Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphics Communications Conference International Brotherhood of Teamsters *and* Robert Guiliano. Cases 31–CA–027950 31–CA–027965, 31–CA–028043, 31–CA–028104, 31–CA–028116, 31–CA–028131, 31–CA–028151, 31–CA–028161, 31–CA–028162, and 31–CA–028157

August 11, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

At issue in this case is whether the judge correctly found that the Respondent, a newspaper publisher, committed numerous violations of Section 8(a)(3) and (1) of the Act after its newsroom employees initiated a union organizing campaign.[1] The Respondent also raises two threshold matters. First, the Respondent argues that the organizing campaign, in its entirety, was not protected by the Act because the employees' primary demand was to protect their integrity as professional journalists at the newspaper,[2] a matter concerning which, the Respondent argues, its employees had no statutorily protected interest. Alternatively, the Respondent argues that the organizing campaign was unprotected because it involved disloyal conduct. Second, the Respondent argues that any governmental intervention on the employees' behalf will impermissibly interfere with its First Amendment right to control the content of its newspaper. For the reasons explained below, we reject these threshold arguments, and we agree with the judge's unfair labor practice findings.[3]

I.

The Respondent publishes a daily newspaper in Santa Barbara, California, which has been copublished by Wendy McCaw and Arthur von Wiesenberger since April 2006. As discussed by the judge, employees began to organize following a series of management decisions in mid-2006[4] that led employees to believe that the new publishers were inappropriately interfering with the work of the employees on the news-gathering side of the paper.

The first of those incidents occurred in May, when the publishers limited coverage of the arrest and sentencing of Travis Armstrong, the paper's editorial page editor. A second incident occurred in late June, when McCaw formally reprimanded a reporter and three editors for

[1] On December 26, 2007, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed answering briefs to the General Counsel's and the Charging Party's cross-exceptions, and reply briefs to the General Counsel's and the Charging Party's answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings as modified, and conclusions and to adopt the recommended Order as modified and set forth in full below.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

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

[2] We recognize that each side characterizes what was at stake in the employees' demands differently—the Respondent as an effort to prevent it from exercising editorial control over the paper's content in order to prevent bias and the employees as an effort to preserve their autonomy as journalists in order to prevent the publisher and editor from inserting their editorial stance into coverage of the news. We need not and do not address the question of which side's characterization is correct in deciding this case.

[3] The Respondent excepts to the judge's decision to revoke its subpoena duces tecum of Sam Tyler, a documentary filmmaker who filmed interviews with current and former members of the News-Press staff. The Respondent requested that Tyler produce all documents and recordings in his possession that related to the labor dispute at the News-Press. (At the time of the hearing, Tyler's film had not been completed or screened for the public.) Tyler filed a petition to revoke the subpoena, arguing that the requested footage was not relevant to the Board's proceedings, and that compelling its production would interfere with his First Amendment rights and his ability to produce the film. We find no merit in this exception.

The Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. *300 Exhibit Services & Events*, 356 NLRB 415, 415 fn. 1 (2010). Here, the judge's revocation of the subpoena was well within his discretion. Counsel for the Respondent stated that its primary purpose in requesting the material was to potentially discover defamatory statements made by the discriminatees on camera that could be presented as a basis for denying them backpay. The Board has previously rejected similar requests. *Parts Depot, Inc.*, 348 NLRB 152 fn. 6 (2006) (holding that the respondent was free to cross-examine claimants regarding their postemployment conduct, but that the judge properly precluded it from "asking questions which amounted to nothing more than a fishing expedition"). In addition, even if an unlawfully-terminated employee had made defamatory statements to the filmmaker, that alone would not necessarily have been a basis for denying reinstatement or backpay. See *Hawaii Tribune-Herald*, 356 NLRB 661 (2011). Finally, in ruling that the Respondent's request was overbroad, the judge indicated that the Respondent was free to narrow its request during the hearing to state more specifically what material it required. There is nothing in the record to indicate that the Respondent made any effort to do so. Finally, the Respondent could have questioned the discriminatees about what they said to Tyler and then, if necessary, renewed its request, but it did not avail itself of this opportunity during the hearing despite the judge's invitation to do so.

[4] All dates herein are in 2006, unless otherwise stated.

writing an article that included the future home address of actor Rob Lowe, a friend of McCaw's. Employees criticized McCaw's decision as an abrupt, unwarranted departure from the paper's longstanding practice of publishing the addresses of controversial building projects as well as the name of the owner involved. A final incident occurred shortly thereafter when management circulated a revised "Business Conduct" policy, placing new limits on employees' ability to disseminate information concerning the News-Press to other media outlets. Employees objected to the new policy as a "gag order," and at least 15 employees, including editors, columnists, and reporters, resigned from the paper following its issuance. The judge found that the employees resigned to protest what they perceived as McCaw's and von Wiesenberger's improper interference with their reporting of the news.

Immediately following the resignations, the remaining newsroom employees began meeting with representatives of the Graphics Communications Conference, International Brotherhood of Teamsters (the Union). During one of the meetings, employees drafted the following letter, which was delivered to Travis Armstrong on July 13:

> We, the newsroom employees of the Santa Barbara News-Press, can no longer remain silent about the intolerable conditions at the newspaper we love.
>
> We respectfully request that you:
>
> 1. Restore journalism ethics to the Santa Barbara News-Press: implement and maintain a clear separation between the opinion/business side of the paper and the news-gathering side.
>
> 2. Invite back the six newsroom editors who recently resigned: Jerry Roberts, newsroom editor; George Foulsham, managing editor; Don Murphy, deputy managing editor; Jane Hulse, city editor; Michael Todd, business editor and Gerry Spratt, sports editor.
>
> 3. Negotiate a contract with the newsroom employees governing our hours, wages, benefits and working conditions.
>
> 4. Recognize the [Union] as our exclusive bargaining representative.
>
> We look forward to discussing these issues further with you. Thank you.

To raise awareness of their efforts, employees staged a series of rallies outside the News-Press headquarters and in the community during which they reiterated their demands.

On July 20, employees announced a campaign to persuade readers to cancel their subscriptions if the employees' demands were not met by September 5.[5] The Respondent refused to recognize the Union or accede to the employees' other demands by that date, and the cancellation campaign commenced.

In the meantime, in August, the Union had petitioned for a representation election among the newsroom employees. The employees voted for representation and the Union was certified as the employees' exclusive collective-bargaining representative.[6]

As described below, the judge found that, from shortly after the Union filed its petition through February 2007, the Respondent committed numerous unfair labor practices involving employees who supported the Union.

II.

Before turning to the judge's specific unfair labor practice findings, we address the Respondent's threshold arguments: that the employees' campaign activities were not protected by the Act; and that the judge's decision (and now presumably, our own) impermissibly interferes with the Respondent's First Amendment rights. We find no merit in those arguments for the following reasons.

A. The Employees' Activities were Protected by the Act

The Respondent argues that the employees' demands for journalistic integrity did not implicate any statutorily recognized term or condition of their employment, and thus were not protected by Section 7 of the Act. It also contends that, even assuming the employees' activities were initially protected, the employees lost the protection of the Act by engaging in disloyal conduct. The Respondent is incorrect for the following reasons.

Section 7 provides that employees have the right to organize, bargain collectively, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. As a starting point, the Respondent largely ignores the fact that, in addition to protecting their journalistic ethics, the employees here were seeking recognition of the Union as their representative for purposes of bargaining over wages, hours, and other terms and conditions of employment generally. This was a clearly protected goal.

Further, the Respondent's changes of policy, whether they are correctly characterized as purely editorial or not, had a direct impact on employees' terms of employment. For example, the change of policy regarding the printing

[5] At this point in the campaign, the group dropped its demand that the Respondent reinstate the six newsroom editors who resigned. Thereafter, it was not included as one of the employees' organizing goals.

[6] On September 27, the Union won a Board-supervised election by a vote of 33 to 6. The Board overruled the Respondent's objections and certified the Union as the employees' bargaining representative in August 2007.

of addresses resulted in several employees being disciplined, which strongly supports a finding that employees' "terms and conditions of employment" were at stake. See *Peerless Publications*, 283 NLRB 334, 336 (1987). And in fact the employees protested those disciplinary actions as part of their campaign.

Finally, we reject the Respondent's argument that the employees' more general demands that their journalistic ethics not be compromised were not sufficiently tied to their interests as employees to be protected by Section 7. These were newsroom employees. The management decisions at issue had and threatened to have a direct impact on the autonomy they had enjoyed in performing their work according to their perceptions of applicable professional norms as well as on their actual, day-to-day duties.

In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), the Supreme Court held "that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity" and "that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause" of Section 7. Id. at 567–568. Here, however, we find that the employees' demands concerned their employment relationship and were directly related to their interests as employees.

Mitchell Manuals, Inc., 280 NLRB 230 (1986), is persuasive authority on this point. In that case, editorial employees of an automobile repair guide sent a letter to their employer's parent company criticizing the employer's managerial practices and demanding the creation of a new research department that they believed would improve the quality of the guide. The employees asserted that such a department was necessary to maintain the credibility of the company and its publications. Id. at 230–231. The employees had also asked their employer for improved wages and benefits, but the letter did not focus on those demands. As a result, the judge found the letter unprotected, reasoning that it amounted to no more than "disagreement with [the] employer over basic managerial guidelines and philosophy." Id. at 231. The Board reversed. Although mindful of the limitations described in *Eastex*, the Board reasoned that the editorial employees' demands related primarily to their desire to perform their work according to appropriate professional norms, a protected objective. Id. In that respect, moreover, the demands in the employees' letter were "part of and related to the ongoing labor dispute." Id.

Here, as in *Mitchell Manuals*, the employees' concerns about journalistic integrity were connected to their interests as news-reporting employees of the Respondent. The Respondent's changes of policy caused employees to question their ability to report the news in what they viewed as a professionally appropriate manner. Various employees testified that those decisions undermined their integrity as journalists, making it more difficult for them to cultivate relationships with sources and to perform their jobs effectively.

The newsroom employees' concerted actions were not in protest against a change in the editorial stance of the paper—whether to endorse the Democratic or Republican candidate for mayor, for example. Rather, they were in protest against decisions that limited the autonomy they had previously enjoyed to report the news according to what they believed were professional norms. Restrictions on their autonomy and threats to their professional ethics directly implicated their interests as employees.[7]

In all of these respects, we find that the employees' campaign was sufficiently linked to their desire to organize, their terms and conditions of employment, and their interests as employees to bring it within the ambit of Section 7.

But, even assuming arguendo that one of the employees' objectives was unprotected, there is no evidence to suggest that that was the reason for the adverse actions. In fact, the Respondent gave a range of other reasons for the actions, all of which the judge found were pretexts. In other words, contrary to its post hoc rationale, the Respondent did not act in order to protect its editorial control. It did not warn employees that continuing to protest their loss of autonomy might lead to adverse action and it did not impose any of the adverse action on that ground. See *Thompson Products*, 70 NLRB 13, 14–15 (1946). In fact, the Respondent at the time claimed that the employees' claims about the integrity of the paper were simply designed to pressure the Respondent to grant voluntary recognition of the Union.

Alternatively, the Respondent argues that the employees' campaign was unprotected because some of the participants engaged in disloyal conduct. Specifically, the Respondent cites numerous examples of what it terms public disparagement, including the employees' letter to management demanding that it restore journalistic ethics, their customer cancellation drive, their "McCaw Obey the Law" buttons, and their public appeals in support of their effort to "take back" the News-Press.

[7] Our conclusions that these matters were sufficiently related to employees' terms and conditions of employment such that the employees' concerted actions were protected under Sec. 7 does not necessarily suggest that proposals addressing the matters would be mandatory subjects of bargaining the employees would have a right to strike over as discussed infra. This follows necessarily from the fact that under *Eastex*, concerted activity can be for mutual aid and protection even though its object is outside the control of the employees' employer.

We reject this argument. Contrary to the Respondent's representations in its brief, it did not even purport to discipline any of the employees for disparaging its product. The Board has long rejected such post hoc reasoning. See *Thompson Products.*, supra. Further, even assuming that some of the cited statements were disloyal, it does not follow that the rest of the employees' organizing campaign would be rendered unprotected in its entirety. *East Texas Pulp & Paper Co.*, 143 NLRB 427, 446 (1963), enfd. 346 F.2d 686 (5th Cir. 1965) (finding that employees' previous unprotected conduct "did not render unprotected and unlawful all further concerted activity on their part").

In any event, the record makes clear that none of the cited statements constituted unprotected disloyalty or disparagement. The Board has held that employees' communications to the public may lose the Act's protection if they are "disloyal, reckless, or maliciously untrue." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); see also *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).[8]

Here, the employees' communications may have raised issues that the Respondent was sensitive to, but just as certainly there was no disloyalty or disparagement of the Respondent's newspaper.[9] Throughout the campaign, the employees' stated purpose was to obtain changes that in their view would improve the journalistic quality of the News-Press. See, e.g., *Sacramento Union*, 291 NLRB 540, 549 (1988), enfd. 889 F.2d 210 (9th Cir. 1989) (rejecting argument that newspaper employees' letter to advertisers was unprotected where employees' demands, in their view, would enhance the newspaper's journalistic standing).

Moreover, none of the cited statements constituted disparagement, as they were not "flagrantly disloyal, [or] wholly incommensurate with any grievances which the [employees] might have."[10] All of the employees' representations to the public were expressly linked to the ongoing labor dispute between the parties.[11] In fact, the Respondent acknowledges that during many of their rallies, employees wore union paraphernalia and displayed a large Teamsters rallying sign. And, employee statements urging McCaw to obey the law were protected given the allegations of unfair labor practices that had been made at that time, our findings of unlawful conduct here, and McCaw's central role in the labor dispute.

Further, the Board has repeatedly held that boycott-oriented communications, such as the employees' "Cancel Your Newspaper Today" banner message, do not constitute disloyalty that would result in a loss of the Act's protection. See *Arlington Electric, Inc.*, 332 NLRB 845, 846 (2000); *Coors Container Co.*, 238 NLRB 1312, 1318–1319 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980).

B. The Respondent's First Amendment Rights are not Infringed

The Respondent argues that the employees "invoked the Act as a regulatory means to gain control over the content of the newspaper," and that any governmental endorsement or protection of that action impermissibly interferes with its First Amendment right to publish the news as it sees fit. In support, the Respondent urges us to consider *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950 (9th Cir. 2010), in which the Ninth Circuit cited First Amendment concerns in affirming a district court's denial of the Regional Director's petition for 10(j) preliminary injunctive relief in this case.[12] We find no merit to the Respondent's arguments.

1.

As the Respondent acknowledges, it is settled that the Act applies to news organizations. See *Associated Press*

[8] Member Becker believes the scope of unprotected conduct defined in *Valley Hospital*, supra, and *Five Star Transportation Inc.*, infra, is overbroad for the reasons he stated in *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. 9–10 (2011). Nevertheless he agrees with his colleagues that the stated standard is not met here.

[9] "The Board has traditionally been careful to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues." *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), enfd. mem. 742 F.2d 1438 (2d Cir. 1983).

[10] *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), quoting *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978).

[11] The dispute concerning this question as it relates to the protest on the bridge is discussed separately below.

[12] We have accepted the Respondent's submission addressing *McDermott*, which was decided after the record in this case closed, pursuant to *Reliant Energy*, 339 NLRB 66 (2003). We have also accepted the Union's response to that submission.

To the extent *McDermott* addresses the scope of the Respondent's First Amendment rights, we agree it warrants consideration here. Nonetheless, in our disposition of this case on the merits, we are not bound by the court's decision on the 10(j) injunction issue. See *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993) (rejecting the argument that "a district court finding in a section 10(j) auxiliary proceeding would later bind the NLRB when ruling, definitively, on the unfair labor practice charge"); see also *Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB 835 fn. 2 (1999), enfd. in part 233 F.3d 831 (4th Cir. 2000). The court ruled on the propriety of the relief sought by the Regional Director in the district court, not the relief we grant here. Moreover, the court ruled on a request for interim, injunctive relief, not a final order of the Board. Finally, the court reviewed the district court's denial of the requested relief under an abuse of discretion standard. 593 F.2d at 957.

v. NLRB, 301 U.S. 103 (1937). In *Associated Press*, the Supreme Court rejected the argument that applying the Act to news organizations abridged the freedom of speech or of the press safeguarded by the First Amendment. There, as here, the press employer argued that ordering it to reinstate fired editorial employees would infringe its First Amendment rights. The Court rejected this argument, observing that the press employer remained free to hire employees who would observe its editorial decisions and to fire those who refused to do so. Id. at 132. The same is true under our Order. The Court held that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." Id. at 132–133.[13] Yet at bottom, a special privilege is exactly what the Respondent seeks here.

The judge found that the Respondent engaged in an extensive campaign of retaliatory conduct against employees because they exercised their rights to seek union representation and to join together for their mutual aid or protection. Our Order remedies that unlawful conduct. It does so, moreover, in a manner explicitly approved by the Supreme Court in *Associated Press*, through a cease-and-desist order, reinstatement, and other make-whole relief. To be sure, the employees demanded, among other things, that the Respondent refrain from interfering with their autonomy in reporting the news. But nothing in our decision or Order requires the Respondent to grant that demand, or otherwise interferes with the Respondent's First Amendment right to control the content of its newspaper or its authority to terminate or otherwise discipline any employee who refuses to carry out is instructions concerning the contents of the paper. As before, those editorial matters remain wholly within the Respondent's control.

2.

Contrary to the Respondent's suggestion, that conclusion is not undercut by the Ninth Circuit's decision in the preliminary injunction proceeding. The court expressly did not decide whether the First Amendment protected, or even probably protected, the Respondent's conduct. 593 F.3d at 959. Rather, the court found only that there was "at least some risk" that constitutionally protected speech would be enjoined, warranting application of a "heightened" standard for equitable relief. Id. The court denied the requested injunction under that heightened standard. We share the court's concern that First Amendment rights be safeguarded from government interference, but we do not find any risk of interference with First Amendment rights in the present case sufficient to implicate our duty to construe the Act, when possible, to avoid raising "serious questions" of constitutionality. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 575 (1988).

Of particular concern to the court was the employees' demand that the Respondent respect their journalistic integrity and autonomy in reporting the news, coupled with their use of economic pressure to support that demand; e.g., urging readers to cancel their subscriptions. 593 F.3d at 961. The court concluded that governmental intervention to support the employees would effectively hinder the Respondent's ability to resist the employees' efforts, necessarily posing some risks to the Respondent's First Amendment rights. Id. at 962. In the court's view, those risks arise both with the potential reinstatement of discharged employees and also at the bargaining table. We address each of those issues in turn.

Before addressing the Ninth Circuit's specific concerns, however, we point out the entirely novel nature of the Respondent's contention. The First Amendment, of course, is implicated only by state action. Here, the only state action, our Order, in no way interferes with the Respondent's expressive activity, as the Supreme Court concluded in *Associated Press*. Thus, this case is entirely unlike the prior Ninth Circuit case relied on by that Court in the preliminary injunction proceeding here, *Overstreet v. Carpenters*, 409 F.3d 1199 (9th Cir. 2005), in which the Board sought unsuccessfully to enjoin the peaceful display of stationary banners under Section 8(b)(4) of the Act. For the same reason, this case is also entirely unlike the other cases cited by the Ninth Circuit, all of which involved newspapers being compelled by the State to publish specific content. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper. In *Passaic Daily News v. NLRB*, supra, the D.C. Circuit refused to enforce a Board order requiring the newspaper to resume publication of a reinstated columnist's weekly column. No such State compulsion is at issue here.

In explaining the potential First Amendment ramifications of requiring the Respondent to reinstate unlawfully discharged employees, the Ninth Circuit reasoned that

> telling the newspaper that it must hire specified persons, namely the discharged employees, as editors and

[13] The D.C. Circuit similarly did not question the Board's order that a newspaper "restore [a columnist] to his former position as a weekly columnist" in *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1549 (D.C. Cir. 1984), refusing to enforce only that portion of the Board's order that limited the paper's discretion over whether to publish his columns post-reinstatement. See id. at 1559.

> reporters constituting over 20 percent of its newsroom staff is bound to affect what gets published. To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.

McDermott, supra at 962–963. The court's concern has already been addressed, however. As the Supreme Court explained in *Associated Press*:

> [t]he Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.

Associated Press v. NLRB, supra, 301 U.S. at 132. This principle cannot depend on whether a newspaper employer unlawfully fires 20 percent of its employees instead of one. In either case, merely ordering the employees to be reinstated is not "bound to effect what gets published." The Respondent remains free to continue publishing its newspaper as it sees fit and to insist that employees, including those who may be reinstated, conform to its editorial decisions and standards.[14] As before, the Respondent is precluded only from discriminating against employees because they engage in activities protected by the Act. If reinstated discriminatees refuse to implement Respondent's editorial policies, the Respondent may lawfully discipline or discharge them as it sees fit.

Similarly, we are not persuaded that the court's bargaining-related concerns warrant granting immunity for what would be unlawful conduct in any other industry. Nothing in the judge's decision or recommended Order or the Order we issue today requires the Respondent to grant the employees' demand for greater autonomy in reporting the news. Rather, consistent with our remedial authority, we seek only "to restore, so far as possible, the status quo that would have been obtained but for the wrongful act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Our decision does not suggest in any manner that the decisions that triggered the employees' organizing the protest activities were wrongful. Thus, our Order leaves all of the Respondent's policies and procedures related to the contents, editorial approval and publication of articles fully intact.

Moreover, although we have found that the employees' demands were protected, whether the Respondent would be legally required to bargain over those demands is another issue and one not before us in this case. Generally, an employer is not required to bargain about the contents or design of its product. *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995). Specifically in the newspaper industry, the Board has held that a newspaper publisher "is free to establish reasonable rules designed to prevent its employees from engaging in activity which would 'directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity,' without necessarily being required to bargain initially." *Peerless Publications*, supra, 283 NLRB at 335.[15] *If* the represented employees choose, during bargaining, to make proposals relating to the concerns that, in part, motivated the protests at issue here, the proposals may relate only to permissive bargaining subjects.[16] In that event, it would be left to the Respondent's discretion whether to bargain over the proposals.[17] Even assuming, however, that one or more of the employees' proposals would constitute a mandatory subject of bargaining, the Act makes clear that the Respondent would not be obliged to agree to any of those proposals or make any concessions. See Section 8(d) of the Act. Thus, the Respondent's contention that the judge's decision rejected Respondent's position that "the Act does not provide employees with a statutory right to control the content of the newspaper" is pure hyperbole.

[14] As stated above, the remedies ordered here do not require the Respondent to publish any material, nor do they interfere with the Respondent's editorial discretion. This issue might have arisen had the judge ordered the reinstatement of Starshine Roshell's unlawfully-canceled column, but the General Counsel did not request such relief, as Roshell subsequently resigned from the newspaper.

[15] There, the Board found that the employer's unilateral promulgation of a new ethics policy violated the Act, in part, because the terms of the policy were overly broad and not narrowly tailored to meet the respondent's legitimate objectives. Id. at 336.

[16] The D.C. Circuit has indicated that this "agency possesses the requisite special expertise for making specific determinations in this highly delicate field which encompasses both labor relations and the workings of the press, and its detailed factual findings are likely to illuminate the framework of mere general principles." *Newspaper Guild of Greater Philadelphia Local 10 v. NLRB*, 636 F.2d 550, 563 (D.C. Cir. 1980).

[17] We find it unnecessary to rely on the judge's analysis of "whether there is room for collective bargaining on the issue of journalistic integrity under current law" or his discussion of *Peerless Publications*, supra.

Nevertheless, we emphasize that a union's making of proposals relating to that subject or seeking to bargain over them, without more, would not be unprotected. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). "Even if it be assumed that that choice would finally be a matter for management to determine, the fact remains that the guaranty of Section 7 of the Act extends not only to concerted activities for the purposes of collective bargaining, but also to those undertaken for 'other mutual aid or protection.'" *Phoenix Mutual Life Insurance Co.*, 73 NLRB 1463, 1465 (1947), enfd. 167 F.2d 983 (7th Cir. 1948). In other words, nothing we have said here is inconsistent with our holding above that the employees' actions were protected.

Still, we are mindful of the Ninth Circuit's concern that the Respondent nevertheless might be "forced" to accede to its employees' demands as a result of economic pressure. But the Respondent will not be without recourse if faced with such pressures. If a union insists to impasse on permissive subjects of bargaining, it commits an unfair labor practice. See *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985). If employees strike to pressure their employer to agree about permissive subjects of bargaining, the strike may be unprotected by the Act. Cf. *Nassau Insurance Co.,* 280 NLRB 878 fn. 3 (1986).

But the fact is that none of those issues is before us in this case. We are in effect being asked to preemptively withhold relief from employees who are otherwise clearly entitled to it based solely on what *may* come to pass in the future. In *Associated Press*, the Supreme Court observed that the employer sought "to bar all regulation by contending that regulation in a situation not presented would be invalid." 301 U.S. at 132. The Court rejected the speculative argument, explaining that "[c]ourts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." Id. The same is true of the Board. Accepting the Respondent's argument here would seriously undermine the established principle that the Respondent "has no special privilege to invade the rights and liberties of others." Id. at 132–133. Because the Respondent's First Amendment argument is entirely novel and based on a chain of speculation about what might happen in the future, we conclude that our order in this case raises no "serious questions" under the First Amendment.

III. THE RESPONDENT'S UNFAIR LABOR PRACTICES

Having addressed the Respondent's threshold arguments, we turn now to the specific unfair labor practices found by the judge.[18]

A.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by coercively interrogating employees concerning union activities, engaging in surveillance of union activities,[19] requiring employees to remove buttons and signs reading "McCaw Obey the Law," and terminating Supervisor Robert Guiliano because he refused to commit an unfair labor practice.[20]

We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by cancelling Starshine Roshell's column;[21] discharging Melinda Burns and Anna Davison, ostensibly for biased reporting;[22] and lower-

[18] The Respondent does not except to the judge's finding that it violated Sec. 8(a)(1) by threatening employees with discipline if they engaged in protected concerted activity or by interrogating employees about their protest on a footbridge, as discussed below.

[19] We agree with the judge that the Respondent violated Sec. 8(a)(1) on February 7 and 21, 2007, by appearing to film employees during prounion rallies. We find it unnecessary to pass on the General Counsel's separate surveillance allegation involving the Union's meeting at a public library on February 13. Even if found, that violation would be cumulative of the other surveillance violations and would not affect the remedy.

Contrary to his colleagues, Member Becker would find that the Respondent violated Sec. 8(a)(1) when its agents attended and refused to leave the Union's meeting at a public library on February 13. As set forth by the judge, union representatives rented a room at the library to meet with local advertisers in the hope of getting their support for the ongoing campaign. Shortly after the meeting began, the Respondent's lawyer and accountant entered the room. When asked to leave by the union representatives, they refused to do so.

Member Becker agrees with the judge that the Respondent engaged in unlawful surveillance when its agents appeared, without invitation, at the Union's private meeting, and then refused to leave. See *Hollywood Vassarette, Division of Munsingwear, Inc.*, 149 NLRB 839, 845–847 (1964) (finding that the employer violated the Act by appearing at a private union meeting at a restaurant). Even assuming that the library maintained a policy requiring all meetings there to be open to the public, the Union had a federal right to meet privately and to be free from Respondent's interference. Accordingly, any such rule would be irrelevant to whether a violation of the Act occurred.

[20] No party excepts to the judge's decision to deny Robert Guiliano reinstatement and toll his backpay as of March 26, 2007.

[21] We do not rely on the Respondent's incipient antiunion campaign in adopting the judge's finding that the Respondent bore animus toward Roshell's union activity.

[22] With respect to the unlawful discharges found by the judge, we reject the Respondent's argument that the burden-shifting analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), should be modified because of First Amendment concerns. The Respondent argues that the General Counsel should have been required to prove that the Respondent would not have taken the same actions in the absence of the employees' protected activity. As discussed, the Respondent's First Amendment concerns do not justify affording it special treatment. See, e.g., *Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C. Cir. 1984) (applying *Wright Line* where the respondent was a newspaper). In any event, the Respondent has provided no case support for its proposal. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the primary case relied on by the Respondent, involved the burden of proving truth or falsity in a libel case, and the policy considerations discussed by the court are not present in the unfair labor practice context.

With regard to the judge's analysis of Burns' discharge, we do not rely on his statements regarding the quality of Burns' writing, including his conclusion that the Respondent failed to show any shortcomings in Burns' "Axis of Inequality" article, his statement that the Respondent was arguing that Burns' "Danger Zones" article was biased because City Editor Scott Steepleton said it was, and his statement that the Respondent "may not use unsupported assertions as a pretext to mask unlawful conduct." These statements create the appearance that the judge improperly imposed his own judgment as to what constitutes biased reporting.

In finding Burns' discharge unlawful, we rely instead on the strong circumstantial evidence supporting the judge's finding that the Respondent's proffered rationale for Burns' discharge was pretextual. In particular, we rely on the judge's finding that other instances of perceived biased reporting did not result in discipline of any kind, much less termination. The Respondent's discharge of Burns was thus highly atypical. See *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). In addition, the Respondent

ing the evaluation scores of union supporters Davison, Dawn Hobbs, Melissa Evans, and Karna Hughes.

B.

Further, we agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging six union activists who demonstrated on a footbridge to protest the Respondent's unlawful discharges of Burns and Davison. In addition to the reasons given by the judge, we add the following rationale, much of which concerns the Respondent's defenses.

The events surrounding the footbridge protest can be summed up as follows. On February 5, 2007, employees Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans stood atop a footbridge over Highway 101 and held two large banners reading "Cancel Your Newspaper Today."[23] They also displayed two signs reading "Stop Illegal Firings" and various smaller signs reading "Bring Back Melinda [Burns]," "Bring Back Ann[a Davison]," and "Protect Free Speech." As indicated, the Respondent discharged the employees for this protest, and the judge found those discharges unlawful.

In its exceptions, the Respondent contends that the employees' actions were unprotected for two reasons: (1) the employees' activity was disloyal; and (2) their activity was illegal. We reject those contentions.

1.

