UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIKLIN ENTERPRISES, INC.
d/b/a JIMMY JOHN'S

Cases 18-CA-19707
18-CA-19727
18-CA-19760

and

INDUSTRIAL WORKERS OF THE WORLD

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for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota on February 14-15, 2012. The Industrial Workers of the World filed charges on March 7, 24, and April 22, 2011. The General Counsel issued a consolidated complaint and notice of hearing on November 9, 2011. In this complaint the General Counsel alleges the Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of Erik Forman, Michael Wiklow, Davis Ritsema, David Boehnke, Max Spector and Micah Buckley-Farley on March 22, 2011 and issuing written warnings the same day to Isaiah "Ayo" Collins, Sean Eddins and Brittany Koppy. Respondent contends that it terminated and/or disciplined these employees for conduct that is not protected by Act. At least part of the conduct in question was posting flyers near Respondent's restaurants suggesting that customers might get sick by eating one of Respondent's sandwiches due to Respondent's lack of paid sick leave.

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

managers removed union literature from a public bulletin board inside one of the restaurants. Finally, the General Counsel alleges that Respondent's owner illegally interrogated an employee about the union sympathies of another employee.

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

FINDINGS OF FACT

I. JURISDICTION

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

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent owns and operates 10 Jimmy John's sandwich shops in the Minneapolis-St. Paul area. There are 40-50 other Jimmy John's establishments in this area owned and operated by others and approximately 1400 Jimmy John's shops nationwide. The Union, the International Workers of the World, began to organize MikLin's shops as early as 2007. The campaign went public in September 2010. On October 22, 2010 a representation election was conducted in a unit covering all 10 MikLin stores. Eighty-five votes were cast in favor of representation by the IWW; 87 were cast against representation. The Union filed objections to the conduct of the election. The objections case was settled on January 10, 2011. The essence of the settlement was that after 60 days but not later than after 18 months, the Union would be allowed to file a petition for a rerun election and that if it did so Respondent would agree to an election within 30 days, G.C. Exh. 46.

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

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

Respondent's attendance policy as it pertains to illness

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

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

On March 16, 2011, Respondent promulgated a new attendance policy. However, the substance of this policy as it relates to this case was identical to its existing policy. Under this policy employees are "expected to be at work on time or find a suitable replacement for their scheduled shifts." Respondent also instituted a disciplinary point system for attendance issues. An employee who does not report to work, but finds a replacement is not assessed any points. An employee who called his or her manager at least one hour before the shift without finding a replacement is assessed one point. The employee is assessed two points if they call in less than an hour before or after the start of the shift and 3 points for a no call/no show. Within any rolling 12 month period an employee receives a disciplinary coaching for 1 point; a recorded verbal warning for 2 points; a written warning for 3 points and is terminated for accumulating 4 points.

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

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

G.C. Exh. 18.

The posters

In late January or early February 2011, members of the Union put up posters on community bulletin boards in the public area of several of Respondent's stores, G.C. Exh. 44.

These posters were removed by Respondent's managers each time they encountered one.[2] These posters featured two color photographs of a Jimmy John's submarine sandwich side by side. The sandwiches looked identical. Both had a little mayonnaise on the top of the upper loaf of the sandwich. Above the sandwich to the left of the poster were the words "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER." The words above the sandwich to the right read, "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." The wording was in the color white on a black background, except that the words HEALTHY and SICK were in red.

Below the pictures of the two sandwiches was the following:

CAN'T TELL THE DIFFERENCE?
THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T
GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK.
WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO THE TAKE THE SANDWICH TEST…

HELP JIMMY JOHN'S WORKERS WIN SICK DAYS
SUPPORT US ONLINE AT www.jimmyjohnsworkers.org

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

The March 10, 2011 meeting

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

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

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

The Union also issued a press release on March 10, G.C. Exh. 38, entitled. "Jimmy John's Workers Blow the Whistle on Unhealthy Working Conditions." The press release

[2] Complaint paragraph 5(c) alleges that Respondent through its Area Manager Jason Effertz removed Union postings from its Riverside store. The record establishes that Effertz admitted to removing postings other than the sick day posters, but that agents of Respondent routinely took down the sick day posters whenever they encountered them at any of Respondent's stores, Tr. 167-70, 199, 285.

asserted that Respondent's lack of sick leave put the health of employees and customers at risk. The release did not make any essential distinction between Respondent MikLin and Jimmy John's shops generally. At some points it focused on Jimmy John's generally and at others specifically on the MikLin franchise. It also indicated that the lack of sick leave was an industry-wide problem. The press release stated, "The issue of working while sick has became a staple concern for countless workers in the service industry and beyond, accelerated by the turn to a fast food employment model without benefits or job security."

