the employer's motive, the General Counsel must prove:

- The existence of union or protected activity;

- Employer knowledge of the union activity;
- Employer animus; and
- An adverse employment action taken against those involved or suspected of involvement in union or protected activity which has the effect of encouraging or discouraging union activity.¹⁹⁷

Once the General Counsel has established a *prima facie* case, the burden shifts to the employer to demonstrate that it would have taken the same action against the employee notwithstanding the employee's union activities or protected conduct. Importantly, the employer's burden under the *Wright Line* analysis is to establish that it *would* have discharged the employee and not simply that it *could* have discharged the employee for improper conduct.¹⁹⁸ For example, an employer successfully showed that it would have taken the same action against an employee who engaged in union activities in the absence of those union activities by proving that unlike other employees, the discharged employee repeatedly refused to work overtime.¹⁹⁹

The legal effect of the employer's action thus turns on the employer's motive for taking the adverse employment action. The Board's decision in *Wright Line* provides the analytical framework for resolving discrimination allegations turning on the employer's motivation.²⁰⁰ The Board has recently articulated that test as:

[T]he General Counsel must first make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole.²⁰¹

In the Board's view, evidence of suspicious timing, false reasons for the action given in defense of the action, and the failure to adequately investigate the employee's alleged misconduct all support an inference of animus and discriminatory motivation.²⁰²

In addition, because the Board will infer animus from the record as a whole, myriad other facts and circumstances in the record may support the inference. For example, in one case the Board cited the employer's union-free policy statement contained in the employee manual as evidence of animus.²⁰³

Discharge and Constructive Discharge

An employer may not discharge an employee because the employee engaged in union activities.²⁰⁴ Using the *Wright Line* principles, the Board found employers had unlawfully discharged employees when:

- The discharged employee joined a union;²⁰⁵
- The discharged employee complained of working conditions, contacted the union, planned and facilitated union meetings, and obtained coworker signatures on authorization cards;²⁰⁶
- The discharged employee distributed union literature;²⁰⁷
- The discharged employee signed an authorization card, held union meetings in her home, and collected signed authorization cards from other employees;²⁰⁸
- The employer discharged all of the employees it believed to be union proponents at a time when the employer was short-staffed and having difficulty hiring qualified employees;²⁰⁹
- The employer refused to rehire a employee who supported the union;²¹⁰ and
- The employer discharged an employee who told the employer he was going to vote for the union in the upcoming election.²¹¹

The Board also recognizes Section 8(a)(3) violations based on the theory of constructive discharge.²¹² The Board has stated the test for constructive discharge allegations as:

There are two elements which must be proven to establish a 'constructive discharge. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.²¹³

For example, the Board determined that an employee was constructively discharged after the employer cancelled his status as a lead person trainee, ended his chances of wage increases or advancement, cursed him, revoked a previously promised leave of absence for the employee's wedding, and invited him to quit if he did not like it.²¹⁴

As with all cases turning on the employer's motive, once the General Counsel has made a *prima facie* showing of unlawful discharge, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. For example, the Board determined that an employer successfully made the defense when it lawfully discharged an employee for walking off the job after receiving a direct order to stay.²¹⁵

Discipline

The employer may not discipline employees for engaging in union activities.²¹⁶ The Board found Section 8(a)(3) violations in all of the following cases:

- Unlawful to discipline for employees' attendance at a bargaining session;²¹⁷
- Unlawful to discipline for using work computer's screen saver to promote the union;²¹⁸
- Animus proven by employer's variance from its normal disciplinary procedure;²¹⁹
- Disciplinary suspension to the employee who initiated the original contact with the union, openly solicited authorization cards, and challenged management at employee assemblies;²²⁰
- Animus proven where the employer provided no explanation for failing to follow its own progressive disciplinary procedure;²²¹
- Animus proven where employee's conduct did not warrant discipline under the employer's work rules;²²²
- Animus proven via blatant disparity in taking disciplinary action against a known union supporter but not other employees who engaged in same conduct;²²³ and
- Issuing poor performance evaluations to employees who support the union.²²⁴

Discrimination Regarding Other Terms and Conditions of Employment

The Act's protection is not limited to those circumstances in which an employee has been discharged or disciplined. It also protects employees against discriminatory changes in other terms and condition of employment.