The Respondent, citing *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992), contends that the employees' protest was disloyal because it was not explicitly related to the parties' ongoing labor dispute. Specifically, it argues that passing motorists would not have understood that the boycott banner was linked to the labor dispute because they would not have been able to see the smaller supporting signs that referred to the dispute. We disagree.

By any measure, the employees' footbridge protest was clearly linked to their ongoing dispute with the Respondent. The linkage was obvious with respect to the signs seeking Davison's and Burns' reinstatement, which were accompanied by signs protesting illegal firings. See *Richboro Community Mental Health Council, Inc.*, 242 NLRB 1267, 1268 (1979) (finding a letter to be linked to ongoing labor dispute where it protested the employer's unlawful discharge of an employee). Indeed, the Respondent concedes that the protest was motivated by its recent termination of employees.

Assuming that motorists could see the smaller signs addressing the labor dispute, the activity was clearly not unprotected disloyalty, as seeking a consumer boycott in support of employees' position in a labor dispute is protected. *Arlington Electric.*, supra; *Coors Container Co.*, supra. Even if motorists could not see the smaller signs, if motorists nonetheless understood that the banners were directed at the Respondent, it is more likely than not that that was because of the parties' well-publicized conflict and that they would thus have also understood the banners and signs saying "Cancel Your Newspaper" and "Protect Free Speech" as being related to a labor dispute. See *Endicott Interconnect*, 345 NLRB 448, 450 (2005), enf. denied on other grounds 453 F.3d 532 (D.C. Cir. 2006). The employees' dispute with the Respondent, over journalistic integrity, union recognition, and other matters, had been matters of public discussion for several months. Indeed, it had been reported on extensively by area news outlets, including the News-Press, well before this particular protest. See *Endicott*, supra at 451 (finding communication to be linked to ongoing labor dispute where prior events were "widely publicized in the local media"). Thus, although neither of the large banners identified the Respondent, it is likely that anyone who understood that the "Newspaper" referred to was the Respondent's also understood that the banners were part of the labor dispute. For those reasons, we find that the footbridge protest was, and would have been seen as, "simply part and parcel, and a continuation, of [the] long-running labor dispute" between the parties and did not constitute unprotected disloyalty. *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761 (2000), enf. denied on other grounds 268 F.3d 575 (8th Cir. 2001).

Even accepting the Respondent's argument that passing motorists could not see the smaller signs and assuming they would not nevertheless have understood that the banners were part of the ongoing labor dispute for the reasons explained above, we still find that the protest did not constitute unprotected disloyalty. If motorists could not see the smaller signs, they may not even have known what newspaper they were being asked to cancel as there

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offered shifting reasons for Burns' discharge. During the hearing, it relied in part on factual errors in Burns' articles, whereas previous disciplinary communications to Burns focused solely on concerns about bias. See *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001), enfd. 53 Fed. Appx. 171 (2d Cir. 2002). Finally, notwithstanding McCaw's longstanding concerns about bias in Burns' articles, the Respondent did not take any disciplinary action against Burns until she became involved in union activity. Despite its argument that Burns' bias had been improperly tolerated by previous managers, the very article that purportedly triggered Burns' discharge had been approved by Steepleton, who was installed only months earlier by McCaw.

[23] We find no merit in the Respondent's argument that the judge improperly precluded its expert witness, Dr. Ralph Haber, from testifying that passing motorists would have seen only the "Cancel Your Newspaper Today" banners. Even if that were true, the banners' message was not unprotected, as explained below. Accordingly, the Respondent was not prejudiced by the judge's ruling.

were at least two other local newspapers. Moreover, Interstate 101 is the major highway running up the California coast and the protest could easily have been understood to be directed at papers in other cities, for example, the *Los Angeles Times*. The Respondent was obviously not disparaged in the eyes of those drivers who did not know and could not discern the protestors' intended target. Contrary to the Respondent, neither the Board nor the D.C. Circuit has ever required that a boycott protest explicitly refer to the labor dispute in order to be protected. In *Hormel*, the court found an employee's boycott message to be unprotected not because it was insufficiently linked to the underlying labor dispute, but because that labor dispute had already ended.[24] *Five Star Transportation*, also cited by the Respondent, involved employees' disparaging remarks about the employer's operations rather than a call for a boycott.[25] Accordingly, we find that the Respondent's argument here lacks merit.

Finally, as discussed above, we also reject the Respondent's argument that the employees' protest disparaged the Respondent's product. The Board has repeatedly held that boycott-communications, such as the employees' "Cancel Your Newspaper Today" banner message, do not constitute disloyalty that would result in a loss of the Act's protection. See *Arlington Electric, Inc.*, supra; *Coors Container Co.*, supra. Moreover, the smaller banners referred to the parties' labor dispute and not the quality of the Respondent's product. In the context of the protest, the "Protect Free Speech" sign would have been understood to refer to the free speech of employees. Even if it was not, that message, standing alone, did not disparage the Respondent's product.[26]

2.

Last, we find no merit to the Respondent's argument that the employees lost the protection of the Act because the footbridge protest was illegal. As correctly set forth by the judge, employee Hobbs contacted the police department prior to the protest and was told by a sergeant that the group would not be violating the law by holding banners on the footbridge. Thus, regardless of whether the employees' conduct actually violated local law, they acted in accordance with the advice of local authorities. Further, the employees were not cited for or convicted of any criminal offense. See *McKee Electric Co.*, 349 NLRB 463, 465 fn. 13 (2007). In addition, contrary to the Respondent, the mere fact that an otherwise peaceful concerted action might be illegal under local law does not necessarily remove it from the Act's protection. See *Washington State Service Employees*, 188 NLRB 957, 958–959 (1971).[27]

AMENDED REMEDY

We agree with the judge that a broad cease-and-desist order is warranted because the Respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979).[28] We also agree with the judge's other recommended remedies, except as set forth below.[29]

Contrary to the judge, we order the Respondent to have the attached notice publicly read by a responsible corporate management official or by a Board agent in the presence of a responsible management official. We find that the Respondent's unfair labor practices are sufficiently serious and widespread to warrant having the attached notice read aloud to the employees so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920, 929–930 (D.C. Cir. 2005). The public reading of the notice is an—"effective but moderate way to let in a warming wind of information and, more important, reassurance." *United States Service Industries*, 319 NLRB 231, 232 (1995) (citations omitted), enfd. 107 F.3d 923 (D.C. Cir. 1997). In order to monitor the reading of the notice, representatives of the Board and of the Union shall have the right to be present. T*exas Super Foods*, 303 NLRB 209, 220 (1991).

The judge found that discriminatees Davison, Hobbs, Evans, and Hughes, who were unlawfully evaluated,

[24] 962 F.2d at 1064.

[25] 349 NLRB at 45–46.

[26] The Respondent does not argue that the employees' communications were either reckless or maliciously untrue.

[27] We also reject the Respondent's argument that it would have discharged the employees for such conduct even in the absence of their protected activity. The judge found that the Respondent's decision to terminate the employees was motivated solely by its belief they had engaged in disloyal conduct. Further, the Respondent failed to establish that hanging a banner on a footbridge would have normally been a dischargeable offense even assuming it was unlawful. To the contrary, Steepleton testified that whether an employee would ordinarily be discharged for similar conduct depended solely on the content of the signs being displayed. The Respondent's decision to terminate these employees was inseparable from its overriding objection to the employees' protected message.

[28] In this regard, however, we do not rely on the judge's statement that the Respondent's position on the journalistic integrity issue "reveal[ed] concerns" about whether the Respondent would be inclined to violate Sec. 8(a)(5) in the future.

[29] In sec. 1(h) of his remedial order, the judge ordered that the Respondent cease and desist from "[c]anceling the publication of columns appearing in the newspaper that are written by supporters of the Union." We have added the phrase "because they engaged in protected concerted activity" at the end of that section in order to clarify that the Respondent is only prohibited from canceling columns in retaliation for protected conduct. See *Herald News*, 276 NLRB 605, 605 fn. 6 (1985).

should be awarded performance bonus payments for 2006 consistent with prior years. We think this finding was premature. Because the Respondent requires employees to achieve at least a specific evaluation score in order to qualify for a bonus, the discriminatees' eligibility should be contingent on the outcome of their nondiscriminatory evaluations. We conclude that the correct remedy is to order the Respondent to make the discriminatees whole by paying them what they would have been paid absent the discrimination against them. Accordingly, the issue of whether the discriminatees should receive bonuses and, if so, the specific dollar amount of the bonuses, will be left to the compliance proceeding. *Federal Screw Works*, 310 NLRB 1131 fn. 3 (1993).

Finally, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press, Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discipline employees if they engage in union and protected concerted activity.

(b) Coercively interrogating employees concerning their union activities.

(c) Discharging supervisors or managers because they refuse to commit an unfair labor practice.

(d) Engaging in surveillance of the union activities of employees.

(e) Issuing letters of suspension to employees because those employees engaged in protected concerted activity.

(f) Instructing employees to remove buttons from their clothing and signs from their vehicles reading "McCaw Obey the Law."

(g) Discharging or otherwise discriminating against any employee for supporting the Graphics Communications Conference, International Brotherhood of Teamsters, or any other union.

(h) Canceling the publication of columns appearing in the newspaper that are written by supporters of the Union because they engaged in protected concerted activity.

(i) Giving lower evaluations to employees because they engaged in union activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans 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) Within 14 days from the date of this Order, rescind the discriminatory evaluations given to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes.

(c) Prepare new evaluations for Anna Davison, Dawn Hobbs, Melissa Evans, and Karna Hughes without regard to those employees' support for the Union.

(d) Within 14 days from the date of this Order, rescind the letters of suspension issued to Al Bonowitz, Kim Favors, Karna Hughes, Rob Kuznia, Lara Milton, Mike Traphagen, Dawn Hobbs, George Hutti, Barney McManigal, Tom Schultz, and Alan McCabe.

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

(f) Make Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, Melissa Evans, Karna Hughes, and Robert Guiliano 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 amended remedy section of this decision.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Santa Barbara, California, copies of the attached notice marked "Appendix."[30] Copies of the no-

[30] 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 Judg-

tice, on forms provided by the Regional Director for Region 31, 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, 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 August 17, 2006.

(i) 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.

MEMBER HAYES, concurring.

Although I join my colleagues in finding that the Respondent committed numerous unfair labor practices,[1] I write separately to emphasize the limited grounds for my agreement on certain key issues.

First, I do not join my colleagues' unnecessary dictum with respect to whether employee protests about journalistic integrity or autonomy are protected concerted activity, as defined by the Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). For the purpose of resolving the issues presented in this case, it is enough to find that (a) the Respondent's employees were otherwise engaged in clearly protected concerted activities by seeking representation by the Union and a collective-bargaining agreement, and by protesting the discharges of coworkers, and (b) the Respondent failed to show that it would have taken any of the adverse employment actions at issue because of employee protests about journalistic integrity or autonomy even in the absence of their clearly protected activities.

With respect to the Respondent's First Amendment arguments, I find no need to say more than that the Supreme Court's decision in *Associated Press v. NLRB*, 301 U.S. 103 (1937), controls and that the State action at issue—a Board Order to remedy specific, fully litigated unfair labor practices, including discriminatory discharges—does not raise serious questions under the First Amendment. In particular, the Order imposes no prior restraint on the Respondent's free speech and no limitation on its ability to set its own editorial agenda and to discharge any employee for failing to follow its instructions with respect to the content of its newspaper.

Finally, although I find it to be a close question, I agree that the Respondent's discharge of the six employees who engaged in the footbridge protest was unlawful. Clearly, the protesters acted concertedly in furtherance of a labor dispute related to the firing of coworkers. They displayed small signs explicitly referring to this dispute ("Stop Illegal Firings," "Bring Back Melinda," and "Bring Back Ann"). They also displayed two large signs advocating a consumer boycott of an unnamed newspaper ("Cancel Your Newspaper Today") as well as another small sign ("Protect Free Speech"), none of which made any reference to a labor dispute. The question is whether this concerted activity was protected.[2]

Based on the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), the Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Mountain Shadows Golf Resort,* 330 NLRB 1238 (2000). As to the first prong of this test, if construed as requiring that *each* sign displayed by the footbridge protesters must be independently identifiable as related to an ongoing labor dispute, then the conduct would seemingly not be protected. However, I believe it is sufficient to find as an objective matter that members of the intended consumer audience would reasonably perceive the relationship of the protest to an ongoing labor dispute about firings from the collective message conveyed by the signs on their face. I would not go beyond that to speculate about how general notoriety of

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Although I join in finding these violations, I would not impose the extraordinary requirement of a public reading to remedy them. In addition, for the reasons stated in my dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), I would not require electronic distribution of the notice.

[2] I agree with my colleagues' rejection of the Respondent's argument that the protest was unlawful because it was allegedly illegal. However, I do so based solely on the fact that the protesters relied in apparent good faith on advance advice from police that the group would not be violating the law by displaying banners on the footbridge. The mere fact that the protesters were not arrested is not determinative of the legality of their actions.

fractious labor relations at the Santa Barbara News-Press might have informed the understanding of someone viewing this particular protest. I also need not pass on whether the protest would have been protected if none of the displayed signs indicated the existence of a labor dispute.[3]

As to the second prong of the test, I agree with my colleagues that none of the banners conveyed messages that the Board has traditionally viewed as disloyal. I note that dictum in *Jefferson Standard* could be interpreted as indicating that it is per se disloyal and unprotected for employees to engage in promotion of a consumer boycott of their employer while receiving pay to work for that employer, even if the boycott communications are expressly related to an ongoing labor dispute.[4] However, the Board and several courts of appeals have rejected that broad interpretation,[5] and the Respondent here does not seek the overruling of precedent in arguing that the employees' conduct was disloyal.

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 threaten to discipline employees if they engage in union and protected concerted activity.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT issue letters of suspension to employees because those employees engaged in union and protected concerted activity.

WE WILL NOT instruct employees to remove buttons from their clothing and signs from their vehicles reading "McCaw Obey the Law."

WE WILL NOT discharge supervisors or managers because they refuse to commit an unfair labor practice.

WE WILL NOT engage in surveillance of the union activities of employees.

WE WILL NOT cancel the publication of columns appearing in our newspaper that are written by supporters of the Graphics Communications Conference, International Brotherhood of Teamsters, or any other union, because they engaged in protected concerted activity.

WE WILL NOT give lower evaluations to employees because they engaged in union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Graphics Communications Conference, International Brotherhood of Teamsters, or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans 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, within 14 days from the date of the Board's Order, rescind the discriminatory evaluations given to Anna Davison, Dawn Hobbs, Melissa Evans, and Karna Hughes and the letters of suspension issued to Al Bonowitz, Kim Favors, Karna Hughes, Rob Kuznia, Lara Milton, Mike Traphagen, Dawn Hobbs, George Hutti, Barney McManigal, Tom Schultz, and Alan McCabe.

WE WILL prepare new evaluations for Anna Davison, Dawn Hobbs, Melissa Evans, and Karna Hughes without regard to those employees' support for the Union.

WE WILL make Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, Melissa Evans, Karna Hughes, and Robert Guiliano whole for any loss of earnings and other bene-

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[3] Contrary to the Respondent, it was not necessary that the signs refer to the Union in order to establish the existence of a labor dispute with respect to the firings. Further, even assuming relevance of the rejected testimony of an expert witness about conclusions drawn from a post hoc study of the footbridge protest, I am not persuaded that such testimony would alone be sufficient to prove that occupants in motor vehicles could only see the two large signs that made no reference to the firings.

[4] In J*efferson Standard*, supra at 476 fn. 12, the Court cited with approval *Hoover Co. v. NLRB,* 191 F.2d 380, 390 (6th Cir. 1951), which stated there that

> It is a wrong done to the Company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required. under the Act, to finance a boycott against himself.

[5] See, e.g., *Coors Container Co.*, 238 NLRB 1312, 1318–1319 (1978), enfd. 628 F.2d 1283, 1287 (10th Cir. 1980). Also see *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992).

fits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Melinda Burns, Anna Davison, Robert Guiliano, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans; the unlawful letters of suspension given to Al Bonowitz, Kim Favors, Karna Hughes, Rob Kuznia, Lara Milton, Mike Traphagen, Dawn Hobbs, George Hutti, Barney McManigal, Tom Schultz, and Alan McCabe; and the discriminatory evaluations given to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges, the suspension letters, and the discriminatory evaluations will not be used against them in any way.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS

Steven Wyllie and *Brian D. Gee, Esqs.,* for the General Counsel.

A. Barry Cappello, Esq., Matthew M. Clarke, Esq., and *Dugan P. Kelley, Esq. (Cappello & Noel, LLP),* of Santa Barbara, California, and *L. Michael Zinzer, Esq. (The Zinzer Law Firm),* of Nashville, Tennessee, for the News-Press.

Ira L. Gottlieb, Esq. (Bush, Quinonez, Gottlieb, Singer, Lopez, Kohanski, Adelstein & Dickenson), of Burbank, California, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Santa Barbara, California, for 17 days beginning on August 14 and concluding on September 26, 2007. The initial charge, Case 31–CA–27950, was filed was filed by the Graphic Communications Conference, International Brotherhood of Teamsters (the Union) on August 25, 2006. On February 28, 2007, Robert Guiliano, an individual, filed a charge in Case 31–CA–28157. An order consolidating cases, second consolidated complaint, and notice of hearing (the complaint) issued on May 31, 2007. The complaint alleges that Ampersand Publishing, LLC d/b/a Santa Barbara News-Press (the News-Press) violated Section 8(a)(1) of the Act by threatening employees with discipline if they engaged in an "employee delegation," interrogating employees about their union and protected concerted activities, instructing employees to remove buttons and signs that read "McCaw obey the law," and engaging in surveillance of and interfering with the union activities of its employees. The complaint alleges that the News-Press violated that same section of the Act by discharging its supervisor, Robert Guiliano, because he refused to issue a pretextual reprimand to an employee in furtherance of that employee's unlawful discharge. The complaint also alleges that the News-Press violated Section 8(a)(3) and (1) by discharging employees Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans, canceling the weekly newspaper column of employee Starshine Roshell, issued 2-day suspension notices to 11 employees, issuing lower performance evaluations, and failing to award performance bonuses to 4 employees, all because those employees engaged in union and other protected concerted activities.

The News-Press filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, jurisdiction, labor organization status, supervisory, and agency status except that it clarified that David Millstein was its agent but not its supervisor. The News-Press denied that it had committed any unfair labor practices and asserted a number of general affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and reply briefs[1] filed by the General Counsel, the News-Press, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The News-Press, a limited liability company, publishes the Santa Barbara News-Press, a daily newspaper, at its facility and place of business in Santa Barbara, California, where it annually derives gross revenues in excess of $200,000, held membership in or subscribed to the Associated Press, advertised nationally sold products, and purchased and received goods, supplies, and materials valued in excess of $5000 directly from suppliers located outside the State of California. The News-Press 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 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, the News-Press publishes a daily newspaper. Wendy McCaw and Arthur von Wiesenberger are copublishers. Travis Armstrong is editorial page editor, Scott Steepleton is associate editor, and Yolanda Apodaca is director of human resources. McCaw purchased the News-Press from the New York Times in 2000. The News-Press' offices are located on De La Guerra Plaza, the central square in Santa Barbara. In the center of the square is a large grassy area where fiestas and rallies and the like are held.

Part of this case involves concerns of journalistic ethics and the need to assure that there is no bias in the reporting coming from the news department of the News-Press. In this case these concerns are viewed through two separate pairs of eyes. From the view of Wendy McCaw, the owner and copublisher of the News-Press, she saw bias in the reporting and sought to eliminate it. But from the view of some employees in the newsroom, they saw McCaw's efforts as an attack on journalistic integrity through the injection of McCaw's own biases into

[1] The News-Press filed a reply brief both to the brief filed by the General Counsel as well as the brief filed by the Union.

their reporting. According to those employees this resulted in the breakdown of a "wall" that should separate McCaw's control of the opinion pages of the newspaper from control over the news reporting pages.

The News-Press has a conflict of interest policy that contains the following:

> The duty of the journalist is to seek truth and provide a fair and comprehensive account of events and issues, without bias, and without real or perceived conflicts. Journalists should act independently, free from obligation to any interest other than the pursuit of the truth. Journalists should present analytical reporting without bias or stereotype, avoiding undue influence from any outside forces, including family and peers, advertisers, sources, story subjects, political and powerful individuals, and special interest groups. In this regard journalists must avoid impropriety and the appearance of impropriety. The public must have confidence in the objectivity of the News-Press and know that what they read is objective and untainted by personal bias.

In 2005, the New-Press held training sessions with the staff about a lengthy survey that the News-Press had arranged to be performed to survey the readership on a number of matters. Then editor Jerry Roberts reported, among other things, that the study showed that 64 percent of the readers of the News-Press thought that reporters writing about local politics tend to project their views in stories instead of staying neutral. He also mentioned that this percentage typically shows up in other surveys that assess readership perceptions of bias.

As the tension between McCaw as owner of the News-Press and the news department had been developing over time, some background is necessary. As indicated above, Anna Davison is alleged to have been unlawfully fired in 2007; the News-Press claims she was fired for biased reporting. On July 28, 2004, the News-Press published an article written by Davison that covered the reintroduction of bald eagle chicks to Santa Cruz Island. McCaw wrote on a copy of the article that it was very biased and that the article quoted the National Park Service and U.S. Fish and Wildlife. She noted that the article did not point out the disadvantages to the reintroduction program. It ended, "[Davison] has become like the reporter before her, a mouthpiece. Disgusting." She forwarded her comments and the article to Joe Cole, who was publisher at the time.

On August 1, 2004, the News-Press published an article by Barney McManigal about how some residents of a community had become fearful of walking outdoors because of a growing coyote population. The article noted that coyotes had attacked five children in southern California, including a 3-year old who was killed, and how the community association had decided to remove and destroy the coyotes. The article reported how some residents had lost pets and supported efforts to rid the community of the coyotes while others had mixed feelings about seeing any animal destroyed. A resident pointed out how the coyotes had rid her property of gophers and rats. McCaw forwarded a copy of the article to then editor and vice president of the news department, Jerry Roberts, with a handwritten note indicating that she felt the article was biased. At the trial I asked McCaw to explain what, in her view, was biased about the article. She explained:

> It was anti-coyote. . . . And it was very negative toward those poor animals that were in danger of being annihilated because of the hysteria that was based on nothing. . . . Well, I think, you know, there are other groups, in fact, my foundation brought in a group to discuss the issue with [the community] and tried to get them to stop this killing because there was really no reason for it. It was mass hysteria by a couple of people who had a problem with coyotes. . . . But if you start killing coyotes, you create a lot of other problems. So it's unintended consequences that were not even being thought about. So those other groups were not even—[the reporter] never even went to anybody else to see what the other side might be to this.

McCaw also sent an e-mail message to Cole indicating that the coyotes article was another piece of biased reporting. She continued:

> I'm sick of this. We have talked to [Roberts] repeatedly about one-sided reporting and NOTHING seems to get done. Another problem in yesterday's paper, [an architect who had sued McCaw] was again photographed on the FRONT PAGE. . . . What is it that is not understood? How many conversations have we had with Roberts about this? The last article, which I talked to [Roberts] about last week, was about the baby bald eagles from Alaska taken out to the [Santa Barbara Channel] Islands (Last Saturday's front page story, lots of ink and color photos), which was only ONE side, that of Fish and Wildlife and National Park Service. No dissenting voices. Anna Davison has been taken in by those guys and only wrote that side of it. I was told she was supposed to have an environmental background. I'm think[ing] there is no such thing at the paper.
>
> Today's article was the same, only worse. No one in the article expressed any outrage or opposition. I don't think I'm the only one who feels that way. I wasn't quoted, nor was I even asked ([Roberts] never contacted me), so something is really wrong out there.

Cole spoke with Roberts about many matters, including McCaw's concerns about bias. He reported back to McCaw:

> Lack of Balance in Environmental Stories. [Roberts] said you were right with the eagle story. He said the coyote story was done on deadline, which happens frequently in a daily paper. The newsroom wanted to publish something other than Barney Brantingham's column about the coyote issue before the editorial ran. It was not meant to be the definitive piece on the coyote issue. We discussed the need to balance the stories by talking with all sides.

At the trial, McCaw pointed to an article prepared by Davison and published by the News-Press on April 9, 2005, nearly 2 years before Davison's termination. The article was entitled *"Bullets fly as divisive pig hunt on Santa Cruz Island gets under way."* It began:

> Opponents denounce effort as a killing spree. Proponents: Eradication needed to help native species. The National Park Service disclosed Friday that hunters have fired the first shots in a long and controversial campaign to rid Santa Cruz Island of the feral pigs that have roamed here for 150 years.

On April 15, 2005, the News-Press weighed in on the controversy by running an editorial entitled *"Our Opinion: Killing spree off our coast."* The editorial criticized a local member of the United States House of Representatives for supporting the "'eradication'" programs. The editorial continued:

> Mrs. Capps isn't alone in participating in the spin. The reporting by news outlets, unfortunately including the News-Press, after a controlled media trip to the island failed to challenge park officials about the former superintendent's revelations.
>
> Reporters clue readers into their own biases when they don't aggressively pursue stories or use derogatory sounding words, such as feral or invasive, to describe wild creatures that have lived on the island since the 1850s.

On March 26, 2006, another article written by Davison was published by the News-Press. This article concerned the relocation of sea otters to the Santa Barbara Channel. Davison's article reported the protests of local abalone and urchin fishermen who feared that the reintroduction of the otters would be the end of their commercial fisheries and would be contrary to a deal struck between the fisherman and Government in 1987 that kept sea otters away from the waters near Santa Barbara. McCaw felt the article was biased because it did not report "anything about the otters in a positive fashion." On April 4, 2006, the News-Press published another article written by Davison. This article concerned the growth in the populations of foxes on the Channel Islands. According to the article those foxes had been endangered animals. McCaw circled Davison's name on the article and wrote "Continuing biased reporting. She's a shill for the feds."

On April 8, 2006, McCaw sent a message to Cole that began:

> Since you've been away, I've been doing a lot of thinking about the paper and what has not been happening. I am extremely frustrated that my goals for the paper are not being achieved, in fact I feel they have been actively thwarted.

McCaw then detailed 21 items that she saw as continuing problems at the News-Press. The first item was:

> "Us" vs "Them" mentality. This has been a very big problem for far too long. Not because you haven't heard a lot of my complaints about this, but because you have done nothing to stop it. This will stop IMMEDIATELY even if it means firing the whole newsroom and hiring new people, including the editors. This has nothing to do with the purported wall between news and editorial, it has everything to do with biting the hand that feeds you.

Later McCaw continued:

> Biased reporting. If things weren't already bad enough with her biased reporting, Anna Davison has now become a mouthpiece for the Feds and Nature Conservancy regarding Santa Cruz Island and the fisherman regarding otters. Anything we write about on the editorial pages, apparently someone feels the need to write the opposite on the news pages. Virtually every time we write something on the editorial page, she comes out with the latest press release from the Feds et al, see 4/4/06 article "Island foxes may be in for a baby boom". Her "article" on 3/26/06 about the otter meeting is more of an opinion piece than a news report, saying the "Relocation plan could jeopardize abalone, urchin," (says who?); it was pejorative, calling otters "voracious eaters" and it was again biased in favor of the fishermen against the sea otter. Her reporting has only one side and it's hers. This is a continuing problem, again not because you haven't heard anything about it, but because you have done NOTHING about it, nothing has changed. Since there has been no accountability, bad behavior has been allowed to flourish. Anna isn't the only one guilty of this type of reporting, she's just the most egregious.

McCaw ended:

> I shouldn't have to remind you or anyone else at the paper what my goals are, and it would be a waste of time anyway, since they will undoubtedly continue to be ignored and worse thwarted. With that in mind, I am going to be making some major changes at the paper in the new future.

On about April 27, 2006, Cole resigned as publisher of the News-Press and McCaw and von Wiesenberger took over that position as copublishers.

Two public events led some on the News-Press staff to become concerned about the issue of journalistic integrity. The first event dealt with the News-Press' coverage of the arrest of Travis Armstrong, the News-Press' editorial page director, for driving under the influence on May 9.[2] Reporter and alleged discriminatee Dawn Hobbs prepared a report on the arrest and the News-Press published the report on page A-3 above the fold. On May 17, von Wiesenberger sent a message to Roberts listing 12 questions and concerns, one of which pertained to the reporting on Armstrong. It read:

> Article on [Armstrong]. This was overkill, and was clearly given too much space. Why? The front page story in Tampa had no similarity to this one. In that case, as was reported in the mainstream media, the executive editor called in the story herself so as not to allow another paper to scoop hers. That was not the case here. Another fact that was different, she had a documented blood level, [Armstrong] did not. It seems you have it in for [Armstrong] and permitted your personal views to color your news judgment. I'd like to know why?

But the controversy continued concerning whether the News-Press should report on Armstrong's sentencing hearing. The sentencing hearing covered matters such as Armstrong's blood alcohol level as well as his sentence. In preparation for the story, Hobbs tried to interview Armstrong, but Armstrong refused to be interviewed and instead claimed the newsroom was targeting him. Although Hobbs prepared a story concerning the sentencing hearing, the News-Press refused to publish it; Arm-

[2] Unless otherwise indicated, the dates that follow are in mid-2006 to early 2007.

strong had raised the matter with McCaw, who then instructed that the article not be published.

