Hawaiian Telcom, Inc. *and* International Brotherhood of Electrical Workers, Local Union 1357.
Cases 20–CA–069432 and 20–CA–069433

February 23, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On September 5, 2012, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions for the reasons below and to adopt the recommended Order as modified and set forth in full below.

I. INTRODUCTION

The principal question presented here is whether the Respondent lawfully ceased providing employees accrued health-related benefits based on their commencement of a strike against the Respondent. The judge found that the Respondent's cancellation of those benefits was unlawful because, under the applicable collective-bargaining agreement, the employees' eligibility for the benefits previously had accrued and was not dependent upon their continued performance of work for the Respondent. We agree with the judge for the following reasons.

II. FACTS

The Respondent provided telecommunications services to commercial and residential customers in Honolulu, Hawaii. At all relevant times, the Union was the exclusive collective-bargaining representative of a unit comprising various classifications of the Respondent's employees. The parties' most recent collective-bargaining agreement was effective from September 13, 2008 through September 12, 2011 (2008 Agreement).[3] During negotiations for a successor agreement, the parties mutually agreed to several extensions of the 2008 Agreement, the last of which expired on October 24.

A. Relevant provisions of the 2008 Agreement

The 2008 Agreement contained several provisions that bear on the outcome of this case. Article 5, which was a general definitional section, defined "Employee" as "any person who performs work for the Company for a regularly stated compensation and whose job duties are within the scope of the collective bargaining unit."

Article 28 of the 2008 Agreement set forth the parties' agreement on medical benefits. In this Article, the Respondent agreed to provide medical insurance coverage to all "employees covered by this Agreement." More specifically, the Respondent agreed to provide such coverage to all regular and probationary employees, the latter including any newly hired employee. Article 28 did not establish any time-in-service requirement for coverage. Further, Article 28 spoke directly to the Respondent's obligation to continue employees' medical coverage. Thus, Article 28.1 provided that "the benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union." Article 28.12 provided that coverage "will end thirty (30) days after termination of employment," after which individuals could elect continued COBRA coverage. No other ground for termination of coverage was stated.

Similarly, Article 39 of the 2008 Agreement contained the parties' agreement on dental benefits. There, the Respondent agreed to provide dental insurance for bargaining unit employees on basically the same terms as its commitment to provide medical insurance. Thus, Article 39 did not impose any time-in-service requirement and, like Article 28, Article 39 set forth only two circumstances in which dental coverage would be changed or discontinued: by agreement of the parties or 30 days after an employee's termination of employment.

Finally, the 2008 Agreement contained a general "Duration of Agreement" clause, stating the Agreement's effective dates, September 13, 2008 through September 12, 2011, and specifying that the Agreement would renew annually unless timely notice of cancellation was given by either party.

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

[2] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) unlawfully restricting unit members' communication with the Union by referring, in a Special Alert dated November 17, 2011, to potential discipline under its employment policies; and (2) unlawfully applying its antiharassment rule against the Union's Wall of Shame campaign in a manner that restricted employee's Sec. 7 rights. Also in the absence of exceptions, we adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by maintaining an antiharassment rule.

[3] All dates are in 2011, unless stated otherwise.

B. The Respondent's Cessation of Benefits

As the parties were attempting to negotiate a successor agreement, the Respondent, anticipating a work stoppage, contacted its dental insurance agents in July and August in order to add a rider to the employees' dental plan stating that, effective September 1, an employee's dental benefits would terminate if he or she ceased to actively work due to a strike. The Respondent initiated this change without notifying the Union, much less obtaining the Union's agreement as required by Article 39 of the 2008 Agreement. In the Respondent's view, its action was permitted by language in Article 39.1, stating that the "selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration, or benefits payable shall be determined by and at the sole discretion of the Company." The Respondent did not make any similar unilateral modifications to the employees' medical plan.

As described, the parties' last extension of the 2008 Agreement expired on October 24. With no successor agreement having been reached, the Union informally told the Respondent that it was considering a work stoppage. Several days later, the Respondent advised its medical and dental insurance providers that the Union was "planning for a walkout at any time which means we will be stopping benefits for our active Union employees (approx. 700 employees) immediately once a strike is called (benefits will continue for Union retirees)."

The Union formally notified the Respondent by letter dated November 10 that a strike would begin at 10:30 a.m. that day, and that strikers would return to work on November 11 at 8 p.m. The strike began as scheduled and, at 10:31 a.m. on November 10, the Respondent emailed its insurance providers informing them of the strike and giving official notice that it "was beginning the process for cancelling all benefits for striking union employees effective immediately." The Respondent instructed the insurance providers to stop benefits for all employees "that have a Union status code," and benefits were cancelled accordingly.

Also on November 10, the Respondent prepared and mailed COBRA packets to the strikers with a notice of cancellation of benefits, an explanation of optional continued COBRA coverage, and an application form. It did not send COBRA packets to unit employees who remained at work, to employees on approved military leave, or to those employees on approved leave under the Family and Medical Leave Act.

As planned, striking employees returned to work on Friday, November 11, at 8 p.m. The Respondent then instructed its providers to re-enroll the strikers in the insurance plans. By Tuesday, November 15, employees could submit claims, including retroactive claims for expenses incurred during the strike. There is no evidence that any employee experienced out-of-pocket costs or other financial losses as a result of the Respondent's actions.

Analysis

A. The Respondent unlawfully cancelled striking employees' benefits

The judge found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by cancelling striking employees' medical and dental benefits because of their participation in the strike. As explained below, we agree with those findings based on the particular facts and circumstances of this case.

Although it is well established that an employer is not required to finance a strike against itself, it is equally well established that it may not withhold accrued benefits from strikers based on their participation in the strike. In *Texaco, Inc.,* 285 NLRB 241 (1987), the Board determined that the appropriate analytical framework for deciding whether an employer's withholding of benefits in a particular case is unlawful is the framework established in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967):

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. We emphasize the need for proof that the . . . benefit is accrued, that is, "due and payable on the date on which the employer denied [it]." Absent such proof, there is no basis for finding an adverse effect on employee rights because an employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services for the employer. . . . Proof of accrual on a case-by-case basis will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative

> has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. Waiver will not be inferred, but must be explicit. If the employer does not seek to prove waiver, it may still contest the . . . employee's continued entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is "reasonable and . . . arguably correct," and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.

Texaco, above, 245–246 (footnotes and citations omitted); see also *NFL Mgmt. Council*, 309 NLRB 78, 85 (1992), and *Gulf & Western Mfg. Co*., 286 NLRB 1122 (1987).[4]

1. The General Counsel carried his initial burden

As set forth above, the General Counsel was required to show, initially, both that the employees' medical and dental benefits were "accrued" and that the Respondent withheld those benefits based on the employees' participation in the strike. In agreement with the judge, we find that the General Counsel established both points.

Initially, we observe that there can be little dispute that the Respondent withheld the relevant medical and dental benefits from striking employees based on their participation in the strike. As described, even before the strike commenced, the Respondent preemptively altered the dental plan to discontinue coverage for striking employees, and alerted its insurance carriers that it believed a work stoppage would occur and that it intended to cancel coverage for striking employees. Then, minutes after the strike began, the Respondent contacted those carriers to effectuate the cancellation of that coverage. It is thus clear, and we find, that the General Counsel established that the Respondent acted because of the strike.[5]

The real question here is whether the General Counsel established that the relevant medical and dental benefits were "accrued." As described, a benefit is "accrued" if it is "due and payable on the date on which the employer denied [it]," *Texaco*, above, 285 NLRB at 245. In other words, an accrued benefit is one that is already owing; an employee's entitlement to it does not depend on his return to work or future employment, but rather stems from his past work for or established employment relationship with the employer. See *Murphy Oil USA, Inc*., 286 NLRB 1039 (1987).

Here, Articles 28 and 39 of the 2008 Agreement clearly and expressly establish that the relevant medical and dental benefits were accrued. Each provision contained a broad eligibility clause providing medical and dental insurance benefits to all employees, and neither provision imposed a time-in-service requirement. In short, employees were entitled to those benefits simply by virtue of their employment with the Respondent. Each provision, moreover, specified only two circumstances in which the Respondent could discontinue providing employees those benefits: by agreement between the Respondent and the Union or upon 30 days after an employee terminated his employment. Neither condition occurred in this case. The durational provision and expiration of the collective-bargaining agreement is nondeterminative, for Board law has long held that "the mere expiration of a collective-bargaining agreement does not permit the Respondent to withhold an accrued benefit from its employees or to unilaterally change their terms and conditions of employment." *Gulf & Western*, supra, 286 NLRB at 1124; *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 206 (1991). Further, the Respondent's continuation of medical and dental benefits for employees who were not actively working for non-strike related reasons, including those on military or FMLA leave, indicates that the Respondent well understood that such benefits were contractually "due and payable" to employees based only on their ongoing employment relationship with the Respondent, not the active performance of work.[6] For all of these reasons, we find in the particu-

[4] We reject the Respondent's contention that the *Great Dane/Texaco* standard does not apply as well its assertion that the cases in which the Board has found benefits to be accrued and owing to striking employees are inapposite because they address coverage under sick, accident, workers' compensation, or other leave. The Board has not established a separate test for accrual of medical insurance premiums or otherwise carved them out of the standard *Texaco* analysis.

[5] We reject the Respondent's argument that no benefits were actually withheld because no employee was denied coverage given the retroactive restoration of benefits. The Respondent relies on *Texaco*, above, in which the Board found that it had insufficient evidence to decide whether the health insurance coverage was an accrued benefit, but even if it was, the employer did not violate the Act by discontinuing coverage during a strike because there was no actual deprivation of the benefit. As the judge noted, however, *Texaco* is distinguishable because coverage never actually ceased in that case. Here, the Respondent actually cancelled coverage and sent employees COBRA notices to that effect. Thus, employees actually lacked coverage for the 2-day strike period plus an additional 4 days after the end of the strike while the Respondent completed the process of restoring the benefits, and may have foregone medical care during this period. Even if employees ultimately incurred no out-of-pocket expenses, that bears only on the remedy and is an issue for compliance. See *GSM, Inc*., 284 NLRB 174, 174 (1987).

[6] Our colleague's assertion that continuation of coverage for employees on those other types of leave was statutorily required does not undercut our rationale on the basic accrual question under Arts. 28 and 39 of the parties' agreement. Thus, that the parties executed additional

lar circumstances of this case that the General Counsel carried his initial burden to show that the medical and dental benefits at issue were "accrued" benefits on November 10, the day the strike began. See, e.g., *NFL Mgmt. Council*, above at 85–86 (finding the respondent violated the Act when it failed to pay eligible players' salaries during a strike when the contract provided that a player who (1) sustained a football-related injury; (2) immediately reported the injury; and (3) was physically unable to perform would receive medical care and a continuation of his salary during that time because once the conditions for eligibility were met, the medical and financial benefits accrued under the contract absolutely until defeasance without further action from the employee).

The Respondent and our dissenting colleague argue, at length, that the employees' medical and dental benefits were not "accrued" for several reasons, none of which has merit.[7] Our dissenting colleague, in particular, argues that finding that those benefits had accrued to the employees is inconsistent with ERISA, insofar as ERISA deems medical coverage a "welfare" benefit and permits employers to terminate such benefits at any time for any reason. In support, he points to *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015), in which the Supreme Court, drawing on those ERISA principles, held that the Sixth Circuit erred in interpreting certain language in an expired collective-bargaining agreement to provide lifetime retiree health insurance to then-retired employees. But *Tackett* plainly held only that the Sixth Circuit erred by not applying ordinary principles of contract interpretation in evaluating the contractual language at issue there. *Tackett* did not hold that ERISA bars "welfare" benefits from ever being vested or accrued under a collective-bargaining agreement, only that in interpreting such an agreement one must look to ordinary contract principles to determine the parties' intent when those principles are not inconsistent with federal labor policy. Id. at 933. That is precisely what we have done in interpreting the plain language of Articles 28 and 39 of the 2008 Agreement in light of the principles of established Board law.[8]

As to that interpretation, the Respondent and our colleague contend that it is inconsistent with language in Articles 28 and 39 stating that benefits were provided to employees "covered by this Agreement," the "Duration of Agreement" language in the 2008 Agreement, and the notion that, absent clear language to the contrary, medical benefits expire with the agreement that created them. In fact, there is no inconsistency at all. As noted, well-established precedent makes clear that the mere expiration of a collective-bargaining agreement does not relieve an employer of its obligation under Section 8(a)(5) to continue providing established benefits to employees, notwithstanding that, as a contractual matter, they are no longer "covered" by the agreement. See *Litton Financial Printing Division v. NLRB*, supra, 501 U.S. at 206. See also *Gulf & Western*, supra, 286 NLRB at 1124. Moreover, the Board has held that where, as here, a collective-bargaining agreement affirmatively provides for a benefit, general durational language is insufficient to establish that the parties had agreed that the employer could unilaterally terminate that benefit upon the agreement's expiration. See, e.g., *AlliedSignal Aerospace*, 330 NLRB 1216, 1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) (finding that the employer unlawfully discontinued paying severance benefits for laid-off employees that were provided for in a collectively bargained agreement that had expired, notwithstanding a duration clause providing that "This [agreement] shall remain in effect until [the expiration date], but not thereafter unless renewed or extended in writing by the parties.") Further, it bears emphasis that those principles are not altered by the fact that the employees were on strike against the Respondent, for they indisputably remained bargaining unit employees employed by the Respondent.

Nor are we persuaded by the Respondent's and our colleague's suggestion that our interpretation of the 2008 Agreement is undercut by the general definition of "employee" in Article 5.1.1 of the Agreement as "any person who performs work for the Company for a regular stated compensation and whose job duties are within the scope

agreements to state clearly that coverage would continue in certain situations is not inconsistent with our finding, based on the parties' agreement that continued benefits previously had accrued for all employees in any event.

[7] Our colleague appears to conflate parts one (the General Counsel's initial burden) and two (the employer's "legitimate and substantial business justification") of the *Great Dane* analysis by arguing that the benefits were not accrued because the Respondent reasonably interpreted the 2008 Agreement differently from the General Counsel. We address this argument below in considering the Respondent's asserted interpretation.

[8] Our colleague charges us with accepting that the *Tackett* principles apply to evaluating accrual but then disregarding those principles. To the contrary, our application of traditional contract interpretation doctrine is consistent with the applicable principles of *Tackett*. As noted above, a durational clause does not preclude the continuing of certain provisions post contract expiration. Nor does finding accrual constitute imposing a "lifetime promise." The intent to vest is clearly demonstrated in the plain language of the agreement, including the limited and defined ways in which benefits may cease—none of which came to pass here.

of the collective bargaining unit." They read this language to mean that a person must be actively performing work at all moments in time in order to be an "employee" and thus to receive benefits. But, of course, no person who "performs work for the Company" does so continually, and Article 5.1.1 clearly intends to cover all persons who have a current employment relationship with the Respondent, whether or not they are actively working at any particular time. It does not refer, for example, to "any person who *is performing* work." Moreover, in evaluating their proposed reading of Article 5.1.1., we have observed the well settled principle of contract interpretation that specific terms bearing on a particular subject take precedence over general terms. E.g. *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*, 342 NLRB 101, 107 (2004); *Carpenters Local 537 (E. I. DuPont)*, 303 NLRB 419, 419 fn. 2 (1991); *Newspaper & Mail Deliverers' Union (Macromedia Publishing)*, 281 NLRB 588, 591 fn. 15 (1986), affd. mem. 804 F.2d 1248 (3d Cir. 1986). For that reason as well, we reject their proposal to rely on the general definitional language in Article 5.1.1. to limit Articles 28 and 39, which address specifically the benefits at issue here.[9]

For all of those reasons, we find that the General Counsel demonstrated both that the striking employees' medical and dental benefits were "accrued" and that the Respondent withheld those benefits based on the employees' participation in the strike.