It is unlawful to transfer employees or change employment conditions to discourage unionization. As examples, the Board found it unlawful to transfer an employee while reducing his workload,²²⁵ to attempt to force an employee-union proponent to transfer to the night shift,²²⁶ to transfer an employee to a temporary work assignment that resulted in wage loss,²²⁷ or simply to change an employee's work assignment.²²⁸

It is also unlawful to attempt to prevent the dissemination of union views by isolating employees who support the union. As examples, the Board found it unlawful to change an employee's work assignment and work schedule in a way that isolated the pro-union employee from much of rest of workforce²²⁹ and to prohibit a pro-union employee from leaving her work area without permission when no other employee was similarly restricted.²³⁰

Employers may not change its policy or employee requirements or disparately apply its existing policies and requirements with the intent to discriminate against union supporting employees. As examples, the Board found it was unlawful, during a union organizing drive, for an employer to announce a new and more stringent tardiness policy that would result in immediate discharge of tardy employees,²³¹ or to institute and implement a harsher disciplinary process,²³² to institute increased production standards,²³³ or to change from a practice of oral warnings for discipline to a "written system of progressive discharge culminating in discharge."²³⁴

As with all Section 8(a)(3) allegations in which proof of motive is required, the employer may defend its action by demonstrating that it would have taken the same action notwithstanding the employee's protected conduct.²³⁵

Refusing to Hire an Applicant Because of Union Membership or Activity

Based on the *Wright Line* burdens of proof, the Board has defined the specific elements the General Counsel must prove to demonstrate a *prima facie* refusal to hire violation:

To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following at the hearing on the merits: (1) that the [employer] was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.²³⁶

The Board has been able to prove antiunion animus in a number of different interview circumstances. As examples, animus was proven based on the un rebutted testimony that the interviewer said to the

applicant, “you’re union? I can’t use you, you’re union. I can’t hire anybody from the union”²³⁷ and when an employer asked an applicant if he had worked for any unionized employers in the recent past or whether the applicant “had ever been any part of the Union.”²³⁸

Animus may also be found in the totality of the employer’s conduct. For example, the Board found that a temporary-help provider violated Section 8(a)(3) of the Act when it permanently barred from its property an applicant who circulated a petition requesting the provider change its practice of requiring employees to be at the office each morning to register for work.²³⁹

Some Allegations of Discrimination Are *Per Se* Violations of the Act Because the Employer Action Is “Inherently Destructive” of Important Employee Legal Rights

If it can reasonably be concluded that the employer’s discriminatory conduct is “inherently destructive of important employee rights,” no proof of an anti-union animus is needed.²⁴⁰ This is so because “such conduct carries its own indicia of intent.”²⁴¹ The burden then shifts to the employer, which, in order to avoid the finding of a Section 8(a)(3) violation, must prove that it “was motivated by legitimate objectives.”

If the employer fails to meet its burden, the Board will find the employer has violated Section 8(a)(3) of the Act.²⁴² If the employer meets its burden, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.²⁴³ For example, the Board found that an employer’s conduct in prohibiting union employees from bidding for positions in another facility not covered by the collective bargaining agreement, during a time when bargaining unit jobs were being eliminated due to a plant closure, was inherently destructive.²⁴⁴

If the resulting harm to employee rights is “comparatively slight” and a substantial and legitimate business end is served, the employer’s conduct is lawful and the General Counsel must prove anti-union motivation to establish a violation.²⁴⁵

Though most often arising in cases in which the employer’s employees are already unionized, application of the “inherently destructive” doctrine is not limited to those circumstances. The Board will find certain pre-election conduct to be inherently destructive of employee rights as well. For example, the Board recently found that an employer’s hiring guideline that denied employment to applicants whose most recent year of work experience was at a pay level more than 30 percent higher or more than 30 percent lower of the employer’s starting wage rate was inherently destructive.²⁴⁶

An Employer Cannot Discriminate Against an Employee Who Files Charges or Gives Testimony

Section 8(a)(4) provides that an employer commits an unfair labor practice if the employer discharges or otherwise discriminates against an employee because the employee has filed charges against the employer or given testimony under the Act.²⁴⁷ The Board has found violations in such cases as discharging employees for filing charges and testifying,²⁴⁸ discriminating in regard to rehiring,²⁴⁹ denying employment to a job applicant because the applicant testified against a former employer,²⁵⁰ and discharging supervisors who testify against their employer.²⁵¹

Company Unions (“Employer Domination or Assistance to a Union”)

Historically, some employers believed that the best strategy to prevent unionization was to create its own union or internal union-like institution that was sympathetic to the employer’s wishes. In other words, some employers attempted to forestall unionization by creating company committees or organizations then dominating the workings of those entities. Still other employers attempted to influence external unions by providing financial support or access to facilities or access to employees.