Among other things raised von Wiesenberger in his May 17 message was "we need more local news, fewer opinions, and fewer columnists." On May 19, von Wiesenberger replied to Roberts' response to von Wiesenberger's May 17 message[3] Von Wiesenberger indicated his real concern about two stories that had caused extensive damage with the News-Press' advertisers, commenting, "While I expect you will characterize this criticism as us cowering to commercial interests and bring out your book of Journalistic ethics, it has nothing to so with ethics." It continued:

> Biased reporting. A good example is Anna Davison. She seems to have become the mouthpiece for government agencies and the Nature Conservancy, as every time there is a press release she writes an article. Very troubling that she seldom has the "other side" quoted and in virtually every one of her articles that last paragraph shows her bias. A good example is the headline in her 3/26/06 article "Relocation plan could jeopardize abalone, urchins," in the paper and on line "Dining habits keep otters on unwanted visitors list." That appears to be her opinion, as there is nothing to indicate that either abalone or urchins are in danger because of otters or that they are "unwanted." Her ending sentence in that article was "'If it was happening on the land and it was doughnut shops, you'd be concerned,' abalone fisherman Mr. Rebuck told the crowd."
>
> The broader message is that the newsroom is not meeting our expectations. This was expressed repeatedly to Joe Cole but I'm not sure you heard it. The newspaper should be a "must read" every day. Front page stories should be local, local, local. There should be many more local stories and fewer wire service stories. What we want to see are compelling local news stories (not opinions or columns). Since Dawn Hobbs is at the Police Department let's get more local crime reporting (like a police blotter) and Sheriff reports. I've sat in on enough newsroom meetings to feel a lack of enthusiasm from a number of staff. You need to put a fire under the reporters and get them passionate about the news. If they are on cruise control, replace them. Maybe they are lulled into some false sense of security as the newsroom parades "awards." Awards don't pay the bills. Readers and advertisers pay the bills. Our readership is declining and the readers are voting with their wallets and not renewing subscriptions. The letter I had Carol copy you is indicative of the prevailing feeling in this community. To renew a subscription because the subscribers only like the puzzles says that something is terribly wrong with the news in the paper.

The second public event involved actor Rob Lowe's plans to build a house for himself and his family on a vacant lot in Montecito. The size of the planned house apparently drew objections from Lowe's neighbors and public hearings were held before the Montecito Planning Commission on the matter. It was standard practice at the News-Press to publish the exact location of a controversial project under such circumstances and News-Press reporter Camilla Cohee attended the hearing before the Montecito Planning Commission on June 21 to prepare an article on the controversy. That same day after the hearing Lowe, who is a personal friend of McCaw's, called Armstrong and explained that there had been a meeting before the Montecito Planning Commission that day and he was concerned about the publication of the address of the location where he was planning to build a home because he had small children; Lowe described how he had been involved in stalking incidents. Lowe said he did not want the address printed in the newspaper. Armstrong replied that he understood how Lowe felt and he would pass the information to editors in charge of the newsroom. That same evening, Armstrong sent the following e-mail to George Foulsham, the News-Press' managing editor:

> Rob Lowe called me and I told him I'd forward his concern onto the proper editors: Mr. Lowe is concerned about the publication of the address and location of his new house because of the safety of his family. He says he believes there will be a story on his house in the paper tomorrow.

On June 22, the News-Press ran a story that began on its front page written by reporter Camilla Cohee about Rob Lowe's "dream home." The story reported how the Montecito Planning Commission had narrowly approved the plans for the house over the objections of some in that community. The story also contained the address of the property at which Lowe's house was to be built. Lowe's assistant called after the article was published and left a message that he was going to cancel his subscription to the News-Press because it had published the address. On June 23, McCaw directly issued substantially identical reprimand letters to George Foulsham, Michael Todd, Jane Hulse, and Cohee; this was the first time that McCaw had directly disciplined News-Press staff. The reprimand letters read:

> This is an official letter of reprimand concerning yesterday's front-page story about Actor Rob Lowe's "dream home" written by Camilla Cohee and edited by [George Foulsham, Michael Todd and Jane Hulse.]
>
> Mr. Lowe's new home address was an unnecessary detail in the story. Including Mr. Lowe's address has damaged our credibility with the Lowe family and potentially damaged relations with other high profile readers. As a result of this error the Lowe family cancelled their subscription.
>
> It is now company policy that *no addresses are to be published*. If an editor wishes to publish an address he/she will get the publishers' approval. This policy will prevent any excuses regarding this kind of privacy breach.
>
> Please be advised that future errors of this type will be cause for more severe disciplinary action, up to and including, suspension and dismissal.
>
> This letter will be placed in your Personnel file.

The prior News-Press policy was to not publish the addresses of crime victims, but it had no policy concerning the publication of the addresses of celebrities. Rather, in circumstances involving planning issues that were the matter of public hear-

[3] Roberts' response was not offered into evidence.

ings the News-Press routinely published the address or location of the matter at controversy. Cohee responded to her reprimand in a letter to McCaw:

> This letter is in response to a letter of reprimand issued to me following my coverage of a planning commission hearing regarding the proposed home of actor Rob Lowe.
>
> Firstly, I find it unfair that I would be admonished for writing a story in a manner consistent with the style and approach I have applied to every other land-use story I have covered for the News-Press.
>
> How can it be considered an "error" or "careless news judgment" to have included the location of a proposed project when I have included that kind of detail countless times in the past when covering such stories.
>
> As a reporter assigned to covering the Montecito beat, I have never been told to apply a different standard to stories that might involve celebrities or "high profile" individuals. In Montecito, that could end up being half the people in the room.In this case, including the specific location of the 3.4 acre parcel was important to understanding the controversy before the commission – the impact Mr. Lowe's property and proposed estate would have on surrounding properties and homes.
>
> The project itself . . . and that address was referred to over and over throughout the day as were the properties and addresses of others in the neighborhood, many of whom are powerful, influential and/or multimillionaires.
>
> Aerial maps and site maps, as well as addresses, were posted around the room, and broadcast on public access TV, to give people a sense of the entire area. A detailed analysis was done of each property, location and square footage, to give the commission a grasp of how the neighborhood has evolved.
>
> I can understand why it might not be necessary to include a specific location for a publication outside of our area.
>
> We are a local newspaper, and it seemed important to give our readers the same [illegible] of facts provided to those of us who attended the meeting or who watched it on TV. Our readers in Montecito, in particular, would want to know where the property is located. I interviewed Mr. Lowe and his attorney throughout the day of the hearing. They never mentioned anything about having a concern about the address. I gave them my business card. I am told that later in the same day, Mr. Lowe contacted Travis Armstrong. I am not saying that I would have written the story differently, but in the future, if Mr. Armstrong receives tips or comments related to a daily story I'm reporting on, perhaps he could call me directly, call one of my editors directly, instead of sending off an e-mail and not waiting for a response.There is no guarantee that an e-mail sent after deadline will actually be received. Lastly, I am a meticulous reporter, a stickler for detail, who has devoted 10 years to making the News-Press the absolute best paper it can be. I do not want my reputation and official file to be tarnished by breaking a policy that did not exist until after the fact.
>
> Now that I am aware of a new policy against including addresses, I agree to follow it.

McCaw replied that same day:

> I'd like to address the issues here. First, your response is not helpful and I'm disappointed that you want to argue about this.
>
> Common sense would dictate that publishing a residential address of a high profile person is not only thoughtless, it can be downright dangerous. Apparently this was lost on the newsroom and in the editing process; no one was thinking about this and apparently no one had ever thought about this, otherwise this reprimand wouldn't have been such a surprise.
>
> Just because you have included this information in other stories does not make it right nor does it obviate the need to be concerned about others safety. There was no logic to having the specific location identified; it added nothing to the story. The location was not the issue. What was the issue was an unhappy neighbor weighing in on the purported loss of a viewscape and secondarily the size of the house.
>
> Although the information may be "out there," it's up to you as a reporter to be judicious about what to include. In this case there was no point in putting this in, irrespective of whether or not the information was "out there." You did not use good judgment and it was careless reporting. It was irresponsible of you to invade the owners' privacy in such a way by not only publishing the address but the conceptual drawing of the house itself. Public access TV, as you may be aware, probably does not have 40,000 or more viewing; the paper reaches that many and more.
>
> It is not your job to write for those in Montecito who may be curious nor is it your job to put information out there that is not germane to the story. You seem to forget that the property was under Sheryl Berkoff's name, not under Rob Lowe. Using his name took the story to another level. And the placement in paper was absurd. This is not a page one, above the fold story. Nowhere in your letter have I seen any concern about the property owners, who are high profile and have small children. You seem to be giving more importance to the idle curiosity of others. The fact that Mr. Lowe called Travis Armstrong instead of you might indicate something. The fact that Travis didn't speak to one of the editors directly might indicate something as well, but blaming Travis for not getting this information in the manner you want is like shooting the messenger. There shouldn't need to be a policy regarding addresses, this is a matter of common sense.
>
> The fact that I had to write a letter of reprimand about this indicates to me that we have some very serious problems at the News-Press. The letter of reprimand will stay in the file.

Todd also responded to McCaw concerning his reprimand. In pertinent part he stated:

> Including the address was intentional, appropriate and even necessary for the best understanding of the story—

> even a casual reading of an edited Web version leaves one wondering why a story about a piece of property neglects to mention where that property might be.
>
> No one disputes that a newspaper's owner and/or publisher has the absolute right to make and enforce whatever policies they feel are appropriate. . . . But to punish hard-working people doing the right thing whose "violation" occurred *ex post facto* borders on the malicious and defamatory.
>
> . . . .
>
> That someone might be unhappy with a newspaper story after it appears, and might even cancel their subscription, is one of the many costs for the vigorous application of journalism, and a price I thought we all implicitly accepted in whatever role we have at a newspaper. And that anyone has privacy rights that exceed those given to average citizens seems to abrogate what we might term the Storke Doctrine: "Publish the news that is public property without fear of favor of friend or foe."

The News-Press' handling of the Rob Lowe matter raised a concern among some that, as Melinda Burns described, "for a publisher to squelch that practice on behalf of a Hollywood actor seemed to set very bad precedent for openness and fairness and honesty in reporting. . . ."

On June 22, Yolanda Apodaca, the New-Press' director of human resources, gave employees a memorandum that some viewed as a "gag order." It was titled "Business Conduct policy—REVISED" and read, in pertinent part:

> *Confidentiality*
>
> Employees may have access to confidential information about the New-Press business, advertisers and news stories before their publication. It is essential that the confidentiality of these matters be maintained and protected at all times.
>
> This includes the unauthorized disclosure, release, sharing or leaking of any proprietary, personnel or other information involving the New-Press to other news organization or media outlet.
>
> Such disclosures are strictly prohibited and will be subject to disciplinary action, up to and including immediate termination.
>
> Any confidential information acquired as a result of employment with the New-Press may not be used for personal advantage or profit, nor be divulged for the advantage or profit of anyone else.

On July 3, Armstrong became acting publisher as McCaw and von Wiesenberger left for vacation. On July 5, George Foulsham, managing editor, and Don Murphy, deputy managing editor, resigned from their positions at the New-Press. Other resignations quickly followed. On July 6, Roberts sent to McCaw a message asserting:

> With all due respect, whatever your intentions may have been, your actions in regard to the newsroom over the past two weeks have been widely perceived, both inside and outside the paper, as unwarranted, hostile to loyal employees and violative of fundamental principles of public interest journalism.
>
> At a time when we should be celebrating the talent and teamwork that led to our strongest ever showing in the CNPA competition, we instead have a newsroom under siege by the owner, whose actions are viewed as damaging to the paper, arbitrary and disrespectful towards committed, hard-working staff members.
>
> . . . .
>
> I wish to make clear that I strongly disassociate myself from your issuance of letters of reprimand . . . regarding a story involving a controversial construction project proposed by the actor Rob Lowe. I believe the reprimands not only are unjustified, but also damage the professional reputations of these professional journalists. . . . The fact that you disciplined these people for violating an alleged "policy" which was not in effect at the time of the story only makes the letters more questionable.
>
> Whether or not to publish Rob Lowe's address—which had already been widely publicized during a lengthy hearing and in public documents—is a journalistic judgment call on which honorable people can disagree. Based on my 32 years of experience working in every capacity in newsrooms, however, it is not a matter for which formal discipline is meted out. For the record, I also wish to register my profound disagreement with the June 9 order, given to me by your co-publisher through your attorney, to kill a news brief following up an earlier story about Travis Armstrong's drunk driving case.
>
> It is routine in drunk driving cases involving public figures such as Armstrong (see our coverage of a similar situation involving the spokesman for the City Administrator) to report in follow-ups both the blood alcohol level . . . as well as the disposition of the case. For the News-Press to suppress such information in the case of a high-profile employee who in many ways is the face of the newspaper, represents a deplorable double standard that violates journalistic ethics.

The letter criticized von Wiesenberger's earlier reference to Robert's bringing out his book of journalistic ethics, claiming that it was "an important, industry-wide set of standards, values and guidelines for ethical newsgathering." Roberts also complained about von Wiesenberger's criticism that Roberts had run stories that had upset advertisers. Roberts said it was troubling that von Wiesenberger was inferring that the newspaper not run stories that might upset advertisers, claiming that this breached the wall between the newsroom and the business department "which underpins the most fundamental tenets of public interest journalism." In the message Roberts gave the 30-day notice required under his contract of his intent to quit and indicated that he would inform the newsroom of his decision that day. After reading the message Armstrong decided that Roberts should leave the premises that day rather waiting for the 30 days to expire.

Roberts' resignation that day stirred emotions. Employees gathered as he was being escorted from the newsroom by Armstrong and Apodaca; some employees sobbed and hugged each

other and tried to hug Roberts. Jane Hulse shouted, "Fuck you, Travis. Haven't you done enough?" Armstrong then told Hulse that because she too had already resigned and she too needed to leave the building. Hulse then again directed the expletive to Armstrong. Then Roshell also shouted, "[F]uck you," at Armstrong. I return to this incident below. That day, July 6, more people resigned from their positions at the News-Press. They included Jane Hulse, city editor; Michael Todd, business editor; Gerry Spratt, sports editor; Scott Hadley, senior reporter; Chuck Schultz, courts reporter; Shelley Leachman, college issues reporter; Joshua Molina, city of Santa Barbara reporter; Barney Brantingham, a columnist who had worked for the News-Press for 46 years; as well as Cohee. On July 7, Gerry Spratt, sports editor, resigned. Other resignations followed: Scott Hadley, senior writer on July 12 and Colin Powers, presentation editor, on July 18. They all resigned to protest what they perceived as McCaw's and von Wiesenberger's unethical interference in the news-reporting function of the newspaper.

B. Union Organizing Effort

The resignations spurred employees to seek out the Union. Melinda Burns, who was fired on October 27 and who is an alleged discriminatee in this case, contacted the Union; she arranged a meeting at her home on July 6. About 30 employees met there with Marty Keegan, the Union's representative; the Union's attorney was also present. Other meetings followed during which Burns and other employees signed the Union's authorization cards. During one of the meetings, Keegan distributed a contract that a union had with Newsday in New York. Employees reviewed the contract and discussed how the grievance and arbitration procedure in that contract might provide them with some protection in light of the discipline the News-Press had imposed on reporter Camilla Cohee in the Rob Lowe matter. Melissa Evans, an alleged discriminatee, in particular recalled reading the byline protection language in the contract that read:

> Newsday has a practice of consulting with reporters when necessary and practical before making major changes to their work. A byline will not be used over the employee's objection.

They also reviewed and discussed the following that Burns had discovered online and that appeared on the letterhead of the Newspaper Guild of Greater Philadelphia:

> PLEDGE OF NON-INTERFERENCE WITH EDITORIAL PRODUCT
>
> The Employer recognizes that it is essential to the Inquirer and the Daily News that its employees who are engaged in the gathering, writing or editing of the news shall remain free to fulfill their respective functions and responsibilities without interference, disruption, or threats of retaliation from any source, including from the directors, officers, agents and shareholders of PMH, or any related entities.
>
> Therefore, the Employer agrees that these editorial functions shall at all times remain independent of the ownership and control of PMH, and no director, officer, agent, or shareholder of PMH shall attempt in any manner, directly or indirectly, to influence or interfere with the editorial policies and functions of the Inquirer and the Daily News as described above, or the decisions of the Publisher involved therein.
>
> The Guild shall have, in addition to those remedies available at law, the right to pursue to immediate arbitration any breach, or attempted breach, of this provision of the agreement. The parties agree in such event, the arbitrator shall have the authority to enjoin the Employer, its officers, agents, shareholders, etc. from such conduct, and to fashion such other relief that arbitrator considers appropriate to protect the members involved.
>
> Philadelphia Newspapers, Inc. Newspaper Guild of Greater Philadelphia, Local 38010
>
> By: _____ By: _____
>
> Dated: _____ Dated: _____

During one of these meetings the employees prepared a letter with a list of the demands they wanted to present to the News-Press. The letter, dated July 13 and addressed to Armstrong, read:

> We, the newsroom employees of the Santa Barbara News-Press, can no longer remain silent about the intolerable conditions at the newspaper we love.
>
> We respectfully request that you:
>
> 1. Restore journalism ethics to the Santa Barbara News-Press: implement and maintain a clear separation between the opinion/business side of the paper and the news-gathering side.
> 2. Invite back the six newsroom editors who recently resigned: Jerry Roberts, newsroom editor; George Foulsham, managing editor; Don Murphy, deputy managing editor; Jane Hulse, city editor; Michael Todd, business editor and Gerry Spratt, sports editor.
> 3. Negotiate a contract with the newsroom employees governing our hours, wages, benefits and working conditions.
> 4. Recognize the [Union] as our exclusive bargaining representative.
>
> We look forward to discussing these issues further with you.
>
> Thank you.

That same day a group of about 15 employees, including Burns, delivered the letter to Armstrong in his office. After they walked into his office, Armstrong stood and told the employees to back away, that he felt uncomfortable. Barney McManigal, also an alleged discriminatee in this case and the spokesperson that day for the employees, replied that they just wanted to give him the letter. Armstrong then accepted the letter. Another employee said that they would like an answer within 72 hours. The employees then returned to work.

On July 14, the Union and its supporters held a noontime rally in De La Guerra Plaza in front of the entrance to the News-Press building. The rally was to protest the "gag order" that the employees felt had been imposed by the News-Press concerning the employees' ability to speak to the media about the events that recently occurred there. At noon about 20 employees emerged from the front doors of the News-Press led by Burns; Dawn Hobbs, whose evaluation in December and whose discharge on February 5 are the subject of unfair labor practice allegations in this case, and Starshine Roshell, whose column was later canceled and is also the subject of an unfair labor practice allegation in this case, followed at Burns' side. The rally was attended by about 200 onlookers. Burns began the rally by stepping up to the microphone, introducing herself, and said that although she knew everybody was there eager to hear about what had been happening at the News-Press and they wanted very much to talk about it but they had been ordered not to talk to the media. Burns said that if they broke the new rule they could be fired, she said she was very sorry but she could not talk to them that day, and she stepped back into the line of News-Press reporters who were present near the microphone. The employees then placed duct tape over their mouths. Another reporter then stated that a majority of the staff had committed to joining the Union and he read the four demands that the employees had presented to Armstrong the day before. The event received wide coverage by the Santa Barbara press, televisions stations, and bloggers. The News-Press itself covered the event on its front page the next day. That coverage had photographs of the event that included Burns and Roshell. It was also reported in the Los Angeles Times; a photograph of the event that included Burns accompanied that report.

On July 17, the News-Press delivered its response to the employees' July 13 letter. That letter, signed by Apodaca, stated that the News-Press respected the employees' right to decide whether or not to have union representation but that the News-Press did not think that union representation was in the best interest of the newspaper, employees, or readers. The letter indicated that the News-Press believed that more could be accomplished working together without the outside interference of a third party, and the News-Press declined the requests to recognize the Union and invite back the editors who had resigned. A response was also given verbally that day by an attorney for the News-Press to the newsroom employees. Among other things, he said that the matter of ethics could not be included in a union contract.

On July 18, another event was held at De La Guerra Plaza. The purpose of the event was to protest the perceived collapse of ethics at the News-Press. At noon about 15 employees, including Burns and Roshell, filed out of the News-Press building and assembled in a line. They held four signs each listing one of the four demands referred to above. Burns held one of those signs. About 600 people attended this event. Speakers at this event included the mayors of the cities of Santa Barbara, Goleta, and Carpentaria. This event too was widely covered the local media as well as by the Washington Post.

On July 18, McCaw sent a memorandum to staff and friends that read:

> I want to personally congratulate the whole team for your great work in receiving two first and five second place awards from the California Newspaper Publishers Association on Saturday. This is further proof that the News-Press is still the great paper it has always been, thanks to our dedicated and talented staff.
>
> We are rapidly moving forward to complete our new team in the newsroom. While there are still some difficulties ahead, we are picking up momentum and should be back on track very shortly. Our search for a new editor is well underway.
>
> My responsibility as owner is to balance the needs of the paper, the business and journalism. I respect the traditions of journalism and believe that the best way to run a paper is to hire good people and let them do their job, and that is exactly what I am doing. While it is a fact that tensions will always exist between the news staff and management, discussions and debate lead to better news coverage. I firmly believe that this is healthy and promotes excellence in journalism, a principle to which I am deeply committed. In the future, I expect this type of debate to focus on professional issues, not personal matters.
>
> To make the News-Press an even more professionally and personally rewarding place to work, I welcome your comments, recommendations and feedback so we can have an open dialogue to work collectively and collaboratively as we further improve the quality, coverage and accuracy of our paper.
>
> I am deeply appreciative of the loyalty and expressions of support from the hundreds of News-Press employees who unfortunately, were caught in an emotionally charged situation. The many calls and letters of support from the community have also been gratifying. My heartfelt appreciation and thanks goes to each of you for continuing to get the paper out from under these trying conditions. Please be assured that I will keep you updated with any developments as they occur.

On July 20, another event was held in De La Guerra Plaza and about 12–15 employees, including Burns, attended. Marty Keegan, the Union's lead organizer, read the demands and stated that they were giving the News-Press 45 days to work things out. The group also announced a campaign to persuade readers to cancel their subscriptions as of September 5, if the demands were not met. The group distributed pledge cards that read:

> Save the Santa Barbara News-Press
>
> I, _____, support the Santa Barbara News-Press newsroom staff in its effort to restore journalistic integrity to the paper, obtain recognition and negotiate a fair employment contract. Cancel my subscription by Sept. 5, 2006, if the employees' demands have not been met to their satisfaction.
>
> Name:
> Address:
> Phone:
> E-mail:

It should be noted that one of the four original demands—invite the former editors back to their positions—was omitted and was not thereafter linked to the subscription cancellation campaign. This event was covered by the local media. The News-Press' coverage was accompanied by a photograph showing Keegan and several employees, including Roshell, holding up the subscription cancellation cards at the event.

On July 25, the News-Press published an opinion article written by McCaw. In that article McCaw gave her position on, among other things, the recent resignations, freedom of the press, and the union organizing campaign. In the article McCaw stated: "Violations of our paper's policies and standards are what brought on this conflict."

In the evening of July 26, a community forum was held at a theatre in downtown Santa Barbara. This event was sponsored by the Santa Barbara Community Action Network and was titled "Honest News and the Free Press, What Can We Do Now?" Burns was one of the speakers at the event which was attended by several hundred people. Burns spoke about how the News-Press as it had existed for 150 years was in real danger because the journalists were under assault from management. She said that nine top journalists had resigned because the owner of the News-Press was interfering in the news. Burns said that McCaw had recently imposed a gag order prohibiting the employees from making disloyal remarks about the newspaper but Burns said her first loyalty was to her profession. Burns said that the question was whether the newspaper would reflect the world views of McCaw or would it reflect the views and the lives and the vision of the entire community. She explained that in order to restore journalistic integrity to the News-Press the employees had decided to form a union and she described the demands that had been submitted to the News-Press. She told the audience that the journalists who remained desperately wanted to practice their profession in an atmosphere of respect for journalism ethics and she was asking for the help of the community by signing the subscription cancellation cards. Two employees, one of whom was Roshell, handed out the subscription cancellation cards at the end of the event. The next day, the News-Press ran an article about the event that quoted some of the remarks Burns had made.

Thereafter, News-Press employees, including Burns, began distributing the subscription cancellation cards at events such as the Saturday farmer's market in downtown Santa Barbara. Burns collected more than 100 cards; she turned them over to Hobbs. The subscription cancellation effort became the centerpiece of the Union's campaign concerning the News-Press as the Union took placed advertisements in the Santa Barbara Independent and on a local radio station during the month of September.

On July 30, the News-Press began publishing columns written by Laura Schlessinger. In her August 3 column, Schlessinger reported on a couple who sided with the News-Press and against the Union's subscription cancellation effort by buying a second subscription to the News-Press. Schlessinger encouraged readers to do the same.

Scott Steepleton played a role in many of the decisions that are the subject of the unfair labor practice allegations in this. In July Steepleton was promoted to city editor and he held a meeting with the news department employees to announce his promotion. During the meeting, the employees questioned Steepleton concerning McCaw's involvement in the news department. Steepleton responded by saying that because McCaw was the owner "she had the right to be part of whatever she wants to be part of." By late July Steepleton was aware of the fact that the Union was promoting a campaign to have readers cancel their subscriptions to the News-Press by a September 5 deadline and that employees who supported the Union were handing out the yellow cancellation cards to get readers of the News-Press to do so. On August 10, Steepleton was again promoted, this time to associate editor. This put Steepleton in charge of the overall management and supervision of the news department. He succeeded Charles Boucher, who had been interim editor after Roberts resigned on July 6. Steepleton testified that in August he relayed the content of the July meeting he had with employees, described above, to McCaw "where it seemed to me like [the employees] wanted to [do] what they wanted to do when they wanted to do it without any input from management." At the trial the New-Press claimed that this evidence supports its argument that the union campaign was directed at telling McCaw "that she can't be involved in running her own newspaper." I pause to comment on this testimony. First, there is no specific evidence supporting Steepleton's description of the July meeting he had with the employees. Moreover, it is completely at odds with the record as a whole in this case. In other words, it strikes me as an obvious exaggeration that serves to undermine Steepleton's credibility as a witness. I comment more on the credibility of Steepleton's testimony below.

The Union filed a petition with the NLRB on August 10 to represent a unit of news department employees. The next day, the News Press reported on the filing of the petition and quoted Ira Gottlieb, the union attorney, and Agnes Huff, a spokeswoman for the News-Press. The article continued:

> "The filing of a petition is simply the initiation of the NLRB process and we will cooperate full with them," Mrs. McCaw said in a statement.
>
> Newspaper spokeswoman Agnes Huff said in a statement late Thursday that "after repeated strong-arm attempts to unionize the Santa Barbara News-Press without going through the NLRB process, union leaders today conceded defeat and filed a petition with the NLRB." "These ugly tactics, known as a 'corporate campaign,' attempted to force the paper into accepting a union without an election. Tactics included personal attacks against management and the owner of the paper, encouraging the public to cancel subscriptions and advertising through the 'yellow card' boycott, and continuing to spread lies and misrepresentations about working conditions at the paper."
>
> . . . .
>
> "A tragedy is unfolding at the News-Press and we have to stop it," reporter Melinda Burns said in a statement. "We desperately need to practice our profession in an atmosphere of openness and fairness, so essential to the freedom of the press. Only a union contract can guarantee that we will be treated with respect."

> Added crime reporter Dawn Hobbs: "We are dealing with an intolerable situation at a newspaper that had previously garnered many top journalism awards. The union will serve as a tool to restore the newsroom to its prior top-notch status."
>
> In her statement, Mrs. McCaw rejected charges about a breach of journalistic integrity and meddling on the part of management.
>
> "Further attempts at Teamster extortion will not be tolerated," added Mrs. McCaw. "We are fully committed to protecting the livelihood of our News-Press employees. The paper will continue to publish daily, long after this campaign is a distant memory."

On August 10, Steepleton announced a number of adjustments he made to the work assignment of many employees in the newsroom. Roshell, Evans, Hobbs, and Davison were among those given additional duties.

On September 5, the Union and 12 of its supporters held a press conference. There Keegan announced that because their demands had not been met he was asking the community to cancel their subscriptions to the News-Press. The media, including the News-Press, again reported this event. Burns among other employees was in a photograph that was featured in that coverage.

On September 24, a rally and fundraiser was held in De La Guerra Plaza. The rally was to let the community know that the NLRB-conducted election was coming in a few days and that the employees attending the rally were confident that the Union would win the election. The demands were again stated and the employees asked for the support of the community. The fundraiser followed the rally and the attendants were asked for contributions to raise money for journalists who were leaving the News-Press. About 200–300 people attended the rally and it was covered by the local media. The Santa Barbara Daily Sound headlined the event in its September 25 edition. With it appeared a photograph of Dolores Huerta, a farm laborer organizer, delivering remarks at the rally with a raised clenched fist. In the background were several employees including Burns. A banner bearing the message "Cancel Your Newspaper Today" was also displayed. This banner, measuring 8-feet wide and 4-feet high, becomes involved in the discharge of six employees discussed later in this decision.

The election was held on September 27; the Union won by a vote of 33 to 6. The election was covered by local media and was picked up by the Associated Press. The Santa Barbara Daily Sound headlined coverage of the election in its September 28 edition. Among the photographs included in the coverage was one of Hobbs hugging Burns in the aftermath of the union victory. Burns was also in two other photographs that were part of the coverage. The Santa Barbara Independent contained photographs of the Union's supporters; Burns appeared in one of the photographs.

The News-Press filed objections to the election and a hearing was held before Judge William L. Schmidt on January 9 and 10. On March 8, Judge Schmidt recommended that the objections be overruled and August 16, 2007, the Board adopted Judge Schmidt's recommendations and certified the Union as the collective-bargaining representative of the unit employees.

The News-Press ran several editorials concerning the union organizing effort. On November 9, in an editorial entitled *"Our Opinion: Union compromises journalism ethics,"* the News-Press commented on the role that union money played in county elections and asserted that the Union had a long history of political donations and dealings. It quoted a matter from a New York newspaper that claimed that a union's political contributions had made editors and staff concerned about the paper's coverage of the news. It stated, "For journalists who believe in independence and being impartial, [the union's] tactics and practices present ethical problems." Another editorial, dated November 14, read *"Opinion: No place for union bias."* The editorial referred to "measure D," a tax increase proposal that was defeated by the voters in a recent election. It discussed how the yes on measure D committee had used the News-Press' nameplate, photos, and story for a "slick" brochure and that this gave the impression that the News-Press was supporting measure D. This incident is discussed in more detail later in this decision. The editorial continued:

> Reporting must be straightforward, a goal the News-Press management strives for at all times. During the past election, another challenge was to make sure that readers didn't perceive a pro-union bias in some stories about candidates backed by particular unions.
>
> . . . .
>
> Still, we're troubled if or when readers or candidates say they believe they detect pro-union bias in election and other stories.