2. The Respondent did not establish a legitimate and substantial business justification for discontinuing the striking employees' benefits

Because the General Counsel has carried his initial burden, the burden shifts to the Respondent to prove that it had a "legitimate and substantial business justification" for withholding medical and dental benefits from the striking employees. The Respondent must show either that the Union waived the striking employees' right be free from such discrimination or that the Respondent relied on a nondiscriminatory contract interpretation that was "reasonable" and "arguably correct." *Noel Corp.*, 315 NLRB 905, 911 (1994). We find that the Respondent has failed to carry its burden.

The Respondent does not contend that the Union waived its employees' statutory rights, and there is no evidence of such a waiver in any event. Rather, the Respondent, joined by our dissenting colleague, essentially contends that its termination of the striking employees' medical and dental benefits was based on a reasonable and nondiscriminatory reading of the 2008 Agreement. But, for reasons largely explained above, we find that the Respondent's reading of the 2008 Agreement was not reasonable. The Agreement provided for two specific scenarios in which the provided benefits could be discontinued—through agreement with the union, or once 30 days had passed from the cessation of an individual's employment—neither of which were even arguably implicated by the brief work stoppage that took place.

The Respondent relies on additional language in Articles 28 and 39 to justify its action. Article 28 (medical) stated that "The selection of the carrier and the administration of the medical plan will rest with the Company provided the level and quality of the benefits remain the same." Similarly, Article 39 (dental) stated that "The selection of the carrier and the administration of the Dental Insurance Plan will rest with the Company provided the level and quality of the benefit remains the same." The Respondent suggests that this supported its decision to cancel striking employees' coverage. The Respondent's discretion to select a carrier and administer a plan, however, does not even arguably encompass the wholesale cancellation of coverage for employees, particularly when that cancellation is on the basis of employees' protected activity.

Finally, we find unpersuasive two cases heavily relied upon by the Respondent and our colleague: *General Electric Co.*, 80 NLRB 510 (1948), and *Simplex Wire & Cable Co.*, 245 NLRB 543 (1979). In *General Electric*, which was decided before *Great Dane* and *Texaco*, the question was whether the employer unlawfully denied striking employees continuous-service credit, which was the basis for determining certain benefits including vacations and pensions, for the period they were on strike. The Board found no violation as to the vacation and pension benefits, reasoning that the employer was not required to credit employees for service during the strike. However, as pointed out by Member Murdock, dissenting in part, the majority's analysis utterly failed to consider whether the right to continued service credit was "accrued" under the parties' agreement, as *Great Dane* and *Texaco* now make clear is necessary. 80 NLRB at 514–515. As a result, *General Electric* is of dubious standing today.

[9] We also observe that other provisions of the 2008 Agreement tend to cast further doubt on the Respondent's and our colleague's expansive reading of Art. 5.1.1. The contractual "Sickness Disability Plan," for example, provided benefits to "employees" who experienced a "total inability . . . to perform the duties of employment." Similarly, the 2008 Agreement provided long-term disability coverage for "regular full-time employees" who were "continuously and totally disabled, under the care of a physician, and absent from work for twenty-six (26) weeks." Employees in either of those categories plainly received benefits notwithstanding Art. 5.1.1.

The value of *Simplex Wire*, another pre-*Texaco* decision, is questionable for the same reason. In *Simplex*, the Board found that the employer did not unlawfully withhold medical insurance benefits from striking employees, but did not engage in the analysis now required under *Texaco.* Thus, the Board made no inquiry into whether those benefits were accrued under the applicable contractual provisions and, if they were, whether the employer nonetheless established a legitimate and substantial business justification for withholding them.[10]

We thus find, in agreement with the judge, that the Respondent violated Sections 8(a)(1), (3), and (5) of the Act by cancelling the accrued medical and dental benefits of employees who participated in the work stoppage. We emphasize, however, that this finding is based on our application of the *Great Dane-Texaco* analytical framework to the particular facts and circumstances of this case. As such, there is no basis for our colleague's claim that our decision somehow alters Board precedent. Our decision certainly does not—as our colleague suggests—require all employers to provide medical benefits to employees who are not actively at work. It does not, as he asserts, create an "open-ended" obligation on employers to provide benefits for all employees who are not actually working for extended periods of time. This is not a "preposterous" blank check: it does not impose an obligation to continue health benefits in all strike cases. The obligation in this case is a limited one that arises from the collective-bargaining agreement created and agreed to by the parties themselves. Indeed, because our decision is dependent on the language negotiated by the parties, we acknowledge that a different outcome could well obtain under a different contractual language. See, e.g., *Ace Tank & Heater Co.*, 167 NLRB 663, 664 (1967). [11]

[10] Our colleague seems to suggest that *Simplex Wire* remains good law because it was cited "with approval" in the post-*Texaco* decision *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1326 and fn. 27 (2006). We disagree. It was cited in *Beverly Health* only for the proposition that an employer is not generally required to continue paying health insurance premiums for employees who are on strike, or in any way finance a strike against itself. The Board acknowledged and affirmed this principle in *Texaco*, 285 NLRB at 245, but found that it does not apply to employee benefits that, as in *Texaco* and here, have accrued. Likewise, *General Electric* was cited favorably by Board in *Texaco* solely for the proposition that the General Counsel must show that (1) the benefit was accrued, due and payable on the date it was denied, and (2) the benefit was withheld on the apparent basis of a strike.

[11] For essentially the same reasons given above, and contrary to our colleague, we affirm the judge's finding that the Respondent unlawfully denied medical and dental benefits to employees who were on Union leaves of absence during the strike.

As to all categories of employees, in adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally changing its dental plan, we do not rely on the judge's discussion of the standard for analyzing 8(d) violations because there is no 8(d) allegation in this case. As we recently clarified, the two sections are analytically distinct. See *Springfield Day Nursery a/k/a Square One*, 362 NLRB No. 30 (2015). Our finding thus rests on the points that the dental plan was a mandatory subject of bargaining and that the Respondent unilaterally changed its terms without giving the Union notice and an opportunity to bargain.

B. The Respondent Unlawfully Mailed COBRA Notice Packets to Strikers

Having found the Respondent unlawfully cancelled striking employees' medical and dental benefits, we also agree with the judge that the Respondent violated Section 8(a)(1) by mailing COBRA notices to those strikers with the date of insurance cancellation and information on continued coverage. The strikers were statutory employees even when on strike, and, under the particular terms of the contract agreed to by the parties in this case, should have been covered by the Respondent's insurance plans. As the judge found, the COBRA notices "only served to remind employees of the unlawful discontinuation of benefits." We reject the Respondent's argument that because coverage had ended, it was required by law to mail COBRA notices to its employees. As we have found, the Respondent unlawfully ended the coverage and created the situation giving rise to any such duty; it cannot now use that unlawful conduct to create a statutory COBRA notice obligation.

AMENDED REMEDY

The judge's recommended remedy and Order includes an award of make-whole relief. We adopt the make-whole remedy, but in light of evidence that employees may not have incurred out-of-pocket costs or other losses as a result of the Respondent's unlawful conduct, we leave to compliance a determination of the extent of the Respondent's make-whole obligation.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we shall modify the judge's recommended Order to require that any monetary make-whole relief shall be paid with interest compounded on a daily basis. We shall also order the Respondent to compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum make-whole awards and to file a report allocating the make-whole awards to the appropriate calendar quarters for each employee in accordance with our decisions in *Don Chavas d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *AdvoServ of New Jersey*, *Inc.*, 363 NLRB No. 143 (2016).

Excepting to the judge's narrow cease-and-desist order, the Respondent argues that it has already ceased the conduct we find unlawful today and that the order is therefore unnecessary. We disagree. The Board routine-

ly issues cease-and-desist orders to remedy the violations found. See Section 10(c) (upon finding an unfair labor practice, the Board "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice"). Doing so will "prohibit the repetition by the Respondent of similar conduct and subject[] [the] Respondent to contempt if it continues its unlawful conduct." *Truck Drivers Local 705 (Gasoline Retailers)*, 210 NLRB 210, 211 (1974).

Finally, we shall modify the judge's recommended Order to conform to the Board's standard remedial language and the violations found. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Hawaiian Telcom, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Cancelling health, drug, vision, and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011.

(b) Changing its dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike.

(c) Informing its employees who participated in the work stoppage that their life, health, drug, vision, and dental insurance were cancelled.

(d) Restricting unit members' communication with the Union by referring, in a Special Alert dated November 17, 2011, to potential discipline under its employment policies.

(e) Applying its antiharassment rule against the Union's Wall of Shame campaign in a manner that restricts employees' Section 7 rights.

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

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

(a) Make whole with interest all former strikers for any accrued health, drug, vision, and/or dental benefits denied them as a result of their participation in the strike in the manner set forth in the remedy section of the judge's decision as amended in this decision, to the extent it has not already done so.

(b) Compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum make-whole awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of make-whole awards are fixed, either by agreement or Board order, a report allocating the make-whole awards to the appropriate calendar years for each employee.

(c) Upon request, rescind the unilateral change eliminating dental benefits for unit employees whose employment ends due to a strike to the extent it has not already done so.

(d) 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.

(e) Within 14 days after service by the Region, post at its Honolulu, Hawaii facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20, 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. If 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 September 1, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 23, 2017

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

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

One might wish for a world where people receive wages and benefits without performing work. My colleagues have constructed one-half of this world in the instant case. They do not require the payment of wages,[1] but they impose an open-ended obligation on the Respondent here to provide medical benefits for employees who have stopped working in support of a strike. This particular case involves a short strike, but the obligation created by my colleagues is unlimited in duration. Under their reasoning, the employer must continue paying for medical benefits even if the nonworking employees spend weeks, months or years—or the rest of their careers—refusing to work until the employer and union have agreed upon further improvements in wages and benefits.

I do not favor denying medical benefits or wages to striking employees any more than I favor strikes, lockouts and other types of threatened or inflicted economic injury that are protected by the National Labor Relations Act (NLRA or Act). As I have stated previously, "[t]he *statute* protects these types of economic weapons. Their availability . . . has produced virtually all of the agreements reached in the Act's 80-year history."[2] By statutory design, parties in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[3] Yet, absent unusual circumstances not presented here, the right to strike does not include an entitlement to receive wages or benefits during periods that employees perform no work because of the strike.[4]

My colleagues depart from this basic principle. Therefore, I respectfully disagree with their assessment of the merits, and the present case does not stand in isolation. In other recent decisions, the Board has similarly gone too far in the direction of imposing wage or benefit obligations in the absence of any contract, when the disputed employment terms have not been agreed to by anyone and remain under negotiation. In *Lincoln Lutheran of Racine*,[5] a Board majority held that, after contract expiration, the employer must continue deducting union dues and remitting them to the union, even though dues checkoff remained under negotiation.[6] In *Finley Hospital*,[7] a Board majority held that the employer, after contract expiration, was required to grant annual wage increases of 3 percent (the same percentage increase provided to employees under the expired one-year labor agreement), even though wages remained under negotiation. The Court of Appeals for the Eighth Circuit rejected the Board majority's conclusion in *Finley Hospital*; the court found there was no support for the Board majority's "assumption" that the annual raises were part of the status quo merely because they had been included in the expired one-year agreement.[8] In *Arc Bridges, Inc.*,[9] a Board majority held that the employer, during initial contract negotiations, was required to pay a 3-percent wage

[1] Although wages are not at issue in the instant case, Board majorities in recent decisions have found that employers—though prohibited from making unilateral changes in wages without bargaining—are required to unilaterally increase wages, even though such increases have not been agreed to by the union, and even though bargaining over the union's wage demands has not produced an agreement or impasse. See, e.g., *Finley Hospital*, 362 NLRB No. 102 (2015), enf. denied in relevant part 827 F.3d 720 (8th Cir. 2016); *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), enf. denied in relevant part 662 F.3d 1235 (D.C. Cir. 2011), on remand 362 NLRB No. 56 (2015). The Board's decisions in these cases have been divided, with dissenting opinions by one or more participating members. See, e.g., *Finley Hospital*, 362 NLRB No. 102, slip op. at 11–17 (Member Johnson, dissenting in part); *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 6–12 (2015) (Member Miscimarra, dissenting).

[2] *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 10 (2016) (Member Miscimarra, dissenting in part) (emphasis in original).

[3] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488–489 (1960).

[4] See *Texaco, Inc.*, 285 NLRB 241, 245 (1987) ("[A]n employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services for the employer," absent proof that the benefits in question were "accrued," which means "due and payable on the date on which the employer denied [them].") (citation omitted).

[5] 362 NLRB No. 188 (2015). Former Member Johnson and I dissented in *Lincoln Lutheran of Racine* from the Board's holding that dues-checkoff obligations continue following contract expiration. Id., slip op. at 9–15 (Members Miscimarra and Johnson, dissenting in part).

[6] In *Lincoln Lutheran*, supra, that Board majority held that the obligation to continue deducting union dues arises from dues checkoff provisions that existed in the expired collective- bargaining agreement, and an employer would be permitted to discontinue dues checkoff after the contract expires only if the employer bargains to an agreement or impasse over new contract proposals under which dues checkoff is eliminated.

[7] Supra, 362 NLRB No. 102. Former Member Johnson dissented from the Board majority's decision in *Finley Hospital*. Id., slip op. at 11–17 (Member Johnson, dissenting in part).

[8] *Finley Hospital v. NLRB*, 827 F.3d 720, 724–725 (8th Cir. 2016).