Congress viewed such employer activities as interference with employee rights, and in 1935 passed Section 8(a)(2) of the Act. That section provides that it is an unfair labor practice for an employer to “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it[.]”²⁵²

Classic examples of activities that constitute unlawful domination and support of a union include establishing company unions,²⁵³ having supervisors attend and vote at union meetings,²⁵⁴ contributing financial support to the union,²⁵⁵ providing clerical assistance and support to the union,²⁵⁶ and soliciting employees on behalf of a labor organization.²⁵⁷

Except in the construction industry, an employer also may not recognize or enter into a collective bargaining agreement with a union that does not have majority status.²⁵⁸ An employer can, however, enter into a contract with an incumbent union whose representation has been challenged. A timely representation petition will put the incumbent union to the test of demonstrating in an election that it is still the majority choice for bargaining representative.²⁵⁹

Finally, Section 8(a)(2) permits employees to confer with the employer during working hours without loss of time or pay. Payments to employees acting in a representative capacity are also covered.

When Are Employee Participation Initiatives Unlawful?

As described above, an employer violates Section 8(a)(2) of the Act if it invites employees to form a shop committee that substitutes for a union.²⁶⁰ Many employers, however, have made employee communications and employee relations a business priority believing such arrangements lead to increased quality of goods and services, reduced machine downtime, better employee communications, and a generally more satisfactory work experience for employees. These groups, with such designations as employee advisory committees, quality circles, communication committees, high performance work teams, employee involvement teams, etc., can be collectively described as employee participation initiatives.

The Board's concern with employee participation initiatives is its belief that some of the initiatives are sophisticatedly veiled employer-dominated labor organizations. Since at least 1992 the Board has analyzed employee participation initiatives in their many varied forms to determine their lawfulness under the Act. The basic teaching of those cases follows.

Because labor organization status is a necessary element of Section 8(a)(2) violations, prior to finding a violation the Board must determine whether an employee participation initiative is a statutory labor organization.²⁶¹ The term "labor organization" is defined as an entity that "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."²⁶² Thus, the critical issue with employee participation initiatives is whether the employee group "deals with" the employer on wages, hours, and working conditions.

The Board has determined that "dealing with" means "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management."²⁶³ "That 'bilateral mechanism' ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, [and] management responds to these proposals by acceptance or rejection by word or deed[.]"²⁶⁴

For example, the Board found that an employee grievance committee did "deal with" the employer when it made recommendations to management who accepted some of the recommendations but rejected others.²⁶⁵ In other words, the committee and the company "went back and forth explaining themselves until an acceptable result was achieved."

There is no "dealing," however, if the employee participation initiative's "purpose is limited to performing essentially a managerial" function.²⁶⁶ For example, the Board found that an employee participation initiative did not "deal with" an employer when the employee

participation initiative exercised authority comparable to that of the front-line supervisor in the traditional plant setting.²⁶⁷

In *Crown Cork & Seal*, the Board expressly rejected the General Counsel's contention that the employee participation initiatives at issue were labor organizations because "none of the seven committees possess authority that is final and absolute."²⁶⁸ The Board determined that an employee participation initiative need not be granted final and absolute authority to be lawful because "[f]ew, if any, supervisors in a conventional plant possess authority that is final and absolute."²⁶⁹

In so determining, the Board focused its analysis on "spheres of delegated authority."²⁷⁰ The Board analogized the workings of the employee participation initiative to that of "one level of management [the employee participation initiative], acting within its sphere of delegated authority, forwards for review its recommendations to a higher level of authority (e.g., the plant manager)."²⁷¹ The Board determined that such an exchange was not "dealing" contemplated by the Act.²⁷²

NOTES

1. 29 U.S.C. § 158(a).
2. 29 U.S.C. § 158(a)(1).
3. 29 U.S.C. § 157.
4. 29 U.S.C. § 158(a)(1).
5. Triple A Fire Protection, Inc., 312 NLRB 1088 (1993) (violations of Section 8(a)(5) derivatively violate Section 8(a)(1) of the Act).
6. 29 U.S.C. § 158(a)(2).
7. 29 U.S.C. § 158(a)(3).
8. 29 U.S.C. § 158(a)(4).
9. 29 U.S.C. § 158(a)(5).
10. The Ideal Electric and Manufacturing Co., 134 NLRB 1275 (1961).
11. Dresser Industries, 242 NLRB 74 (1979).
12. Orange County Publications, 328 NLRB 404 (1999).
13. In Re Matter of General Shoe Corp., 77 NLRB 124 (1948).
14. Avis Rent-A-Car System, Inc., 280 NLRB 580 (1986).
15. National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969).
16. 29 U.S.C. § 152(2).
17. Pan-Boston Co., 336 NLRB 305 (2001).
18. 29 U.S.C. § 152(11).