A December 12 piece read: *"Opinion: Teamsters, ethics, & big spending"* and began:

> As we've previously noted, the News-Press is standing firm against allowing outside union organizers to influence news coverage or interject bias into reporting.
>
> The Teamsters organization wants to represent certain reporters and copy editors at this newspaper, and we'll take it seriously when readers say they believe they detect pro-union bias in stories.

However, there is no evidence in this case that the News-Press ever claimed that prounion biased articles were ever written by its staff. The December 12 piece continued, describing a report concerning a lawsuit brought by the U.S. Justice Department against the Teamsters in 1989 concerning racketeering and organized crime. The article then again referred to the New York newspaper matter continuing:

> Readers know the influence that unions in general have on local elections. Union dues can go to support candidates, even if individual union members don't want their money to go to these campaigns.
>
> But where else does money taken from the paychecks of union members end up? In the case of the Teamsters, does the money pay for a top-heavy bureaucracy and well-paid union bosses? A reform-minded group, calling itself Teamsters for a Democratic Union, maintains a lengthy list of union bosses who are in the "$150,000 club" and

"$100,000 club" in terms of salaries paid for by union dues.

The opinion piece continued in a similar vein by describing how Teamsters officials allegedly receiving multiple salaries and holding meetings in "posh resorts."

III. CREDIBILITY OF THE WITNESSES

The facts in this decision are largely based on a composite of the testimony of Melinda Burns, Tom Schultz, Barney McManigal, Anna Davison, Dawn Hobbs, Starshine Roshell, Melissa Evans, Karna Hughes, and Rob Kuznia. Even taking into account the fact these witnesses are alleged to be discriminatees and therefore stand to benefit from the outcome of this case, I nonetheless conclude that their testimony was truthful. Their demeanor was serious and believable and they tended to corroborate each other. The testimony they gave was supported by documentary evidence and fit convincingly with the record as a whole. Burns, a long-term veteran of the News-Press, in particular impressed me with her careful, thoughtful responses; she seemed to understand the vital importance to tell the truth in this proceeding. For these reasons I rely on her testimony as a foundation for many of the facts in this case. I was also impressed with Schultz' testimony; it was rich is detail and flowed naturally. I have relied heavily on his testimony concerning the allegations in the complaint stemming from events of August 24 set forth below. I questioned Schultz rather extensively about the August 24 matter and his demeanor while responding as well as the content of his testimony reinforced my conclusion concerning the reliability of his testimony. I deal with the News-Press' challenge to Schultz' credibility below.

As indicated below, Linda Strean testified on behalf of the General Counsel. I have considered the fact that she admitted being a personal friend of Jerry Roberts and worked with him not only at the News-Press and but at another newspaper also. I nonetheless credit Strean's testimony to the extent it is cited in this decision; to that extent her demeanor was impressive and her testimony was consistent with other evidence in this case. In assessing the testimony of Michael Todd I have taken into the fact that he was part of the group that resigned on July 6 and that he earlier had received a written warning related to the Rob Lowe incident described above and then, after he wrote a message to McCaw protesting the warning, he was suspended for an allegedly unrelated matter that had occurred weeks earlier. Nonetheless, I rely on his testimony to the extent that it described the editing procedures in the newsroom and his working relationship with Burns. In that regard his testimony was largely uncontested. Sarah Sinclair worked for the News-Press for over 20 years until her resignation in February 2007; during that time she held various management positions in the advertising department. I found her testimony, also largely uncontested, to be credible. Andrea Huebner worked for the News-Press from April 1999 until her termination on September 12, 2006. Huebner's demeanor was convincing and her testimony on key matters was corroborated by the testimony of other witnesses. I rely on it also. Marty Keegan, the Union's lead organizer, was also a witness in this proceeding. His testimony largely corroborated that of other employee-witnesses concerning the organizing campaign and too was mostly uncontested. In addition, he provided testimony concerning the pledge of noninterference set forth above. His demeanor was sincere and convincing and I credit his testimony.

The testimony of Robert Guiliano requires more explanation. He had difficulty answering some questions directly and seemed eager to voice his opinions on matters even when not asked. Even more troubling was Guiliano's concession that he did not believe the penalty of perjury applied to testimony in NLRB hearings because, according to Guiliano, Steepleton had lied during the hearing before Judge Schmidt and yet received no punishment. Accordingly, I have been cautious in relying on Guiliano's testimony alone. I give an example of how I dealt with Guiliano's testimony. Guiliano testified that he had a conversation with Davison after she received her 2006 evaluation from Steepleton; this is described in more detail below. During that conversation, according to Guiliano, Davison expressed concern about the low ratings that Steepleton had given her. Guiliano had recently attended 6 days of management training and learned to give staff clear expectations of what needed to be done and then follow up afterward. Guiliano told Davison that he would give her assignments at the beginning of the week and then at the end of the week he would send her something in writing indicating that she had completed her assignments and she was doing a good job. Guiliano testified that he then reported all this to Steepleton, but Steepleton vetoed the plan, saying that Guiliano could not tell Davison that she is doing a good job while Steepleton was telling Davison that she was doing a poor job. I have decided to credit Guiliano's testimony in this regard because Davison credibly corroborated the first part of this testimony, documentary evidence supports the management training portion of it, and Steepleton did not credibly deny the last part.

I have decided not to credit Steepleton's testimony except to the extent that it involves purely background and uncontested matters or when it constitutes admissions against the interest of the New-Press and then only to the extent it is contained in this decision. I have scattered instances concerning Steepleton's credibility in other parts of this decision when it seemed more appropriate to do so in a given context rather than repeat the entire context again here. Steepleton seemed overeager to answer in the affirmative to blatantly leading questions. For example, Steepleton testified in general concerning meetings he had with McCaw in August where she allegedly stated that she wanted bias out of the newspaper. The next question along this line was: "Next, when Mrs. McCaw told you that bias was something that she wanted to get out of the newspaper did she or did she not indicate to you that she wanted you to be vigilant about that?" Steepleton answered, "Absolutely." Take the matter of obscenity in the newsroom. Steepleton was asked a series of questions by counsel for the General Counsel. Did Roberts swear quite a bit in the newsroom? Steepleton answered, "If he did swear, he didn't swear in my presence." Didn't Foulsham routinely swear in the newsroom? "Not in front of me." Didn't Hulse occasionally swear in the office? "Not that I recall." Did you ever hear Todd swear in the newsroom? "I don't think so." Keep in mind that before his promotions to management positions in July 2006 Steepleton was a senior writer and therefore was not someone around whom others in

the newsroom might fear cursing. Steepleton's demeanor while answering those questions was entirely unimpressive; it had a smirking quality to it.

Yolanda Apodaca also appeared as a witness. I conclude that her testimony was generally credible. Her demeanor was confident and she was careful not exaggerate in a way that might benefit the News-Press. Her testimony fit comfortably with other undisputed parts of this record. Although much her testimony did not concern many disputed factual issues, I have relied on it, with one exception noted below, to the extent it is contained in this decision. For example, the General Counsel sought to prove that the News-Press had a progressive disciplinary policy largely through the testimony of Guiliano; Apodaca testified that there was no such formal policy. I credit her more convincing testimony over that of Guiliano's.

Travis Armstrong also gave testimony in this case. Concerning the Rob Lowe incident, he testified that the News-Press had a prior practice of not publishing the home addresses of celebrities and that practice was based on common sense. However, this testimony is uncorroborated, contradicted by a number of other more credible witnesses and by the correspondence on this matter from McCaw herself. I do not credit this testimony. More credibility issues concerning Armstrong are discussed below. Armstrong's general demeanor as a witness was not particularly impressive; the content of his testimony seemed exaggerated more to make a point than to relay the facts. I rely very little on his testimony in my findings of fact in this case.

Wendy McCaw appeared as a witness in this case. She testified that as early as 2002 and 2003 she had complained about perceived bias in the reporting of Burns, who was fired for alleged bias reporting and who is a discriminatee in this case. But McCaw's testimony was given in answer to leading questions and was without specific context or supporting details. Her demeanor as a witness was not sufficiently persuasive to convince me to accept this uncorroborated testimony. In other respects I have credited her testimony, to the extent set forth in this decision. But, as explained below, I do not credit her testimony concerning whether six of the alleged discriminatees would have been fired anyway under a theory of after acquired evidence of misconduct.

I have also considered von Wiesenberger's testimony. I have credited those portions of his testimony that appear in this decision, but I have not done so otherwise because von Wiesenberger appeared prone to exaggerate to enhance the litigation prospects of the News-Press. For example, among the points raised in the May 17 message he sent to Roberts, referred to above in the paragraph concerning the reporting of Armstrong's arrest, von Wiesenberger wrote:

> The "Okies" series seems questionable. While I appreciate the idea of an in depth look at the immigration issue, the title is at the same time disparaging (the term "Okies" was a derogatory term) and biased, to the extent it forms the conclusion that the analogy sticks, while the reader [should] be the one who comes to the conclusions.

This comment focused on the use of the term "Okies," it made no comment that the content was biased. Yet at trial von Wiesenberger testified that the article was "was just one-sided, and our readers were very disappointed with it." Conveniently, the article was written by Burns, an alleged discriminatee in this case. I do not credit von Wiesenberger's testimony in this regard. Rather, his earlier comments concerning the use of "Okies" with no complaint of bias more accurately reflects his impressions at the time. In that same message von Wiesenberger told Roberts:

> I believe Joe Cole had told you not to do a Tuesday column. I need to reiterate no column. That real estate is for the columnist that you were asked to find. Have you found anyone?

By the time of trial von Wiesenberger's testimony was, after being asked the leading question, "And why were you stopping the column*s*?" "We were *stopping* the column*s* in the newspaper because we felt that the column*s* were not what people wanted to read." (Emphasis added.) This testimony came despite the fact that there was no mention in the message of any decision to stops column*s*; to the contrary the message referred to other columns with no indication that von Wiesenberger that he wanted those column*s* to be canceled too. And this is apart from the fact the message quoted above shows that von Wiesenberger was instructing Roberts to search for a new columnist at that time. Again, von Wiesenberger's testimony fits conveniently in the News-Press' argument concerning why it cancelled the column of Starshine Roshell, described in detail below. Von Wiesenberger was not a convincing witness.

Finally, the News-Press presented the testimony of John Irby as an expert in the field of journalism. To the extent he testified that in his many years of experience in that field that he had never heard of a wall separating editorial pages from the news pages, I simply discredit that testimony as unbelievable. To the extent that he was focusing on the existence of a "wall" as opposed to a "separation" then his testimony was merely misleading. I questioned Irby directly on this issue; both his demeanor and the content of his answers were not persuasive. I conclude that his testimony was influenced by the fact that he was a paid witness.

IV. LEGAL OVERVIEW

Seventy years ago, the United States Supreme Court held that the Act constitutionally applies to news organizations such as the News-Press. *Associated Press v. NLRB,* 301 U.S. 103 (1937).

Several allegations in the complaint allege violations of Section 8(a)(1). In general, the test in resolving these allegations is whether the employer's conduct tends to interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act. This test is an objective one; that is, the existence of actual coercion is not required. See *California Acrylic Industries v. NLRB,* 150 F.3d 1095, 1099 (9th Cir. 1998). In applying this test the Board takes into account the "economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969).

The allegations discussed below concerning the discharges of Burns, Davison, and Guiliano, the cancellation of Roshell's

column, and the lower evaluations turn on assessing the motivation of the News-Press. In resolving that matter, I apply the shifting burden analysis described in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Under that analysis the General Counsel must prove by a preponderance of the evidence that union animus was a motivating factor in the employer's adverse employment action. The elements that the General Counsel needs to prove to meet this burden include showing that the employees engaged in union or other protected, concerted activity, the employer was aware of the activity, and the employer was hostile towards that activity. See *Consolidated Bus Transit,* 350 NLRB 1064, 1065–1066 (2007). Moreover, as the Board stated in *Real Foods Co.,* 350 NLRB 309, 312 fn. 17 (2007):

> Unlawful motive may be demonstrated not only by direct evidence but by circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice, and shifting or pretextual reasons being offered for the action [citations omitted].

When an employer provides inconsistent or shifting reasons for its actions, a permissible inference is that the reasons proffered are mere pretexts designed to mask an unlawful motive. *GATX Logistics, Inc.,* 323 NLRB 328, 335 (1997), enfd. mem. 165 F.3d 32 (7th Cir. 1998) (published in full 160 F.3d 353 (7th Cir. 1998)). If the General Counsel meets this burden, then the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the action even in the absence of the employees' union activity. *Consolidated Bus Transit,* id.

As noted above, a purpose of the union activities of the employees was directed toward what they viewed as a need to restore journalistic integrity at the News-Press. The News-Press, however, takes the position that the matter of journalistic ethics or integrity is solely one for management to decide. It contends that efforts by employees to have a voice in the matter of ethics through their collective-bargaining representative are activities not protected by the Act. In applying *Wright Line* in this case I must therefore address this issue. In doing so I note that this case does not involve 8(a)(5) allegations where the precise limits of permissive and mandatory subjects of bargaining would be properly addressed. Nor do I necessarily decide what aspects encompassed by this topic will, in the end, be bargainable subjects. Rather, I simply examine whether there is room for collective bargaining on the issue of journalistic integrity under current law as applied to the general fact situation of this case. The starting point in this analysis is the First Amendment protection of Freedom of the Press. As the News-Press correctly points out, this protection belongs to the publisher of a newspaper and not to the reporters in their role as employees. *Eisenberg v. Alameda Newspapers, Inc.,* 74 Cal.App. 4th 1369 (1999). The Board takes into, as it must, the protections the First Amendment extends to publishers. In *Peerless Publications, Inc.,* 283 NLRB 334 (1987), the Board addressed the concerns expressed in *Newspaper Guild Local 10 v. NLRB,* 636 F.2d 550 (D.C. Cir. 1980), concerning the Board's earlier decision in *Peerless Publications, Inc.,* 231 NLRB 244 (1997). First Amendment protections also must be taken into account to assure that a newspaper's freedoms of speech and of the press are not offended by the Board's remedies. *Passaic Daily News v. NLRB*, 736 F.2d 1543 (D.C. Cir 1984).

In *Peerless* the Board concluded that a newspaper could unilaterally implement, without bargaining first with a union, a code of ethics that was essentially based on ethical concerns designed to enhance the credibility of the newspaper. The Board stated:

> We affirm the view that protection of the "editorial integrity of a newspaper lies at the core of publishing control," and that in order to preserve such, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity," without necessarily being required to bargain initially. [Footnotes omitted.] [Id. at 334.]

The fact situation in *Peerless,* therefore, differs from the facts in this case because here the employees, attempting to act through their collective-bargaining representative, were seeking to *restore* editorial integrity of the News-Press. The Board stated in *Capital Times Co.,* 223 NLRB 651, 653 (1976), overruled on other grounds *Peerless Publications, Inc.,* 283 NLRB 334 (1987), that regulations appearing to undermine employees' integrity would normally affect terms and conditions of employment since it could strike at the heart of the individuals' reputations. As Burns testified in this case:

> To keep its credibility, a newsroom has to have independence from the editorial side of the paper. . . . The editorial side is the opinion side. The publisher's opinion is in the editorials. The news side has to have the independence and freedom to report the news, gather the news . . . and not to be pressured by the publisher to report it or gather it in a certain way.
>
> . . . .
>
> I don't think I want to work for a vanity press where every article in the paper reflects the editor's, the publisher's or the owner's views, but rather I want to be a serious journalist. I want to able to report the news as truthfully as I can and as fairly as I can without a publisher telling me how to write it.

Hobbs testified that journalistic integrity was necessary to help establish the credibility of the individual journalists whose byline often appeared with the articles they wrote. Evans testified how their credibility as journalists would affect their ability to develop relationships with sources and thereby impact their ability to perform their jobs. So it may be that the collective-bargaining process will allow more flexibility under the circumstances in this case than in a situation where a newspaper is imposing ethical standards to enhance the newspaper's credibility. That might especially be true here, where the News-Press presents itself as a credible newspaper and expects its employ-

ees to maintain high ethical standards yet engages in conduct that employees believe undermines their credibility as journalists. As stated above, the employees discussed the possibilities of obtaining a collective-bargaining agreement containing a byline protection clause similar to those obtained by another union in representing reporters at another newspaper; they also discussed the pledge of noninterference. All of this shows that there may be room for bargaining on the matters of journalistic integrity, depending on the particular fact situation and the language proposed.

Even in fact situations covered by *Peerless* the Board cautioned that a newspaper's degree of control over editorial integrity is not opened-ended but must instead be narrowly tailored to protect the core purpose of the newspaper. It held:

> [T]he rule must on its face be (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to accomplish the necessarily limited objectives.

Applying that test to this case, the News-Press' ethical standards, seen from the view of some employees, could be viewed vague and ambiguous as demonstrated by the discipline issued to Camilla Cohee, who believed she was acting accordance with the News-Press' standards but was disciplined nonetheless for standards that were clarified after the fact. As the General Counsel aptly stated in his brief:

> The fact that Cohee had violated no policy of [the News-Press] and that her article was vetted through the editorial process (consisting of [the News-Press'] managers) prior to publication, illustrates the arbitrary and vague nature of how the disciplinary process would be applied. Employees could not know if their articles, even if approved through the newsroom's editorial process, would subject them to discipline for "careless news judgment" because there was no defined standard. Would that standard be determined by publisher and editorial board member McCaw? Would it depend upon whether the content of an article upset a personal friend of McCaw's, as Cohee's article had done?

Certainly collective bargaining might be able to address this matter. As described below, the cases of the discharges of Burns and Davison for alleged bias also point to vagueness in the News-Press' ethical standards concerning bias. Not only did these employees disagree with the allegations of bias, but, more importantly, the News-Press' management itself initially saw no bias as they approved the articles for publication. Collective bargaining might assist in better defining the obligations of employees under these circumstances. Also, a grievance arbitration procedure might assist in assuring that even when a newspaper lawfully unilaterally implements an ethics code with penalties that the penalties are enforced in an even-handed manner. For example, as again described below, Davison's alleged biased story at first warranted only a reprimand and then for no stated reason was converted into a discharge. All of this supports the conclusion that the matter of journalistic integrity may be a matter over which employees may bargain through its collective-bargaining representative. Finally, as the General Counsel notes in his reply brief, others who supported the Union's effort remained employed by the News-Press; this undercuts the News-Press' claim that it was genuinely concerned about the effort to restore journalistic intergrity as opposed to ridding itself of prominent union supporters. I therefore reject the News-Press' argument that the employees' efforts, through supporting a union, to "restore" journalistic integrity to the newspaper was not protected by the Act. I also find it unnecessary to resolve the Union's argument, made in its brief, that this conduct remained protected even if was unrelated to the employees' terms and conditions of employment.

The allegations of the complaint concerning discharge of the six employees and the two-days suspension issued to a number of employees turn on whether they engaged in misconduct such that would deprive them of the protection that the Act would otherwise provide. *Atlantic Steel Co.,* 245 NLRB 814 (1979). In such cases the *Wright Line* analysis is unnecessary. *Honda of America Mfg.,* 334 NLRB 751, 753 (2001).[4] As the Board stated:

> The Supreme Court has placed its imprimatur on the principle that our Act protects language during protected activity that "might well be deemed actionable per se in some state jurisdictions." *Linn v. Plant Guards Local 114,* 383 U.S. 53, 58 (1966). "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Id. [citation omitted]. Such "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974). The protection that our Act provides employee verbal and written expressions during the course of protected activity is not without limitation. Otherwise protected activity may become unprotected "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language." *American Hospital Assn*., 230 NLRB 54, 56 (1977). Nonetheless, "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn*, supra at 63.

Whether language is protected under the Act does not turn on the inaccuracy or lack of merit of an employee's statements absent deliberate falsity or maliciousness. *CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1586 (2000).

During the course of the campaign the union supporters used statements such as "Don't let McCaw control the news" and "Help us take back the News-Press." From that the News-Press argues that the employees were attempting to gain entrepreneurial control of the newspaper. But these statements, in the context of this case, are simply insufficient to support that con-

[4] See *Bridgestone Firestone South Carolina,* 350 NLRB 526 (2007), where the Board, without explanation, applied a *Wright Line* analysis in assessing the lawfulness of discipline imposed on an employee while speaking in favor of unionization during a lunchroom conversation with coworkers. Moreover, the Board there cited *Honda of America Mfg.,* 334 NLRB 746 (2001), which did not apply the *Wright Line* analysis and *Aluminum Co. of America,* 338 NLRB 20 (2002), which explicitly rejected the *Wright Line* analysis under such circumstances.

tention. In any event I credit Schultz' testimony that the union campaign was not part of an effort to let the reporters rather management control the content of the newspaper. I also take into account the settled proposition that the motives of employees for participating in activities protected by the Act are irrelevant as long as the purpose of that activity relates terms and conditions of employment. *Dreis & Krump Mfg. Co. v. NLRB,* 544 F.2d 320, 328 fn. 10 (7th Cir. 1976). The News-Press points *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), and argues that certain statements made by the union supporters were disloyal. But statements such as "Banish the Bias" and "McCaw Obey the Law" are clearly protected by the Act and are not disloyal. *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1321–1322 (2006), and cases cited therein. See also *Community Hospital of Roanoke Valley v. NLRB,* 538 F.2d 607, 610 (4th Cir. 1976). It is also well settled that employees may urge consumers to withhold patronage from an employer with whom the employees have a labor dispute. *Equitable Life Assurance Society of the US,* 343 NLRB 438 (2004); *Arlington Electric, Inc.,* 332 NLRB 845, 846 (2000), and cases cited therein. It follows that the appeals made by the employees here to have subscribers cancel their subscriptions to the News-Press were not disloyal; rather it conduct protected by the Act.

Finally, I note that while one of the four original demands of the employees was to have the News-Press invite back some managers who had earlier resigned, that demand faded out as the union campaign progressed and before the News-Press engaged in any of the conduct alleged in the complaint in this case. I, therefore, find it unnecessary to analyze whether, as the Union argues in its brief, that conduct itself was protected by the Act. I likewise find it unnecessary to analyze *Smithfield Packing Co. v. NLRB,* 2007 U.S. App. Lexus 28030 (4th Cir. 2007), cited by the News-Press in its reply brief.

In its brief the News-Press cites *Five Star Transportation,* 349 NLRB 42 (2007), and similar cases. However, those cases are clearly distinguishable. As the Board majority pointed out in *Five Star*, the employees there made ancillary attacks on the quality of the employer's services and those matters were unrelated to any labor dispute or working conditions. In this case I have concluded above that none of the comments made by the employees, when viewed in context, fall into that category.

Having set forth the facts, explained my credibility resolutions, described the applicable legal principles, and disposed of preliminary legal issues, I now address the specific allegations in the complaint.

V. UNFAIR LABOR PRACTICE ALLEGATIONS

A. Cancellation of Roshell's Column

The complaint alleges that on about August 17 the News-Press canceled the weekly column of Starshine Roshell because she supported the Union. The New-Press contends that Roshell's column was eliminated as part of a new business model that eliminated all columns written by New-Press employees.

As indicated above, Roshell was an active and visible supporter of the Union. Roshell began working for the New-Press in 1995. She wrote a column that appeared on the front page of the Life Section of the Sunday edition of the newspaper; the News-Press does not consider that section to be in the news portion of the newspaper. It covered topics such as trends, pop culture, sex, romance, parenting, and relationships. Roshell's columns were very popular among the News-Press' readers and the News-Press used her photograph, among others, in its marketing advertisements. In 2003 Roshell won a first place award from the California Newspaper Publishers Association in the category of columns, commentary, and criticism. In addition to her column, Roshell wrote an average of two stories per week. These stories were mostly for the Life Section of the newspapers and covered topics such as human interest, home, garden, and food. She also wrote theater and music reviews.

The following are excerpts from Roshell's 2004 evaluation:

> Starshine is one of the most creative and innovative writers in the newsrooms. This year, she generated a seven-part fictional serial aimed directly at children to lure a new readership.
>
> Her bi-weekly column is now weekly and it has a loyal readership. When it doesn't run we hear about it. Her topics have ranged from toy parties to speaking more Yiddish to thong underwear and the death of the low-rise jeans (trend) as well as cheerleading camps, sexy songs and the grocery strike.
>
> . . . .
>
> Starshine's work is creative, smart and clean.
>
> . . . .
>
> For the last two years, Starshine has thought of, outlined and executed two out-of-the-mainstream serials. This year, it was the children's serial, "Hocus Bogus." In this respect, she is fearless.

And her 2005 evaluation contained:

> Talent galore that is poured every week into a popular Sunday column on the Life section front.
>
> . . . .
>
> Meticulously written copy with an occasional glitch. She's creative and pushes the envelope.
>
> . . . .
>
> Starshine and her editor need to figure out how to get more of her in the News-Press.
>
> . . . .
>
> Major writing contributions this year included:
>
> Several nights' gala coverage of the 2005 film festival for Page 1 as well as Leonardo DiCaprio interview.

It will be recalled that at one of the rallies described above the employees placed duct tape over their mouths. On July 30, the News-Press published a column by Roshell entitled "*It's a sticky subject: Creative uses for duct tape."* The article concluded:

> There are downsides to duct tape, of course.
>
> "I recently had occasion to discover that it doesn't taste that great," confessed a colleague of mine.
>
> He joined me and other News-Press reporters for a press conference this month, when we slapped duct tape over our mouths to protest a company communication pol-

> icy that we believed is too restrictive. Covered by media nationwide, the event taught me two new uses for duct tape:
>
> It's great for making a loud statement without saying a word.
>
> When removed briskly and with no small amount of courage, it saves you a bundle on lip-waxing.

The next week, on August 6, the News-Press published another column written by Roshell and entitled *"What I know about reporters: It's not about the money."* It included the following:

> Our newsroom recently lost some impassioned journalists, the kind of folks who dropped into the office on weekends because it was their favorite place to be. Many of them were mentors to me, and the chance to marvel at their particular passion for the trade was no small part of why I enjoyed coming to work.
>
> . . . .
>
> These folks (who, it's worth noting, had the most finely tuned b.s. detectors I've ever encountered) challenged me to ask the tough questions, look at both sides of every issue and keep my own bias out of my news stories. And last month, when they felt those basic journalistic tenets were being compromised by the paper's management, they left their posts. But far more of us chose to stay.
>
> Some observers of the current News-Press controversy question our integrity for continuing to work here. Others pardon us on the assumption that we can't afford to leave. The truth is that many of the folks who resigned couldn't afford to leave either.
>
> . . . .
>
> Credibility is a reporter's commerce. Without it we are not journalists—we are typists. So we guard it carefully, like a dancer protects her legs, a surgeon her hands. If [Laura] Schlessinger can trust me, you can, too, when I tell you the News-Press staff writers would never put job security over journalistic integrity.

As mentioned briefly above, on August 10 Steepleton made a number of additional work assignments to newsroom employees, including Roshell. Steepleton gave Roshell the new task of "News-feature stories of the day: Taking the best of the wire and localizing it for A-1, and Life section as appropriate." Huebner, the News-Press' life section editor and Roshell's supervisor at the time, clarified with Steepleton that this was an additional assignment for Roshell as time permitted. Huebner conveyed this to Roshell, who was on vacation at the time. Roshell responded by e-mail dated August 14:

> Hi guys,
>
> I was on vacation when these changes were announced, but [Huebner] filled me in on the plan. Sounds like fun! I look forward to helping out the news section when my Life schedule permits it. Thanks for thinking of me.

On August 16, 6 days after the Union filed its petition to represent the News-Press employees, Steepleton told Huebner that Roshell's column was being canceled under a new policy. Steepleton told Huebner that the new policy was being implemented so as to remove the appearance of bias in the news pages and that all columns written by staff were going to be cancelled. He also indicated that another purpose of the new policy was to make more space for other stories. Because there were several freelance writers whose columns appeared in the Life Section, Huebner asked if the new policy applied to them too. Steepleton said no, only to staff written columns. Huebner asked if the staff written sports columns were going to be canceled and Steepleton replied that they were not being canceled at that time. The result was that under the new policy as announced by Steepleton the only column then being canceled was Roshell's. The next day Huebner contacted Steepleton on the matter and explained that because Roshell's column was the only one being canceled under the new policy it gave the appearance that the paper was retaliating against Roshell because of her union support; she asked Steepleton to consult with his superiors on this matter. Steepleton declined to do so. Huebner then informed Roshell that her column was being canceled pursuant to a new policy. After being asked by Roshell, Huebner explained that only Roshell's column was being canceled at that time. Roshell then met with Huebner and Steepleton. Roshell stated that she wanted a clarification on why her column was cancelled. Steepleton answered that there was a new business model that called for more reporting. He said, "Reporting, reporting, reporting." He explained that there were not going to be any more personality columns. Roshell asked about the Schlessinger column. Steepleton replied, "Let me restate that. No staff-written personality columns in the news or Life sections." Roshell asked if any other columnist were going to be canceled and Steepleton said he did not know whether the new business plan would apply to sports columnists. She asked if she would continue to write the theatre and music reviews as she had done in the past, and whether other reporters would continue to write restaurant and dance reviews. After Steepleton told her that she would, Roshell asked, why because those reviews contained her opinion? Steepleton explained that those reviews were on a single topic.

During the time period that Roshell's column was eliminated Mark Patton wrote a sports column; he was hired as a columnist. Maria Zate compiled a weekly column of local real estate deals, but this was not the type of a column where she expressed opinions. Neither of these columns was eliminated.

On September 10, News-Press photojournalist Ana Fuentes wrote an opinion piece that was published by the News-Press. In that article Fuentes describes how Michael Todd had on 2 consecutive days told her that someone wanted to kill her. In the article Fuentes tells how Guiliano described these comments as a "joke" or "dark humor." Fuentes commented how none of the reporters in the newsroom had approached her about the incidents to prepare a story about them. She described how she as a farmworker's daughter and her family were included in articles in the News-Press covering the Nuevo Oakies/Mixtec exhibits and reception but she asked in the opinion piece:

> Where is your inclusion now? Where is the protection and interest you seemed so dedicated to document? No more grant-making coffers to appease, so you do not care.