[9] Supra, 355 NLRB at 1222.

increase, even though wages remained under negotiation and the union was demanding a *50-percent* wage increase over a 3-year period.[10] The Court of Appeals for the D.C. Circuit rejected the holding in *Arc Bridges* that the Act required the payment of the disputed 3-percent wage increase, and the court stated that the Board's analysis came "out of thin air" and was "nothing short of arbitrary."[11] On remand, though accepting the court's criticisms "as the law of the case,"[12] a Board majority held the employer was *still* required to pay the disputed 3-percent wage increase because the majority concluded—over my dissent—that denying the increase constituted antiunion discrimination in violation of Section 8(a)(3).[13]

In the instant case, the majority is requiring the Respondent to continue medical benefits even though no contract exists, and even though the recipients have stopped working and do not even report to work. The NLRA provides critical protection to employees who engage in a strike, and this protection makes it unlawful to retaliate against striking employees by denying them accrued benefits. *Texaco*, supra. However, this has never previously been interpreted to require employers to continue contractual medical benefits when no collective-bargaining agreement exists and when employees perform no work because of a strike. In my view, one cannot reconcile this case, and the direction and outcome of the other cases described above, with the limited role that Congress envisioned for the NLRB as a neutral arbiter of the collective-bargaining process. As the Supreme Court stated in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680 (1981), "the Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."[14]

Our statute prohibits the Board from imposing substantive economic terms on parties,[15] and the Board lacks authority to change the balance struck by Congress when devising the various economic weapons available to parties in bargaining.[16] In addition, when evaluating health

[10] In *Arc Bridges*, the Board reasoned that the employer had to provide the disputed 3 percent wage increase because (i) in the past employees who were unrepresented sometimes received an across-the-board increase in July "if sufficient funds" existed (355 NLRB at 1223–1224); (ii) these occasional wage increases were declared an "established condition of employment" because they were given at some times (though not given other times) (id.); and (iii) the failure to give new wage increases during bargaining, according to the Board, was "inherently destructive" of employee rights (id. at 1224–1225).

[11] *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011).

[12] *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2 (2015).

[13] One cannot succinctly summarize the deficiencies in *Arc Bridges* that, in my view, rendered inappropriate the Board majority's factual and legal conclusions, and those deficiencies are enumerated in detail in my dissenting opinion. See 362 NLRB No. 56, slip op. at 6–12 (Member Miscimarra, dissenting). However, as I pointed out, the D.C. Circuit correctly held that annual wage increases clearly were *not* part of the status quo, which meant the employer would have violated Sec. 8(a)(5) by unilaterally implementing a 3-percent increase (which the union opposed) at a time when bargaining had not yet resulted in an impasse or agreement. Id., slip op. at 7, 12. Thus, the Board majority in *Arc Bridges* found that Sec. 8(a)(3) required the employer to unilaterally implement a 3-percent wage increase, even though implementing the increase would have breached the employer's bargaining obligations in violation of Sec. 8(a)(5) of the Act. As I stated in my dissent: "The practical effect of the majority's decision . . . [was] to put the Respondent in a no-win situation. The Board cannot reasonably adopt standards that cause parties to be in violation of the Act regardless of the actions they take." Id., slip op. at 12 (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981)). See also *Advanced Life Systems, Inc.*, 364 NLRB No. 117 (2016) (finding that employer violated Sec. 8(a)(3) by freezing wages after employees chose to be represented by a union, even though Sec. 8(a)(5) required employer to freeze wages pending negotiations with the union for an initial collective-bargaining agreement); see id., slip op. at 5–12 (Member Miscimarra, dissenting in part).

[14] Similarly, in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Supreme Court stressed that the Act imposes limits on the Board's authority to pass on substantive terms that have not been agreed to by the parties in collective bargaining:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that, through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might, in some cases, be impossible, and *it was never intended that the Government would, in such cases, step in, become a party to the negotiations, and impose its own views of a desirable settlement*.
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> . . .
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> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*. It would be anomalous indeed to hold that, while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining *under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract*.

Id. at 103–104, 107–108 (emphasis added; footnotes omitted).

[15] Sec. 8(d) (providing that the obligation to bargain under the NLRA "does not compel either party to agree to a proposal or require the making of a concession"); *H. K. Porter Co. v. NLRB*, supra, 397 U.S. at 102 ("[W]hile the [NLRB] does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision . . . .").

[16] See, e.g., *NLRB v. Insurance Agents' International Union*, supra, 361 U.S. at 497 (It is not a proper function of the Board to act "as an

insurance issues the Board may not disregard federal benefits law, particularly the Employee Retirement Income Security Act (ERISA),[17] nor may the Board misapply other well-established principles of contract construction. Indeed, the Supreme Court has held that the Board has no special expertise when interpreting collective-bargaining agreements, and regarding these contract issues, the courts will afford no deference to the Board's interpretation.[18]

In this case, I believe my colleagues impose an extraordinary obligation that is not supported by our statute or the parties' collective-bargaining agreement. I also believe my colleagues' conclusion is contrary to the record evidence. For these reasons, as explained more fully below, I respectfully dissent.

Background

The Respondent and the Union were parties to a 2008–2011 collective-bargaining agreement (CBA). By its terms, the CBA expired on September 12, 2011. However, the parties attempted to negotiate a successor agreement, and during these negotiations they agreed to extend the term of the 2008–2011 CBA five times. The fifth contract extension ended on October 24, 2011.

On November 10, 2011,[19] the Union notified the Respondent that it would engage in a work stoppage beginning at 10:30 a.m. Employees engaged in a protected work stoppage, which lasted two days, and Respondent lawfully denied wages to employees for the time they were not working because of the work stoppage. The Respondent likewise discontinued medical and dental benefits coverage for striking employees during the period of the strike.[20] Consistent with the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA),[21] the Respondent mailed COBRA notices advising the affected employees that they could elect to continue their benefits coverage at their expense.[22] After the strike ended, the employees were re-enrolled in the employer-provided medical and dental plans, and coverage was restored retroactively (including the two days employees were on strike) at the Respondent's request.

There is no allegation that the Respondent unlawfully denied any individual post-strike benefits coverage when employees resumed working. However, my colleagues find that the Respondent had a statutory obligation to provide medical benefits *during* the period employees performed no work while on strike. Specifically, the majority finds that the Respondent's discontinuation of benefits during the period when employees performed no work constituted antiunion discrimination in violation of Section 8(a)(3) and (1) of the Act. The sole question before the Board is whether our statute required the Respondent, after contract expiration, to provide employer-paid medical benefits to employees who were not performing work.

Nothing in the NLRA directly requires an employer to continue wages or benefits for employees who refuse to work because they are on strike. However, the majority creates this type of statutory obligation by reference to the expired CBA. In my view, the expired CBA contained several potentially relevant provisions that, read together, clearly establish that the Respondent was under no obligation to continue medical benefits during the strike.

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arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965) (The Board is not vested with "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.").

[17] See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

[18] *Litton Financial Printing Division, Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 202–203 (1991) ("Although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, . . . the Board is neither the sole nor the primary source of authority in such matters. 'Arbitrators and courts are still the principal sources of contract interpretation.'") (citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), and quoting *NLRB v. Strong,* 393 U.S. 357, 360–361 (1969)); Electrical Workers *IBEW Local 1395, v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986) ("If deference were afforded the Board's interpretation of collective bargaining agreements, the Board would be free to apply different . . . standards of interpretation than those applied by the courts in Section 301 suits."); *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802, 805 (D.C. Cir. 1975) ("The Board's argument to the extent it relies on contract interpretation alone . . . is entitled to no particular deference.").

[19] Unless otherwise noted, all dates are in 2011.

[20] For ease of reference, although the instant case involves medical *and* dental benefits, I use the term "medical benefits" to encompass both, unless the context warrants differentiating between the two types of benefits.

[21] COBRA gives an employee the right to elect continued coverage, at the employee's expense, under the employer's group health plan for a prescribed period of time, even though he or she would otherwise lose coverage because of a qualifying event such as termination of employment or, as is relevant here, a strike. See 26 C.F.R. § 54.4980B-4 (2012) ("[A] strike or a lockout is a termination or reduction of hours that constitutes a qualifying event if the strike or lockout results in a loss of coverage. . . ."). As noted in the text, COBRA also requires employers to issue written notices to employees regarding their right to elect continuation coverage when a qualifying event occurs. It also imposes a limit on the cost amount that employees may be required to pay for continuation coverage, among other requirements. There is no allegation that the Respondent in the instant case failed to satisfy its legal obligations under COBRA.

[22] The Respondent did not send COBRA notices to employees on approved military leave or approved leave under the Family and Medical Leave Act (FMLA).

Article 42 ("Duration of Agreement") stated the CBA was "effective and binding upon the parties from ***September 13, 2008*** to and including ***September 12, 2011***," subject to renewal from year to year absent 60 days' notice of termination or modification, and if either party provides such notice, "then th[e] Agreement terminates upon the expiration of its original term or its yearly extended term."[23] In the instant case, the parties agreed to five contract extensions during negotiations for a new contract, with the fifth extension ending on October 24, 2011.[24]

Article 5, Section 5.1.1 ("Interpretation") defined the term "employee" as "any person *who performs work* for the Company for a regular stated compensation and whose job duties are within the scope of the collective bargaining unit."[25]

Article 28 ("Medical Plan") provided for the Respondent to pay "the entire plan premium for regular full-time employees and their dependents," and in relevant part stated as follows:

> The Company will make available a medical plan *to employees covered by this Agreement*. The selection of the carrier and the administration of the medical plan will rest with the Company provided the level and quality of the benefits remain the same. *The benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union*.
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> . . .
>
> For all regular full-time employees and their dependents, the Company shall pay all of the premium for the medical plans.
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> . . .
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> For all temporary employees, the Company shall pay one-half (1/2) of the premium for the medical plans. . . .
>
> . . .
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> Effective January 1, 2003, coverage for employees and their dependents will end thirty (30) days after termination of employment. Coverage for dependents will end on the date they become ineligible for coverage. Employees and their legal dependents may have an opportunity to continue to participate in the Plan in accordance with the Consolidated Omnibus Budget Reconciliation Act (COBRA).[26]

Article 39 ("Dental Plan") was similar to Article 28 and stated that the Company "will make available a Dental Plan *to employees covered by this Agreement*," that the "benefits provided by this plan *will not be discontinued or amended without the agreement of the Company and the Union*," that "the Company will pay all of the premium equivalent for the Company Dental Plan" for regular full-time employees and their dependents, that (effective January 1, 2003) "coverage for employees and their dependents *will end thirty (30) days after termination of employment*," and that employees and dependents, after their coverage ends, "may have an opportunity to continue to participate in the Company's dental plan in accordance with [COBRA]."[27]

Article 32 ("Leave on Union Business") provided for Union officials to be granted leaves of absence without pay, subject to the following additional provisions:

> The number of such officials shall not exceed five at any one time. Such leaves of absences shall not be granted if the absence of the employees would disrupt the operation of any work group of the Company.
>
> . . .
>
> While on leave, the Company agrees to cover the employee under the Retirement System *as if the employee remained in active service with the Company*. Should the employee be a member of the Company's Medical and/or Dental Plans, the Company agrees to provide medical coverage *in accordance with Article 28 and/or Article 39 of the Agreement*.[28]

[23] GC Exh. 2, Art. 42, Sec. 42.1–42.3, p. 55 (emphasis in original).
[24] GC Exh. 3.
[25] GC Exh. 2, Art. 5, Sec. 5.1.1, p. 3 (emphasis added).
[26] Id., Art. 28, Sec. 28.1, 28.2, 28.3, 28.12, pp. 38–39, 40 (emphasis added).
[27] Id., Art. 39, Sec. 39.1–39.3, p. 53 (emphasis added).
[28] Id., Art. 32, Secs. 32.1–32.4, 32.6, p. 44 (emphasis added). The expired CBA also included provisions regarding sickness disability and long-term disability plans, military leave, and FMLA leave, which are consistent with the requirements of Hawaii law. See Hawai'i Prepaid Health Care Act, Hawaii Rev. Stat. §§ 393-1 through 393-51 (requiring covered employers to provide health insurance to their employees, to pay at least 50 percent of the cost of coverage, and to continue such coverage for disabled employees for at least three months); Hawai'i Temporary Disability Insurance Law, HRS Chapter 392 (generally providing for partial wage replacement insurance coverage to eligible disabled employees). Art. 27 of the expired CBA, Sickness Disability Plan, provides that all regular employees and certain temporary employees "shall be qualified to receive payments . . . on account of physical disability to perform scheduled work by reason of sickness or accident outside of working hours, not covered by the Workers' Compensation Law of the State of Hawaii." Art. 31 provides for leaves of absence for military service. Although Art. 31 makes no provision for continuation of medical benefits during such leaves, the Federal Uniformed

Analysis

For more than 50 years, it has been firmly established that "an employer is not required to finance a strike by paying wages for work not performed," and that wages, for this purpose, include "vacation benefits and health insurance premiums." *Ace Tank & Heater Co*., 167 NLRB 663, 664 (1967) (citations omitted).[29] However, an exception exists where particular benefits, at the time of a strike, had already "accrued," meaning they were "due and payable on the date on which the employer denied them."[30] The standard governing whether or when benefits are deemed "accrued" was established in *Texaco, Inc*., supra, 285 NLRB at 245–246:

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was *accrued* and (2) the benefit was withheld on the apparent basis of a strike. *We emphasize the need for proof that the . . . benefit is accrued, that is, "due and payable on the date on which the employer denied [it]."* Absent such proof, there is no basis for finding an adverse effect on employee rights because *an employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services for the employer*. . . . Proof of accrual on a case-by-case basis will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with *proof of a legitimate and substantial business justification for its cessation of benefits*. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. Waiver will not be inferred, but must be explicit. If the employer does not seek to prove waiver, it may still contest the . . . employee's continued entitlement to benefits by demonstrating *reliance on a nondiscriminatory contract interpretation that is "reasonable and. . . arguably correct," and thus sufficient to constitute a legitimate and substantial business justification for its conduct*. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.[31]

Three principles—each disregarded by my colleagues—are particularly relevant to the question of whether the Respondent violated the Act by discontinuing medical benefits for the period that employees ceased working because of their strike.

First, as the Board emphasized in *Texaco*, when the Board evaluates whether medical benefits were "accrued," which means "due and payable" even though employees are no longer working,[32] the Board's role is limited to determining whether the employer relied on an interpretation of the contract that is "reasonable and . . .

Services Employment and Reemployment Rights Act (USERRA) requires employers to continue health plan coverage under certain circumstances for employees absent for military duty. See 43 U.S.C. § 4317. A Memorandum of Agreement between the parties regarding FMLA leave (FMLA Memo) states that "[w]hile on FMLA leave, eligible employees shall continue to receive company-paid life insurance and medical/dental benefits to the extent provided to active employees." A separate Memorandum of Agreement (LTD Memo) governs long-term disability (LTD) benefits. The LTD Memo provides that employees may choose to enroll in a LTD plan that pays a portion of the employee's monthly pay in case of disability, with coverage paid for solely by the employee, and the LTD Memo also provides that "[d]uring the period LTD benefits are paid, eligible employees will continue to receive life, medical and dental insurance coverage in accordance with the" CBA.

[29] This principle was already clearly established when the Board decided *Ace Tank & Heater* in 1967. See, e.g., *General Electric Co*., 80 NLRB 510, 511–512 (1948). See also *Mooney Aircraft, Inc.,* 148 NLRB 1057 (1964), enfd. 366 F.2d 809 (5th Cir. 1966); *W. W. Cross & Co.,* 77 NLRB 1162, 1164 fn. 5 (1948), enfd. 174 F.2d 875 (1st Cir. 1949); *Inland Steel Co.*, 77 NLRB 1 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied in relevant part 336 U.S. 960 (1949).

[30] *E.L. Wiegand Division, Emerson Electric Co.*, 650 F.2d 463, 469 (3d Cir. 1981), cert. denied 455 U S. 939 (1982), enfg. in relevant part *Emerson Electric Co.,* 246 NLRB 1143 (1979); *Texaco, Inc*., supra, 285 NLRB at 245–246.