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19. Dico Tire, Inc., 330 NLRB 1252 (2000).
20. Masterform Tool Company, 327 NLRB 1071 (1999).
21. Dico Tire, Inc., 330 NLRB 1252 (2000).
22. Azusa Ranch Market, 321 NLRB 811 (1996).
23. 29 U.S.C. § 152(2).
24. 29 U.S.C. § 152(13).
25. Waterbed World, 286 NLRB 425 (1987).
26. Pan-Oston Co., 336 NLRB 305 (2001).
27. Southern Bag Corp., 315 NLRB 725 (1994).
28. Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988).
29. Jules V. Lane, 262 NLRB 118 (1982).
30. Industrial Construction Services, Inc., 323 NLRB 1037 (1997).
31. Knogo Corp., 265 NLRB 935 (1982) (transmittal of work orders, that is routine in nature, is alone inadequate to bestow apparent authority on a low-level foreman).
32. Knogo Corp., 265 NLRB 935 (1982).
33. Springfield Jewish Nursing Home of the Aged Inc., 292 NLRB 1266 (1989).
34. Southern Bag Corp., 315 NLRB 725 (1994).
35. Victor's Café 52, 321 NLRB 504 (1996).
36. Zimmerman Plumbing and Heating Co., Inc., 325 NLRB 106 (1997).
37. 29 U.S.C. § 157.
38. Sarkes Tarzian, Inc., 374 F.2d 734 (7th Cir. 1965).
39. Phoenix Glove Co., Inc., 268 NLRB 680 (1984).
40. Delta Data Systems Corp., 279 NLRB 1284 (1986).
41. Thompson Products, Inc., 46 NLRB 514 (1942).
42. ABC Liquors, Inc., 263 NLRB 1271 (1982).
43. Brown Transport Corp., 296 NLRB 552 (1989).
44. National Labor Relations Board v. American Furnace Co., 188 F.2d 376 (7th Cir. 1946).
45. Thunderbird Hotel, Inc., 152 NLRB 1416 (1965).
46. Robertson Industries, 216 NLRB 361 (1975).
47. Alexander Manufacturing Co., 110 NLRB 1457 (1954).
48. Zinke's Foods, Inc., 185 NLRB 901 (1970); National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969).
49. El Rancho Market, 235 NLRB 468 (1978); *see also* National Labor Relations Board v. Illinois Tool Works, 153 F.2d 811 (7th Cir. 1946).

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50. *Id.*
51. Nabors Alaska Drilling, Inc., 325 NLRB 574 (1998).
52. Rodeway Inn of Las Vegas, 252 NLRB 344 (1980).
53. 29 U.S.C. § 158(c).
54. Aluminum Casting & Engineering Co., 328 NLRB 8 (1999).
55. Van Vlerah Mechanical Inc., 320 NLRB 739 (1996).
56. Addington, Inc., 325 NLRB 702 (1998) (a supervisory statement prefaced with the words, “in my opinion” is protected under Section 8(c) of the Act).
57. Bay State Ambulance and Hospital Rental, Inc., 280 NLRB 1079 (1986).
58. Blue Grass Industries, Inc., 287 NLRB 274 (1987).
59. Churchill Catering Corp., 276 NLRB 775 (1985).
60. National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969).
61. 29 U.S.C. § 158(c) (“[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act”).
62. Scranton Lace Company, 294 NLRB 249 (1989).
63. Paramount Parks, Inc., 334 NLRB No. 29 (2001).
64. Bay State Ambulance and Hospital Rental, Inc., 280 NLRB 1079 (1986).
65. Frank’s Nursery & Crafts, Inc., 297 NLRB 781 (1990).
66. Orange County Publications, 334 NLRB No. 48 (2001).
67. Wilshire Foam Products, Inc., 282 NLRB 1137 (1987).
68. Noah’s New York Bagels, Inc., 324 NLRB 266 (1997).
69. Jensen Enterprises, Inc., 339 NLRB No. 105 (2003).
70. BCI Coca-Cola Bottling Company of Los Angeles, 339 NLRB No. 14 (2003).
71. Springfield Jewish Nursing Home for the Aged, Inc., 292 NLRB 1266 (1989).
72. Lott’s Electric Co., 293 NLRB 297 (1989).
73. K-Mart Corporation, 316 NLRB 1175 (1995).
74. Eckert Fire Protection Company, 329 NLRB 920 (1999).
75. Sears Roebuck and Company, 300 NLRB 804 (1990) (threat to take disciplinary action up to and including discharge of employment for refusing to remove union hat).
76. Lott’s Electric Co., 293 NLRB 297 (1989).
77. El Rancho Market, 235 NLRB 468 (1978).
78. Kentucky May Coal Company, Inc., 317 NLRB 60 (1995).
79. House of Raeford Farms, 308 NLRB 568 (1992).