> . . . .
>
> The current labor union placards read: "Banish the bias." Every time I read this, I say to myself, I wish they would. I wish they would banish the bias. Some of those same people are still working in the newsroom, just as biased as ever. Not one asking me how I feel, what happened, are you OK? Not even out of journalistic curiosity or instinct.
>
> . . . .
>
> The underlying message is that I am dispensable. They looked the other way because it benefited them. They marginalized and discomforted my life. They made a mockery of my life and my profession, and yet they are being given accolades and awarded for their ethics. Pontificating on journalistic ethics at roundtable discussions.

The next day Roshell asked Apodaca why Fuentes was allowed to write an opinion column after Roshell's column had been canceled. Apodaca replied that the circumstances were different; at the trial Apodaca explained that the circumstances were different in that Fuentes' column ran in the opinion pages while Roshell "wanted to write her column in the news pages." As pointed out above, however, Roshell's column did not run in the news section of the newspaper and in this instance I do not do not credit Apodaca's after the fact testimony.

On October 3 Roshell resigned from her position at the News-Press;[5] she had worked there for 11 years.

Steepleton testified that he made the decision to cancel Roshell's column. However, he also testified that on July 6, the same date that Roberts and a number of others resigned from the News-Press, he received a call while still on vacation from Travis Armstrong, the News-Press' editorial page director. During that conversation Armstrong offered Steepleton the position of city editor and Steepleton accepted. Together they decided that Steepleton should not longer continue to write a column that he had been writing for the News-Press. Also, according to Steepleton as part of a reorganization the "decision was that we were going to eliminate columns that *reporters* wrote in our newspaper [emphasis added]." Steepleton, however, provided no other details concerning this conversation. He did not provide the context in which the alleged decision to eliminate reporter-written columns was made. Nor did he attempt to reconcile this testimony with his earlier testimony that he made the decision to cancel Roshell's column. Steepleton identified Amy Orozco, who was *not* a reporter but instead was an editor for the News-Press as someone whose column was eliminated. In response to the leading question, "Was that cancellation part of this reorganization?" Steepleton unsurprisingly answered, "Yes." Steepleton also testified that columns written by Steven Murdoch, Rochelle Ross, Helen Thomas, Bill Etling, and Randy Alcorn were also eliminated. He testified that these columnists were stringers[6] and not employees and there is no evidence that these persons were also reporters as opposed to simply columnists. Nor did he provide the dates on which those columns were canceled. However, in response to the question, "Now the columns that were eliminated were these columns of employees of the paper or were they columns of independent stringers or both?" Steepleton clarified that it was both. Barney Brantingham also had a column with the News-Press; his column ended when he resigned on July 6. As indicated above, on July 30 the News-Press began publishing a column by Laura Schlessinger. Earlier in his testimony upon examination by the Union's attorney, Steepleton, identified Schlessinger as a "stringer," but conveniently Schlessinger column did not fit under the column-elimination decision because Schlessinger was not also a reporter. I do not credit Steepleton's testimony that Roshell's column was eliminated as part of a broader policy to eliminate columns. Rather, I conclude he fabricated this rationale and then gerrymandered it so that it conveniently applied only to Roshell.

Analysis

The cancellation of Roshell's popular and award winning column was akin to a demotion. Applying the *Wright Line* analysis, Roshell was among the more active and visible union supporters. She expressed that support in the two columns that she wrote, as described above. Animus towards that activity by the News-Press is shown above by the antiunion campaign it conducted as described above and below by the many violations of the Act that followed quickly after the cancellation of Roshell's column. Timing supports the General Counsel's case in two respects. First, the column cancellation followed by a number of days the two columns Roshell wrote expressing her support for the Union. Second, the cancellation was made shortly after the Union filed its petition to represent the employees in the news department.

I turn now to determine whether the News-Press has shown that it would have terminated Roshell's column even in the absence of her union support. To be sure, the News-Press had expressed its view that there were too many columns appearing in the newspaper, and this concern predated the arrival of the Union on the scene. In fact, as described above, some columns were eliminated but I have concluded that the News-Press has failed to show by credible evidence that they were eliminated as part of a new business plan or model that would include the elimination of Roshell's column. Importantly, the News-Press had recently added Schlessinger's column and continued to run the sports column. Finally, to the extent that the News-Press relies on Steepleton's testimony to explain a lawful reason for canceling the column, I have concluded that his testimony is not credible. In conclusion, I fail to find any lawful explanation to support why the News-Press cancelled Roshell's column, so I do not even get to the point of assessing whether the News-Press has met its burden of showing that it would have canceled the column for such reason. Rather, this conclusion serves to buttress a finding that the cancellation was unlawful.

[5] The News-Press offered testimony concerning a numbers of e-mails exchanged between Steepleton and Roshell after her column was canceled; this testimony and these documents were received in the record in the absence of objections. I have reviewed those documents and conclude they are not probative of any matter at issue in this proceeding.

[6] Steepleton described a stringer as someone who is not employed by the News-Press but is a contract per piece typewriter.

The News-Press argues that even if it did cancel Roshell's column because of the prounion slant of her last two columns it had a First Amendment right to do so. But I have concluded above that while those two articles played a prominent role in the decision to cancel Roshell's column, her other union activities likewise entered into the decision. More importantly, the News-Press' First Amendment right certainly would have allowed it not to publish those columns if it chose not to. It could have instructed Roshell not to cover the union organizing effort in her columns. For example, the record shows that McCaw and von Wiesenberger were dissatisfied that the content of columns written by Martha Smigless had shifted from being gossip-oriented to being political; they directed Smigless' superior to have Smigless refocus the column back to its original intent. The News-Press did neither of these; instead it canceled Roshell's column altogether. This the Act forbids and the First Amendment cannot be stretched so broadly as to preempt the Act in this regard. *Passaic Daily News,* 266 NLRB 898 (1983), remanded 736 F.2d 1543 (D.C. Cir. 1984), modified 276 NLRB 605 (1985). Because Roshell resigned her employment with the News-Press the General Counsel does not seek a restoration order of the column. By canceling publication of the column written by Starshine Roshell because she supported Union, the News-Press violated Section 8(a)(3) and (1).

B. Threats and 2-Day Suspensions

The complaint alleges that on or about August 24 Steepleton unlawfully threatened employees with discipline if they engaged in an "employee delegation."[7] The complaint also alleges that on August 31 the News-Press issued 2-day suspensions to the following employees because they supported the Union:[8] Al Bonowitz, Kim Favors, Karna Hughes, Rob Kuznia, Lara Milton, Mike Traphagen, Dawn Hobbs, George Hutti, Barney McManigal, Tom Schultz, and Alan McCabe. Lastly, the complaint alleges that on August 31 Apodaca unlawfully threatened to discipline employees if they engaged in an "employee delegation."

On August 24, the employees prepared and signed the following:

> Dear Wendy McCaw,
>
> Please respect our wish to be represented by a union without fear of threats or harassment.
>
> In recent weeks, some of us have been taken off our beats, removed from night editing jobs and summoned to Human Resources to answer questions about our stories. One union supporter was punished with loss of her column. The car of another supporter was photographed because of pro-union slogans in the window.
>
> Now we are confronted with a conflict of interest policy that requires us to seek an editor's permission before speaking in public on our own free time about our efforts to unionize.
>
> Finally, some of managers have been pressured to dissuade us from forming a union.
>
> These actions are unprecedented at the News-Press and clearly seek to rob us of our individual liberties. Please stop trying to intimidate us. Let us make up our own minds about joining a union.

The letter appears to have 25 signatures. The first signature was that of alleged discriminate Melinda Burns, whose discharge is discussed below. It was followed by the signatures of alleged discriminatees Dawn Hobbs and Tom Schultz.

That same day around 3:30 p.m. about 15 employees assembled in the newsroom for the purpose of delivering the letter to McCaw. The employees then walked to McCaw's office located some 50–60 feet from the newsroom. Steepleton, who was nearby, called Apodaca and told her that the employees had gotten up and were walking through the newsroom; he asked Apodaca what he should do. Apodaca advised Steepleton to tell the employees to return to work. Steepleton then did so but only some of the employees heard him. There is an enclosed reception office area in front of McCaw's office through which access is gained to McCaw's office. The employees knocked on the outside door, but the employees received no response from either office. The employees then decided to deliver the letter to Apodaca instead. Her office is located downstairs from the newsroom and McCaw's office. Upon arriving at Apodaca's office an employee knocked on the door; the employees waited outside because they could see through the window that someone was in the office with Apodaca. Apodaca then opened her door and spoke to the employees from there; the employees remained outside her office. Schultz explained to Apodaca that they wanted to deliver a letter to McCaw but McCaw was not there. Hobbs asked if there was a lawyer present to whom the employees could deliver the letter. Apodaca said she would try and locate McCaw for them and Apodaca went inside the office, made a telephone call, came to the door, and told the employees that McCaw was not available but Apodaca would try and make an appointment for the employees to meet McCaw. The employees and Apodaca agreed that the employees would try to meet again with McCaw at 4 p.m. The employees returned to the newsroom passing Steepleton on the staircase and resumed working. The entire event lasted about 10 minutes. There was no yelling or chanting or stomping of feet or any type of disruptive behavior. There is no contention that this was done on worktime as opposed to the afternoon breaktime. At around 4 p.m., Schultz called Apodaca and asked if McCaw was available. He also asked if von Wiesenberger might be available. Apodaca put him and hold and then told Schultz that von Wiesenberger was not available. So the employees decided to simply give the letter to Apodaca and they began gathering to go down to her office. At that point Steepleton told the employees to sit back down or they would be sent home. The employees then sat down. Schultz responded that he had just spoken with Apodaca and had made ar-

[7] That term was never fully explained at trial. But whatever it meant, the allegation clearly covers the events described below.

[8] I allowed the General Counsel to amend the complaint to add Alan McCabe to the list of employees. The News-Press objected on 10(b) grounds. However, the charge in Case 31–CA–27965 was timely filed and clearly allows McCabe's name to be added to this allegation in the complaint. Also, at the hearing the General Counsel withdrew the name of Melissa Evans from this allegation.

rangements with her for the employees to bring the letter to her. Schultz asked if he could call Apodaca because she was expecting the employees to bring the letter to her. After Steepleton agreed Schultz called Apodaca and explained what had just transpired; they agreed that Schultz himself could bring the letter to her. He then did so.

That same day Schultz sent the following e-mail message to Apodaca:

> On behalf of myself and the other signatories to our letter to Mrs. McCaw, thank you for handling our request earlier today. I appreciate your efforts to determine whether she, Mr. Von Wiesenberger, or perhaps one of their attorneys might be available to personally accept our letter.

Apodaca later replied, "You're Welcome."

On August 31, 7 days later, Steepleton sent the employees the following letter:

> Please be advised that you are being suspended without pay for a period of two workdays. . . .
>
> On Thursday, August 24, you and a group of other employees assembled in the Newsroom en masse and were told by me that you could meet in the lunch room if you wanted to assemble, but you could not do so in the Newsroom and you needed to get back to work. You ignored these instructions.
>
> You proceeded to march to Mrs. McCaw's office, assembled there a group of 11 or more, occupying the small area in front of the anteroom. Even though there was no one at her assistant's desk in the anteroom, someone in the group knocked loud enough so that Mrs. McCaw would hear knocking and come out of her office and be surprised, confronted, and intimidated physically by your group. When she did not (she was not in her office) someone yelled "let's try the side door" but did not when another yelled, "the girl is not there then she is not there."
>
> This action was a clear and outrageous attempt to physically intimidate Mrs. McCaw and everyone else in the workplace by the improper and alarming confrontation undertaken after clear instructions to return to work. I then instructed you to return to work a second time; you again ignored my specific direction. Instead, you continued to disrupt other workers by parading through the building, interfering with their work activities, the activities and movement of employees and others on the stairs and in the hallways. You then interrupted a meeting in Yolanda Apodaca's office.
>
> You are hereby advised that any repeat of such action, or any similar action, will lead to the immediate termination of your employment.

No evidence was submitted to support the various assertions in the suspension letter that the employees had engaged an attempt to physically intimidate anyone or disrupt the work of others. The suspensions were never imposed.

On August 31 Apodaca issued a memorandum addressed to all newsroom staff that read:

> As you are all aware, last Thursday, August 24th, during the middle of the work day, a group of about 11 of our newsroom employees marched en masse through the building, causing a disruption. Twice they were directed to return to work by [Steepleton], but they refused. The group assembled in front of the co-publisher's office and continued to interfere and disrupt the workplace, intimidate and interfere with workers and impede access to the hallways and stairwells as they proceeded to march through the building.
>
> This type of disruption and insubordination is unacceptable and will not be tolerated. We will not permit employees to threaten and intimidate other employees in this way or any other manner.
>
> Any employee who engages in this or similar behavior in the future will be subject to discipline up to and including termination.

Again, no credible evidence was submitted at the trial to support the assertions in the memorandum that the employees engaged in the activities had threatened, intimidated, or interfered with anyone or had impeded anyone's access.

Late the night of August 24 Hobbs sent Schultz an email message that among other things, congratulated him on doing a great job that day. He replied early the next morning, in pertinent part:

> Today was very interesting. I think the fact that we dragged it out as long as possible was a great thing. I felt really confident about how I handled the phone and all that, and that everybody was so calm even as [Steepleton] got UNGLUED. Their signals were CROSSED 100 percent. [Steepleton] and [Apodaca] were on totally different pages. I luuuuved that.

As indicated above, I have relied on Schultz' testimony, among others, in finding the facts in this section of the decision. The New-Press challenges Schultz' credibility that the letter-delivery was free intimidation or disruption based on an e-mail message he sent to about 25 persons still later that morning that read:

> Re: update on today's delivery!
>
> Peeps, we rocked the house, crossed their wires and got em unglued. Way to go. Anybody feel free to grab me for the full run down on the letter delivery.
>
> . . . .
>
> Lastly, please let your contacts know that our yard signs and window posters are AVAILABLE. Anybody who wants these should be able to have a pile delivered on their doorstep. Let's canvas [Santa Barbara] with these bad ass (not to mention old-skool letter pressed) placards.

When read in context with the surrounding circumstances, I conclude that the email was nothing more than a self-congratulatory message phrased in generational slang describing what Schultz perceived to be a successful outcome to what I conclude was conduct protected by law.

On September 5, a piece labeled *"Our Opinion: Union tactics, bias aren't welcome"* was published by the News-Press. The piece-related tactics used by the Union and indicated that what "this community and our employees should not have to put up with is any sort of intimidation by anyone even remotely

connected to the organizing campaign. The News-Press management already has needed to take steps to make sure that disruptive behavior doesn't continue inside the News-Press building."

On September 5, Schultz sent another e-mail message that read in part:

> [H]earing loss . . . must be due to the sonic boom we created during our blitzkrieg through the newsroom on our way to Wendy's office. Dammit, I must have banged on that sauce pan to close to my head right before jackhammering our demands into the floor at HR.

This was obviously a facetious response to the News-Press' descriptions of the events of August 24. It confirms that these messages sent by Schultz were not meant to be taken literally.

On September 7, McCaw and von Wiesenberger sent a memorandum to all employees that read, in part:

> We regret that in last few weeks those of you who are personally and professionally dedicated to your jobs are being placed in an uncomfortable and difficult situation by a small group of employees. The way in which a large number of newsroom staff marched en masse throughout the building a couple of weeks ago was a deliberate attempt by them to confront, threaten, and physically intimidate all of us in the building and interfere with our work.
>
> These aggressive actions created emotional and physical threats among our staff and will not be tolerated. The News-Press intends to maintain a safe work environment and protect the welfare of all its employees. Such actions violate our company policies, professional standards and are an impediment to our ongoing business operations. Disciplinary notices have been sent to those employees who engaged in this unacceptable behavior. They have been advised that any repeat intimidating behavior will lead to further disciplinary action.
>
> . . . .
>
> We fully expect the union to continue their usual pressure tactics in an effort to force the company to give in to their demands. This includes the subscription cancellation campaign being waged. . . .

Analysis

In *Quietflex Mfg. Co.,* 344 NLRB 1055 (2005), the Board comprehensively reviewed existing law concerning work stoppages by employees for the purpose of protesting their working conditions. I apply the law described in that case. The work stoppage here was brief, lasting only about 10 minutes. The march was peaceful and not disruptive. This distinguishes this case from *Detroit News,* 341 NLRB 947 (2004), and similar cases cited by the News-Press in its brief. The march was in part to protest the unlawful conduct by the News-Press. The employees had no grievance procedure available to them that could have resolved the subjects of their protests. I conclude that the march was activity that is protected by Section 7 of the Act. Although the suspensions were not carried out, the letters of suspension were not retracted; Apodaca testified that she considered them to be disciplinary reprimands. Moreover, in the September 5 opinion piece the News-Press indicated that it would continue to prevent what it labeled as intimidation and disruptive behavior but what I have concluded was activity protected by the Act. And in their September 7 memorandum to the staff McCaw and von Wiesenberger wildly mischaracterized the march on August 24 and indicated that if the employees again engage in that activity they will again be disciplined. I find that by issuing letters of suspension to Al Bonowitz, Kim Favors, Karna Hughes, Rob Kuznia, Lara Milton, Mike Traphagen, Dawn Hobbs, George Hutti, Barney McManigal, Tom Schultz, and Alan McCave because those employees engaged in protected concerted activity, the News-Press violated Section 8(a)(3) and (1). I have also described above how when the employees began to resume their protected concerted activities Steepleton threatened to send them home if they continued. Apodaca also threatened the employees with discipline if they again engaged protected union activity. I find that by threatening to discipline employees if they engage in protected concerted activity the News-Press violated Section 8(a)(1).

C. Termination of Melinda Burns

The complaint alleges that on about October 27 the New-Press fired Melinda Burns because she supported the Union. The New-Press asserts it fired Burns for bias in her reporting. Burns did not receive any written warnings or discipline of any type during her employment at the News-Press.

Some background is needed in the operation of the news department in the News-Press. Steepleton, as associate editor, is in overall charge of the newsroom. Reporting to Steepleton are a business editor, a life section editor and associate life section editor, and a sports editor. After a story is written it is sent to the editor who assigned the reporter to write it. The assigning editor reviews it and checks it for grammar, misspellings, completeness, and bias, among other things. If the story is lengthy and in depth then the assigning editor may review it several times as it is being created and discuss it as needed with the reporter. From there the story is reviewed by another editor who again reviews the story for, among other things, any bias. After review by the other editor the story goes to the copy desk where a headline is created by a copy desk editor. In other words, one of the key functions of the editors is to review the stories prepared by reporters to assure that the stories are not biased. And the identification and elimination of bias is a process that starts but does not end with the reporter. In this regard it is important to note that there is no evidence that the role editors played in attempting to eliminate bias or that the standards that they were to apply concerning what constituted bias were changed by McCaw and von Wiesenberger when they became copublishers.

Burns worked for the New-Press for 21 years. At the time of her termination she was a senior writer, a position she had occupied since 1995; as such she worked on projects that took time to create such as investigative reports. She was 1 of only 3 senior writers among the staff of about 25 reporters for the New-Press. During her work with the New-Press, Burns received about 15 awards and 5 fellowships. In 2000, the News-Press touted Burns' achievements in its advertising. In 2003, the New-Press nominated her for a Pulitzer Prize for reporting. Burns graduated from Harvard University magna cum laude

and worked for Los Angeles Times before joining the New-Press.

On October 1, the New-Press published a page-one article authored by Burns bearing the headline *"Danger Zones."* In general, the article concerned safety issues for children arriving at school and the increase in traffic at schools during the drop-off and pickup times. The article reported on the death of a 12-year old who was riding a bicycle on his way to school. At the time the article was published voters in Santa Barbara County were considering whether to approve measure D; if passed this would raise the sales tax to provide funding for various transportation projects in the county. The article reported on how measure D, if passed, would provide funds for safety improvements around schools. It also reported the viewpoint of opponents of measure D that other sources of income should be used to improve school safety. Steepleton edited the article and approved it for publication. Burns had written about 10–15 stories for the News-Press about measure D before the October 1 article.

Thereafter, proponents of measure D used portions of Burns' article, along with the New-Press' logo, in a brochure they prepared and circulated to members of the community. It is not uncommon for interest groups to use articles from the press to their advantage in their advertising. The New-Press, however, had previously "vociferously opposed Measure D" in its editorial pages and it issued a statement to inform the public that it should not be misled by the brochure into believing that it now supported the measure. On October 25, the New-Press published an article written by Steepleton concerning the matter.

On October 10, the New-Press published another page-one article written by Burns headlined *"Axis of Inequality."* Keep in mind that the copy editors and not the reporters create the headlines. Burns explained at the trial that her assignment was to cover an activist forum and she accurately did so. Under those circumstances, there was no obligation to seek out other viewpoints because she was not writing a comprehensive story on immigration issues. Steepleton gave her the assignment to cover the activist forum. The same day the article ran von Wiesenberger received an email message from the publisher of the Montecito Journal stating:

> If Melinda Burns' front page article on immigration isn't a perfect example of liberal bias and/or advocacy journalism, I don't know what is. Perhaps you folks just reprinted a La Casa de la Raza press release by mistake?

Von Wiesenberger forwarded the message to McCaw who noted:

> Couldn't agree with him more. Need to discuss this with [Steepleton] as well as her upcoming article. Ask [the publisher of the *Montecito Journal*] if he would like to send a letter to the editor for publication about this. He needs to know he's right about this.

Meanwhile, Burns continued to report on measure D. On October 14, she reported on how a taxpayers group opposed to the measure had asked for the State to investigate the use of public funds by an organization in favor of the measure. On October 15, the News-Press published another page-one story Burns wrote on measure D. Both articles were approved for publication by editors of the News-Press.

Steepleton testified that he made the decision to fire Burns; that decision was made without any warning to Burns that she had engaged in any conduct that might warrant discharge. The October 27 termination letter Steepleton gave Burns provides a lengthy explanation of the reasons for her termination; relevant portions are set forth below:

> Reporters have a solemn obligation to report both sides of the issues about which they write.
>
> A reporter may not inject personal views into the articles. They must always be balanced. Possibly, there is no greater duty of a reporter. The public relies upon it. Despite counseling, admonition and warnings over the past five years, you have ignored this duty and consistently produced biased and one-sided reporting which promotes your own personal views. You have been given repeated warnings, and every opportunity to improve, however, you have chosen not to so. We are therefore compelled to terminate your at-will employment agreement. . . .
>
> Your history of biased reporting has been well documented in your personnel file for years by many managers:
>
> - In 2001: Your annual review stated: "Melinda tries to be impartial always, but . . . it can be difficult to curb unintentional bias on intimately familiar subject matter." Editors at the time reminded you "to get many voices from all sides of an issue."
> - In 2002, your evaluation by then Managing Editor Linda Strean stated that "(Melinda) has been criticized in the past for letting her own strong feelings creep into her stories. That still occurs, but she is trying to be on guard against it."
> - Your 2003 review, signed by then City Editor Jane Hulse, and Linda Strean stated: "We are seeing a troubling trend in her writing. Her personal views on environmental and social issues are creeping into her stories which keep her from presenting a full, unbiased picture of the subject matter."
> - In your 2005 evaluation then Managing editor George Foulsham wrote: "I do believe she carries a green bias, and while she might disagree with that assessment, she has made a conscious effort to address concerns in that regard."
>
> Despite this documented full and long history of biased reporting, you have utterly failed to change your ways. It is evident that you choose to remain biased in your reporting. On October 10, 2006, in an article entitled "Axis of Inequality," you reported on an immigrant's rights discussion at La Casa de la Raza and failed to include any opposing viewpoints. This is an important issue to many in our community and it is imperative that both sides be presented. You failed to do so.

> Another article, one which triggered this decision, was your report on ballot Measure D that ran on October 1, 2006. Pro-Measure D supporters thought portions of your article were so weighted in their favor that they used them as campaign literature. Portions of your article ended up in a campaign mailer from the "Yes on D" campaign distributed to thousands of voters. Upon examination, your article contained only perfunctory reference to the views against the Measure compared with advocacy by you for the [M]easure. Your later Measure D reports that ran on October 14 and 15 also did not adequately present opinions of those who might have a viewpoint that differs from the pro-Measure forces. Clearly, you have axes to grind, and you express it in the stories you write. The additional reports that ran on October 14 and 15 only contained a single perspective and what had clearly been presented as your viewpoint, and did not adequately present this ballot issue. The present management does not believe the former management should have tolerated your biased reporting for so long. We believe it is not the responsibility of management to continue to steer you away from bias or edit your stories to remove your bias. The responsibility to keep out bias is yours and the duty to be impartial is a personal one for which you are personally responsible. Your supervisors are not responsible to monitor your articles for bias.
>
> In light of the repeated warnings and years of cautioning and counseling, your unwillingness to change your ways is inexcusable. You have been given five years to improve your reporting and have chosen not to.You are reminded that the confidentiality provisions in the employee handbook require you to maintain the private information concerning your employment at the News-Press.
>
> We will respect your privacy and will not initiate any comments upon the reasons for this termination. However, should you initiate, either directly or through your many long-term connections with fellow journalists, public comment on the same, we will respond with the true facts concerning the termination, including your long history of biased reporting, which almost every supervisor and manager for whom you reported made it a point to note in your personnel file.

In the 2001 evaluation (actually for the year 2000) referred to in the termination letter, Burns was rated as "consistently exceeds expectations," the highest rating possible under the rating system used that year. The entire quote regarding her alleged bias in that evaluation, only portions of which appears in the termination letter, is:

> Melinda tries to be impartial always, but as with any senior status/veteran reporter, it can be difficult to curb unintentional bias on intimately familiar subject matter. She is constantly vigilant, and city editors watch for any environmentalist bias that could slip into stories and remind Melinda to get many voices from all sides of an issue.

In her evaluation for 2001, not mentioned in the termination letter, Burns received an overall score of 6 out of a possible 7. The evaluation contained the comment, "My only concern, and I should say that it has not been a serious problem at any time, is that she has a very strong liberal stance, and occasionally seems initially reluctant to contact or play up a contrary view." Burns received a rating of 6 in that category of the evaluation. There are no complaints of bias in Burns' 2002 evaluation. In the 2003 evaluation referred to in the termination letter Burns was rated as "Consistently average. Improvement required." In the category of the evaluation that referenced the concerns over her bias. Burns' 2004 evaluation, not mentioned in the termination letter, states, "She has been criticized in the past for letting her own strong feelings creep into stories. That still occurs but she is trying to be on guard against." She received a rating close to being "Consistently Excellent" in that category of her evaluation. In the 2005 evaluation referred to in the termination letter the mention of Burns "green bias" occurred in the category "Accuracy/quality of work." In that category Burns received a numerical rating of 5, the highest possible score and the highest rating Burns received in any of the eight categories listed in the evaluation. The "Professional" category in that evaluation contains the following comment: "Melinda is very professional and polite, and now that we've addressed my concerns of bias I believe she's a more balanced reporter too."

Burns' termination letter mentions the article she wrote on October 1 as the incident that triggered her termination. As indicated above, Steepleton edited the article and approved it for publication; he conceded that he did not think it was biased at the time he reviewed it. He testified that he received a verbal reprimand "around this time for allowing biased reporting to get into the newspaper." Of course editors reviewed the other articles mentioned in the letter and they approved them for publication without sending them back to be rewritten to eliminate bias; Steepleton conceded that he did not investigate who had performed that editing. Concerning the portion of the termination letter describing how promeasure D forces had used a portion of the article Burns had written, Steepleton conceded that politicians or proponents of measures frequently use newspaper articles in their campaign literature. In the termination letter, Steepleton refers to an article written by Burns entitled *"Axis of Inequality,"* Steepleton conceded that typically the copy desk, and not the reporters, creates the headlines for stories. Steepleton also conceded that not all articles must contain both side of an issue. For example, reporting on an event or conference would not require contacting the other side.

Linda Strean worked at the News-Press as managing editor from June 2003 until March 2005 after having worked at the San Francisco Examiner as page 1 editor, various management positions at the San Francisco Chronicle and several other newspapers. Strean also taught a journalism class at the University of California, Berkeley, Graduate School of Journalism. While working at the News-Press, Strean frequently reviewed Burns' work; she signed off on Burns' 2003 evaluation that Steepleton quoted in Burns' termination letter as well as Burns' 2004 evaluation not mentioned in that letter. Strean did detect bias in Burns' reporting, but it was not a consistent problem and that when she pointed out the problem in the context of a story Burns was invariably cooperative and addressed the concern by revising the story. She explained:

> Every reporter brings a set of experiences and opinions to their work and so it's sort of a constant job of an editor to make sure that that doesn't creep into the work and bias also appears in stories that's not through any fault of the reporters. Sometimes it's inexperience. Sometimes it's not knowing all the stakeholders who need to be addressed in a story and that's when an editor comes in, as well, to try and make sure that all—all points are kind of covered.

Based on her experience at the News-Press Strean explained:

> An editor is there to be an extra set of eyes on a story and to try and read it in the way a reader might and make sure that all stakeholders are represented in a story, that it's told fairly and it's told accurately. . . .

Strean described Burns as "one of the finest reporters I've ever worked with."

Michael Todd worked at the News-Press from March 2000 until he resigned as part the group resignations on July 6, 2006. Todd directly supervised Burns from September 2003 until his resignation. He described himself as right of center while Burns was left of center, but those perspectives together lead to balanced reporting on the many contentious issues covered by Burns.

Analysis

I again apply the *Wright Line* analysis in resolving the issue of whether Burns' termination was unlawful. Burns was one of the two leaders in the News-Press supporting the Union. She was one of the Union's most visible supporters, as fully set forth above. The News-Press' hostility towards the union activities of the employees is documented above and below. The termination came barely a month after the Union overwhelmingly won the election in which Burns had played such a significant role. The termination came in the midst of the continuing effort by the employees to gain immediate recognition and in the middle of a continuing unlawful campaign by the News-Press to thwart that effort. I take into account the fact the termination came without warning to an award winning, 21-year veteran employee with an otherwise unblemished work record. I conclude the General Counsel has amply met his *Wright Line* burden.