[31] *Texaco*, supra, 285 NLRB at 245–246 (emphasis added; fns. omitted) (citing *General Electric*, 80 NLRB at 510; *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967)).

[32] The test under *Texaco*—whether the disputed benefits were "due and payable" regardless of the fact that employees are performing no work – involves the same type of analysis utilized by courts that have evaluated whether retiree medical benefits are "vested." See, e.g., *M&G Polymers v. Tackett*, 135 S.Ct. 926, 935–938 (2015). In both contexts, the inquiry turns, in part, on whether the parties mutually intended that the benefits would be a form of deferred compensation based on services already performed. See, e.g., *Texaco*, 285 NLRB at 244 (benefits were "accrued" and "due and payable" to the extent "they were based on . . . employees' past performance" and did "'not depend on any return to work or on any future services to the employer'") (quoting *Emerson Electric Co. v. NLRB,* supra, 650 F.2d at 469); *Tackett*, 135 S.Ct. at 936 (evaluating whether benefits were a "form of deferred compensation").

arguably correct."[33] In this area, the Board is not empowered to second-guess the employer's reasonable interpretation of the CBA, even though the Board might resolve the question of contract interpretation in a different manner. As the court stated in *Vesuvius Crucible Co. v. NLRB,* 668 F.2d 162 (3d Cir. 1981):

> We need not decide on this appeal whether Vesuvius, or the Board, correctly interpreted the collective bargaining agreement at issue here. Indeed, we believe that *in formulating its own interpretation of the contract, the Board overstepped its authority and seriously misperceived its role*. The legitimacy of the company's conduct for purposes of the analysis prescribed by *Great Dane* depends not on the truth of its assertions regarding its contractual obligations but rather on the reasonableness and bona fides with which it held its beliefs. *The mere fact that the NLRB construed the contract differently from the way Vesuvius did should not, without more, mean that Vesuvius ipso facto committed an unfair labor practice*. . . . Accordingly, we hold that, in the absence of proof of anti-union motivation or a finding that the company's conduct was inherently destructive of employee rights, *a non-discriminatory refusal to pay benefits to all employees based on a good faith interpretation of the labor contract is insufficient to make out a violation of the National Labor Relations Act*.

Id. at 167–168 (emphasis added). See also *NLRB v. Borden, Inc.,* 600 F.2d 313, 321 (1st Cir. 1979) ("Borden did come forward with evidence of a business justification for its conduct, namely, the terms of the collective bargaining agreement and past practice. The Board found this reason invalid because its interpretation of the contract differed from that of Borden's. This, however, is not a question of contract interpretation. The Board had a duty to determine whether Borden was motivated by its reliance on the collective bargaining agreement or by anti-union animus when it withheld the accrued vacation benefits. We caution the Board that it is neither our function nor the Board's to second-guess business decisions. 'The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation.'") (citation omitted; paragraph structure altered); *NLRB v. Sherwin-Williams Co.,* 714 F.2d 1095, 1101 (11th Cir.1983) ("In short, we conclude that there is insufficient evidence on this record to support a conclusion that Sherwin-Williams was motivated by anything other than its good faith and reasonable interpretation of the Disability Plan when it, consistent with past practice, suspended disability benefits during work stoppages at the Morrow, Georgia facility. The Board's determination that the Company committed an unfair labor practice by withholding disability benefits from the named employees cannot be sustained."); *Conoco, Inc. v. NLRB,* 740 F.2d 811, 815 (1984) ("Under the *Great Dane* test, if the employer presents evidence of a legitimate and substantial business justification for withholding accrued benefits, the NLRB must then prove anti-union animus. . . . [P]roof of good faith reasonable reliance on the terms of the collective bargaining agreement is sufficient to establish a substantial and legitimate business justification. Further, the NLRB may not formulate its own interpretation of the contract, but is limited to determining the truth of the employer's assertions regarding its contractual obligations, based upon 'the reasonableness and bona fides with which [the employer] held its belief.'") (quoting *Vesuvius Crucible*, supra at 167, and citing *Borden Chemical*, supra, and *Sherwin-Williams*, supra).

Second, medical coverage is considered a "welfare" benefit under ERISA,[34] and the Supreme Court has emphasized that ERISA principles governing welfare benefits apply to medical coverage even when provided pursuant to a collective-bargaining agreement. Thus, in *M&G Polymers v. Tackett*, the Court stated:

> When collective-bargaining agreements create pension or welfare benefits plans, *those plans are subject to rules established in ERISA*. ERISA defines pension plans as plans, funds, or programs that "provid[e] retirement income to employees" or that "resul[t] in a deferral of income." § 1002(2)(A). It defines welfare benefits plans as plans, funds, or programs established or maintained to provide participants with additional benefits, such as life insurance and disability coverage. § 1002(1).
>
> ERISA treats these two types of plans differently. Although ERISA imposes elaborate minimum funding and vesting standards for pension plans, §§ 1053, 1082, 1083, 1084, *it explicitly exempts welfare benefits plans from those rules*, §§ 1051(1), 1081(a)(1). Welfare benefits plans must be "established and maintained pursuant to a written instrument," § 1102(a)(1), but *"[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."* . . . As we have previously recognized, *"[E]mployers have large leeway to design disability and other welfare plans as they*

[33] *Texaco*, supra, 285 NLRB at 246 (emphasis added).

[34] 29 U.S.C. § 1002(1)(A) (defining the terms "employee welfare benefit plan" and "welfare plan" as including plans, funds or programs established or maintained for the purpose of providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness . . ."); *Tackett*, supra, 135 S.Ct. at 936 (citation omitted).

> *see fit."* . . . And, we have observed, the rule that contractual "provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan."[35]

The Court in Tackett further held that "'[b]ecause vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest must be found in the plan documents and must be stated in clear and express language.'"[36] Even more relevant, the Supreme Court in *Tackett* overruled *International Union, UAW v. Yard-Man, Inc*., 716 F.2d 1476, 1479 (6th Cir. 1983), where the Sixth Circuit had previously held that retiree medical benefits—linked to the status of being retired—warranted an inference that they were deferred compensation for past services.[37] The Supreme Court rejected this proposition and stated that Yard-Man's "premise" (that retiree medical benefits constitute deferred compensation for prior work) "is contrary to Congress' determination otherwise."[38] The Supreme Court emphasized that, in ERISA, only pension plans are defined as "a deferral of income by employees." Thus, the Court found that, as a result of ERISA, welfare plans providing medical benefits "*are not a form of deferred compensation*."[39]

Third, where collectively bargained medical benefits are at issue, the benefits terminate upon the CBA's expiration, unless the CBA provides otherwise in explicit contract language. When the Supreme Court in Tackett overruled the Sixth Circuit's Yard-Man decision, it squarely rejected the notion that medical benefits were unaffected by a CBA's "general durational clause."[40] The Supreme Court's analysis of this issue warrants its quotation in full:

> [T]he Court of Appeals has refused to apply general durational clauses to provisions governing retiree [medical] benefits. Having inferred that parties would not leave retiree benefits to the contingencies of future negotiations, and that retiree benefits generally last as long as the recipient remains a retiree, the court in *Yard-Man* explicitly concluded that these inferences "outweigh[ed] any contrary implications derived from a routine duration clause terminating the agreement generally." . . . The court's subsequent decisions went even further, requiring a contract to include a specific durational clause for retiree health care benefits to prevent vesting. . . . *These decisions distort the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties*. See 1 W. Story, Law of Contracts § 780 (M. Bigelow ed., 5th ed. 1874); see also 11 Williston § 31:5.[41]

The Supreme Court in *Tackett* concluded that the Sixth Circuit in *Yard-Man* and similar cases had improperly "failed to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,'"[42] and the Supreme Court held that "when a contract is silent as to the duration of retiree [medical] benefits, a court may not infer that the parties intended those benefits to vest for life."[43]

My colleagues agree that the principles stated in *Tackett* are applicable to a determination of whether medical benefits are accrued, but the majority here disregards several of these principles. Although the Court in *Tackett* held that collective-bargaining agreements are interpreted according to "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy,"[44] the Court emphasized that these "ordinary principles of contract law" include (i) the rule that a general durational clause limits the parties' obligations to the term of the agreement,[45] (ii) "the traditional principle that courts should not construe ambiguous writ-

[35] *Tackett*, supra, 135 S.Ct. at 933 (emphasis added) (quoting *Curtiss–Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995); *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 833 (2003); and *Heimeshoff v. Hartford Life & Accident Ins. Co.,* 134 S.Ct. 604, 611–612 (2013)).

[36] *Tackett*, supra, 135 S.Ct. at 937 (emphasis added) (quoting *Sprague v. General Motors Corp*., 133 F.3d 388, 400 (6th Cir. 1998)).

[37] In *Tackett*, the Supreme Court specifically evaluated whether collectively bargained *retiree* medical benefits were vested. However, the principles articulated by the Supreme Court in *Tackett* apply with even greater force to *active employee* medical benefits, which have consistently been considered less likely than retiree medical benefits to be considered a form of deferred compensation for past services. See, e.g., *Tackett*, supra, 135 S.Ct. at 933–934 (noting that in *Yard-Man*, the Sixth Circuit inferred that retiree medical benefits were vested by contrasting such benefits with active employee medical coverage and finding that retiree medical benefits were "in a sense 'status' benefits" linked to the status of being retired) (citing *Yard-Man,* 716 F.2d at 1481–1482).

[38] *Tackett*, supra, 135 S.Ct. at 936.

[39] Id. (emphasis added; citations omitted.)

[40] Id. at 934, 936–937.

[41] Id. at 936 (emphasis added) (quoting *Yard-Man*, supra, 716 F.2d at 1482–1483, and citing *Noe v. PolyOne Corp*., 520 F.3d 548, 555 (6th Cir. 2008)).

[42] Id. at 937 (quoting *Litton Financial Printing Division v. NLRB*, supra, 501 U.S. at 207).

[43] Id. The Supreme Court in *Tackett* recognized that the principle that contract obligations ordinarily cease upon a CBA's expiration "does not preclude the conclusion that the parties intended to vest" particular benefits, because "'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" Id. (quoting *Litton Financial Printing Division v. NLRB*, supra, 501 U.S. at 207 (alterations in *Tackett*)).

[44] 135 S.Ct. at 933.

[45] Id. at 936.

ings to create lifetime promises,"[46] (iii) "the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,"[47] and (iv) the principle that, "[b]ecause vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest must be found in the plan documents and must be stated in clear and express language."[48] My colleagues do not attempt to reconcile their interpretation of the expired agreement with these fundamental principles, each of which warrants a finding that the disability benefits here were not "accrued" or "due and payable" when applying the Board's decision in *Texaco*.

Nonetheless, my colleagues affirm the judge's decision finding that medical benefits were "due and payable" on the basis of the employees' past performance. The sole bases for this conclusion are Articles 28 and 39 of the expired CBA, which stated in part (i) that medical plan and dental plan "coverage for employees and their dependents *will end thirty . . . days after termination of employment*," and (ii) that "benefits provided by this plan *will not be discontinued or amended without the agreement of the Company and Union*" (emphasis added). My colleagues interpret these provisions as follows:

> Articles 28 and 39 of the 2008 Agreement clearly and expressly establish that the relevant medical and dental benefits were accrued. Each provision contained a broad eligibility clause providing medical and dental insurance benefits to all employees, and neither provision imposed a time-in-service requirement. In short, employees were entitled to those benefits simply by virtue of their employment with the Respondent. Each provision, moreover, specified only two circumstances in which the Respondent could discontinue providing employees those benefits: by agreement between the Respondent and the Union or upon 30 days after an employee terminated his employment. Neither condition occurred in this case. . . . Further, the Respondent's continuation of medical and dental benefits for employees who were not actively working for non-strike related reasons, including those on military or FMLA leave, indicates that the Respondent well understood that such benefits were contractually "due and payable" to employees based only on their ongoing employment relationship with the Respondent, not the active performance of work. For all of these reasons, we find in the particular circumstances of this case that the General Counsel carried his initial burden to show that the medical and dental benefits at issue were "accrued" benefits on November 10, the day the strike began. [Footnote omitted.]

By making these findings, my colleagues conclude that the Respondent agreed to an open-ended obligation to give its employees medical and dental benefits even if the employees perform no work for a period spanning months or even years. It would be preposterous to suggest that an employer agreed to assume a comparable obligation to pay wages for an extended period when employees performed no work. However, applying this type of open-ended obligation to medical and dental benefits is no less remarkable, and such an obligation has the same potential to be financially ruinous for the employer. In this respect, my colleagues agree with the judge, who found that the CBA confers a guarantee upon every unit employee "by the *end of his first day on the job*" that medical and dental benefits *will be provided for the rest of the employee's career*—regardless of whether the CBA remains in effect and whether or not employees perform work—and the CBA does not even "contemplate a scenario . . . under which their benefits could be cancelled" unless and until the company terminates the person's employment or the company and union enter into a different agreement.

In my view, this conclusion is contradicted by the CBA's express provisions as well as the principles articulated by the Supreme Court in *Tackett* that control the duration of collectively bargained medical benefits.[49] Regarding my view that the medical benefits here had not "accrued," the following considerations are especially compelling.

First, the CBA contained a "Duration of Agreement" provision that applied to *all* contractual obligations, including the medical benefits set forth in Article 28 and the dental benefits set forth in Article 39, which demonstrates that the parties contemplated that all contractual obligations would cease upon the Agreement's expiration. The record leaves no doubt that the parties took the CBA's limited duration seriously: they entered into successive extension agreements *five times* between September 12, 2011 (the stated expiration date in CBA Article 39) and October 24, 2011 (the expiration date set forth in the parties' fifth extension agreement).[50] Nor can the Board disregard the general principle that a

[46] Id.
[47] Id. at 937 (internal quotation omitted).
[48] Id. (internal quotation omitted).

[49] I agree with my colleagues that the judge erred in relying on Sec. 8(d) in her analysis of the issues presented by the Respondent's modification of its dental plan to clarify that striking employees are not covered, and I join them in adopting the findings of the judge as to which no exceptions were filed.
[50] GC Exh. 3.

CBA's fixed duration applies to medical benefits. As the Supreme Court held in *Tackett*, medical benefits—like other contract terms—are governed by the "traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'"[51] See also *Finley Hospital v. NLRB*, supra, 827 F.3d at 725 (clause stating that employer would adjust wages 3 percent on employees' anniversary date "for the duration of this Agreement" created no contractual or status quo obligation applicable after the contract expired).