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

Sunday, March 20, 2011

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

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

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

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

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

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

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

Spector, Ritsema, Buckley-Farley, Wiklow and Forman were terminated for being part of the group that presented Rob Mulligan with the letter threatening to post the sick day poster if

Mulligan did not meet with the employees about Respondent's sick leave policy and causing the public posting of hundreds of these posters in neighborhoods near Respondent's stores.

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

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

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

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

G.C. Exh. 9.[3]

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

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

In addition, MikLin's October 2010 Employee Handbook, G.C. Exhibit 13, states that its employees must dress in accordance with Jimmy John's uniform and personal grooming and dress code policy. It further states that "our employees represent the Jimmy John's image to every customer they serve."

[4] The General Counsel argues in its brief the terminations and disciplinary warnings violate the Act even if the activities of March 20 were unprotected. I need not reach that argument and in any event, I find that Respondent fired the 6 and disciplined the 3 for posting the sick day posters near its stores on March 20.

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

The day after the terminations and written warnings were issued, the Union issued another press release, G.C. Exh. 39. In that press release, Buckley-Farley was quoted as follows:

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

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

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

G.C. Exh. 41.[5]

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

There is apparently no requirement that an employee who has any other type of illness, such as a cold, cough, runny nose or sore throat, be restricted from working with food. There is also no evidence in this record that illnesses such as a cold, cough or sore throat can be transmitted through food. Respondent's employees wear plastic gloves when making sandwiches but apparently do not wear gloves when bagging napkins for an order that is to be delivered, Tr. 266, 273-74.

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

Anti-Union Facebook Postings

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

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

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

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

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

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

Alleged Interrogation (Complaint paragraph 5(b))

In January 2011, Mike Mulligan asked Micah Buckley-Farley if Mike Wiklow knew that Respondent was reimbursing Wiklow for damage to his bicycle. Wiklow was on workers compensation at this time, having been injured while riding his bicycle making a delivery for

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

Respondent. Buckley-Farley responded that he believed Wiklow was aware of the fact that he was being reimbursed. Mulligan then asked if Wiklow was happy that he was being reimbursed and whether Wiklow was "ready to support the Company now." At the time it was well-known that Wiklow was a very active supporter of the Union.[7]

Removal of Union Literature (Complaint paragraph 5 (c))

In January and February 2011, Union supporter Travis Erickson posted a copy of the amended charge in case 18-CA-19551, G.C. Exh. 62 and a flyer entitled FAQ (frequently asked questions) about the Union Election & Settlement, G.C. Exh. 61 at Respondent's Riverside store. On February 10, Jason Effertz, one of Respondent's Area Managers, told Erickson he had been taking down these union flyers because he was told they were unprotected.

Analysis

The posting of the "sick day" posters at Respondent's stores and outside those stores on March 20, 2011 are protected by Section 7 of the Act.

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

> Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). This includes communications about labor disputes to newspaper reporters. See, e.g., *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995)…
> But finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise protected

[7] Mike Mulligan testified that he did not recall this conversation. I credit Buckley-Farley that it occurred. Buckley had also been an open supporter of the Union at least since October 2010, see. G.C. Exh. 37, Objections to the Election, p. 6.

> communications with third parties may be "so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987); accord *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).
>
> Statements have been found to be unprotected as disloyal where they are made "at a critical time in the initiation of the company's" business and where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953); accord: *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), denying enforcement of 345 NLRB 448 (2005). The Board is careful, however, "to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, supra at 139. To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence "a malicious motive." *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).
> Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.

The Board most recently addressed this issue in *Mastec Advanced Technologies,* 357 NLRB No. 17 (2011) and *Dresser-Rand Company*, 358 NLRB No. 34 (April 19, 2012).[8] Numerous Board cases establish that virtually any form of protected activity can be subjectively considered disloyal, including forming, joining or assisting a labor organization, e.g., *RTP Co.,* 334 NLRB 466, 467, 476 (2001), enfd. 315 F. 3d 951 (2003). Moreover, protected activity will often adversely impact an employer's reputation and revenue. Indeed, Justice Frankfurter in his *Jefferson Standard* dissent observed that, "Many of the legally recognized tactics and weapons of

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

labor would readily be condemned for "disloyalty" were they employed between man and man in friendly personal relations," 346 U.S 464 at 479-80.

There is no question that if employees posted or handed out flyers asking the public not to patronize their employer because they did not get paid sick leave, such conduct would be protected, *Kitty Clover, Inc.,* 103 NLRB 1665, 1687-88 (1953); *Arlington Electric,* 332 NLRB 845, 846 (2000). Appeals to customers that may adversely affect the employer's revenue have been found to be protected by Section 7 in many cases. For example, in *Allied Aviation Service of New Jersey, Inc.,* 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3rd Cir. 1980) the Board found that the letters of a union steward to his employer's customers were protected. The steward in that case claimed that his employer's practices relating to the servicing and maintenance of ground vehicles created a safety hazard to customers and resulted in inferior service.[9]

The posters were sufficiently connected to a labor dispute to be protected by the Act