I turn now to examine the record to see if the News-Press would have fired Burns even if she had not supported the Union. In the termination letter Steepleton quoted from prior evaluations of Burns that mentioned concerns for bias. But in context those concerns were not significant enough for the News-Press to even deny Burns a bonus, much less merit disciplinary action. Rather, the fact that the comments in the evaluations were taken out of context only serves to show that the News-Press was seeking to create support for its decision to fire Burns where none existed.

The October 10 article concerning immigration is also mentioned in the termination. But Burns' assignment was to cover an activist forum and she accurately did so. Under those circumstances there was no obligation to seek out other viewpoints because she was not writing a comprehensive story on immigration issues. Steepleton gave her the assignment and he conceded that not all articles must contain both side of an issue. For example, reporting on an event or conference would not require contacting the other side. I note that the various editors approved this article for publication; they are assigned according to the News-Press' own procedures to search for bias, yet they apparently found none. Nor were any of these editors informed by the News-Press that they were not properly doing their jobs. This fact is important because it refutes any contention that the News-Press, with McCaw and von Wiesenberger as co-publishers, was trying to refine or change the past standards of what constituted bias. Under these circumstances I conclude that the News-Press has failed to show any shortcomings by Burns concerning this article.

The event that triggered Burns discharge, according to the News-Press, was her coverage of measure D in her October 1 article. In support of its contention that the article was biased, the News-Press points to the fact the proponents of measure D reprinted portions of Burns' article. But as Steepleton conceded it is not unusual for proponents to use News-Press publications for their partisan benefit and, of course, it does not necessarily followed that when they do so the articles were biased. In this regard there is no evidence that the News-Press has a policy of disciplining, much less terminating, employees whose articles are used for partisan purposes. To the contrary, there is no evidence that the News-Press has done so in the past or intends to do so in the future. The bottom line for the News-Press' argument is that Burns' article was biased because Steepleton said it was. Keep in mind that Steepleton himself had reviewed the article and approved it for publication, and he never explained what made him apparently change his mind. And while it is indeed the prerogative of the News-Press to define bias and to change the definition of bias, it may not use unsupported assertions as a pretext to mask unlawful conduct. In that regard no one ever told Burns that the October 1 or October 10 articles published by the News-Press were biased until that information appeared in her termination letter weeks later. Finally, it is important that the News-Press bears the burden at this point of persuading by a preponderance of the evidence not only that Burns engaged in misconduct but that it would have fired her for that conduct. Here, the News-Press failed to show that it had ever fired anyone for alleged biased reporting. This fact serves to distinguish *Merrillat Industries,* 307 NLRB 1301 (1992), cited by the News-Press in its brief. In that case the employer presented persuasive evidence that it had fired another employee for petty theft, the same reason it fired the alleged discriminatee.

At the trial the News-Press pointed to corrections it published on certain facts in the article Burns wrote on measure D. However, there is no mention of this in Burns' termination letter; instead the letter focuses exclusively on the matter of bias; nor did anyone testify that the corrections played any role whatsoever in Burns' termination. I conclude this evidence was presented as afterthought in a transparent and ultimately unsuccessful effort to buttress its case for terminating Burns.

I conclude that the News-Press has failed to show it would have terminated Burns even if she had not engaged in union activities. It follows that by discharging Burns because she engaged in union activity the News-Press violated Section 8(a)(3) and (1).

Returning to the continuing union campaign, the Union ran an advertisement on the radio criticizing the News-Press for firing Burns and urging listeners to cancel their subscriptions. It also contained the appeals "Don't let McCaw control the news" and "Help us take back the News-Press." On November 11, the union supporters held a candlelight vigil. Signs reading "McCaw Obey the Law" were displayed at that event.

On November 11, the Union and its employee supporters held an evening candlelight vigil protest outside The Biltmore Hotel in Montecito to protest Burns' discharge. The Biltmore was the site of the annual News-Press Life Time Achievement Awards.

The News-Press, in turn, used its termination of Burns for its own purposes in a piece published in the newspaper on February 28 that contained the following:

> The Facts: Yes, there was bias in the Newsroom at the Santa Barbara News-Press. So much so that an independent study conducted in 2005 revealed that over 60% of the readers believed that the news was biased. One reporter's recent story regarding a political campaign was so biased that proponents for the campaign used it as a mailer to voters. These biased reporters have either quit or been dismissed. Now the Teamsters want to bring back the bias to the News-Press by forcing the paper to re-hire these ex-employees. We think Santa Barbara deserves at least one non-biased news reporting company. Don't you?
>
> . . . .
>
> Honoring the tradition, maintaining the standard, continuing the excellence. Santa Barbara News-Press, today, tomorrow and beyond.

D. Interrogations

The complaint alleges that on about December 15 Steepleton, through a written affidavit distributed to employees, interrogated employees about their protected concerted activities and on that same date also (verbally) interrogated employees about their protected concerted activities.

On December 5, the New-Press distributed the following memorandum from McCaw to all New-Press employees:

> Our company manufactures a product, *Santa Barbara News-Press,* a newspaper of daily circulation. I made a significant investment when I purchased *Santa Barbara News-Press.* As the owner of the business, it is common sense that I have the right to have significant input into the content of the product that we produce. For anyone to suggest otherwise is just plain wrong.
>
> Like any other newspaper, we are free to express opinions on the Editorial Page of the newspaper. With respect to news, sports, and features content of the paper, we strive for good, fair, accurate reporting. Every day, there are many choices of stories to place into the newspaper. There are always more stories available than the number we choose to print. The decision of the content of the pages of the newspaper is solely that of management. Union or no union, that is not going to change.
>
> All of you know that a union is attempting to organize our newsroom employees. In the election, the union won. However, we believe that the union engaged in misconduct before the election, and we filed objections in an attempt to get another election so that employees can make a free, uncoerced choice. In the event that our objections are not successful, we will begin the collective bargaining process with the union. If our objections are successful, the union victory will be set aside and a new election had. We are awaiting the decision of the National Labor Relations Board on these issues.
>
> Every employer has the right to expect the loyalty of its employees. All employees owe a duty of loyalty to their Employer. No less an authority that the United States Supreme Court has ruled that it is disloyal for an employee to publicly disparage the quality of the Employer's product. The Court ruled that was disloyal. The Court ruled that disloyalty is clearly cause for discharge.
>
> Very recently, the United States Court of Appeals ruled that it was lawful for a Company to discharge an employee who publicly disparaged the management of the Company. The Court ruled that those communications were "unquestionably detrimentally disloyal." The Court went on to say that an employee loses the protection of the National Labor Relations Act if the employee's public attack constitutes insubordination, disobedience, or disloyalty. The fortuity of the coexistence of a labor dispute affords the employee no substantial defense. We are certainly going to respect the rights of employees to engage in activity protected by the National Labor Relations Act. We are also going to protect our management right to expect the loyalty of our employees. Public disparagement/disloyalty of the management of *Santa Barbara News-Press* and/or the newspaper it produces will not be tolerated, and appropriate discipline will be imposed.
>
> Please do not allow yourself to be "used" by a small group of employees who, in reality, are attempting to grab from management the right to determine the daily content of the pages of our newspaper. This they cannot and will not do.

McCaw admitted at trial that she issued the memorandum because employees had been displaying signs such as "Banish the Bias" and "McCaw Obey the Law." She believed that those signs were disloyal.

The New-Press has a written policy covering confidentiality. In July that policy was clarified to explicitly allow for employees to discuss wages, etc., and to allow employees to communicate with a labor organization and the media concerning unionization.

Craig Smith is a blogger in Santa Barbara; he had been reporting on events at the News-Press. Steepleton testified that he learned that someone has "leaked" the December 5 memorandum to Smith and it appeared in his blog. Steepleton testified that under his understanding of the News-Press' confidentiality policy the December 5 memorandum "shouldn't be leaked to anybody, meaning we—we should not give that information out."

On about December 15, Steepleton called each employee from the newsroom individually into the conference room at the

facility; Apodaca was also present for some of the interviews. Steepleton told each employee that he was investigating a leak of information outside the Company, that he was trying to find out who leaked the information, and he required each employee to fill in their name, acknowledge receipt of the December 5 memorandum from McCaw and sign a statement as follows:

> At no time have I provided [the December 5 memorandum] to anyone, copied or reproduced [it] or showed it with someone outside the newsroom, including Craig Smith.
>
> Executed this 15th day of Dec. under penalty of perjury, in Santa Barbara, California.

Thirty-two employees and managers signed the statement. Some employees refused to sign the affidavit; they were not disciplined. Some employees indicated that they were going to provide the Union's attorney with a copy of the affidavit; Steepleton did not voice any objections to those employees.

I describe the specifics of two employees who were involved in this matter. Steepleton handed the December 15 memorandum to Dawn Hobbs at her desk and asked her to sign it. As described below, Hobbs was a leading union activist who is also the subject of two unfair labor allegations in this matter. She asked why she needed to sign it and Steepleton answered because she was being order to and if she did not she would be considered insubordinate and proper action would be taken against her. Hobbs said that because she considered the memorandum to be a legal document she wanted to call the Union's lawyer first before she signed it. Hobbs then called the lawyer. About 15 minutes later she learned that Schultz had been asked to go to conference office; she accompanied Schultz there. Once there Steepleton told them that it did not involve a disciplinary matter and instructed Hobbs to return to her desk. Schultz then entered the conference room. Steepleton asked Schultz if he had distributed the December 5 memorandum for publication. Schultz replied, "For publication? No." Steepleton then asked Schultz if he had given it to anyone. Schultz answered that he had given it to the union attorney. Steepleton wrote that down and proceeded to ask who else Schultz had given it to. Schultz admitted that he had given it to "Marty Keegan, our Union organizer." Steepleton then summoned Hobbs to the conference room where he asked her if she had provided the December 5 memorandum from McCaw to anyone outside the building. Hobbs answered that she had given documents given to the Union's lawyer but was not sure if the December 5 memorandum was one of them. After Steepleton raised his eyebrows she explained that there was so much "paper flying" from Apodaca and McCaw she couldn't remember if it was she or someone else to sent the December 5 memorandum to the Union's lawyer. Steepleton asked whether Hobbs was going to sign the December 15 memorandum and she answered that she would not, that she needed to hear back from the Union's lawyer.

Analysis

I first determine whether the interrogations covered union activity. The questioning was so broad in scope that it reasonably tended to cover conduct protected by the Act, such as disseminating the December 5 memorandum to the Union. After all, the December 5 memorandum explicitly focused on the union organizing campaign and threatened discipline to employees who disobeyed its contents. It therefore should not have been surprising to the News-Press that employees would provide it to the Union. But the questioning of the employees covered whether the employees had done so. Indeed, the testimony of Hobbs and Schultz confirms the fact that the questioning reasonable tended to cover the employees involvement with the Union. And even after one employee indicated that he had provided the information to the Union, Steepleton did not narrow the scope of his questioning. Whatever legitimate purpose the News-Press may have had, the broad nature of its interrogations of employees exceeded that purpose. *ATC of Nevada,* 348 NLRB 796 (2006).

I now examine whether the interrogations were unlawful. In doing so, I consider all the surrounding circumstances to decide whether they were coercive. *Rossmore House,* 269 NLRB 1176, 1177 (1984), enfd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The interrogations were conducted by Steepleton, the highest supervisor in the news department. The employees had to answer the questions under penalty of perjury. There is little doubt that a threat of discipline hovered over the questioning. The fact that only newsroom employees were subjected to the interview despite the fact that the December 5 memorandum was distributed to all employees of the News-Press only serves to heighten the coercive nature of the interviews. I find that by coercively interrogating employees concerning their union activities, the News-Press violated Section 8(a)(1).

E. Performance Evaluations and Bonuses

The complaint alleges that in mid-December the News-Press issued substantially lower performance evaluations and then, based on those lowers evaluations, failed to award performance bonuses to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes because those employees supported the Union.

Steepleton prepared each of these evaluations. He conceded that he knew that each of these employees supported the Union. As the News-Press conceded in its opening statement, "Hobbs apparently appeared to be the central figure in the union organizing effort." In fact Hobbs and Burns were the two leaders in the organizing drive. The most visible and vocal union supporters worked at the city desk area at the News-Press. Evans, Hobbs, and Davison worked at the city desk at the News-Press. Burns had also worked there before she was fired. McManigal, Kuznia, Schultz, all visible union supporters who were later fired by the News-Press, also worked at the city desk.

The evaluation process was changed for the 2006 evaluations in that Steepleton decided that he would do the evaluations for the news department employees except for copy editors and sports. Employees in the last two categories were evaluated by their direct supervisors, Charles Boucher and Barry Punzal, respectively. Before Steepleton began to directly evaluate these employees the assistant city editor or secondary editor positions did the evaluations for the newsroom employees. The process was changed, according to Steepleton, because the narrative portions of the evaluation did not match up with the higher

scores given. When confronted with evidence of employees whose overall scores were increased over the previous year by Steepleton, Steepleton simply testified that he did not conclude that earlier evaluations were inaccurate. He gave no specifics to support this conclusion and a reading of those evaluations does not support his bare assertion. Moreover, it was Apodaca's job to review all evaluations to insure that the narrative portions matched the numerical scores and there is no evidence from her that she was concerned that the narrative portions did not support the numerical scores. I again do not credit Steepleton's testimony concerning why he and he alone decided to write certain evaluations for the year 2006, especially taking into account that he had supervised those employees for a period of only several months that year and after the union organizing campaign had begun July. Rather, I look to see if there was another unspoken reason to explain Steepleton decision to write the evaluations himself.[9] In doing so, I note that all employees working for the city desk and evaluated by Steepleton in 2006 received lower overall ratings that year than in the previous year.

The overall ratings in the 2006 evaluations were 2.8 out of a possible 5 for Evans (compared to 3.9 in 2005); 2.1 out of a possible 5 for Hughes (compared to 3.625 in 2005 and 3.875 in 2004); 2.7 for Hobbs (compared to the highest possible rating in 2000 5.75 out of a possible 6 in 2001, 3.73 out of a possible 5 for 2002, 3.8 for 2003, 3.6 in 2004, and 3.56 for 2005); and 2.3 for Davison (compared to 3.7 for 2005, and 3.3 for either 2004 or 2003). It is significant to note that because employees needed an overall rating of at least 3 to receive a bonus, none of these employees received one despite the fact that they all had received bonuses for each of the previous years described above. Neither Steepleton nor anyone else from the News-Press warned these employees that their performance was deteriorating in 2006.

Concerning Hughes, Steepleton noted in her evaluation several times and at trial that Hughes was repeatedly late in submitting her Public Square columns; that it was supposed to be completed 2 days in advance. A more accurate formulation of when the Public Square columns were to be completed appears in Hughes' 2004 evaluation:

> One of the goals was to have the Public Square ready up to 2 days before publication date. It has been indicated that this has happened "for the most part." [Hughes] should strive to make sure this is business as usual. And, if possible get far ahead as possible. This would help her Metro editors, especially if a late breaking story hits their desks.

Hughes received a rating of 4 out of a possible 5 in that category in her 2004 evaluation. Hughes credibly testified that her practice in submitting those columns did not change since 2004. Her 2005 evaluation had no reference to any timeliness problems concerning the submission of her Public Square columns. I note that in 2006, the year she received the low evaluation from Steepleton, Hughes was offered a promotion by her superiors.

Steepleton testified concerning several incidents to support his lower evaluation of Evans. Evans covered the religion beat for the News-Press. As described above, on August 10 Steepleton emailed the staff concerning "Newsroom assignments." The email noted that: "the following new assignments will take effect: . . . Melissa Evans: K–12 education. News and features from the schools." Steepleton related an incident where someone reported to him that Evans said that the News-Press was no longer covering religion. Steepleton talked to Evans about the matter and Evans explained that she thought the email message meant that she now had the education beat instead of the religion beat. Steepleton clarified that the education desk assignment was in addition to her religion assignment. Thereafter, Evans covered both areas. During the evaluation period Evans took 5 weeks of medical leave. At the hearing, the News-Press' attorney asked Steepleton, "Was there any issues with Ms. Evans concerning substance abuse?" Steepleton answered, "Yes." After objections, I required that the News-Press first link the substance abuse allegations to Evans' evaluation before I heard further evidence on the matter. When I asked Steepleton to point out where in the evaluation that issue was raised he quoted, "Melissa sometimes seems caught up in things other than work affecting her time in the office." and "Melissa had been out more than a month during my time as associate editor." Steepleton testified that these were polite references to the subject of substance abuse. However, Evans credibly testified that her medical condition did not cause her to be distracted at the office and that she was never told by anyone that she appeared distracted. In a two-page response to her evaluation Evans wrote, "I was shocked when I received my performance evaluation by Scott Steepleton." In that response she wrote:

> It was noted that "Melissa sometimes seems caught up in things other than work, affecting her time here in the office." I was given no specific examples of when my attention was focused elsewhere, and disagree with that statement. My attention is always focused on work.

I conclude that Steepleton's connection of Evans' "distraction" to a substance abuse problem was done simply to create a reason for going delving into Evans' medical condition. A more likely explanation for the "distraction" comment is that it referred to Steepleton's perception that Evans was engaging in union activity during working hours. Support for this inference appears below in reference to Davison's evaluation.

Steepleton also described another incident involving Evans. This involved a story Evans had written about a religious study group. By the time the story was completed the group was ending its spring sessions, so then city editor Hulse and Evans decided to hold the story until the group began again after the summer. According to Steepleton, he received a telephone call from a woman who asked about the story that Evans had written; the woman wanted to know when the News-Press was going to run the story. After Steepleton asked for some details the woman explained that Evans had interviewed her several months earlier and the story still had not run. Steepleton informed the woman that the story was set to run in near future.

[9] In addition, as the General Counsel points out in his brief, Steepleton asserted that he did not want employees being evaluated by their friends, yet he evaluated his wife and gave her a perfect score.

Steepleton then spoke with Evans about the matter. Evans advised him that she and Hulse had decided to hold the story because they agreed it would make more sense to run the story while the group was beginning a new session in the fall. Evans called the person who had called Steepleton; that person assured Evans that the information and quotes in the article were still current; Evans told this to Steepleton. The News-Press ran the story on August 17.

A point of contention concerning Hobbs' evaluation is the News-Press' assertion Hobbs shouted, "fuck you" to Armstrong on July 6 as he was escorting Roberts out of the facility. In this regard, Armstrong testified that Hulse and Hobbs, rather than Hulse and Roshell, shouted the curse words at him as he was escorting Roberts from the facility on July 6. He testified that he saw Hobbs shout the words at him. However, he acknowledged that he did nothing concerning the matter at the time or in the days or weeks following the incident. Rather, he waited until August 9 to send the following e-mail to McCaw and Apodaca:

> I waited to send this complaint formally to you both until after I was no longer in the acting publisher position, so that the human resources department can investigate it without me in that top role.
>
> I'd like to lodge a complaint against the insubordinate and unprofessional behavior of Dawn Hobbs on the morning of Thursday, July 6 when I asked Jerry Roberts to leave the News-Press building upon his submitting his resignation letter.
>
> As is widely known, Metro Editor Jane Hulse was the first that morning to swear at me saying "fuck you Travis." As I walked Mr. Roberts to the stairway, I also distinctly heard Ms. Hobbs joining in and saying "fuck you, Travis" while she was standing near Mr. Roberts' former office.
>
> Upon my return to the newsroom to address the staff, Ms. Hobbs was crying, rudely interrupted me, and stated, "What did you do to make Jerry quit?" I replied that Mr. Roberts resigned on his own.To this she replied in a rude manner, "I think you know what it is." Her confrontational manner and profanities are troubling.

According to Steepleton this conduct caused him to give Hobbs the lowest possible rating in the professionalism category in her evaluation. Steepleton was not present for the July 6 events; he did not first ask Hobbs whether she made the remark before he attributed it to her in the evaluation. He relied solely on the report from Armstrong that Hobbs had done so; he did not talk to other witnesses to the event. Significantly, Apodaca was present with Armstrong while Roberts was being escorted from the newsroom. Apodaca testified in this proceeding but gave no support for Armstrong's testimony. No one ever disciplined or warned Hobbs about the matter after it occurred. Upon receiving the evaluation, Hobbs denied making that remark and testified convincingly at trial that Roshell and Hulse shouted, "fuck you" to Armstrong as he was escorting Roberts out of the building but she did not. Instead she was sobbing as the events were unfolding. Hobbs' testimony was corroborated by Huebner, Roshell, and Evans. I do not credit Armstrong's testimony at trial.

In Hobbs' evaluation Steepleton stated:

> Her previous editors, including Jane Hulse and Don Murphy warned while they were still here that [Hobbs] was too cozy with the cops. Reporters can not be too cozy with anyone. That leads to bias.

It will be recalled that Hulse resigned as part of July 6 events. Steepleton testified about one instance in 2006 where he assigned Hobbs to do a story involving the Santa Barbara police department and, according to Steepleton, "[S]he refused to do the story." The story concerned a canine unit training that was supposed to occur in a local park but the Parks Department turned on all the sprinklers that day so the canine training never happened. Hobbs protested that she did not think it was much of a story, but after Hobbs talked to Apodaca about the matter she "ultimately agreed to do a story, mentioning that." From that incident Steepleton testified he concluded that Hobbs was too cozy with the cops. Also, Steepleton pointed to earlier evaluations of Hobbs where this comment was made. And he testified that while still senior writer he had "[n]umerous conversations [with Hulse], about her copy being late, about her swearing. She had some—she had some coarse words she would say—complaints about her still being too cozy with the Cops." There is no explanation why the city editor would have "numerous conversations" with him concerning the work performance of another writer. I again conclude that Steepleton's testimony is exaggerated if not totally fabricated.

Steepleton pointed to one incident involving Davison that had occurred in July and ended up in her evaluation. Recall that in July the News-Press was coping with the staffing issues created by the resignations that had occurred on July 6. Davison had stepped forward in the days following the resignations to perform editing work so the newspaper could get out. After she heard that others were receiving a bonus for their efforts, she requested a bonus also. Later, Steepleton asked her fill in as assistant city editor in a full-time capacity on the 2 to 11:30 p.m. shift; Davison was working 9 a.m. to 6 p.m. at that time. She asked Steepleton how long the new assignment would last and Steepleton said that he did not know. Davison said that she would consider it but that she was waiting to get a response to her request for a bonus. Her bonus request was later denied. Neither Steepleton nor Davison raised the matter again. Based on this Steepleton gave her the lowest possible rating in two categories in her evaluation, thereby indicating that Davison "Does not meet standards. Improvement required." At the trial in this case, Steepleton added that he observed Davison engaging in "nonproductive work during working hours" and that he took that into account in giving Davison those low scores. He conceded, "I would imagine that she was conducting union activity during work hours, yeah." Steepleton continued:

> I observed her and others walking table-to-table-to- table –to-table. I would walk up. It would get silent. This was in the middle of what I know to be a union organizing campaign. I didn't overhear the conversations but I think anybody would assume what was going on during working hours.

The other employees included Evans, Burns, and Hobbs. When Steepleton gave Davison her 2006 evaluation Davison protested; she asked if Steepleton had read the self-evaluation she had prepared of her work performance. Steepleton conceded that he did not. Later, Davison raised the matter of her unread self evaluation with Apodaca. Apodaca said that it would have been a good idea for Steepleton to have read it, especially because Steepleton had been in charge only since August. Apodaca reviewed Davison's evaluation and expressed surprise. Davison asked if there had been an effort to look at the scores given to reporters at the city desk like her, all visible union activists. Apodaca then pulled up a spreadsheet on her computer and explained, "[O]h, my god, I see what you mean." In her 2005 evaluation for the category "Accuracy/Quality of Work" Davison received a 5. In 2006, Steepleton downgraded Davison to a 3 in that category; he provided no explanation, either in the evaluation or at trial to support this rating. Davison discussed her evaluation with Guiliano who agreed that it was unfair. He devised a plan to set goals that she could meet and thereby get a better evaluation in the future, but Steepleton later told Guiliano, who then told Davison, that he could not do so.

The News-Press points to ratings given to other employees who it claims were union supporters. Tom Schultz, Barney McManigal, and Rob Kuznia were all active and visible union supporters and alleged discriminatees in this case. Each had their overall rating reduced by Steepleton from 3.5 on 2005 to 3 in 2006 but each nonetheless received bonuses in both years. Kim Favors went from 3.2 to 3.37; her union activity was limited to wearing the union T-shirt to work on Fridays. Tom De Walt went from 3.4 to 5.0; he wore the union T-shirt to work a handful of times. Marilyn McMahon went from 2.87 to 3.8; Apodaca testified that she saw a television broadcast of a union rally and McMahon was in that broadcast; there is no evidence that Steepleton was aware of this, however. John Zant's ratings for the same time periods increased from 4.1 to 4.6; Zant is an alleged discriminatee in this case. However, Zant was not evaluated by Steepleton in 2006 because he worked in the Sports Department and Steepleton allowed Barry Punzal to evaluate those employees. Mark Patton's overall rating increased from 3.9 to 4.6, Dennis Moran's went from 3.0 to 3.5, and Amy Weinstein went from 3.8 to 4.8, but they too were evaluated by someone other than Steepleton. Allan McCabe's overall ratings fell from 3.8 to 3.5; he participated in the march on August 24 and wore a union T-shirt to work on Fridays with other union supporters; he however was evaluated in 2006 by Charles Boucher. Lara Milton went from 3.7 to 3.5; she too was evaluated by Boucher in 2006. Maria Zate's overall performance ratings increased form 3.1 in 2005 to 3.5 in 2006; Apodaca testified that she believed Zate was a union supporter because she had seen Zate carry a bag with the Union's horse head logo on it. Tim Schultz (different from alleged discriminate Tom Schultz) went from 3.5 to 4.0. Tom Jacobs went from 4.12 to 4.5; Apodaca testified that she saw Jacobs at noon union rally. Whatever union activity these latter employees engaged in, it did not approach the level of support for the Union shown by Davison, Hobbs, Evans, and Hughes.

Analysis

Davison, Hobbs, Evans, and Hughes each received significantly lower evaluations than they had in previous years. As a result they did not receive the bonus payments that they had received in those previous years. Davison, Hobbs, Evans, and Hughes were among the strongest supporters of the Union and the News-Press knew this. The news desk was the center of union support and three of these four employees worked there. The News-Press' hostility toward the unionization effort is described both above and below. The fact that Steepleton undertook to perform evaluations himself, despite his short tenure as head of the news department, adds to the General Counsel's case. The negative evaluations came in the midst on the ongoing exercise of the Section 7 rights of the employees and in the midst on a continuing unlawful campaign by the News-Press to stifle those rights. I conclude that the General Counsel has fulfilled his initial burden under *Wright Line.*

The News-Press points to the fact that other supporters of the Union either received higher evaluations in 2006 or, if they were lower, they nonetheless continued to receive bonuses. But as described above, the prounion employees who received higher evaluations were, for the most part, evaluated by someone other than Steepleton. Rather than tending to exonerate the News-Press, this evidence actually strengthens the General Counsel's case. Focusing on the evaluations Steepleton made, other visible union supporters also received lower evaluations although they retained an overall rating just barely high enough to receive a bonus. And those employees who received higher evaluations were not nearly as visibly active in supporting the Union as Davison, Hobbs, Evans, and Hughes. The News-Press also argues that point drop in the evaluations were relatively minor, but the retort to this argument is that the drop was significant enough to deny these employees the bonuses that they had been given in previous years. The News-Press argues that the lower evaluations were part of a greater effort by Steepleton to tighten up evaluations, but I again do not credit Steepleton's testimony.

I turn now to address the major reasons presented by the News-Press for the lower evaluations it gave to each employee. Concerning Hughes, Steepleton noted in her evaluation several times and at trial that Hughes was repeatedly late in submitting her Public Square columns, but I have concluded Steepleton's testimony was somewhat exaggerated and Hughes' submission of the Public Square columns did not worsen in 2006 compared to prior years. In those prior years, Hughes received a rating of 4 out of a possible 5 in the category covering the columns in her 2004 evaluation and her 2005 evaluation had no reference to any timeliness problems concerning the submission of her Public Square columns. I conclude that the News-Press has failed to show it would have given Hughes a lower evaluation even if she had not supported the Union.

Concerning Evans, Steepleton described how he had talked to Evans about how the News-Press was to continue to cover religion and how Evans explained that she thought that Steepleton's earlier e-mail message meant that she now had the education beat *instead of* the religion beat. Steepleton clarified that the education desk assignment was in addition to her religion assignment. Thereafter Evans covered both areas. This ap-

pears to have been a simple and quickly rectified misunderstanding and the News-Press presented no evidence to show this was the type of work performance that finds its way into employee evaluations. Next, Steepleton testified that Evans had a substance abuse problem that interfered with her performance. But I have not credited Steepleton's testimony either that this matter was mentioned in the evaluation or that it affected Evans' work performance. Steepleton's fabricated testimony on this sensitive matter only shows that the News-Press was searching after-the-fact to justify the lower evaluation it gave to Evans. Finally, Steepleton described the story Evans had written about a religious study group that she and Hulse decided to hold until the group began again after the summer and how Evans advised Steepleton of this. I do not credit Steepleton's testimony to the extent that it describes any fault or shortcomings by Evans in this matter or that the News-Press would routinely note such in an evaluation. I conclude that the News-Press had failed to establish that it would have given Evans a lower evaluation even if she had not supported the Union.

Turning to Hobbs, the News-Press contends that she merited a lower evaluation because she shouted, "Fuck you" to Armstrong. I have determined above, however, that Hobbs did not do so. Nor do I consider this a matter of a good faith but mistaken belief on the part of the News-Press. Armstrong did not report this matter until weeks after it occurred and the News-Press did not investigate it to determine if Armstrong had been mistaken. It did not even ask Apodaca, another supervisor who was present at the time, whether Hobbs had made the remark. At best, the News-Press seized upon this mere accusation with a total unconcern as to its accuracy. I have also discredited Steepleton's other rather feeble attempts to justify the lower evaluation he gave to Hobbs. I conclude that the News-Press has failed to establish that it would have given Hobbs the lower evaluation even if Hobbs had not supported the Union.