Second, the medical and dental benefits language in the CBA—set forth in Articles 28 and 39—expressly stated that benefits would only be provided "to employees *covered by this Agreement*." The existence of such a specific durational limitation in the very contract provisions that ostensibly are the source of the disputed benefit obligation in this case precludes a reasonable conclusion that the employer was contractually required to continue benefits after contract expiration—i.e., when employees *ceased* being "covered by this Agreement." See also *Finley Hospital v. NLRB*, supra ("One cannot separate the [] term limit from the [] obligation.").[52]

Third, as noted above, Articles 28 and 39 limited medical and dental benefits to "employees," and Article 5, Section 5.1.1 defined the term "employee" to mean a "person *who performs work* for the Company." This precludes a reasonable conclusion that the Respondent was contractually required to continue benefits, post-expiration, to individuals who were not even "employee[s]" within the meaning of the CBA, since they were on strike and thus did *not* "perform[] work for the Company."[53]

Fourth, the notion that every employee had an unalterable contractual entitlement to medical and dental benefits "by the end of his first day on the job"—regardless whether the CBA was in effect and regardless whether he or she ceased being an "employee" within the meaning of the CBA (since he or she was no longer performing work)—is also contradicted by the fact that Respondent's medical and dental coverage constituted a "welfare" benefit under ERISA. As the Supreme Court held in *Tackett*, "[w]hen collective-bargaining agreements create . . . welfare benefits plans, those plans are subject to rules established in ERISA," and "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[54]

Finally, in light of the above points, the language in Articles 28 and 39 upon which the majority relies—which stated (i) that benefits "will not be discontinued or amended without the agreement of the Company and Union" and (ii) that "coverage" ends "thirty . . . days after termination of employment"—does not necessarily mean medical and dental benefits were intended to continue after the CBA's expiration for individuals who performed no work because of a strike. For starters, CBA Article 42 (the "Duration of Agreement" provision) and the five contract extensions ending October 24, 2011, governed the entire CBA, including the statement that benefits "will not be discontinued or amended." Therefore, even if one looks at the "will not be discontinued or amended" language in isolation,[55] this language may reasonably be interpreted to mean that the parties intended to preclude amending or discontinuing medical benefits for employees *during the period the CBA remained in effect*, and this interpretation is reinforced by the statements in Articles 28 and 39 that benefits would be afforded only to employees "covered by this Agreement." Similarly, the second statement in Articles 28 and 39 (that "coverage" ends "thirty . . . days after termination of employment") is likewise subject to Article 42 (the "Duration of Agreement" provision) and the parties' five successive contract extensions ending October 24, 2011. Moreover, this interpretation does not deprive the "termination of employment" language of significance. Even if deemed applicable only during the CBA's term, that language still served the important function of specifying how long benefits continue when an employment termination occurs *while* the CBA remained in effect. Here as well, other CBA provisions reinforce a conclusion that the "termination of employment" language in

[51] *Tackett*, supra, 135 S. Ct. at 937 (quoting *Litton Financial Printing Division v. NLRB*, 501 U.S. at 207).

[52] Of course, the Respondent remained subject to a *non-contractual* duty to maintain the status quo following contract expiration as elucidated in *NLRB v. Katz,* 369 U.S. 736 (1962). But the issue here, whether the benefits were *accrued*, turns on whether a collective-bargaining agreement establishes that the benefits were due and payable at the time of the strike. *Texaco,* supra; *Tackett,* supra. As shown, that is not the case with respect to the benefits at issue here.

[53] My colleagues assert that Art. 5.1.1 does not operate as a limitation on eligibility for medical and dental benefits, reasoning that this interpretation is inconsistent with Art. 27 and the LTD Memo, discussed above, which provide for the payment of benefits to disabled "employees" even though those individuals are not currently performing work for the Respondent. I believe these provisions are entitled to little weight in determining whether medical benefits were accrued for strikers in light of the provisions of Hawaii law relative to the provision of health insurance and disability benefits by employers in that state.

[54] *Tackett*, supra, 135 S.Ct. at 936 (citations omitted).

[55] Of course, contract language in CBAs and other agreements should *not* be interpreted in isolation. As recognized in *Tackett*, it is a "cardinal principle" of contract interpretation that "the intention of the parties, *to be gathered from the whole instrument*, must prevail," which entails examining "the *entire* agreement. . . ." *Tackett*, supra, 135 S.Ct. at 937–938 (Justices Ginsburg, Breyer, Sotomayor, and Kagan, concurring) (emphasis added) (citing 11 R. Lord, Williston on Contracts §§ 30:2, p. 27, and 30:4, pp. 55–58 (4th ed. 2012)).

Articles 28 and 39 was intended to be applicable only during the CBA's term: Articles 28 and 39 stated that benefits will be afforded only to employees "covered by this Agreement." Again, it is also significant that Articles 28 and 39 afforded medical and dental benefits only to "employees," and Article 5, Section 5.1.1 defined "employee" as a person "*who performs work* for the Company," which excludes individuals who do *not* perform work based on a strike.[56]

In short, the expired CBA contradicts my colleagues' finding that when Respondent's employees went on strike and stopped performing work—after the CBA expired—medical and dental benefits had "accrued" and were "due and payable" based on the employee's past work and were not tied to the "continued performance of services."[57] To the contrary, (i) the CBA contained a "Duration of Agreement" provision, and pursuant to that provision (and the contract extensions) the CBA had expired by the time employees struck and ceased performing services; (ii) the CBA's medical and dental provisions provided benefits only to employees "covered by this Agreement"; and (iii) the same provisions only conferred a right to benefits coverage on "employees," and the CBA's definition of "employee" excluded any person who did *not* "perform[] work for the Company." Moreover, the judge disregarded the ERISA principle that medical and dental coverage constitute "welfare" benefits, and "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[58]

Even if some question may exist regarding the proper interpretation of Respondent's CBA, that would not provide a basis for finding Respondent's actions in this case violated the Act. The interpretation set forth above clearly constitutes a reasonable "good faith interpretation of the labor contract," and I believe that by rejecting this construction and substituting their own interpretation, the Board majority has "overstepped its authority and seriously misperceived its role." *Vesuvius Crucible Co. v. NLRB,* supra, 668 F.2d at 167. See also *Texaco*, supra, 285 NLRB at 245–246, and *Borden*, *Sherwin-Williams*, and *Conoco*, supra.

Until today's decision, the Board has consistently held that medical benefits constitute compensation for present services being performed, which means they may be withheld from active employees who stop working during a strike. See *Ace Tank & Heater,* supra, 167 NLRB at 664 ("[A]n employer is not required to finance a strike by paying wages for work not performed, and …wages include such deferred benefits as retirement and vacation benefits and health insurance premiums.").[59] This conclusion reflects the seminal holding in *General Electric Co.,* supra, 80 NLRB at 511, that an employer is not required under the Act to finance an economic strike against it by compensating the strikers for work not performed.

Significantly, the right recognized in *General Electric* to distinguish between active strikers and non-strikers in the provision of benefits is based on the Act itself and does not depend on the terms of a collective-bargaining agreement. In *General Electric,* the Board specifically rejected the argument that the benefits at issue there—continued accrual of vacation and pension benefits under a continuous service plan—could not lawfully be withheld on the basis of a strike because the collective-bargaining agreement provided that benefits would accrue except in specified circumstances and did not provide for the tolling of those benefits during a strike. Instead, the Board held that the contract language "does not necessarily mean, in our opinion, that the Respondent has thereby contracted away its right to differentiate, in a manner consistent with the Act, between strikers and non-strikers in the application of the continuous service plan. In any event, even though under the contract the strikers may have enforceable rights in other forums, it does not follow that the Respondent's treatment of the strikers constituted per se an unfair labor practice." 80 NLRB at 511 fn. 3.

The Board applied the same principle to medical benefits in *Simplex Wire & Cable Co.,* supra. There, the Board rejected the claim that striking active employees were entitled to continued medical benefits based on con-

[56] The Respondent properly maintained medical benefits for employees on military or FMLA leave, consistent with the provisions of USERRA and the FMLA Memo, discussed above, which confer an entitlement to such benefits that is independent of the provisions of Arts. 28 and 39 governing the rights of active employees.

[57] *Texaco*, 285 NLRB at 244. See also fn. 32, supra.

[58] *Tackett*, supra, 135 S.Ct. at 936 (citations omitted).

[59] See also *Simplex Wire & Cable Co.,* 245 NLRB 543 (1979); *Trading Port,* 219 NLRB 298, 299 fn. 3 (1975). The Board has reached different results on whether medical insurance coverage for *disabled* employees was an accrued benefit under *Texaco*, depending on the particular facts of the case. Compare *Texaco,* 285 NLRB at 247 (not accrued) with *Gulf & Western Mfg. Co.,* 286 NLRB 1122 (1987) (accrued) and *NFL Mgmt. Council,* 309 NLRB 78, 85 (1992) (same). Those holdings do not bear on the question of whether such benefits are accrued with regard to *active* employees, the issue presented in this case. For this same reason, I believe that the Respondent's treatment of disabled employees under the various provisions of the expired CBA applicable to the provision of disability benefits, which by definition are not paid to active employees, has no bearing on whether medical benefits for active employees were accrued at the time of the strike.

tract language strikingly similar to that present in this case.[60] The Board explained:

> [T]he question is not whether the contract required Respondent to pay the August premium because the P & M employees performed "active employment' on August 1, as the General Counsel contends, but whether the contract required Respondent to finance the strike by the P & M employees, which began on August 3, by paying the August premium. Considered in this respect, Respondent's position that it was under no duty to do so is well taken and based on sound legal principles.

245 NLRB at 545. See also *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1326 fn. 27 (2006) (citing *Simplex Wire* with approval and reaffirming principle that "an employer is not generally required to continue paying health insurance premiums for employees who are on strike, or in any way finance a strike against itself").[61]

The majority cannot point to a single case in which the Board has found that an employer violated the Act by withholding medical benefits from striking active employees. To the contrary, until today's unprecedented decision the Board has uniformly held that an employer acts lawfully when it withholds medical benefits in these circumstances. My colleagues make no attempt to reconcile their determination that the Respondent violated the Act by withholding medical and dental benefits from striking active employees with this precedent. Instead, they refuse to apply it, arguing that, after *Texaco,* the Board's longstanding case law in this area has "dubious standing" and "questionable" value. This position would come as a surprise to the Board members who decided *Texaco,* since they cited *General Electric* with approval and never questioned its holding in a comprehensive opinion that broadly addressed then-existing Board precedents dealing with accrued benefits. And it would also surprise the Board members who decided *Beverly*, supra, since they cited *Simplex Wire* with approval *for the specific proposition* that "an employer is not generally required to continue paying health insurance premiums for employees who are on strike, or in any way finance a strike against itself." It defies reason to suggest that the *Beverly* Board thought *Simplex Wire* was "questionable" in these circumstances.

For similar reasons, I believe that the majority erroneously finds that the Respondent violated Section 8(a)(3) by failing to continue medical and dental benefits for individuals who were on a Union leave of absence pursuant to Article 32 of the expired CBA. Preliminarily, as the judge noted, the complaint did not allege that the discontinuation of benefits for employees on Union leave violated the Act.[62] Nonetheless, for two reasons—even assuming this issue is properly before the Board—I believe the record fails to support a violation of Section 8(a)(3) regarding the discontinuation of medical and dental benefits for employees on Union leave at the time of the strike.

First, the judge's finding of a violation as to employees on Union leave was based in large part on the same reasons that prompted the judge to find a violation when the Respondent discontinued medical and dental benefits, following contract expiration, for its other striking employees. In this regard, the judge addressed this issue—even though it had not been alleged in the complaint—because she found that the employees on Union leave were "arguably" encompassed by the complaint allegation relating to active employees, and the judge found the Union leave issue was "predominantly a legal and textual question identical to that regarding the mass of employees who went on strike." Therefore, the same considerations described above—which I believe preclude a finding that Respondent violated Section 8(a)(3) by discon-

[60] In *Simplex Wire & Cable*, the contract provided that "[a]ll active employees, with the exception of probationary employees, are eligible for the benefits" and that health insurance coverage terminated on "[t]he last day of the month in which the employee terminates active employment." Based on this language, the General Counsel contended in *Simplex*, similar to his contention here, that the employer was required to pay the health insurance premiums based on the employees' past performance of work (i.e., whenever employees worked the first day of the month). The Board rejected this contention.

[61] In *Beverly,* the Board found that the employer violated Sec. 8(a)(5) by unilaterally deducting from striking employees' pay the premiums it paid for their insurance during the strike, contrary to its established practice of allowing employees on unpaid leaves of absence to choose whether to continue coverage by paying the premium themselves. No such facts are present in this case. Moreover, the Board's opinion in *Beverly* strongly suggests that the employer would not have violated the Act had it simply ceased paying the premiums, as was the case here. See 346 NLRB at 1325 fn. 27 ("Here, however, the Respondent did more than simply cease paying its share of the insurance premiums; rather, the Respondent paid the premiums and then deducted from employees' paychecks a pro-rated share of the premiums for the 3 days that they were on strike.").

[62] The complaint alleged that the Respondent discontinued benefits for "certain employees" who "ceased work concertedly and engaged in a strike." Nonetheless, the judge addressed the discontinuation of medical and dental benefits for employees on Union leave, even though she stated that "it could be fairly argued that employees on leave did not 'cease work,'" as alleged in the complaint. I would find that the General Counsel, having failed to allege this violation in the complaint, is barred from litigating this issue except to the extent that the employees on Union leave are identically situated as the active employees who ceased providing services based on the strike, which was the primary basis for the judge's finding of a violation. However, for the reasons expressed in the text, even assuming this issue is properly before the Board, I believe the record does not provide adequate support for a finding that the medical and dental benefits were "accrued" as to employees on Union leave.

tinuing medical and dental benefits for active employees—likewise preclude a violation as to employees on Union leave.

Second, Article 32 stated: "While on leave, the Company agrees to cover the employee under the Retirement System *as if the employee remained in active service with the Company*. Should the employee be a member of the Company's Medical and/or Dental Plans, the Company agrees to provide medical coverage *in accordance with Article 28 and/or Article 39 of the Agreement*" (emphasis added). The judge found that Article 32 made the case for finding a violation "even stronger" for individuals on Union leave. Contrary to the judge, I believe the language in Article 32, if anything, *weakens* the argument that individuals on Union leave were entitled, following contract expiration, to continuing medical and dental benefits while employees stopped performing work during the strike. There are significant qualifications in Article 32, which (i) expressly referenced employees "in active service with the Company," and (ii) referred to coverage "in accordance with Article 28 and/or Article 39 of the Agreement." Of course, Articles 28, 32 and 39 (along with the rest of the CBA) were expired at the time of the strike. And even if Article 32 is deemed applicable following contract expiration (which I believe would be contrary to Article 42, the "Duration of Agreement" provision), the reference to "active service" appears to contemplate, at a minimum, that *some* employees would be in "active service" while Article 32 benefits are being provided.

More importantly, Article 32 only provides for medical and dental benefits to an "employee." As noted above, Article 5, Section 5.1.1 defines the term "employee" as a person "*who performs work* for the Company," which excludes individuals who are *not* performing work during a strike.[63] Additionally, Article 32 only makes medical and dental benefits available "in accordance with Article 28 and/or Article 39 of the Agreement," and those provisions, as noted above, limit medical and dental benefits to employees "covered by this Agreement." Article 32 does not confer any greater benefits entitlement than provided under Articles 28 and 39. As explained at length above, neither Article 28 nor Article 39 support a finding that individuals performing no work during a strike, following contract expiration, have an "accrued" right to receive medical and dental benefits.