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80. Westchester Iron Works Corp., 333 NLRB 859 (2001).
81. Venture Industries, Inc., 330 NLRB 1133 (2000).
82. Jakel Motors, Inc., 288 NLRB 730 (1988).
83. Bill Scott Oldsmobile, 282 NLRB 1073 (1987).
84. Heritage Nursing Homes, Inc., 269 NLRB 230 (1984).
85. National Labor Relations Board v. Gissel Packing Co., 395 U.S. 575 (1969).
86. Shelby Tissue, 316 NLRB 646 (1995).
87. Iplli, Inc., 321 NLRB 463 (1996).
88. 280 NLRB 491 (1986).
89. Feldkamp Enterprises, Inc., 323 NLRB 1193 (1997).
90. MK Railway Corp., 319 NLRB 337 (1995).
91. A.M.F.M. of Summers County, 315 NLRB 727 (1994).
92. K-Mart Corporation, 316 NLRB 1175 (1995).
93. K-Mart Corporation, 316 NLRB 1175 (1995).
94. Pyramid Management Group, Inc., 318 NLRB 607 (1995).
95. Feldkamp Enterprises, Inc., 323 NLRB 1193 (1997).
96. Venture Industries, Inc., 330 NLRB 1133 (2000).
97. ITT Automotive, 324 NLRB 609 (1997).
98. Peter O'Dovero, 325 NLRB 998 (1998).
99. Louis Gallet, Inc., 247 NLRB 63 (1980).
100. Pyramid Management Group, Inc., 318 NLRB 607 (1995).
101. Milford Plains Limited Partnership, 309 NLRB 942 (1992).
102. Larson Tool & Stamping Co., 296 NLRB 895 (1989).
103. 296 NLRB 895 (1989).
104. Virginia Concrete Corp., Inc., 334 NLRB No. 105 (2001).
105. Saginaw Control and Engineering, Inc., 339 NLRB No. 76 (2003).
106. Aqua Cool, 332 NLRB No. 7 (2000).
107. System Analyzer Corp., 171 NLRB 45 (1968).
108. Olney Motels, Inc., 176 NLRB 903 (1969).
109. Lionel G. Sullivan and Ralph A. Fattore, 276 NLRB 999 (1985).
110. 29 U.S.C. § 158(c).
111. Traction Wholesale Center Co., 328 NLRB 1058 (1999).
112. Albert Einstein Medical Center, 316 NLRB 1040 (1995).