Finally, turning to Davison, I have described above how Steepleton asked her fill in as assistant city editor in a full-time capacity on a different shift. Davison said that she would consider it but that she was waiting to get a response to her request for a bonus. Her bonus request was later denied. Neither Steepleton nor Davison raised the matter again. Based on this Steepleton gave her the lowest possible rating in two categories in her evaluation, thereby indicating that Davison "[d]oes not meet standards. Improvement required." But what the News-Press failed to do is show how this incident would normally be cited in an evaluation much less justify such low marks. Moreover, Steepleton conceded he gave Davison the lower evaluation in part because he believed she was conducting union activity during working hours. Also, in her 2005 evaluation for the category "Accuracy/Quality of Work" Davison received a 5. In 2006, Steepleton downgraded Davison to a 3 in that category; he provided no explanation, either in the evaluation or at trial to support this rating. Finally, Davison discussed her evaluation with Guiliano who agreed that it was unfair. He devised a plan to set goals that she could meet and thereby get a better evaluation in the future, but Steepleton later told Guiliano, who then told Davison, that he could not do so. Here again, I conclude that the News-Press has failed to meet its burden under *Wright Line.*

By giving lower evaluations to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes because they engaged in union activities, thereby depriving them of annual performance bonuses, the News-Press violated Section 8(a)(3) and (1).

F. Removal of Buttons and Signs

The complaint alleges that on about January 8 the News-Press instructed an employee to remove a button reading "McCaw Obey the Law" and instructed employees to remove signs that also read "McCaw Obey the Law" from their private vehicles parked in the News-Press' parking lot. The News-Press admits these allegations in its answer to the complaint.

The employees had been displaying those signs in their vehicles and wearing those buttons while at work. Steepleton admitted that he told Hobbs to remove the "McCaw Obey the Law" button she was wearing. He explained his conduct by stating that the News-Press had decided this was not a personal fight against McCaw and therefore it was the News-Press' position wearing the button was not appropriate conduct. Hobbs removed the button. Hobbs also removed the sign she had on display in her vehicle.

Analysis

At the hearing, the New-Press contended that it was permitted to require the removal of the signs and buttons because "we had the absolute right to tell the employees to remove the sign because it was defamatory." But here even the vigorous assertion of a right fails to convert that assertion into a serious legal argument. I have already concluded above that employees have the right to display these buttons and signs. This is buttressed by the fact that I have concluded that the News-Press has, in fact, violated the law. McCaw was not only the owner and co-publisher of the News-Press, but as described above she had interjected herself personally in the effort to defeat the Union. As the Union aptly stated in a written motion it filed, "As much of the record in this . . . case shows, this is a debate that McCaw and her representatives are quite willing to participate in as aggressors, while claiming victim status when the employees . . . rejoin in kind." By instructing employees to remove buttons from their clothing and signs from their vehicles reading "McCaw Obey the Law," the News-Press violated Section 8(a)(1).

G. Termination of Anna Davison

The complaint alleges that on about January 25 the News-Press fired Anna Davison because Davison supported the Union. Davison worked as a staff writer since October 2002. While at the News-Press Davison won a commendation from the Newspaper Publishers Association for a three-part series she wrote on the Channel Islands in 2006. In 2005, Davison received a fellowship from the California Endowment to attend a seminar in Los Angeles on covering healthcare matters. In 2004, she received a fellowship from the Council for the Advancement of Science Writing to travel to the University of Arkansas to attend a science seminar. The News-Press contends Davison was fired for bias reporting in an article written

by her and published by the News-Press on January 15. This matter concerns whether the article showed bias on the subject of tree removal from some streets in downtown Santa Barbara. In Davison's 2005 evaluation, the last one before her involvement with the Union, the News-Press commented:

> Anna's writing sparkles. She writes with flair, humor,—when it's called for—and clarity. She is one of the best writers in the newsroom, a pro at using just the right word for something. She is the one we turn to when we want that certain "touch" to the story. When the story is in her hands, we don't need to worry about it; we're confident it will come in good shape with little editing required. Accuracy has never been a problem.
>
> . . . .
>
> Anna always goes the extra mile to make a story better than just acceptable. She always does a thorough job of researching something before writing about it so that her stories carry [an] air of authority. We'd like to see her come up with more story ideas and dive into them.
>
> . . . .
>
> Anna is always a professional in her dealings with sources, people in the newsroom, and in writing her stories. Her ethics are solid, and she strives to be fair to all sides in her writing. She often volunteers to help editors and willingly takes on daily assignments from editors.

Davison supported the Union by signing an authorization card and attending the public rallies sponsored by the Union. She wore the union T-shirt to work on Fridays along with other union supporters. She also wore union buttons while at work. As indicated above, her signature was the fourth of about 25 on the August 24 letter to McCaw. She appeared in several of the photographs that ran in newspapers covering the union rallies described above. On January 2, the employees sent a letter to McCaw and von Wiesenberger complaining about the lack of sufficient staff; that letter was signed by about 18 employees, including Davison, as part of "The Organized Newsroom Staff."

On January 9 and 12, the News-Press ran opinion pieces criticizing the city of Santa Barbara for cutting down trees on Lower State Street in downtown Santa Barbara as part of a redevelopment and beautification program that also involved tearing out and replacing the slippery sidewalks in that area. The editorial commented, however, that the public uproar that had occurred concerning the removal of trees on Upper State Street did not happen this time. The News-Press also published articles concerning the tree removal phase of the project.

On September 9, Davison was assigned to cover the Santa Barbara beat. On January 12, Davison began preparations for a Santa Barbara story concerning the replacement of slippery tiles on Lower State Street. She walked to that area and noticed that the trees already had been cut down and removed. She spoke to shop owners and others about the project; no one seemed particularly concerned about it. She returned to her office where she called Santa Barbara Mayor Marty Blum, who provided Davison with some information of the project. She interviewed another person who was a leader in the beautification project in that area. She reviewed earlier articles in the News-Press to search for leads to contact for someone who might have concerns about the tree removal aspect of the project and then called an organization, Santa Barbara Beautiful, which had in the past opposed tree removal. She left a message asking to speak to someone by the end of day, but her call was not returned. The story was originally intended to run the next day, Saturday, on page 3 or 4 of the paper, but it was decided to hold the story until Monday and feature it on the front page. Davison revised the story to make it more appropriate for a front page piece. The story was then edited and approved by Robert Guiliano, the News-Press' assistant city editor.

On January 15, the News-Press published the article prepared by Davison. The article was entitled *"Walk This Way"* and was accompanied by a photograph of a worker in a hardhat working on the sidewalk. That photograph contained the statement, "The tiles on Lower State Street are being ripped up and replaced with brick pavers to make the busy stretch safer for pedestrians." A smaller photograph showed drilling work being done near a tree stump. The article reported on how the tiles on Lower State Street in downtown Santa Barbara were being torn up and replaced with brick pavers to make the street more pedestrian-friendly. According to sources in the article, the old tiles were slippery when wet. The article mentioned that as part of the effort, 51 street trees were being cut down or moved "to the chagrin of some locals."

The same day the article was published Guiliano attended a meeting with McCaw and von Wiesenberger; Steepleton was on vacation at the time and Guiliano was selected to fill in for him while he was away. At this point the facts concerning Davison's discharge merge with the facts leading to Guiliano's discharge discussed in the next section of this decision. At the meeting McCaw said that she felt Davison's article was biased because it was a positive story about the downtown sidewalk replacement at the expense of 51 trees. She pointed out that this was directly against what the News-Press had been saying in its editorials against cutting down the trees. She expressed concern that there were not more details from the perspective of people who opposed replacing the sidewalks and removing the trees. McCaw also stated that she did not like the fact that Santa Barbara Mayor Blum was quoted so often in the article; the News-Press had been very critical of the mayor in its editorial pages. McCaw told Guiliano to reprimand Davison. Guiliano then told Davison of his discussion with McCaw; Davison said it seemed ridiculous to be criticized for quoting the mayor of the city and that she had contacted a source on the tree removal issue but that the person did not return her call in time for the story deadline. Guiliano suggested that she continue to contact that source and prepare another story from the perspective of those who opposed replacing the sidewalks and removing the trees. Guiliano reported all of this to Steepleton in an email message. Guiliano did not reprimand Davison; instead he refused to do so.

Davison then continued to pursue leads concerning the tree-removal issue. On January 22, she received an email message from Desmond O'Neill, a self-proclaimed tree lover, who stated:

If you want to pass this on, by all means, but it really comes from me as a member of the City Trees Advisory Committee, not as a member of [Santa Barbara Beautiful]:

The plan for renovating the 400–500 blocks of State Street has been in the works for more than two(2) years, and has gone through public hearings with the Downtown Organization, Street Tree Advisory, Landmarks, Architectural Review, Old Town Merchants, Parks and Recreation, City Council . . . the list is long and the hearings and discussions have been prolonged and public. The final decision to go ahead was made by the City Council months ago, and the City has been purchasing the materials and preparing the project ever since.

It should have come as no surprise to anyone even vaguely interested in street trees, that portion of State Street, or City business. . . . Why the News-Press would belatedly raise a Hoe and Cry over this, and try to generate a controversy where really none exists, is beyond my understanding, but there has been a lot of stuff going on at the News-Press recently which has been beyond my understanding. Presumably the newspaper editorial management thinks that stories and controversies sell more newspapers . . . ? A charming but outdated notion I'm afraid.

As anyone will tell you, I'm a tree lover and a tree-hugger, but the original plans, particularly the sidewalk materials, were faulty, as became very evident over the past ten or twelve years. When Public Works and the Safety people (Risk Management) decided (recommended) that extensive work would need to be done, the subject of saving the trees already in place was discussed, and as a matter of fact trees of a size or species that will stand up to removal and replanting have been saved, some will go back in on State Street, some in other locations. Some trees couldn't be saved and were cut down, which I personally regret, but they will be replaced, and as a matter of fact, the City will have a small net gain in the number of trees (about seven, if memory serves) and we will have some trees more suitable to the urban and quite rough arboreal environment down there than some of the now-gone trees proved to be—We have poor to middling soil conditions, inadequate water and drainage, steady vandalism—What is going in now, as part of the renovation, will be larger and hardier and just as leafy and beautiful. Between replacing the paving and curbing, re-locating some trees wells and plantings, and re-configuring utilities and basement spaces, as many trees were saved as possible, and those lost will be, as noted replaced.

I am the last person to advocate for tree removal or destruction, and have in past argued strenuously for preserving trees throughout the City, as my colleagues on the Tree Advisory Committee and City Council will attest. Persistent and articulate as I might be, however, in this instance I am satisfied that everything possible was done to save and preserve and replace our State Street trees, and I venture to suggest that the public will in the end be very pleased with the results.

If the News-Press cannot use this in its article, I would be happy to submit this as a letter or Op-ed column, but I do emphasize that I speak (write) as a public citizen and State Street Advisory Committee member (now past member) and not as a representative of Santa Barbara Beautiful, since SBB has taken no position on this.

That same day Davison forwarded this message to Guiliano who provided it to McCaw and von Wiesenberger accompanied by a message that read, in part, "The information that [O'Neill] includes in his e-mail, I think, may shed light on why the tree issue on lower State has not outraged the public as much as the tree issue on upper State did."

On January 25, Steepleton gave Davison termination letter that read:

> Your performance evaluation this year, which was 2.3, was one of the lowest scores given to any reporter. We had hoped that there would be improvement, but instead you failed even to provide acknowledgement, a promise to improve, and in fact took the review home for a month and did not return it until yesterday when I requested it. In some ways this is emblematic of your performance.
>
> Your recent article on January 15, 2007, was totally biased in that it reported on an issue that *always* is surrounded by controversy—cutting down trees on a public street in Santa Barbara—without *any* reporting on the other side.
>
> When confronted with this, you appeared to suggest there was no "other side" or that you somehow could not find someone who disagreed with the project. That is ridiculous and not credible. This is Santa Barbara. There are many opposed to this; you simply failed to show the initiative to find them—or worse, decided to ignore them. You could have stopped people on the street for comment. Had you opened our newspaper (do you read it?), you would have noticed the Editorial pages opposed this project, and the flood of letters to the editor opposing it when it became known made it clear that *were* others with different opinions.
>
> Our job at the Santa Barbara News-Press is to present *all* sides of an issue. Because the Editorial pages opposed this project does NOT mean that you were supposed to write an article with that slant: you were supposed to write an article with NO slant. We will not tolerate bias. Without two sides to a story, it is biased—and this calls into question the basic journalistic ethics that we need to show in every story.
>
> Based upon these facts your employment with the News-Press is hereby terminated.

While the termination letter refers to the "flood of letters to the editor opposing" the project, it appears only one brief letter was sent to the News-Press on this matter before the article ran. And Steepleton never warned Davison about bias in her reporting. The termination letter was the first time anyone at the News-Press had accused Davison of bias in her reporting; she had received no warnings, reprimands or negative comments in her evaluations on the subject.

Guiliano had approved the Davison article for publication; he testified that he did not feel the article was biased despite the fact that in his January 22 email to McCaw containing O'Neill's comments described above Guiliano stated Davison's "story was weak in that area, as we agreed, in telling both sides." At trial Guiliano explained that this remark was not accurate but he was trying to apply the principles he had learned from reading "How to Win Friends and Influence People" by trying to agree with McCaw in order to influence her. He gave the same explanation to Davison, who saw the e-mail before she was fired, became angry by the comment and questioned Guiliano about it.

Steepleton testified that prior to Davison's termination in about August or September McCaw spoke to him about what she perceived to be bias in Davison's reporting. The stories by Davison that McCaw thought were biased concerned the Channel Island fox and bald eagles. Steepleton did not believe that McCaw told him why she felt those articles were biased. Yet Steepleton conceded he made no mention of any alleged bias in the evaluation he prepared for Davison a month earlier. Remember, Steepleton testified that he had been reprimanded by McCaw for allowing the alleged bias in Burns' article and had allegedly directed him to be vigilant against bias. I again do not credit Steepleton's testimony.

On April 12, News-Press TV[10] aired a report on the Lower State Street construction. The report described the beautification project and that store owners and pedestrians all say they are looking forward to the project's completion, some were wondering why the project has taken so long. It then showed someone from a business in the area commenting on how the completion dated had been extended several times. The report ended with the announcer stating:

> Workers have been replacing the slippery sidewalks with brick and have repaved major sections of the street. About fifty trees had to be uprooted which the city said will be replaced. Local, unbiased, accurate. 24 hours a day. This is News-Press TV.

Although Steepleton did not supervisor the reporters for the News-Press TV, he did offer an explanation of how the April 12 piece was not biased yet Davison's article was. He explained how the redevelopment and beautification project on Lower State Street lasted about 5 months and was done in phases. First there was the clearing out of the old trees and then that issue faded. Then the new trees were installed and then "it was replacement of the tiles with this new type of brick." He testified that that the TV report focused on the end phase of the project and therefore it was not necessary to include reporting on both sides of the tree removal issue. But given that Davison's article focused on the tile replacement phase of the project and not the tree removal phase, Steepleton failed to explain why Davison showed bias in concentrating on that tile phase without revisiting the tree removal phase. And there is no evidence in the record of any controversy over the removal of the apparently unsafe tiles and their replacement by safer bricks; in other words, in the words attributed to Davison by Steepleton, "[T]here was no 'other side.'"

On April 8, the News-Press published a story about two workers being fired because they made too much money. Steepleton admitted that the story was biased because it did not have the view of the employer who fired the workers and the News-Press published a correction on April 11 conceding as much. The reporter in that case, who was also a union supporter, was not disciplined. Obviously, the News-Press did not issue any "correction" on the Davison story. On May 1, 2007, McCaw sent Steepleton a message indicating that she felt that a front page article written by Orsua concerning illegal immigrants was biased. She asked who have approved the article and asked to discuss it with Steepleton. There is no evidence that Orsua was discipline or fired for the alleged biased reporting.

Analysis

The General Counsel's initial burden under *Wright Line* is satisfied again by the same familiar pattern. Davison was an active Union supporter, the News-Press was aware of this, and its animus towards the Union is described above and below. The discharge occurred in the midst of the continuing struggle between the employees and the News-Press' unlawful responses. Also, Davison's termination relies in part on her evaluation which I have already found to be unlawful. That same evaluation, as explained by Steepleton, refers to her union activity. Moreover, there is no mention in that evaluation, prepared by Steepleton, of any concerns over biased reporting.

Turning now to the News-Press' burden, I begin by noting that McCaw had long perceived Davison as having made biased environmental articles, as shown by McCaw's reactions to the articles Davison had written concerning the otters, pigs, and eagles as described above. This demonstrates that McCaw's concerns were unrelated to Davison's union activity. On the other hand, McCaw's concerns were never shared with Davison in any form by her superiors and McCaw never demanded at that time that Davison be fired because of the perceived bias. To the contrary, Davison's superiors shielded her from these criticisms and Davison continue to work for the News-Press. The News-Press asserts it fired Davison because the short article she wrote was biased in that it did not give voice to those who oppose the loss of the trees. But as described above, the tree-cutting phase of the project had ended and the focus of the article was on the tile replacement phase. Even the tree cutting phase of the project had generated minimal controversy because of the overriding need for safety and the fact the city had satisfied the tree-supporting groups that it properly handled the matter. McCaw complained that the article did not take into account the editorial position of the News-Press but remember that the News-Press' own conflict of interest policy, described above, seems to require employees not to swayed by that position in reporting. Of course, it is not the role of the Board to decide whether the article was or was not biased or to substitute its judgment for that of the News-Press. But the point is that the News-Press has not established that is routinely labels as "biased" articles written under these circumstances. Of course, it is possible that McCaw had not been aware of these circum-

[10] The record does not clearly define the relationship between the News-Press and News-Press TV.

stances when she first criticized Davison's article. But the letter from O'Neill should have given pause to the notion that there remained a controversy over the tree removal aspect of the project that still needed coverage. Moreover, there is no explanation as to why what began as a reprimand ended up as a termination. Finally, there is no evidence that the News-Press routinely fires employees for bias appearing in articles. To the contrary, the record shows other instances of perceived bias by the News-Press that did not result in discipline of any kind, much less termination. For these reasons I conclude that the News-Press has failed to show that it would have fired Davison even if she had not supported the Union.[11] I find that the News-Press violated Section 8(a)(3) and (1) by discharging Anna Davison.

H. Guiliano's Termination

The complaint alleges that the New-Press fired Robert Guiliano, the News-Press' assistant city editor, on January 26 because he failed to issue a pretextual reprimand to Davison in furtherance of that employee's unlawful discharge. The assistant city editor is a management position. In its brief, the News-Press contends that it fired Guiliano for three main reasons. Those were Guiliano's refusal to follow a direct order to reprimand Davison; Guiliano's inappropriate public exclamation concerning Steepleton's testimony given at Judge Schmidt's hearing; and Guiliano's inappropriate and baseless accusation that reporter Leana Orsua had committed plagiarism.

Steepleton hired Guiliano in October. At the trial in this case Guiliano testified that he refused to issue the reprimand to Davison because he felt Davison was being targeted for her union activities. He pointed how he was aware of Davison's low evaluation and how he felt she was being "tanked" unfairly, that he was not allowed by Steepleton to help Davison through positive feedback, and that he did not feel the article that Davison had written and that he had approved was biased.

On January 16, the day Steepleton returned from vacation and the day after Guiliano had the meeting with McCaw and von Wiesenberger where McCaw gave the instruction to reprimand Davison, Steepleton testified that he received a call from McCaw. He testified that McCaw told him that she had reprimanded Guiliano the day before. Steepleton then met with McCaw and von Wiesenberger. McCaw related how she had instructed Guiliano to reprimand Davison but that Guiliano had refused to do so.

As described above, Davison was fired on January 25. On January 26, Guiliano was summoned by Steepleton to Apodcaca's office where she also was present. Steepleton told him he was fired "performance related." Guiliano protested that he ran the newspaper for 3 weeks while Steepleton was away and that Steepleton had said that he did a good job and now he was being terminated. Steepleton did not respond. Guiliano then turned to Apodaca, but she said that she was sorry but that she just filed the paperwork around there.

In response to the questioning by counsel for the General Counsel, Steepleton identified three occurrences that lead him to fire Guilano. The first was Guiliano's handling of the story written by Davison, described above, that triggered her termination. In describing what Guiliano did wrong in this regard Steepleton testified:

> Well, he was I think the assigning editor on that story. He should have given her direction up front or could have anyway. I don't know if he did or not, but he could have given her direction on what to go after.

Steepleton continued that later when Guiliano was directed to reprimand Davison for the story he failed to do so but instead suggested writing another biased story to make amends for the first story.

Steepleton testified about another incident that he considered in deciding to fire Guiliano. This incident occurred after Steepleton testified at the hearing before Judge Schmidt; Guiliano attended the hearing that day. According to Steepleton, Guiliano came into his office and in front of all the reporters said something like, "Hey, our boss did a great job in court today." Steepleton testified that Guiliano's comment was "an inappropriate exclamation for a manager to say in the middle of the newsroom."

Finally, Steepleton cited an instance where Guiliano accused reporter Leana Orsua of plagiarism "in front of other reporters." The portion of the article prepared by Orsua at issue is:

> State emergency and health officials are urging preparedness for the expected cold snap.
>
> "The safety of all Californians is our utmost concern," said Office of Emergency Services Director Henry Renteria."

The problem, according to Guilano, was that Orsua appeared to be quoting directly from Renteria when in fact she had taken the information from a press release issued by the Office of Emergency Services that quoted Renteria as having made the comment. In other words, according to Guiliano, Orsua should have attributed the quote to the press release. Steepleton testified that he disagreed with Guiliano's conclusion of plagiarism and told this to Guiliano. Steepleton was asked, "Were you suspicious whether—what the reasons—why he was accusing her of plagiarism?" Steepleton answered: "It was very strange that this guy was continuing to call her a plagiarist. I did not believe she was a plagiarist." It will be recalled that Steepleton testified that Guiliano made his accusations of plagiarism in front of other reporters. He testified that Guiliano did a disservice to Orsua by addressing the matter in public. However, there was no specific evidence presented that Guiliano addressed his concerns with Orsua in front of other reporters. There is also no evidence that Steepleton ever advised Guiliano

[11] The Union, in its brief, argues that the News-Press gave shifting reasons for discharging Davison and that this too supports the conclusion that her discharge was unlawful. In support of this contention the Union cites a comment made on the record by the News-Press' attorney that the sole reason that the News-Press fired Davison was because she refused to accept the night-editing position. Of course, a party is generally bound by the statements of its attorneys. But this statement, isolated as it was, and made in the course of 17 days of trial with multiple issues strikes me more as an erroneous comment than a serious contention. Accordingly, I give it little weight.

that he had a different opinion as to what constituted plagiarism.

Later, when questioned by counsel for the New-Press Steepleton added other reasons that lead to Guiliano's termination. On November 19, Guiliano e-mailed an assignment to Orsua concerning the possibility that the draft might be reinstated. The e-mail began:

> Good morning Leana, *this is your mission should you decide to accept it. If you are captured, we will disavow any knowledge of your assignment. Read this memo and memorize it. It will self-destruct in 20 seconds. . . .* [Italics in original.]

Steepleton testified that he found this language "Very strange, not appropriate, not the way that I would expect a manager to assign a story."

The New-Press hired Orsua after the resignations on July 6 and Guiliano had issues with her work; he brought this to Steepleton's attention in a number of email messages. At the trial, the New-Press pointed to one such message dated January 12 where Guiliano stated:

> Just for the record, I have never made any attempt to ask Leana out socially and never tried to have anything other than a professional working relationship with her. I have been warned by others that she may attempt to file a complaint about me to HR suggesting that I'm making her feel "uncomfortable," insinuating sexual harassment, while the real situation focuses 100 percent on my assuring that she write accurate, unplagiarized stories for publication in our newspaper, even if she finds this frustrating because of her apparent inability or unwillingness to comprehend what plagiarism is.

Guiliano explained that he feared that because he had been critical of Orsua's work she might falsely accuse him of sexual harassment and so was merely "covering my bases."

Analysis

Supervisors do not enjoy the protections that the Act extends to employees. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402, 403 (1982). However, an employer may not discharge a supervisor for failing to commit an unfair labor practice. Id. I first assess whether the reprimand that McCaw instructed Guiliano to give to Davison would have been an unfair labor practice. Viewed in isolation the instruction McCaw gave to reprimand Davison might be dismissed as a passing outburst unrelated to Davison's union activities. But viewed in context and taking into account the factors that lead me to conclude that Davison's discharge was unlawful I conclude that the instruction, had it been carried out, would too have been unlawful. I have noted above that Guiliano refused to issue the reprimand because he felt it was retaliation for Davison's support of the Union. The timing of his discharge, coming the day after the News-Press unlawfully discharged Davison, in context serves to connect the two.

I now examine whether the News-Press has shown that it would have fired Guiliano anyway even if had not failed to give Davison the reprimand. But Steepleton's reliance on the dispute of whether or not Orsua committed plagiarism seems wildly exaggerated so as to serve as basis for discharge in what otherwise would likely have been only a matter of discussion or debate in the newsroom. In this regard I do note that in other stories run by the News-Press described above the News-Press has been careful to make the very distinction that Guiliano was attempting to make with Orsua. Steepleton's vague testimony concerning Guiliano's failure to correct the alleged bias in Davison's article stands in stark contrast to his own role in approving Burns' allegedly biased article and links Davison's unlawful discharge with Guiliano's. Finally, Guiliano's "Hey, our boss did a great job in court today" falls of its own weight. It may be that Guiliano may not have fit in, over the long run, with the expectations of the News-Press. But the fact remains that his termination was linked to Davison's unlawful discharge and the News-Press has failed to show it would have happened without that linkage. In its brief, the News-Press cites *Pioneer Hotel, Inc. v. NLRB,* 182 F.3d 939 (1999), in an effort to avoid liability. While I must indicate that I am bound to apply Board law, I find it significant that the court in that case noted the absence of any evidence that the discharged supervisor refused to obey the instruction to discharge the employee because the supervisor thought it would be unfair labor practice. In this case, as described above, Guiliano credibly provided precisely that evidence.

I find that by terminating Robert Guiliano because he refused to commit an unfair labor practice the News-Press violated Section 8(a)(1).

I. Termination of Six Employees and Related Interrogations

The complaint alleges that the New-Press fired Dawn Hobbs, Rob Kuznia, and Barney McManigal on February 5 and Tom Schultz, John Zant, and Melissa Evans on February 6 because those employees supported the Union. The complaint also alleges that on those same days Steepleton unlawfully interrogated employees concerning their union activity.

Prompted by Davison's termination the week before, on February 2 before work Burns, Dawn Hobbs, Rob Kuznia, Barney McManigal, John Zant, Melissa Evans, and Tom Schultz assembled on the Anapamu Street footbridge that crosses over Highway 101 in Santa Barbara. Keegan and another union representative were also present. For about an hour that morning they displayed two large banners reading "Cancel Your Newspaper Today" to rush hour motorists driving beneath the overpass. They also displayed smaller handmade signs reading "Bring back Melinda" Burns, "Bring back Ann[a]" Davison, and "Stop Illegal Firings." These signs were about 14 inches wide and 22 inches high. A sign reading "Protect Free Speech" and another sign reading "Stop Illegal Firings" were also displayed; these were about 20 inches wide and 30 inches high.

On Friday, February 2 the Santa Barbara Independent ran a story about the event on the overpass entitled *"Taking It to the Overpass: News-Press staff protest"* and with a subtitle *"Organized N-P Newsroom Urges Drivers to Cancel Their Newspaper Subscriptions."* The article was accompanied by a photograph of the overpass with the "Cancel Your Newspaper Today" banner and the smaller sign reading "Protect Free Speech." The article mentioned how the employees on the overpass were calling for illegal firings at the New-Press to

stop and how those related to the fired employees' "involvement in the drive to unionize." The article made clear that the events on the overpass were related to the organizing campaign.

On February 5 and 6 the six employees were summoned individually to a conference room at the New-Press. Present there were Steepleton and New-Press Attorney Dugan Kelley. Kelley asked each employee whether the employee was present on the overpass where the "Cancel Your Newspaper Today" banner was displayed. The employees admitted that they were. The employees were then terminated. The six employees received identical termination letters that read:

> Effective immediately, you are discharged from your employment at *Santa Barbara News-Press* for engaging in disloyal conduct. Specifically, you participated in hanging a large banner from a bridge over highway 101 in full view of oncoming motorists stating "Cancel your newspaper today." It is serious disloyal conduct for you to do while at the same time collecting a paycheck from this company.

Apodaca accompanied Hobbs to her car after she received her termination letter. As they were walking, Hobbs asked Apodaca if Apodaca thought it was right that Hobbs had been fired a union-related protected activity. Apodaca relied by asking Hobbs if she thought what she was doing right by telling people to cancel their subscriptions and people could lose their jobs because of that.

The New-Press argued that it was unaware that the protest was related to union activity. In this regard, Steepleton testified he was aware of the activities on the overpass and knew each of the terminated employees were leaders or supporters of the union effort, but when asked if he knew that the activities on the overpass were part of the Union's campaign he answered that he "didn't see anything that indicated union activity as far as the activity that day." He testified that although he saw a photograph on the "Cancel Your Newspaper Today" banner that he didn't "know that was part of a Union campaign." Yet given the extensive coverage in the New-Press itself and in articles reviewed by Steepleton himself concerning the union effort to persuade readers to cancel their subscriptions, Steepleton's testimony is completely lacking in credibility. This seems to me to be one of those revealing moments during the testimony of a witness that is so obviously contrived that it undermines the witness' credibility on other all matters.