As a final matter, I believe the Board should dismiss the complaint allegation that the Respondent violated Section 8(a)(1) by sending COBRA notices to employees in connection with the discontinuation of medical and dental benefits. See *Trading Port*, supra (employer did not violate Act by informing strikers that it was discontinuing health insurance for strikers). Those letters simply informed employees that their benefits had been cancelled effective November 10 based on "your qualifying event" and provided information on their ability "to continue coverage through COBRA." The letters did not disparage the union or the employees' decision to strike; they did not even identify the strike as the reason that health and dental benefits had been cancelled. Especially in light of the Respondent's undisputed COBRA obligations, I believe the Board cannot reasonably find that these letters violated the Act. See *Southern Steamship Co. v. NLRB,* supra, 316 U.S. at 47 ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

Conclusion

In *NLRB v. Insurance Agents' International Union,* supra, 361 U.S. 477, the Supreme Court stated: "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."[64] The Court explained:

> [W]e think the Board's approach involves an intrusion into the substantive aspects of the bargaining process. . . . Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. *Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.*[65]

[63] There is no dispute that all of the strikers in this case were, at all material times, statutory employees under the plain terms of the Act. See NLRA Sec. 2(3). But their statutory employee status, alone, does not determine their entitlement to continued receipt of benefits during a strike. See *Texaco, Inc.*, supra; *General Electric*, supra.

[64] Id. at 488 (citing *Teamsters Union v. Oliver,* 358 U.S. 283 (1959)).

[65] Id. at 490 (emphasis added; citations omitted). See also *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965) (stating that the

One of the most fundamental principles that govern employment relationships is that employees must perform services in order to receive wages and medical benefits. In the instant case, I believe the Board's departure from this principle does violence to well-established legal principles embodied in our statute. I believe my colleagues also disregard ERISA principles that address the benefits at issue here, and the Board improperly adopts a flawed interpretation of selective provisions contained in the parties' CBA. Especially in this last respect, I believe the Board majority, though armed with good intentions, has "overstepped its authority and seriously misperceived its role." *Vesuvius Crucible Co. v. NLRB,* 668 F.2d at 167–168.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 23, 2017

Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

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 cancel health, drug, vision, and dental benefits for those of you who participated in a work stoppage on November 10 and 11, 2011.

WE WILL NOT change our dental insurance policy to eliminate dental benefits for those of you whose employment ends due to a strike.

WE WILL NOT inform those of you who participated in the work stoppage that your life, health, drug, vision, and dental insurance were cancelled.

WE WILL NOT unlawfully restrict your communication with the Union by referring, in a Special Alert, to potential discipline under our employment policies.

WE WILL NOT unlawfully apply our antiharassment rule against the Union's Wall of Shame campaign in a manner that restricts your rights described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL make whole with interest all former strikers for any accrued health, drug, vision, and/or dental benefits denied them as a result of their participation in the strike to the extent we have not already done so.

WE WILL compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum make-whole awards, and WE WILL file a report with the Regional Director for Region 20 allocating the make-whole awards to the appropriate calendar years for each employee.

WE WILL, upon the Union's request, rescind the unilateral change eliminating dental benefits for unit employees whose employment ends due to a strike to the extent we have not already done so.

HAWAIIAN TELCOM, INC.

The Board's decision can be found at www.nlrb.gov/case/20–CA–069432 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Meredith Burns, Esq., for the Acting General Counsel.
Perry W. Confalone and *Michael J. Scanlon, Esq. (Carlsmith Ball, LLP),* for the Respondent.
Scot Long, for IBEW Local 1357.

Board lacks "general authority to define national labor policy by balancing the competing interests of labor and management").

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case, heard in Honolulu, Hawaii, on June 6, 2012, raises allegations that Hawaiian Telcom, Inc. (Company or Respondent) violated the National Labor Relations Act (the Act) by, inter alia, engaging in activity inherently destructive of employee Section 7 rights. The International Brotherhood of Electrical Workers, Local 1357 (Union or Charging Party), filed both of the captioned charges on November 22, 2011,[1] and amended both charges on February 28, 2012. The Acting Regional Director for Region 20 of the National Labor Relations Board (NLRB or Board) consolidated the cases and issued a consolidated complaint (complaint) and notice of hearing on February 29, 2012, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act.[2] Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged in the complaint and interposing 21 affirmative defenses.

Having carefully considered the entire record together with the demeanor of the witnesses, and after considering the arguments provided in the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Company, a corporation with an office and place of business in Honolulu, Hawaii, furnishes telecommunications services to commercial and residential customers. During the 12-month period ending January 31, 2012, the Company derived gross revenues in excess of $100,000 from the conduct of its business at Honolulu. During the period, the Company purchased and received at its Honolulu, Hawaii, facility goods valued in excess of $5000 directly from locations outside the State of Hawaii. The Company admits, and I find, that it is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company also admits, and I find, that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant facts

The Union was initially certified as the exclusive representative of an appropriate unit of employees on September 29, 1943. The evidence establishes that the unit has expanded over the years by agreement of the parties. The complaint alleges, but answer denies, that the current unit represented by the Union consists of the following:

> All employees employed by Respondent in the State of Hawaii, excluding managerial, supervisory, administrative and professional employees, engineers, confidential employees, guards or security attendants, secretaries to officers and department heads, stenographers (Office Services), stenographers (Special Agent), Security Assistant, Clerks in the Human Resources Department, Communications Consultants, Coin Telephone Promotion Consultants and Telephone Planning Consultants.

I find the unit allegation set forth in the Acting General Counsel's complaint amounts to an accurate summary of the unit described in the parties' most recent collective-bargaining agreement. (GC Exh. 2, pp 1-2.) For that reason, I find the unit alleged by the Acting General Counsel to be an appropriate unit and further find that the Union is the exclusive representative of the employees in that unit within the meaning of Section 9(a) of the Act.

By its terms, the parties' most recent collective-bargaining agreement (agreement) covering the unit was effective September 13, 2008, through September 12, 2011.[3] Prior to the end of the agreement, the parties commenced negotiations for a new agreement. During these negotiations for a successor agreement, the parties agreed to extend the term of the 2008–2011 agreement five times. The fifth extension ran through October 24. (GC Exh. 3.)

Under provisions of the agreement, the Company provided the unit employees with medical, dental and life insurance. The medical coverage included health, drug, and vision benefits. Typically, a newly hired employee attends an in-house benefits orientation during the first week of employment. Following that, the employee may select and register for specific benefit plans online from any location by using the "PlanSource" enrollment software provided by one of the Company's vendors. The PlanSource program codes the unit employees as "Union" when they register for their benefit plans.

The contractual provisions for the medical coverage are set forth in article 28 of the agreement. In relevant part it provides:

> 28.1 The Company will make available a medical plan to employees covered by this Agreement. The selection of the carrier and the administration of the medical plan will rest with the Company provided the level and quality of the benefits remain the same. The benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union. The following classes of employees may voluntarily enroll under and become members of any of the medical plans provided.
>
> 1. Regular employee
> 2. Probationary employee
> 3. Temporary employee who has completed six months of continuous full-time service provided tenure of employment is extended by at least six (6) months at the time the employee completed six (6) months of service.

Article 28 provides that the Company will pay the entire plan

[1] All further dates refer to the 2011 calendar year unless otherwise indicated.

[2] Under Sec. 8(a)(1) an employer may not "interfere with, restrain or coerce" employees who exercise rights guaranteed them in Sec. 7. That section gives employees the right to engage in union or other concerted activities for purposes of collective bargaining or other mutual aid and protection or the right to refuse to engage in those activities. Sec. 8(a)(3) bars employers from discriminating against employees in order to encourage or discourage union membership. Sec. 8(a)(5) requires an employer to bargain in good faith with the representative of its employees.

[3] The agreement includes basic contract terms plus a series of exhibits and memoranda of agreements covering miscellaneous topics.

premium for regular full-time employees and their dependents. Temporary employees selecting coverage pay half of the premium for their own coverage plus the full amount of premium for dependent coverage. The remainder of article 28 addresses various options and special situations not pertinent here applicable to employees whose coverage is cancelled by the insurance provider, newly married employees, pensioners, dependents of deceased pensioners, and former employees. The final provision in article 28 provides:

> 28.12 Effective January 1, 2003, coverage for employees and their dependents will end thirty (30) days after termination of employment. Coverage for dependents will end on the date they become ineligible for coverage. Employees and their legal dependents may have an opportunity to continue to participate in the Plan in accordance with the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Pursuant to these provisions, the Company makes two medical plans available for selection by its employees. One, provided by the Hawaii Medical Services Association, is a Blue Cross–Blue Shield plan. The other is a Kaiser Permanente plan.

Article 38 of the agreement sets forth the parties bargain with respect to dental insurance. It provides:

DENTAL PLAN

> 39.1 The Company will make available a Dental Plan to employees covered by this Agreement. The selection of the carrier and the administration of the Dental Insurance Plan will rest with the Company provided the level and quality of the benefit remains the same. The benefits provided by this plan will not be discontinued or amended without the agreement of the Company and the Union.
>
> 39.2 For all regular full-time employees and their dependents, the Company will pay all of the premium equivalent for the Company Dental Plan.
>
> 39.3 Effective January 1, 2003, coverage for employees and their dependents will end thirty (30) days after termination of employment. Coverage for dependents will end on the date they become ineligible for coverage. Employees and their legal dependents may have an opportunity to continue to participate in the Company's dental plan in accordance with the Consolidated Omnibus Budget Reconciliation Act (COBRA).

The Company also makes two dental plans available for selection by the unit employees. One plan is provided by the Hawaii Dental Service and the other by MetLife. In anticipation of a potential work stoppage during the negotiations for a new agreement, the Company arranged through exchanges with MetLife agents in July and August 2011 to modify that dental plan's rider to provide, in effect, that an employee's dental benefits would end immediately if the employee's active work ceased due to a strike. (GC Exhs. 5 and 17.) In other situations, the benefit continues for a period of 30 days following the end of the employee's employment. This changed rider became effective September 1.

Admittedly, the Company took this action to obtain a change in the dental plan rider without prior notice to the Union or any offer to bargain about the change to the rider. In doing so, the Company relied on a memorandum of agreement with the Union contained in the agreement that provides:

> The [Dental] Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration, or benefits payable shall be determined by and at the sole discretion of the Company.

(GC Exh. 2, p. 75, par. 6.)

Absent some unusual situation, once a unit employee elects coverage under the medical and dental benefit plans provided for in the agreement, that coverage continues for up to 30 days following the termination of the worker's employment. (Tr. 43.)

Article 38 of the agreement sets forth the provision providing for a group life insurance benefit. It provides:

GROUP LIFE INSURANCE PLAN

> 38.1 The Company will make available a Life Insurance Plan to employees covered by this Agreement. The selection of the carrier and the administration of the Life Insurance Plan will rest with the Company provided the level and quality of the benefit remains the same. The benefits provided by the plan will not be discontinued or amended without the agreement of the Company and Union. Details of the plan will be described in a pamphlet which will be distributed to all employees.
>
> 38.2 Effective January 1, 2003, coverage will end thirty (30) days after termination of employment.

The Company pays the premium for a basic level of coverage. Employees may elect higher levels of coverage but must pay the premium charged for the added coverage.

The Company pays the premiums due for its employees' medical and dental benefits on the 15 of the month for the month involved. Hence, the premiums for coverage during the month of November 2011 would have been paid by the Company on November 15, 2011.

Following the expiration of the fifth extension of the agreement on October 25, the Union informally told the Company that it was considering a work stoppage. As early as October 30, Sheri Braunthal, the Company's senior benefits manager, notified the agents of the fringe benefit providers about the possibility of a strike. In an email to the providers' agents she said: "As of now we are planning for a walkout at any time which means we will be stopping benefits for our active Union employees (approx. 700 employees) immediately once a strike is called (benefits will continue for Union retirees)." She suggested that the provider agents "revisit the plans that we had previously discussed with you on canceling benefits and COBRA enrollment/billing" and informed them that the Company would prepare COBRA notices internally for distribution no later than the day following the date the strike begins. (GC Exh. 9, p. 2.)

In a letter dated November 10, the Union notified the Company that it would "engage in strike, picketing and/or concerted activity" at 10:30 a.m. that day. The letter further advised that the striking employees would return to work on November 11 at 8 p.m. (GC Exh. 8.) In fact, the work stoppage announced by this letter began and ended at the times set out in the Union's notice to the Company.

Braunthal emailed the providers' agents at 10:31 a.m. on November 10 stating that the Company had received notice that the work stoppage would begin at 10:30 a.m. that day. She went on to state: "This email is official notice that we are beginning our process for canceling all benefits for striking union employees effective immediately." (GC Exh. 9, p. 1, emphasis in the original.) She instructed Erika Munk, the PlanSource agent, to "begin the process for stopping all benefits for employees in the PlanSource system that have a 'Union' status code." (Id., p. 2.) After sending these email notices, Braunthal spoke personally to Munk and the MetLife agent to inform them that her cancellation notice applied only to the dental plan and not to the life insurance plan. All of the benefit providers except Kaiser cancelled benefits for striking employees as instructed.[4]

Later that day, the Company mailed COBRA packets to each of the strikers.[5] This packet consisted of a COBRA rights notice showing the benefits that would be discontinued, the employee's eligibility to continue coverage individually and a COBRA application form. The COBRA packets were not sent to unit employees who continued to work, who were on an approved leave under the Family and Medical Leave Act or an approved military leave. According to Braunthal, the strikers would have become eligible to exercise their COBRA rights on November 11.

When the striking employees began returning for their assigned shifts at 8 p.m. on Friday, November 11, Braunthal notified the carriers to re-enroll those employees in the benefit plans they had previously been enrolled. Because of the intervening weekend, the re-enrollment process did not get underway until Monday, November 14. As far as Braunthal knew, the re-enrollment process was completed by November 15. As the Company made arrangements for the benefits to be restored retroactive to November 11 when the work stoppage ended, the unit employees whose benefits had been cancelled were again able to submit claims, including claims for expenses incurred on November 10 and 11. (Tr. 74, 85)

Near midday on November 17, Union Financial Secretary—Business Manager Scot Long sent an email to the Union's negotiating committee that was purportedly blind copied to the Union's membership. In it Long said that the negotiating committee was "validating information on those that have crossed [the November 10-11 picket line] for the 'wall of shame.'" The email requests that those having "proof of a scab" contact "us," an unmistakable reference to the Union's officials or a member of the negotiating committee. The email also cautions confrontations and states that the recipients should "not engage with members who crossed, be professional but, if at all possible avoid conversation." The email then concludes with a report on the status of the negotiations with the Company.

Company Vice President and General Counsel Komeiji issued a "Special Alert 2011-62" to all employees in response to the Union's "wall of shame" email. In his special alert, Komeiji notes that the Union's negotiating committee has circulated an email to "employees/union members that talks about the Union's 'hall of shame' and urges employees to report each other in retaliation for reporting to work during the Union's stoppage." Komeiji's alert calls attention to the provisions in the Company's Code of Business Conduct concerning harassment and intimidation as well as its policy on workplace violence. The former provides:

> [Respondent] strives to provide a work environment free of sexual or any other kind of harassment whether committed by or against a supervisor, co-worker, customer, vendor or visitor based on a person's race, color, religion, national origin, citizenship, ancestry, age, disability, marital status, sexual orientation, arrest and court record, military/veteran's status, or any other classification protected by federal or state law. Employees shall not engage in any behavior that ridicules, belittles, intimidates, threatens or otherwise demeans co-workers or others associated with the Company. [Respondent] will not tolerate harassment in any form—conduct, speech, written notes, photos cartoon or electronic mail.