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113. T.C. Worthy Wholesale Inc., 159 NLRB 1700 (1966); Serv-U-Stores, Inc., 225 NLRB 37 (1976); Jakel Motors, Inc., 288 NLRB 730 (1988); M.K. Morse Co., 302 NLRB 924 (1991). *Compare* Olney Motels, Inc., 176 NLRB 903 (1969) (calling the union organizers “gangsters” and “hoodlums” and stating that the union “just takes your money” was unlawful); United States Aviex Co., 279 NLRB 826 (1986) (calling an employee a “chicken” for signing an authorization card unlawfully demeaned the employee).
114. National Labor Relations Board v. Rich’s Precision Foundry, Inc., 667 F.2d 613 (7th Cir. 1981).
115. Rossmore House, 269 NLRB 1176 (1984).
116. Westwood Health Care Center, 330 NLRB 935 (2000).
117. MDI Commercial Services, 325 NLRB 52 (1997); Medical Center of Ocean County, 315 NLRB 1150 (1994) (supervisor’s question, “What is going on; what’s happening?” is unlawful).
118. Solvay Iron Works, Inc., 341 NLRB No. 25 (2004).
119. John S. Barnes Corp., 180 NLRB 911 (1970).
120. Tiidee Products, Inc., 174 NLRB 705 (1969).
121. Sunnyvale Medical Clinic, Inc., 277 NLRB 1217 (1985); Rossmore House, 269 NLRB 1176 (1984).
122. Research Management Corp., 302 NLRB 627 (1991).
123. Rossmore House, 269 NLRB 1176 (1984) (in the absence of threats or promises, an employer’s questioning of an open and active union supporter is lawful).
124. Norton Healthcare, Inc., 338 NLRB No. 34 (2002).
125. Bendix-Westinghouse Automotive Air Brake Co., 161 NLRB 789 (1966).
126. FederalMogul Corp., 163 NLRB 302 (1967).
127. Johnnie’s Poultry Co., 146 NLRB 770 (1964).
128. Struksnes Construction Co., 154 NLRB 1062 (1967) (the poll does not serve an employer’s legitimate interests that are not better served by the impending Board election).
129. Struksnes Constr. Co., 165 NLRB 1062 (1967).
130. Keeler Brass, Automotive Group, 301 NLRB 769 (1991).
131. Heritage Hall, E.P.I. Corp., 333 NLRB 458 (2001).
132. Feldkamp Enterprises, Inc., 323 NLRB 1193 (1997).
133. Garvey Marine, Inc., 328 NLRB 991 (1999).
134. Madison Brass Works, Inc. v. National Labor Relations Board, 381 F.2d 854 (7th Cir. 1967).
135. Autoprod, Inc., 265 NLRB 331 (1982).
136. Van Vlerah Mechanical Inc. 320 NLRB 739 (1996).
137. Wis-Pak Foods, Inc., 319 NLRB 933 (1995).

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138. Excel Container, Inc., 325 NLRB 17 (1997).
139. *Donovan v. National Labor Relations Board*, 520 F.2d 1316 (2d Cir. 1975).
140. *National Labor Relations Board v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118 (7th Cir. 1986).
141. *United Refrigerated Services, Inc.*, 325 NLRB 258 (1998).
142. *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058 (1999).
143. *J. P. Stevens & Co., Inc.*, 268 NLRB 33 (1983).
144. *Bay State Ambulance and Hospital Rental, Inc.*, 280 NLRB 1079 (1986).
145. *Reno Hilton*, 319 NLRB No. 140 (1995).
146. *Southgate Village, Inc.*, 319 NLRB 916 (1995) (employer granted an across-the-board wage increase and improved benefits).
147. *Walter Garson, Jr. & Associates*, 276 NLRB 1226 (1985) (employer's granting of pay increases was in substantial accord with its previously announced policy).
148. *Washington Beef Producers, Inc.*, 264 NLRB 1163 (1982).
149. *Walter Garson, Jr. & Associates*, 276 NLRB 1226 (1985).
150. *Southgate Village, Inc.*, 319 NLRB 916 (1995).
151. *Adams Super Markets Corp.*, 274 NLRB 1334 (1985).
152. *J.P. Stevens and Company, Inc.*, 247 NLRB No. 44 (1980).
153. *Hendel Manufacturing Co.*, 197 NLRB 1093 (1972) (having previously planned and announced a wage increase, a company president unlawfully informed assembled employees that he was withdrawing the wage increase because of "this union stir.").
154. *Crawford Mfg. Co. v. National Labor Relations Board*, 386 F.2d 367 (4th Cir. 1967).
155. *R.R. Donnelley & Sons Co. v. National Labor Relations Board*, 156 F.2d 416 (7th Cir. 1946).
156. *Robinson Chrysler Plymouth*, 186 NLRB 925 (1970).
157. *Edward Fields, Inc. v. National Labor Relations Board*, 325 F.2d 754 (2d Cir. 1963).
158. *Lincoln Mfg. Co. v. National Labor Relations Board*, 382 F.2d 411 (7th Cir. 1967).
159. *KMST-TV, Channel 46*, 302 NLRB 381 (1991).
160. *Atlantic Forest Products*, 282 NLRB 855 (1987).
161. *Grouse Mountain Associates II*, 333 NLRB No. 157 (2001).
162. *MDI Commercial Services*, 325 NLRB 53 (1997).
163. *Clark Equipment Company*, 278 NLRB No. 85 (1996) (survey was conducted after the election but during litigation regarding the election).
164. *A. J. Ross Logistics, Inc.*, 283 NLRB No. 64 (1987).
165. *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058 (1999).
166. *Uarco Inc.*, 216 NLRB 1 (1974).