Analysis

I have already concluded above that the efforts by the employees to apply economic pressure on the News-Press by having subscribers cancel their subscriptions is conduct protected by the Act. Citing cases such as *NLRB v. Washington Aluminum Co.,* 370 U.S. 917 (1962), the News-Press argues that the activity the employees engaged in on overpass was not protected because the employees did not obtain a permit to hang the banner on the overpass. I reject this argument because the News-Press did not fire these employees for any illegal conduct. *Molon Motor & Coil Co.,* 302 NLRB 138 (1991), enfd. 965 F.2d 523 (7th Cir. 1992). I do, however, deal with the matter in more detail below in the section of this decision dealing with issues of reinstatement and backpay. In its brief, the News-Press cites the dissenting opinion in *Endicott Interconnect Technologies,* 345 NLRB 448 (2005). I am, of course, bound to follow Board; I am not free to apply dissenting opinions. However, I do note that in this case, unlike in *Endicott,* it should have been obvious to anyone who was interested that the conduct of the employees on the Anapamu overpass was connected to the extensively publicized labor dispute involving the News-Press. Most importantly, I conclude that the News-Press made the obvious connection between the activity of the union activists on the overpass with their by then familiar signs and banners to its ongoing labor dispute with the Union.

By discharging Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans because they engaged in union activity the News-Press violated Section 8(a)(3) and (1). The interrogations, leading as they did to discharge, were clearly coercive. By coercively interrogating employees about their union activity, the News-Press violated Section 8(a)(1).[12]

J. Surveillance of Rallies

The complaint alleges that on February 7 and 21 the News-Press, through Jim Diaz, engaged in surveillance of the union activities of its employees. Jim Diaz is an admitted agent of the News-Press.

On about February 7 and 21, 2007, the discharged employees and their supporters held rallies in De La Guerra Plaza within about 8 feet to the entrance of the News-Press' facility. On both days Diaz held a camera to his face and appeared to be filming the participants at the rallies. There were no obvious members of the media present for the first rally, but they were present for the second. Diaz was not standing with or near the media observers of that rally; rather he was filming from off to side.

In about the week after July 6, 2006, a black wreath was delivered to the News-Press' facility. The News-Press has newspaper machines in front of its facility and they had been vandalized at unspecified times in the past. The News-Press also had security personnel inside its facility on days that the Union was holding rallies outside. But the News-Press did not otherwise provide details or connect that testimony as to why it found it necessary to film the union-sponsored rallies occurring outside its facility.

Analysis

In assessing the legality of an employer's video surveillance activity, the test is whether there was proper justification and whether it reasonably tends to coerce employees. *Timken Co.*, 331 NLRB 745, 754 (2000). Here, there is evidence of delivery of a black wreath months earlier and vandalism of an unspecified nature and at unspecified times. Importantly, there is no evidence linking those events to the need for the video surveillance of the protesters. I conclude that the News-Press has failed to show any proper justification for this surveillance. In

[12] The complaint alleges that Steepleton conducted the interrogations while the evidence shows that the employees were questioned by Kelley in the presence of Steepleton and at the direction of the News-Press. However, this variation does not change the conclusion that the News-Press is responsible for the interrogations.

the context of the series of violations found above, I find that the News-Press violated Section 8(a)(1) by engaging in surveillance of the union activities of employees.

K. Surveillance at Library Meeting

The complaint alleges that on about February 13 David Millstein, an attorney for the News-Press, interfered with and engaged in surveillance of employees engaged in union activity at the Santa Barbara public library. On January 30, Burns completed an application to rent a meeting room at the library for the purpose of meeting with advertisers in the News-Press to attempt to get their support for the union campaign.[13] On February 8, the union supporters at the New-Press distributed a letter authored by Burns to the New-Press advertisers inviting them to come to a meeting at the library on February 13. The letter included the following comments:

> We want to discuss with you how you can help us improve the editorial and workplace atmosphere in the newsroom. We are seeking a fair employment contract with Wendy McCaw, the New-Press owner and publisher, a contract that will ensure that we can gather and report the news without interference.
>
> More than thirty journalists, including a number of writers whom your customers used to follow, have been forced out or fired from the New-Press since early July, when McCaw began attacking her staff and mixing opinion and news.
>
> Thousands of New-Press readers—your customers—have cancelled their subscriptions in our support. Every week, there are more cancellations. On your behalf we have asked the ABC to conduct an audit because we suspect you have not received the true subscription numbers.
>
> In dictatorial fashion, McCaw has fired reporters, filed lawsuits against her critics and harassed former employees with "cease-and-desist" letters, seeking to silence those who speak out for freedom of the press. The New-Press mess has received national and international coverage in the media as a bad example in the industry. Most recently, a Jan. 15 article in the New York Times business section was entitled "Newsroom Fight Spills Onto the Streets of a Once-Peaceful Town."
>
> We who remain in the newsroom are asking McCaw to negotiate a contract that above all will safeguard the basic rules of journalism ethics. We have voted 33–6 to be represented in this effort by [the Union.] In March, the National Labor Relations Board will prosecute the New-Press for illegally firing a senior writer and threatening newsroom employees.
>
> Your ads are appearing in a paper that is rapidly losing credibility among its readers. But with your help, we believe we can turn the New-Press around. On Feb. 13, we will talk about how you can help us get the New-Press back on track. Your customers want you to intervene to help restore a free press to Santa Barbara. We need a newspaper that is responsive to the community and keeps the publishers' views out of the news—a paper that is good for democracy and good for business.

On February 13, about nine advertisers appeared at the meeting. Keegan and about five former employees of the News-Press and union supporters were also present. The meeting took place in a room available for use by the public for a small rental fee located downstairs in the library. Shortly after the meeting began, Millstein opened the door to the room and entered with Norman Colavincenzo, who identified himself as an accountant for the News-Press. Keegan said that this was a meeting between the Union and the advertisers and he and Hobbs asked Millstein and Colavincenzo to leave. Millstein replied that they had a right to be there because it was a public meeting and he refused to leave. Millstein said that he had statistics on the circulation of the News-Press that he wanted to give out to the advertisers. A heated argument ensued during which two of the advertisers left. Millstein and Colavincenzo remained to the meeting for about 25 minutes.

Analysis

I have already concluded that the attempt to put financial pressure on the News-Press to recognize the Union and to begin immediate bargaining was protected under the Act. The disruptive nature of this conduct adds to its coercive nature. I have considered and rejected the News-Press' defenses for its conduct set forth in its brief. I find that the News-Press again violated Section 8(a)(1) by engaging in surveillance of the union activities of employees.

VI. ISSUES CONCERNING REINSTATEMENT AND BACKPAY

The News-Press contends that none of the unlawfully discharged employees are entitled to reinstatement or full backpay based on after acquired evidence of misconduct. In *John Cuneo, Inc.,* 298 NLRB 856 (1990), the Board held that if an employer shows that an employee engaged in misconduct for which the employer would have discharged any employee, reinstatement is not ordered and back pay is terminated on the date the employer first acquired knowledge of the misconduct. The Board recently reaffirmed this holding. *First Transit, Inc.,* 350 NLRB 825, 826–827 (2007). That case involved an employee who had been unlawfully discharged but who also had been convicted of second degree robbery before she began her employment with the employer. That employee, however, indicated on her employment application that she never had been convicted of a felony. The employer in that case established that it would have never hired the employee had it known that she had lied on her employment application. The Board limited back pay due that employee at the point the employer discovered that she had falsified her employment application.

The News-Press also points to postdischarge conduct by the discriminatees that it contends should deprive them of reinstatement and full backpay. But in *C-Town,* 281 NLRB 458 (1986), the Board stated:

[13] The News-Press attempts to make something of the fact that on the application Burns indicated the Union was a nonprofit organization; this allowed Burns to pay $35 instead of the $125 that profit organizations would have to pay. The application form did not have a definition of nonprofit organizations. I accept Burns' testimony that she did not believe the Union was a profit-making organization.

> [N]ot every impropriety deprives the offending employee of the protection of the Act. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases "in which the misconduct is violent or of such a character as to render the employees unfit for further service." [Citations omitted.]

For example, serious threats of violence will serve to extinguish reinstatement rights and limit back pay. *Hadco Aluminum & Metal Corp.,* 331 NLRB 518 (2000); *Alto-Shoom, Inc.,* 307 NLRB 1466, 1467 (1992). Threats made to induce witnesses to testify in a certain way result in the same forfeitures. *Lear-Sigler Mgt.,* 306 NLRB 393, 394 (1992).

I first turned to the News-Press' argument concerning Robert Guiliano. On March 26, two months after he was terminated Guiliano send McCaw an uninvited three-page e-mail message that included:

> If you want me to help you fix this paper, my suggestions would be these: Ideally, I would recommend firing [Armstrong, Steepleton, and Apodaca] immediately. [Armstrong] is the worst editorial writer I have ever seen and makes you and the newspaper hated for no reason; [Steepleton] does not exude leadership qualities such as courage and character that reporters could look up to and respect. And [Apodaca], unless I am unaware of any efforts on her part to give you advice that was straight up, but you may not have wanted to hear, is not really serving your best interests either by just agreeing with anything you say.[Von Wiesenberger] I don't want to advise you about because you two are romantically involved. So if you want to keep him in some capacity on the newspaper, go ahead, but not in a position where he would be expected to lead the newsroom because he has no background, education or experience in that field. His talks during the management training meetings demonstrated that, with him prefacing his remarks saying, "Well, I don't know about newspapers, but . . . ." This does not reflect on my opinion of him as a person: he acts like a gentleman, dresses impeccably, is relaxed, soft spoken, intelligent, educated and someone I would feel comfortable hanging out with.

In the message, Guiliano gave specific guidance to McCaw as to how she should handle Armstrong, Steepleton, and Apodaca. Among other things, Armstrong "must be required to read and apply the principles of 'How to Win Friends and Influence People' by Dale Carnegie." And Steepleton "is going to have to be expected to apply the Golden Rule. . . ." Interspersed in Guiliano's advice for Apodaca was:

> If [Steepleton] was the sheriff and [Armstrong and Apodaca] his deputies in an old West town and a mob was coming to lynch you, you'd be out of luck. They're not the type to stand up to the mob and declare, "yeah, you might kill us, but we're taking the first bunch of you with us. Who wants it first?" Nope, it'd be more like a scene at the end of a Three Stooges movie, with [Steepleton, Armstrong, and Apodaca] peeling out of town with [Steepleton] yelping "Wooob woooob woooob wooob" and all you'd see is the soles of their shoes kicking up dust while the townsfolk toss a rope around your neck and drag you to the nearest tree.

Later in the message Guiliano continued:

> Also, sorry about that vivid description of you during our meeting. That image of you was burned in my mind because you reminded me so much of a former fiancée I had in New York years ago. I prefer the image I have of you when you swung by the elevator and smiled at me after I shouted out to you, "Hi Wendy!" and pointed to myself saying, "Bob G." and you replied, "I know who you are." "That's my favorite recollection of you."

The test is whether Guiliano's comments rendered him unfit for reinstatement and served to end his backpay at the time he made them. This is a close issue. On the one hand, Guiliano had shown his penchant for humorous asides as shown in his earlier messages to Orsua and Steepleton. I also note that there were no direct threats of harm or violence or attempts to suborn perjury that are the hallmarks in most cases where the Board has concluded a person was no longer eligible for reinstatement. On the other hand, Guiliano's remarks were entirely uninvited, suggested that McCaw fire Steepleton, Armstrong, and Apodaca, referred to Steepleton, Armstrong, and Apodaca in a somewhat bizarre, if comedic, manner, commented on McCaw's romantic relationship with von Wiesenberger, referred to von Wiesenberger in a condescending manner, and overall displayed a level of familiarity that seemed inappropriate. Taking into account the fact that Guiliano would be returning in his role as a manager and would have to work directly not only with Steepleton, Armstrong, and Apodaca but with McCaw and von Wiesenberger also, I conclude that the News-Press has shown that Guiliano should not be reinstated. I also terminate the News-Press' backpay obligation as of March 26, 2007. Because I have concluded that Guiliano's March 26 e-mail message to McCaw terminates the New-Press' obligation to reinstate him and ends his back pay period, I need not resolve whether other evidence pointed to by the New-Press in its brief would also lead to the same result.[14]

The News-Press argues that the six employees it fired for their conduct on February 2 on the Anapamu footbridge are not entitled to reinstatement and full backpay because their conduct there was unlawful. In order to fully understand this argument a more detailed description of the footbridge is required. As indicated, the footbridge crosses over highway 101, a busy thoroughfare in the Santa Barbara area. The footbridge itself has fencing that extends in an uncompleted arc curving over it. The day before the event Hobbs contacted Sergeant Mike McGrew, the watch commander on duty that day for the Santa Barbara Police Department. He advised Hobbs that if they affixed the signs or banners to the footbridge it would be a municipal code violation, but if they just held the banners they could do that all day long. However, the evidence indicates that the presence of the signs and banners on the overpass would be an unauthorized encroachment that would be unlawful because it poses a safety problem to the traveling public. A

[14] I have considered the comments posted by Guiliano on February 10 to the Santa Barbara Independent website. While those comments criticize Apodaca and Steepleton, they are not of the nature of his comments in his March 26 email message to McCaw.

conviction for such an unauthorized encroachment is considered a misdemeanor under California law. Of course, a final resolution of that matter would be for courts of appropriate jurisdiction and not the NLRB. And although the conduct on the overpass was visible and publicized extensively in the media, the appropriate authorities did not cite the demonstrators with any violation of the law. Nonetheless, the News-Press paid Ralph Norman Haber and Lyn Haber, human factors consultants, to prepare a report concerning the display on the banners and signs on the overpass on February 2. McCaw reviewed the 24-page report the day before she was to testify in this proceeding, in particular the less than 2 pages of the report that dealt with safety issues. In that regard the report concluded, "Our opinion is that the display of signs on February 2, 2007, not only violated the law, but endangered the safety of the drivers on US 101." At the trial McCaw was asked, "So the question is would you *consider* having your paper fire the people for that activity as I have described it?" (Emphasis added.) McCaw answered, "Yes." Interestingly, earlier in the proceedings Steepleton contradicted McCaw's testimony. He was asked whether it was a dischargeable offense for employees to affix a sign on a footbridge over highway 101 and he answered that it would depend on the content of the sign. And importantly Apodaca, the News-Press' human resources head, testified at the hearing but did not corroborate McCaw's testimony. Even putting aside the equivocal nature of the testimony, I do not credit it. I simple do not believe that had the employees, for example, displayed banners and signs on the overpass celebrating the victory of a local sports team that McCaw would have fired them. I again note that the employees were not convicted of or even cited for any criminal behavior. And I note that there is no evidence that the News-Press has ever before hired an expert to assess the alleged misconduct of any employee, have the expert prepare an extensive report, and then rely on the report to terminate employee for off-the-job alleged misconduct.

The News-Press contends that Burns in not entitled to a full remedy due her because of several incidents. First, at the hearing it pointed to the February 8 letter, recounted in full above, that Burns drafted that was sent to advertisers of the News-Press before the library meeting set forth above. I conclude that none of the comments in that letter were either deliberately false or were made with a reckless disregard for the truth. Nothing in that letter approaches the type of misconduct that would warrant denial of reinstatement.

The Union provided the News-Press with some documents that the News-Press had subpoenaed, one of which was an e-mail stream between Burns and Rhonda Manville beginning November 5. The News-Press introduced this evidence to support its contention that Burns should not be entitled to backpay and reinstatement. In the e-mail exchange Burns wrote:

> Dear Rhonda,
>
> Thanks for calling! Yes, I went out the way I wanted to, though I already miss reporting. I'll continue to be engaged in the campaign against [McCaw], however. There are talks here about some New Media with 24-hour local news reporting online and a print version on Sunday, all for free. In the meantime the old [News-Press] has been destroyed by a grossly incompetent and tyrannical owner. We're going out with radio ads urging cancellations next week. Don't know what the end of this will be . . . but I'm in it for the fight. Of course, I'm contesting my firing at the National Labor Relations Board, represented by the Teamsters! Cool, huh.
>
> Hope all is well. . . .
>
> What is your phone number?
>
> Love,
>
> Melinda

Manville replied:

> Hi Melinda,
>
> I can't believe all the crap going on down there. My God!!!!! How are Dawn and Nora holding up without you? I tried to call you the other day, and your mailbox at home was full—full of well wishes from your many fans, I'm sure.
>
> My phone number here is . . . . I'll be away for this weekend, but I can't wait to talk to you. I hope you and the kids and Cathy are well (I hope I spelled her name right.)
>
> I really miss you Melinda! Sending you love and kisses.
>
> Rhonda
>
> Isn't it sad about Ruthie? To me she just seemed invincible, and it is such a big loss. She was one of a kind.

I note that this private email exchange between a friend obviously trying to console another friend became known to the community at large not as a result of Burns' dissemination of it but by the News-Press'.

Another example follows. On October 31 Mike Brown sent an email message to Burns that read:

> Hi Melinda—
>
> We've spoken a few times (I worked on ECP's Regional Impacts of Growth Study). Scott Hadley passed along your email. Just wanted to write and say thanks for all the great reporting you've done over your career. You're an asset to the community and I hope you prevail. I realize the battle is likely to be a long one, but I trust that you know that there are a great number of people in the community who admire your work and your stand at [the News-Press.]
>
> Best wishes and solidarity.

Burns replied:

> Thanks very much Mike. I'm sticking around to help oust [McCaw], so long as I can figure out a way to make a living.

From this email exchange the News-Press projects that one of the goals of the union organizing campaign was to remove McCaw as owner of the News-Press and that therefore Burns and others should be denied reinstatement. But these matters must not be viewed in isolation or blown up in significance

outside of the context in which they occur. Nothing in this passing reference serves to deprive Burns or the other discriminatees of the full remedy to which they are entitled for their unlawful discharges.

On about June 21, 2007, Burns told a local public television station that "I would never have believed that the newspaper where I worked for 21 years so proudly would collapse and fall victim to a publisher who has no respect for her own workers or for the freedom of the press" and "Without a contract, it would be impossible to report the news fairly for a newspaper where the publisher was accustomed to using her paper to smear her enemies and curry favor with her friends" and "Will a wealthy woman be allowed to bully an entire community?" There is no evidence whether or not the television station broadcasted Burns' statements.

Taking into account that Burns was unlawfully fired, the News-Press has repeatedly violated the rights of its employees, the News-Press itself had conducted a rhetorically hard-hitting antiunion campaign, and Burns' comments were made in the course of her continued support for the Union, I conclude that none of Burns' rhetoric described above warrants a denial of reinstatement. The News-Press also argues that Burns and Davison cannot be reinstated because they were fired for biased reporting. But because I have concluded above that they were fired for their union activity and not for biased reporting this argument fails.

The News-Press points to a letter sent to the community by Burns, Evans, Davison, Hobbs, Kuznia, McManigal, Schultz, and Zant, all of whom I have found were unlawfully fired, on July 14, 2007, to mark the 1-year anniversary of the events at the News-Press. It also points to a letter authored by Burns on November 21, 2006, and to a November 20, 2006 article containing quotes from Hobbs. In context, nothing is these letters remotely approaches the type of misconduct that would warrant a denial of reinstatement or backpay. I find it unnecessary to describe them further and add to an already lengthy decision.

At the hearing, I ruled that the News-Press would be allowed to present whatever evidence it had concerning after-acquired evidence of misconduct but that I would not allow it to probe witnesses on the stand in the hope of discovering other evidence that it did not have. The Union filed a motion to prohibit or restrict the News-Press' questioning of discriminatees and others for postdischarge statements. The Union argued that the News-Press' inquiries into these matters was having a chilling effect on the employees' rights under the Act. In its brief, the Union again asserts that the News-Press' inquiries had the effect of discouraging employees from engaging in union activities. I agree that this type of meticulous examination of the past activities of unlawfully discharged employees by an employer in the hope of hitting a jackpot may have a tendency to discourage employees from engaging in protected activity in the first place. After all, but for the unlawful terminations the employer would never have scoured the terminated employee's statements and conduct. Some limits are in order. Indeed, the Board has held that it is unlawful to discipline employees for misconduct that was uncovered during an investigation that was unlawfully motivated. *Business Products,* 294 NLRB 840 fn. 3 (1989). More problems arise when the methods of uncovering the after-acquired evidence are first revealed during trial. It may be that in the future the Board will require a respondent to plead in its answer as an affirmative defense matters involving after-acquired evidence of misconduct. This might allow the Government to counter, if appropriate, that the search itself was unlawful. But the limits on this type of activity have to be developed by the Board and the General Counsel.

VII. SUBPOENA ISSUES

All parties raised a number of subpoena matters that I disposed of before and during the hearing. Most, in my view, do not warrant specific discussion in this decision. I do, however, discuss in some detail the matters described below. Before the hearing began the News-Press subpoenaed a number of employees requiring that they give the News-Press: "Any and all documents, including but not limited to affidavits, declarations, or statements that you have provided to the NLRB." Of course, no citation of authority is needed for the settled proposition that the News-Press is not entitled witness statements given to the NLRB except and until employees have testified in an NLRB proceeding and then only after a timely request for those statements for the purpose of cross-examination.[15] The General Counsel filed a petition to revoke those subpoenas and the Union filed a motion for sanctions against the News-Press for having sought them. During a pretrial conference, call I granted the motion to revoke those subpoenas in their entirety. And in considering the Union's request for sanctions I considered the possibility that some employees, unaware of the fact that I had granted the petition to revoke, would feel compelled to appear at the start of the hearing and provide their witness statements to the News-Press. I also considered that some confusion might result if employees were informed that they did not have to comply with certain parts of the subpoenas but had to comply with others. Keep in mind that the News-Press had served its subpoenas on a number of people and neither the General Counsel nor the Union knew all of their names and addresses. I, therefore, required the News-Press to advise those persons in writing of my ruling and it did so. I concluded that this measure was sufficient to undue any harm done by the News-Press and I otherwise denied that Union's request for sanctions. I advised the News-Press that it could re-serve properly drawn subpoenas on those employees if it so desired and it apparently did so.

The News-Press also raised a number of issues concerning whether the Union and the employees had properly complied with the subpoenas duces tecum that it had served on them. Some issues it raises are frivolous. For example, in complying with the subpoenas on behalf of the Union and the alleged discriminatees Ira Gottlieb, the Union's attorney, pointed out in a letter in several instances that he was not turning over copies of documents that were created by the News-Press and therefore already in its possession. In a sworn affidavit supplied in this case, Gottlieb averred that this was the procedure that the Union and the News-Press had agreed upon in the earlier hearing before Judge Schultz in order to save the parties time and ex-

[15] The General Counsel did not amend the complaint to allege that the requests for the witness statements violated Sec. 8(a)(1).

pense. The News-Press did not object to that procedure in this case by informing the Union otherwise, but instead asserted for the first time at trial that the Union had not complied with the subpoenas by failing to provide it with copies of documents that it already had. Although the Union would be required to provide those documents if the News-Press insisted, parties often make arrangements to lessen the burdens of subpoena compliance and the News-Press ought to first have voiced its concerns to the Union rather waiting until the trial and raising this as a noncompliance issue. Cooperation between the parties and self-resolution of the mechanics of subpoena compliance are essential before the Board and the courts should become involved. I further note that the News-Press has failed to show any substantial prejudice to support its request for sanctions.

The News-Press also complains that some employees and the Union failed to produce the "peeps" and "blitzkrieg" emails sent to them by Schultz. It requests that sanctions be imposed. However, except as indicated below I conclude the failure to supply those e-mails was because they had been deleted and the employees and the Union no longer had them to turn over. For example, McManigal testified that depending on the nature of the email message, he will delete some immediately, delete some later, and retain some. He credibly testified that he could not recall receiving these email although given he conceded that they were sent to him and therefore he must have received them. Given the nature of the email messages, I do not find this surprising. Evans credibly testified that she receives many e-mails and she deletes them every couple weeks. After his initial testimony at the trial, the News-Press served Schultz with a subpoena duces tecum covering the email messages. He complied with that subpoena by turning over certain documents, but the August 25 and September 5 email messages were not among them. Schultz credibly testified that his computer has a feature that, when activated, saves a message for 30 days and after that the message is automatically deleted. Hughes did a thorough search for the documents that were subpoenaed by the News-Press and turned those documents over but the contested e-mails were not among them. She credibly testified that she receives so many e-mails that they were clog her inbox and that she routinely deleted those that seemed only "related to the moment." Gottlieb was also served with a subpoena that covered the emails. He represented on the record and in a sworn affidavit that he too had deleted the emails. And although I gave the News-Press the opportunity to examine Keegan under oath concerning his failure to provide the emails, the News-Press decided not to do so. I note that there is no evidence that anyone deleted these emails to avoid turning them over to the News-Press. That people routinely delete email messages is simply part of using a computer to send and receive communications.

Hobbs was subpoenaed to provide information relating to the August 24 incident; she did not initially supply the Schultz "peeps" email. After that message became a matter of controversy in this case she was asked to look for it again, discovered it, and provided a copy to the News-Press. She credibly testified that in reviewing her messages with the eye to locating those covered by the subpoena she read this message, thought it was unimportant and not covered by the subpoena. In the process of locating that email to turn over to the News-Press she discovered two other email message concerning the August 24 incident. Both, in general, confirmed her testimony at trial concerning those events. Although Hobbs should have been more careful, I find nothing worthy of sanctions in her initial failure to supply copies of those e-mails.

A more complicated matter involves a copy of the "peeps" email that was later forwarded to Gottlieb by Rob Kuznia. On September 13, the night before Kuznia was scheduled to appear as a witness subpoenaed by the News-Press, Kuznia reminded Gottlieb that Kuznia had forwarded Gottlieb a copy of Schultz' "peeps" email. Gottlieb did not give that email to the News-Press until he forwarded it to the News-Press that night. Gottlieb explained on the record and in his sworn affidavit that Kuznia was initially subpoenaed by the News-Press on August 3. Kuznia identified some material covered by the subpoena and described those documents to Gottlieb. However, the material described by Kuznia to Gottlieb and then forwarded to the News-Press did not include the "peeps" email. On August 13, before the hearing opened, Kuznia did forward a copy of the "peeps" email to Gottlieb. Gottlieb replied by telling Kuznia that he did not have to provide that a copy of that message to the News-Press; Gottlieb claimed that he initially misunderstood my ruling concerning what information he was required to produce. Later, according to Gottlieb, after the hearing opened and my ruling became clearer to Gottlieb he sent a message on September 5 to everyone who he knew had been subpoenaed to re-review their email boxes and folders to see what else they might have. In the meantime, he had forgotten that on August 13 Kuznia had sent him the copy of the "peeps" email. Gottlieb said:

> I apologize to the Court. This was an inadvertent failure to fully disclose and it was not meant, in any way, to hide anything and obviously, substantively the email has already been produced, which I understand is not an excuse or a reason not to turn it over but that's the best I can—I can reconstruct what happened.

As I noted on the record in this case, Gottlieb certainly such have been more careful. But I found that sanctions were not warranted because I concluded that this error was inadvertent, the information was finally provided, the News-Press was not prejudiced, and Gottlieb expressed regret and showed an understanding that this type of conduct should not be repeated in the future.

CONCLUSIONS OF LAW

1. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and Section 2(6) and (7) of the Act by:

(a) Threatening to discipline employees if they engage in union and protected concerted activity.

(b) Coercively interrogating employees concerning their union activities.

(c) Instructing employees to remove buttons from their clothing and signs from their vehicles reading "McCaw Obey the Law."

(d) Terminating Robert Guiliano because he refused to commit an unfair labor practice.

(e) Engaging in surveillance of the union activities of employees.

2. Respondent 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 by:

(a) Issuing letters of suspension to employees because those employees engaged in union and protected concerted activity.

(b) Canceling the column written by Starshine Roshell because she supported the Union.

(c) Giving lower evaluations to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes because they engaged in union activity, thereby depriving them of annual performance bonuses.

(d) Discharging Melinda Burns, Anna Davison, Dawn Hobbs, Rob Kuznia, Barney McManigal, Tom Schultz, John Zant, and Melissa Evans because they engaged in union activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged employees, with the exception that follows, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The exception is that the Respondent is not required to reinstate Robert Guiliano and his backpay periods ends on March 26, 2007. Respondent having unlawfully given lower evaluations to Anna Davision, Dawn Hobbs, Melissa Evans, and Karna Hughes, thereby depriving them of annual performance bonuses, I shall require it to rescind those evaluations and prepare new evaluations without regard to those employees' support for the Union. Based upon my assessment of the minimal or nonexistent reasons given to support the lower evaluation I conclude that, consistent with earlier years, each of these discriminatees would have received a performance bonus and I shall require the Respondent to pay these employees a performance bonus, with interest. I shall leave the determination of the exact amounts of bonuses to the compliance portion of this proceeding after the Respondent has completed its nondiscriminatory evaluations. The amount shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* supra.

The General Counsel seeks a broad cease-and-desist order. In addition to the violations listed above, the General Counsel points to a statement made by Barry Capello, an attorney for the News-Press, to Colby Frazier works as a reporter for the Santa Barbara Daily Sound. Speaking about the six reporters who were fired for the February 2 events on the footbridge, Capello told Frazier that the News-Press had an absolute right to do what they did, and would do it again in the face disloyalty such as that. Capello continued stating that there are other people who work at that paper that have the right to have their incomes and lives protected and that employees that are out attempting to damage the newspaper that they work for would be terminated by any employer in town. Capello stated that the terminations had nothing to do with union activities. On the one hand, there is no evidence that the News-Press has shown a proclivity to violate Section 8(a)(2) or (4) of the Act. And while I have made no findings concerning violations of Section 8(a)(5), the News-Press' assertions that the matter of journalistic integrity is solely one for management may reveal concerns in that area that cannot be ignored at this point. More importantly, the flagrant nature of the violations in this case, from the unlawful discharges of Burns and Davison to the six employees for their protected conduct on the Anapamu Bridge, resulted in the termination of over 20 percent of the unit and 25 percent of the probable union voters. To make matters worse, the News-Press discharged a supervisor who would not go along its unlawful conduct. Add the obvious violations of Section 8(a)(1); taken together they show the News-Press widespread, general disregard for the fundamental rights of the employees. I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Citing *McAllister Towing & Transportation Co.,* 341 NLRB 394, 400 (2004), the General Counsel also seeks an order requiring Steepleton to read to the employees, or at the option of the News-Press, to have a Board agent read, the notice to employees in this case. While the issue is close, I conclude the broad cease-and-desist order should be adequate to prevent further violations and assure employees of their rights under the Act. Of course, if the News-Press continues to violate the Act additional remedial measures might be necessary.

[Recommended Order omitted from publication.]