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

The statement, "shoot we can't even call in sick" is not a sufficient departure from the truth to render the posters unprotected

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

On the other hand, it is not literally true that employees could not call in sick. However, Respondent's argument to the contrary is not entirely accurate either. Employees were and still are subject to discipline if they call in sick without finding a replacement. Moreover, finding a

[9] Although *Coca Cola Bottling Works,* 186 NLRB 1050, 1054-55 (1970), cited by Respondent at pages 38-39 of its brief, has never been explicitly overruled, I infer that it has implicitly been overruled by *Allied Aviation Service of New Jersey.* On the basis of *Allied Aviation,* I conclude that disparagement of the employer's product may, at least in some situations, be insufficient justification for an employee's termination—if connected to a labor dispute. Moreover, the part of the *Coca Cola Bottling* decision regarding product disparagement appears to be dicta since the employees in question were not denied reinstatement by the Board. The reason for this was that the employer had not relied on the employees' disparagement in refusing to reinstate them.

replacement may present a significant burden to an employee who is sick enough to miss work (particularly one who is vomiting or is experiencing diarrhea).

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

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

The suggestion that employees' lack of paid sick days may cause a customer to become ill is insufficient to render the posters unprotected.

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

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

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

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

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

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

One could argue that two cases of food-borne disease in 10 years when Respondent has made 6 million sandwiches renders any correlation between Respondent's sick leave policy and food borne illness to be so improbable that the Union's posters should be unprotected. Moreover, there has been no direct correlation established between these incidents and the absence of sick leave. Given Respondent's record over a 10-year period one could regard the risk of becoming ill by eating at one of Respondent's shops to be infinitesimal. However, it is also arguable that Respondent's policies make it somewhat more likely that such an incident could reoccur.

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

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

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

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

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

In conclusion I find that Respondent violated Section 8(a)(3) and (1) in terminating Erik Forman, Michael Wiklow, Davis Ritsema, David Boehnke, Max Spector and Micah Buckley-

Farley on March 22, 2011 and issuing written warnings the same day to Isaiah "Ayo" Collins, Sean Eddins and Brittany Koppy.[12]

Removal of Union posters from the public bulletin boards and from property not belong to Respondent.

Removal of other Union literature by Area Manager Jason Effertz.

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

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

Disparagement of Union Supporters

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

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

[12] I reject the argument of the General Counsel and Charging Party that Respondent violated the Act even if the posters were unprotected. I find no illegal discrimination in treating the employees who planned and organized the flyer postings more harshly than those "foot soldiers" who did the posting. An analogous situation would be terminating an employee who fomented strike misconduct but did not participate in the misconduct. However, it is possible the Micah Buckley-Farley's involvement in planning the postings is too attenuated to justify his termination even if the posting was unprotected, *The Patterson-Sargent Company,* 115 NLRB, 1627, 1630-31 (1956). I do not believe I need to analyze whether or not this is so. Buckley-Farley did not attend the March 10 meeting and did not participate in the flyer posting. His only connection to this activity was being listed as a contact in a press release which mentioned the Union's intention to post the sick day flyers.

Alleged illegal interrogation

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

Other arguments in Respondent's brief

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

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

CONCLUSIONS OF LAW

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

1. By removing union postings from its Riverside store.

2. By Assistant Manager Rene Nichols in posting an employee's telephone number on Facebook and soliciting other employees, supervisors and managers to call or text the employee about his protected activities.

3. By co-owner Rob Mulligan in encouraging employees to remove union posters from property not belonging to Respondent.

4. By Area Manager Jason Effertz and other agents in removing union posters and other union literature from in-store bulletin boards on which other material was generally posted without any restriction.

5. By terminating the employment of Max Spector, David Boehnke, Davis Ritsema, Mike Wiklow, Erik Forman and Micah Buckley-Farley on March 22, 2011.

6. By issuing final written warnings to Isaiah "Ayo" Collins, Brittany Koppy and Sean Eddins on March 22, 2011.

THE REMEDY

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

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

1. Cease and desist from

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

(b) Soliciting anti-union employees, managers and supervisors to contact pro-union employees about the pro-union employees' protected activities.

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

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

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

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

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

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

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

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

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

(f) Within 14 days after service by the Region, post at its stores in the Minneapolis, Minnesota area copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 2011.

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

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

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

_____
Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Industrial Workers of the World or any other union.

WE WILL NOT solicit anti-union employees, supervisors and/or managers to contact pro-union employees about their protected union activities.

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

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

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

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

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Max Spector, David Boehnke, Davis Ritsema, Mike Wiklow, Erik Forman and Micah Buckley-Farley and the written warnings issued to Isaiah “Ayo” Collins, Brittany Koppy and Sean Eddins.

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

MIKLIN ENTERPRISES, INC.
d/b/a JIMMY JOHN'S

(Employer)

Dated _____ By _____

(Representative) (Title)

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

Towle Building, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.