The latter provides:

> [Respondent] strictly prohibits any violent, threatening or abusive behavior, including, but not limited to: brandishing weapons, physically harming another person or property, harassing, intimidating, coercing, threatening harm, or attempting or desiring to engage in any such conduct, or the use of profane, vulgar or offensive language.

Following his reference to these two Company policies Komeiji's Special Alert 2011-62 goes on to state:

> Unlawful employee conduct that is intended to intimidate, threaten or demean a fellow employee or others associated with the Company is strictly prohibited under both the Company's Code of Business Conduct and the Workplace Violence guidelines. Facilitating or assisting with unlawful intimidation or threats toward fellow employees - even if planned to be carried out by others- will also not be tolerated. The threats, bullying tactics, and other hostile treatment that have occurred, directed toward a co-worker based on his or her decision to exercise their legally protected right to report to work during a strike, are forms of prohibited threats and harassment.

[4] No explanation has been provided for Kaiser's failure to cancel benefits as requested.

[5] Lisa Parran, who was on an approved union leave when the work stoppage occurred, said that COBRA packet she received was postmarked November 10 but she recalled receiving it at her home in the evening of that very day. Company Vice President and General Counsel John Komeiji testified that he gave the direction to send the packets around 11 a.m. on November 10. Despite Parran's recollection concerning receipt, I have no reason to discount the knowledgeable assertions by Komeiji and Braunthal that the COBRA packets were not prepared and mailed until sometime time after the work stoppage commenced on November 10.

> Violations of the Code of Business Conduct and/or the Company's guideline on Workplace Violence are subject to discipline, up to and including termination of employment.
>
> Employees are required to immediately report any unusual or suspicious activity or incident of violent, threatening or abusive behavior to any supervisor, Corporate Security or the Human Resources Department. Threats or assaults must immediately be reported to Corporate Security at 643-7111 (on all islands) or local law enforcement at 911.

(Emphasis in the original.)

B. The Complaint Allegations

Central to this case is the complaint allegation in paragraph 9 which alleges that Respondent violated Section 8(a)(1), (3), and (5) by cancelling the employees' health, drug, vision and dental insurance on November 10 because they engaged in a strike on that day and the next. The complaint also alleges that Respondent violated Section 8(a)(1), (3), and (5) by changing the employees dental insurance policy on September 1 to eliminate dental benefits for employees whose employment ends due to a strike.

The complaint contains four independent 8(a)(1) allegations. Initially, the complaint alleges that Respondent's harassment and intimidation policy, as written, constitutes a restraint on Section 7 activities. Second, the complaint alleges, in effect, that Special-Alert 2011-62 is unlawful because it applies Respondent's harassment and intimidation policy and its workplace violence policy to restrict employee communication with the Union. Third, the complaint alleges that the notice to employees who engaged in the work stoppage that their life insurance had been canceled is unlawful. And fourth, the complaint alleges the notice to employees who engaged in the work stoppage that their medical and dental benefits had been cancelled is unlawful. These allegations are set forth in complaint paragraphs 7 and 8

Analysis

I. RESPONDENT VIOLATED SECTION 8(A)(1), (3) AND (5) OF THE ACT BY CANCELLING ACCRUED BENEFITS OF STRIKING EMPLOYEES

A. Background Law

Section 8 of the Act declares that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." As the Supreme Court explained, the words "discrimination" and "to . . . discourage" import a requirement that the employer be motivated by an antiunion purpose. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Thus, ordinarily, the General Counsel must prove an illicit motive to establish a violation. *Id.* In the same opinion, however, the Court recognized that certain employer conduct is so "inherently destructive" of employee rights that it "bears its own indicia of intent." Id. Cases in this category do not require a demonstration of intent. Id. Rather, it is the employer who has the burden of coming forward with proof of a legitimate business justification for its conduct. Id. That said, even if the employer presents a business justification, the Board may balance the proffered business justification against the impact on employee rights in order to find a violation. Id.

Where an employer wrongly withholds health and welfare benefits from striking employees, its conduct is considered "inherently destructive" per *Great Dane*. *E.g.*, *Texaco, Inc.*, 285 NLRB 241, 245–246 (1987). Under the framework outlined in *Texaco*, the General Counsel bears the initial, prima facie burden of establishing some adverse effect on employee rights. Id. at 245. "The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike." Id. The Board laid emphasis on the accrual requirement, specifying that "accrued" means "due and payable on the date on which the employer denied [it]." Id. (alteration in original) (quoting *Emerson Elec. Co. v. NLRB*, 650 F.2d 463, 469 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982)). Absent proof of accrual, no violation can be found without running afoul of the well-worn principle that "an employer is not required to finance a strike against itself." Id. (citing *General Electric Co.*, 80 NLRB 510 (1948)). The accrual question, the Board offered, would "most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice." Id. at 246.

If the General Counsel meets its prima facie burden, then, as *Great Dane* teaches, the burden shifts to the employer to come forward with a legitimate and substantial business justification for suspending benefits. Id. *Texaco* identified two ways in which an employer could meet this burden. Id. First, it can demonstrate that "a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion." Id. This waiver must be explicit and cannot be inferred. Id. Second, it can demonstrate that it reasonably relied on a nondiscriminatory contract interpretation that is "'reasonable and arguably correct.'" Id. (quoting *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162, 168 (3d Cir. 1981)). That said, even if the employer proves a legitimate and substantial business justification, the inquiry is not yet ended. Pursuant to *Great Dane*, the Board may still find a violation "if the conduct is demonstrated to be 'inherently destructive' of employee rights or motivated by antiunion intent. Id.

B. The General Counsel's Case

On November 10, Respondent asked its providers to cancel benefits for its striking employees, and every provider, with the exception of Kaiser, complied. On its face, this appears to demonstrate the first element of the General Counsel's case, viz., that a benefit was withheld on the basis of a strike. The complication underneath the surface is that, once the strike ended, benefits were retroactively restored at the company's request. By November 15, employees were once again able to submit insurance claims, including claims for bills incurred on November 10 and 11 (the dates of the strike). On this basis, Respondent argues that since no employee suffered an actual loss of benefit, no violation will lie from its actions. It quotes the following language from *Texaco* in support of its position:

> Even assuming that the medical plan was an accrued benefit, it does not appear that disabled or striking employees suffered any actual deprivation of that benefit. By agreement of the

> Union and the Respondent, the employees' insurance coverage remained intact, their premium contribution rates remained the same, and for two months of the strike the Respondent's premium contributions were paid from a surplus account created in large part from unused portions of the Respondent's prior contributions.

Id. at 247. Given these facts, the Board refused to find a violation. Id.

Whether or not Respondent is correct that no employee suffered out-of-pocket costs as a result of the cancellation, its argument miscarries. The reason is that the facts in *Texaco* are distinguishable from those in the present matter. In *Texaco*, there was never an interlude in coverage under the medical plan, not even a retroactively-filled gap. Id. The surplus account referenced in the quoted text guaranteed that premiums would be paid and coverage would continue. Id. The striking employees of Respondent faced a different situation. As their employer requested, their coverage, except for life insurance, did in fact cease during the tenure of the strike. The fact that it was eventually restored does not change the reality that it was, for a period of time, taken away from them.

The second element of the General Counsel's prima facie case (accrual) is established by language in the expired agreement that unqualifiedly entitles employees to receive benefits for 30 days after the conclusion of their employment. The portions of the agreement dealing with medical, dental,[6] and life[7] insurance benefits all contain the same relevant text. Each includes a guarantee that "coverage for employees and their dependents will end thirty (30) days after termination of employment." It is also promised that "[t]he benefits provided by this plan will not be discontinued or amended without the agreement of the Company and Union."

Read together, these two clauses guarantee any employee that the company will provide benefits until either (1) the Union and Company agree to a modification or (2) the employee ceases working for the employer and 30 days have passed. These are the only two conditions under which Respondent could refuse to furnish benefits—in other words, the only two conditions under which benefits would not be *due and owing*. An employee has already earned this entitlement by the end of his first day on the job. Cf. *Gulf & W. Mfg. Co.*, 286 NLRB 1122, 1123 (1987) (finding accrual after explaining that "once an employee meets the eligibility requirement of subsection a, his entitlement to health insurance 'without cost' continues until one of the conditions for termination set out in subsection b is met."). As the General Counsel expresses it, "A unit employee's eligibility for these benefits arises out of the existence of the employment relationship itself and is not dependent on the continued performance of services." (GC Br. 16.) Had the employees continued to receive benefits during the work stoppage, the company would not have been forced to finance a strike but only to pay what it owes to any employee who leaves work for any reason.

The Respondent argues that the health and welfare plans[8] at issue are governed by ERISA[9] and that principles of ERISA interpretation establish that benefits under those plans had not accrued to striking employees. (R. Br. 40.) Without addressing the issue of ERISA coverage or the relevance of ERISA principles to the interpretation of collective-bargaining agreements, I am convinced that Respondent's argument cannot succeed.

Relying on *Geiger v. Hartford Life Insurance Co.,* 348 F.Supp. 2d 1097, 1108 (ED Cal 2004), Respondent argues against accrual:

> Under ERISA, a welfare benefit accrues when it is paid for. As was recently stated by the United States District Court for the District of Northern California, an employee's rights to a welfare benefit plan under ERISA "do not accrue prospectively. [The beneficiary does] not, upon initial determination of eligibility, accrue a right to benefits indefinitely; instead his right to those benefits accrues as the payments become due."

Id. (alteration in the original) (quoting *Hackett v. Xerox,* 315 F.3d 771, 774 (7th Cir. 2003)). The quoted language is misleading, however, as it deals with a different notion of accrual than that at stake in this litigation. *Geiger* dealt with changes to the provisions of an ERISA plan that would affect benefits to be paid thereafter. *Geiger*, 348 F.Supp. 2d at 1106–1108. Specifically, the *Geiger* plaintiff was arguing that his benefits had vested under the terms of an earlier iteration of the plan and could not be modified by subsequent changes to the plan. Id. at 1108. ERISA prevents such modifications where the benefits are vested. Id. In the language cited by Respondent, the court was simply explaining why the plaintiff's right to benefits had not accrued/vested within the meaning of this area of ERISA law. The issue before the court, whether ERISA barred a plan modification, is distinct from the question of an employer's obligations under a given plan at a given time under the Board's definition of accrual.

C. The Respondent's Business Justification Argument

In rebuttal, Respondent claims that its actions were countenanced by a reasonable interpretation of the agreement and relevant plan documents. It argues first from the silence of the agreement on the continuation of benefits during a strike.[10] In this regard, it points out that under Board law, striking workers are still considered employees. As such, their employment has not "terminated" and they do not qualify under the 30-day guarantee. It further points to clauses that grant the Respondent "Administrator" status and seemingly broad discretion in

[6] The plan documents (not the agreement) for the dental plan contain an exception to the 30-day principle for striking employees. This was a recent alteration to the plan, one that I find to be unlawful in a later section of this decision. Thus, reliance upon it does not save the cancellation of the dental benefits from illegality.

[7] Although employees were told that it was being halted, life insurance was never actually cancelled. The ramifications of the Respondent informing employees that life insurance coverage would be stopped are discussed in more detail in the section of this decision addressing the COBRA notice to employees.

[8] That is to say, not the collective-bargaining agreement, but the plan documents.

[9] Employee Retirement Income Security Act, 29 U.S.C. §1002.

[10] As previously mentioned, the dental plan as modified by Respondent did explicitly address strikes. Respondent's arguments here relate to the health and life insurance plans.

manging the plan. For instance, the agreement states, "The selection of the carrier and the administration of the Dental Insurance Plan will rest with the Company provided that the level and quality of benefits remains the same." It goes on to declare:

> The Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration or benefits payable shall be determined by and at the sole discretion of the Company.

(Memorandum of Agreement re Dental Plan (GC Exh. 2, p. 75).) The dental plan documents themselves bestow additional interpretive authority:

> In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the interpretation was arbitrary and capricious.

(Dental Expense Benefits, GC Exh. 16, unnumbered page contained in "Additional Information.")

Respondent argues that these broad grants of discretion rendered it at least reasonable to believe that it possessed the contractual authority to cancel benefits for the striking workers. The reasonableness of this interpretation, it contends, was further supported by Board law and ERISA principles. With regard to Board law, Respondent cites the adage that an employer is not required to finance a strike against itself. It claims that the existence of this well-known background principle rendered it reasonable to interpret the contract as allowing cancellation. It further argues that the principle stands as an obstacle to the conclusion urged by the General Counsel. In its brief, Respondent states:

> It cannot be that the Act will impose, as a default term, an obligation to provide welfare benefits to striking workers where a contract is silent as to that issue.
>
> To hold otherwise would require an employer in Hawaiian Telcom's position to provide welfare benefits to even long-term strikers because such strikers maintain their status as employees until they have "obtained 'other regular and substantially equivalent employment.'" As a consequence, all employers wishing to exercise their statutory right not to finance a strike against themselves would have either (1) to refuse to allow benefits to extend past a bargaining unit employee's last work day; or (2) to bargain for an explicit carve out for striking workers. This would turn the statute on its head because, instead of requiring a union to bargain for the right of having benefits provided to striking workers, the law would force an employer to bargain to avoid having to pay for the benefits of striking workers.

(R. Br. 39 (citations omitted).) In regards to ERISA, the Respondent asserts that, "where the administrator of an ERISA plan has retained the discretion to interpret the plan, the administrator's exercise of that discretion will not be set aside unless the administrator's exercise of that discretion is arbitrary or capricious." (R. Br. 41 citing *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011).)

I reject Respondent's business justification argument for several reasons. First, although the agreement does not expressly address the subject of benefits during a strike, its logic encompasses them. Even if the Respondent is correct and the striking employees remained employees whose employment did not "terminate" in the relevant sense, there are still only two conditions under which benefits can be halted. If the employees were still employees, the agreement does not contemplate a scenario (apart from agreement by Respondent and the Union) under which their benefits could be cancelled.

Second, while the text of the agreement and plan documents do grant the Respondent substantial discretion, the agreement also places strict boundaries on that authority. As previously described, the agreement prohibits plan benefits from being "discontinued or amended without the agreement of the Company and the Union" and rigidly sets a 30-day timetable for halting benefits to those who cease their employment. Thus, while the agreement and plan documents leave the minutiae of a large insurance program to Respondent's judgment, it gives the Respondent no discretion in the decision whether or not to furnish the benefits in the first place.

Third, Respondent's ERISA argument fails for similar reasons. While I again take no position on the applicability of ERISA principles, I find that, even assuming their relevance, the law cited by Respondent does not establish its point. The case Respondent references does confer great interpretive authority on the administrator of an ERISA plan. However, its own language reveals the limits on that authority, which runs only so far as "the administrator of an ERISA plan has retained the discretion to interpret the plan." In the present case, the agreement restricts Respondent's authority to administrative details, denying it the power to cancel benefits outright without the agreement of the Union.