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167. Uarco Inc., 216 NLRB 1 (1974).
168. Gordonsville Industries, 252 NLRB 563, 568 (1980).
169. Schaumburg Hyundai, Inc., 318 NLRB 449 (1995).
170. Valley Special Needs Programs, Inc., 314 NLRB 903 (1994).
171. Health Management, Inc., 326 NLRB 801 (1998).
172. Athens Disposal Co., 315 NLRB 87 (1994).
173. National Labor Relations Board v. Fruehauf, 301 U.S. 49 (1937) (unlawful for employer to hire detective whose duty was “to ferret out the union activities of the men” and keep the employer informed).
174. Jakel Motors, Inc., 288 NLRB 730 (1988).
175. Flexsteel Industries, Inc., 311 NLRB 257 (1994) (unlawful for employer to tell employee he heard rumors that employee was engaged in union organizing activities).
176. Valley Special Needs Program, Inc., 314 NLRB 903 (1994).
177. Pyramid Management Group, Inc., 318 NLRB 607 (1995).
178. Highland Light Steam Laundry, Inc., 272 NLRB 1056 (1984).
179. Regency Service Carts, Inc., 325 NLRB 617 (1998).
180. Impressive Textiles, Inc., 317 NLRB 8 (1995).
181. Uniontown Hospital Association, 277 NLRB 1298 (1985).
182. Labor Ready, Inc., 327 NLRB 1055 (1999).
183. Woodcliff Lake Hilton Inn, Inc., 279 NLRB 1069 (1986); Virginian Metal Products Co., Inc., 306 NLRB 257 (1992) (“[i]t would be absurd to require a supervisor to make sure [he did] not look at or watch a particular employee too much while the employee is at work.”).
184. Sound Design Corp., 232 NLRB 993 (1977).
185. Nashville Plastic Products, 313 NLRB 462 (1993); The Timken Company, 331 NLRB 744 (2000) (continuous and unlimited videotaping of protected activity unlawful).
186. Adams Super Markets Corp., 274 NLRB 1334 (1985) (“union representatives and employees who choose to engage in their union activities at the employer’s premises should have no cause to complain that management observes them”).
187. F.W. Woolworth Co., 310 NLRB 1197 (1993).
188. International Ship Repair & Marine Services, Inc., 329 NLRB 213 (1999).
189. Roadway Package System, Inc., 302 NLRB 961 (1991).
190. The Standard Products Company, 281 NLRB 141 (1986) (referring to two employees who openly and actively supported the union as “the union president” and “the shop steward was not unlawful).
191. Humboldt Full Fashioned Hosiery Mills, Inc., 103 NLRB 955 (1953).
192. Sarkes Tarzian, Inc., 374 F.2d 734 (7th Cir. 1965).

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193. Glenoaks Convalescent Hospital, 271 NLRB 488 (1984).
194. Phoenix Glove Co., Inc., 268 NLRB 680 (1984).
195. Flatbush Manor Care Center, 316 NLRB 201 (1995).
196. 29 U.S.C. § 158(a)(3).
197. Farmer Brothers. Co., 303 NLRB 638 (1991).
198. Structural Composites Industries, 304 NLRB 729 (whether a written personnel policy could have applied to the fact situation is irrelevant).
199. Desert Pines Golf Club, 334 NLRB No. 36 (2001).
200. Wright Line, 251 NLRB 1083 (1980).
201. Fluor Daniel, Inc., 304 NLRB 970 (1991).
202. Regency Service Carts, Inc., 325 NLRB 617 (1998).
203. Affiliated Foods, Inc., 328 NLRB 1107 (1999).
204. Hebert Pattern Shop, Inc., 285 NLRB 555 (1987).
205. National Labor Relations Board v. McCarthy Motor Sales Co., 309 F.2d 732 (7th Cir. 1962).
206. Hebert Pattern Shop, Inc., 285 NLRB 555 (1987).
207. Asociacion Hospital Del Maestro, Inc., 291 NLRB 198 (1988).
208. Paramount Farms, Inc., 334 NLRB 810 (2001).
209. Insight Communications Co., 330 NLRB 431 (2000).
210. Vacuum Platers, Inc., 154 NLRB 588 (1965).
211. State Equipment, Inc., 322 NLRB 631 (1996).
212. Davis Electric Wallingford Corp., 318 NLRB 375 (1995).
213. Crystal Princeton Refining Co., 222 NLRB 1068 (1976).
214. Maywood, Inc., 251 NLRB 979 (1980).
215. DBM, Inc., 304 NLRB 1110 (1991).
216. Meisner Electric, Inc., 316 NLRB 597 (1995).
217. Opelike Welding, Machine and Supply, Inc., 305 NLRB 561 (1991).
218. St. Joseph's Hospital, 337 NLRB No. 12 (2001).
219. Trover Clinic, 280 NLRB 6 (1986).
220. Alamo Rent-A-Car, Inc., 338 NLRB No. 31 (2002).
221. Fixtures Manufacturing Corp., 332 NLRB No. 55 (2000).
222. Teledyne Advanced Materials, 332 NLRB No. 53 (2000).
223. Dynabil Industries, Inc., 330 NLRB 360 (1999).
224. Bryant & Stratton Business Institute, 321 NLRB 1007 (1996).

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225. Superior Warehouse Grocers, Inc., 277 NLRB 18 (1985).
226. Nissen Foods (USA) Co., Inc., 272 NLRB 371 (1984).
227. Sage Dining Service, Inc., 312 NLRB 845 (1993).
228. Alpha School Bus Co., Inc., 293 NLRB 284 (1989) (different bus route).
229. International Ship Repair & Marine Services, Inc., 329 NLRB 213 (1999).
230. Sea Ray Boats, Inc., 336 NLRB 779 (2001).
231. Adair Standish Corp., 290 NLRB 317 (1988).
232. Ro-Lab Rubber Co., Inc., 279 NLRB 386 (1986); Frank Leta Honda, 321 NLRB 482 (1996) (discriminatory enforcement of a no-smoking policy).
233. Tuscaloosa Quality Foods, Inc., 318 NLRB 405 (1995).
234. Garvey Marine, Inc., 328 NLRB 991 (1999).
235. Wright Line, 251 NLRB 1083 (1980).
236. FES, 331 NLRB 9 (2000).
237. Bodge Electrical Contractors, Inc., 316 NLRB 191 (1995).
238. Tualatin Electric, Inc., 319 NLRB 1237 (1995).
239. Labor Ready, Inc., 327 NLRB 1055 (1999).
240. National Labor Relations Board v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
241. *Id.*
242. *Id.*
243. *Id.*
244. Honeywell, Inc., 318 NLRB 637 (1995).
245. *Id.*
246. Aztech Electric Co., 335 NLRB 260 (2001).
247. Pioneer Recycling Corp., 323 NLRB 652 (1997).
248. National Labor Relations Board v. Town & Country LP Gas Serv., 687 F.2d 187 (7th Cir. 1982).
249. National Labor Relations Board v. Vacuum Platers, 374 F.2d 866 (7th Cir. 1967).
250. National Labor Relations Board v. Lamar Creamery Co., 246 F.2d 8 (5th Cir. 1957).
251. National Labor Relations Board v. Schill Steel Prods., 480 F.2d 586 (5th Cir. 1973).
252. 29 U.S.C. § 158(a)(2).
253. Janesville Products Division, Amtel, Inc., 240 NLRB 854 (1979) (employer ordered elections of representatives, controlled the scheduling and subject matter of meetings, and dictated the resolution of grievances); Superior Bakery, Inc., 294 NLRB 256 (1989) (employer suggested that employees form a committee as an alternative to the union and allowed a supervisor to establish and assist the committee).

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254. Hankins Container Co., 145 NLRB 640 (1963).
255. S & W Motor Lines, Inc., 236 NLRB 938 (1978).
256. Upper Great Lakes Pilots, Inc., 311 NLRB 131 (1993).
257. Malvina Krausman, 293 NLRB 1082 (1989).
258. Garment Workers v. National Labor Relations Board, 366 U.S. 731 (1961).
259. RCA Del Caribe, Inc., 262 NLRB 963 (1982).
260. Hendel Manufacturing Co., 197 NLRB 1093 (1972).
261. Crown Cork & Seal Co., 334 NLRB No. 92 (2001).
262. 29 U.S.C. § 152(5).
263. Electromation, Inc., 309 NLRB 990 (1992).
264. E. I. du Pont & Co., 311 NLRB 893 (1993).
265. Keeler Brass Co., 317 NLRB 1110 (1995).
266. Electromation, Inc., 309 NLRB 990 (1992).
267. Crown Cork & Seal Company, Inc., 334 NLRB No. 92 (2001).
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*

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