Fourth, Respondent's argument from Board law is overstated. While it may be reasonable to consider background principles of labor law in construing the provisions of collective-bargaining agreements, the principle cited by Respondent in support of its interpretation—i.e., that an employer is not required to finance a strike—in this context unacceptably begs the question. In the absence of express language, the question of whether benefits are due and owing under the terms of a collective-bargaining agreement cannot be decided so easily. Otherwise, every case involving ambiguous language would resolve in favor of the employer who represents that it relied on the principle to read the contract to allow it to cancel benefits. This result would defeat in application a further Board principle, that of *Texaco*, which distinguishes between paying accrued benefits and the financing of a strike. In other words, the principle would swallow the exception under the guise of a

reasonable contract interpretation.

Respondent's related argument that a ruling in favor of the General Counsel would turn the strike-finance principle on its head is likewise exaggerated. Refusing to accept Respondent's proposed interpretation of the contract as reasonable would not establish a duty to finance a strike as "a default term." At most, it makes it a default term where, as here, the agreement combines a rigid guarantee of continued benefits with a broad promise to continue paying those benefits for a period of time after employment ends. It is this combination of terms that has placed the Respondent in a position where it cannot cancel benefits for persons who have gone on strike. If the agreement instead had only promised 30 days of continued support to employees who were laid-off, retired, or terminated for cause, the Respondent's legal position would be different. Moreover, even under the agreement as it stands, there is a 30-day limitation to the time Respondent must continue to furnish benefits after an employee has ceased working. That this contract guarantee may also require the inclusion of employees who ceased working concertedly is but the consequence of the *Texaco* decision.

Fifth and finally, Respondent ignores a prominent limitation that *Texaco* established on the invocation of a reasonable contract interpretation by an employer to defend its conduct. Namely, the contract interpretation relied upon must not only be reasonable, but it must be nondiscriminatory as well. *Texaco*, 285 NLRB at 246. Rather than subsume striking employees into a broader category, the Respondent's interpretation simply assumes that the agreement does not contemplate the continuation of benefits for strikers. An interpretation of the contract that singles out striking workers for worse treatment than, for example, employees who leave their tasks independently is not a nondiscriminatory interpretation.

D. Employees on Leave

In its brief, the General Counsel argues that the cancellation of benefits for employees on union leave also violated Section 8(a)(3) of the Act. The Respondent objects to the General Counsel's position on the grounds that these employees were not mentioned in the complaint. However, as Respondent points out, paragraph 8 of the complaint identifies the wronged employees as "certain employees of Respondent" who "ceased work concertedly and engaged in a strike." While it could be fairly argued that employees on leave did not "cease work," Respondent itself admits they engaged in a strike. It writes in its brief, "Here, it is undisputed that each of the employees on union leave joined the strike." (R. Br. 35), and it cites the testimony of various on-leave employees to support its claim.

Since the complaint at least arguably encompasses the employees on leave, the matter was plainly put in issue at the hearing. Moreover, the matter is predominantly a legal and textual question identical to that regarding the mass of employees who went on strike. Thus, I find it appropriate to consider whether a violation was committed against the employees on leave as well.

In article 32 of the agreement, the Respondent agrees to cover employees on union leave under the medical and dental plans. The agreement states that they are to be treated in accordance with the sections of the agreement (arts. 28 and 39) governing the plans for active employees. As a result, the case for finding a violation with respect to employees on leave is even stronger than that for the larger group. Not only are these employees the beneficiaries of the same contractual guarantees discussed above in relation to ordinary employees, but they further enjoy the benefit of article 32's promise of benefits while on leave. As such, the argument for accrual of benefits is even stronger, and the Respondent's proffered contract interpretation less powerful and pertinent. I thus find that Respondent violated Section 8(a)(3) with respect to the employees on leave as well as those on active duty. Thus, based on the above analysis, I find that Respondent violated Section 8(a)(1) and (3) of the Act by cancelling health, drug, vision, and dental insurance of employees who participated in the November 10-11 work stoppage.

E. The 8(a)(1) and *(5) Allegation*

As I have previously found, the agreement entitled the striking workers to continued benefits. By canceling them, Respondent breached the terms of the agreement, an act tantamount to a unilateral modification forbidden by Section 8(d). See *Nick Robilotto, Inc.*, 292 NLRB 1279, 1279 (1989) ("It is well established that Section 8(a)(1) and (5) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.").

For its part, Respondent cites *Trading Port, Inc.*, 219 NLRB 298 (1975). There, the Board declared, "[T]he nonpayment of benefits to strikers during their period of striking is not a matter about which a company has an obligation to bargain." *Trading Port*, 219 NLRB at 299. The quoted principle, however, is too unequivocal to capture the true state of the law. While a sensible extension of the maxim that an employer need not finance a strike against itself, it fails to account for the exception to that rule for accrued benefits. Indeed, in a case where the General Counsel established that an employer violated Section 8(a)(3) by withholding accrued vacation pay to striking workers, the Board also found the employer had violated Section 8(a)(5) by deviating from the underlying contractual guarantee. *Glover Bottled Gas Corp.*, 292 NLRB 873, 882 (1989), enfd. 905 F.2d 681 (2d Cir. 1990). Thus, I find that Respondent violated Section 8(a)(1) and (5) by failing to adhere to the terms of the agreement.

II. RESPONDENT VIOLATED SECTION 8(A)(1), (3), AND (5) OF THE ACT BY SPECIFICALLY EXCLUDING STRIKING WORKERS FROM THE COVERAGE OF ITS DENTAL PLAN

Without consulting the Union, Respondent modified the terms of its dental plan to provide that "if your employment ends due to strike, all of your benefits will end the date your employment ends." (GC Exh. 17.) Otherwise, the plan continued to assure employees that "[a]ll of your benefits will end 30 days following the date your employment ends." Id.

According to Section 8, "[I]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization." Respondent's alteration to the dental plan baldly discriminates between employees who leave their posts as union supporters, i.e., those who strike, and those who abandon their tasks nonconcertedly as individuals. This demarcation is inherently destructive conduct within the meaning of *Great Dane*. As the Board has said, "Inherently destructive conduct has been described as action which has 'far reaching effects which would hinder future bargaining, or . . . discriminates solely upon the basis of participation in strikes or union activity . . . .'" *Montfort of Colorado*, 298 NLRB 73, 78 fn. 21 (1990), enfd. in part 965 F.2d 1538 (10th Cir. 1992) (alteration in the original) (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)).

Respondent, in its brief, does not specifically address the change to the dental plan vis-à-vis the 8(a)(3) allegations. It does, however, attempt to justify the change, as an act within its authority under the agreement and plan documents, *in the context of defending* the 8(a)(5) allegations. Therefore, in the absence of a substantial business justification, I find that Respondent violated Section 8(a)(1) and (3) of the Act by modifying the terms of its dental plan to specially exclude striking workers.

Turning to the 8(a)(1) and (5) allegation regarding change in the dental plan, Section 8(d) of the Act forbids a party to a collective-bargaining agreement from modifying the agreement while it remains in effect without offering to bargain with the opposite party. The Board distinguishes those cases in which a unilateral modification of the collective-bargaining agreement is alleged from those in which mere failure to bargain is asserted. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). "In the 'contract modification' case, the General Counsel must show a contractual provision, and that the employer has modified the provision." Id. In short, "The allegation is a failure to adhere to the contract." Id. Hence, an employer can defend itself by showing that the alleged "modification" did not run afoul of the contract's terms. In the Board's words, "Where an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or . . . acting in bad faith,' the Board ordinarily will not find a violation." Id. at 502 (alteration in original) (quoting *NCR Corp.*, 271 NLRB 1212, 1213 (1984)).

Respondent defends its change to the language of the dental plan based on what it asserts is a sound arguable basis for interpreting the contract to be consistent with its actions. It cites a memorandum of agreement between it and the Union that confers it with discretionary authority in administering the plan:

> This Plan will be administered solely in accordance with its provisions and no matter concerning the Plan or any difference arising thereunder shall be subject to the grievance or arbitration procedure of the Collective Bargaining Agreement. The selection of the Plan Administrator, the administration of the Plan and all the terms and conditions relating thereto, and the resolution of any disputes involving the terms, conditions, interpretation, administration, or benefits payable shall be determined by and at the sole discretion of the company.

(GC Exh. 2.) It further relies on language in the plan documents vesting the Administrator with interpretive authority:

> In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the plan and to determine eligibility and entitlement to Plan benefits in accordance with the terms of the Plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the interpretation was arbitrary and capricious.

(GC Exh. 16.) Respondent argues that these broad assignments of authority render it at least reasonable to believe that the contract permitted it to make the changes it made to the terms of the dental plan.

In order for Respondent to succeed with this argument, it must prove that the Union clearly and unmistakably waived its right to bargain about the existence of dental benefits for strikers. Clearly, the Union did not have any opportunity to do so although the Plan explicitly reserves that right to the Union. The Plan states, "The benefits provided by this plan will not be discontinued or amended without the agreement of the company and the union." The parties agree, however, that discontinuance of dental benefits for strikers was not the subject of bargaining.

In disagreement with Respondent, I find that there is not a sound arguable basis for reading the contract to license—or even to leave open the possibility for[11]—changing the terms of dental plan to exclude striking workers. The reason is that a change to the language of the plan itself so as to deny benefits outright to a group of employees exceeds the administrative authority bestowed on Respondent and invades the substantive guarantee of the agreement. On brief, Respondent itself only argues that it was allowed to make "non-substantive changes," but a categorical denial of benefits to persons previously eligible[12] for them crosses out of the realm of ministerial detail and into the domain of substance.

Respondent cites *Bath Iron Works* as a case where the Board found the employer had sufficient contractual authority to shelter it from an allegation of unilateral modification. The facts of *Bath*, however, differ instructively from those in the present matter. The plan documents in that case gave the employer the express authority to "modify or amend" the Plan or even to terminate it. *Bath Iron Works*, 345 NLRB at 503. On these facts, the Board had little trouble deciding that a reasonable reading of the contract and plan documents permitted Respondent to merge the pension plan at issue with another one. Id. Our case is manifestly different in that the Respondent's discretionary authority does not extend to modifying benefits or terminating them outright. As article 39 of the agreement states, "The benefits provided by this [dental] plan will not be discontinued

[11] As the Board explained under similar facts in *Bath Iron Works*, "[T]he issue here is whether the contract *forbade* the conduct." *Bath Iron Works*, 345 NLRB at 502.

[12] As I have already stated, the agreement only provided for two conditions under which an employee could be denied benefits: agreement of Respondent and the Union and the passing of 30 days from the date of termination of employment.

or amended without the agreement of the Company and Union." (GC Exh. 2.) Moreover, the interpretive authority mentioned in the plan documents is just that, *interpretive authority*, which, by definition, does not extend to modification of the terms to be interpreted.

In light of my rejection of Respondent's proffered interpretation, I find that Respondent's modification to the terms of the dental plan was prohibited by the agreement. Accordingly, I find the alteration violated Section 8(a)(5) of the Act.

III. RESPONDENT VIOLATED SECTION 8(A)(1) BY SENDING COBRA PACKETS

The General Counsel separately alleges violations of Section 8(a)(1) with respect to the COBRA packets Respondent mailed on November 10, the date of the strike. The packets included a notice that specified for each category of benefits the date of cancellation and information on continued enrollment under COBRA. Although the letter reports the cancellation of life insurance benefits along with health and dental coverage, life insurance was not actually stopped.

In general, it is an unfair labor practice for an employer to threaten to withdraw wages or other benefits for engaging in concerted activity. E.g., *Prestige Ford*, 320 NLRB 1172 (1996) (finding an employer violated Section 8(a)(1) by threatening to prevent salesman from using demonstration car). Of course, where the termination of benefits itself is lawful, announcing their cancellation is also legitimate. *Trading Port, Inc.*, 219 NLRB 298, 300 fn. 3 (1975). In this case, however, I found *supra* that Respondent violated Section 8(a)(1), (3), and (5) by cancelling the accrued benefits of striking employees. Under these circumstances, the announcement also violates Section 8(a)(1). See *Texaco, Inc.*, 291 NLRB 508, 510 (1988) (finding a prestrike announcement of termination of benefits itself violative of Section 8(a)(1) where the cancellation itself had already been deemed discriminatory).

Generally, when benefits are discontinued, a COBRA notice is mandated by Federal law. Under COBRA, a strike is considered a qualifying event that compels an employer to give notice to its employees of their right to elect continued coverage. 26 C.F.R. § 54.4980B-4 (2012); see also *Communications Workers of Am., Dist. One v. NYNEX Corp.*, 898 F.2d 887, 888 (1990) (treating a strike as a qualifying event because it resulted in a reduction of hours). Respondent argues that to find the distribution of the COBRA packets to be a freestanding violation would place it and other employers in an unacceptable legal dilemma.

I disagree. In my view, COBRA does not apply in a situation in which benefits have been unlawfully discontinued. To insist that COBRA mandated reminding employees of Respondent's unlawful discontinuance of benefits is unwarranted. In such an instance, the notice only served to remind employees of the unlawful discontinuance of benefits.

IV. RESPONDENT DID NOT VIOLATE SECTION 8(A)(1) BY MAINTENANCE OF ITS HARASSMENT RULE

A. Legal Background

According to Section 8(a)(1) of the Act, an employer commits an unfair labor practice if it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in Section 7." A workplace rule violates Section 8(a)(1) if it would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (unpublished mem. decision). Where a rule does not explicitly restrict Section 7 activity, the Board may still find a violation in one of three ways: "(1) [E]mployees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

The test for how employees would reasonably construe the language of a rule is an objective one; neither the employer's motivation nor the subjective response of the employees is relevant to the inquiry. See *Uforma/Shelby Bus. Forms, Inc.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). In evaluating a challenged rule, the Board does not read particular phrases in isolation and does not presume improper interference with employee rights. *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park*, 326 NLRB at 825, 827). That said, an ambiguous rule must be construed against the employer as the promulgator of the rule. *Lafayette Park*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

B. Respondent's Harassment Rule is Facially Lawful

The General Counsel argues that employees could reasonably construe the broad provisions of Respondent's antiharassment policy to reach protected activity. It points to language forbidding "any behavior that ridicules, belittles, intimidates, threatens or otherwise demeans coworkers or others associated with the company" and a catch-all provision disallowing "harassment in any form." It asserts that employees could reasonably construe these words to prohibit protected activities like calling a fellow employee a scab, complaining about a manager, or persistently soliciting coworkers.

The Board in *Lutheran Heritage* gave a measure of latitude to employers who establish antiharassment rules. Adopting the position of the Court of Appeals for the District of Columbia Circuit, the Board recognized that "employers have a legitimate right to establish a 'civil and decent work place.'" *Lutheran Heritage*, 343 NLRB at 647 (quoting *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)). Reiterating the principle from a different perspective, it proclaimed, "[E]mployees have a right to a workplace free of unlawful harassment, and both employees and employers have a substantial interest in promoting a workplace that is "civil and decent.'" Id. at 648–649 (quoting *Adtranz*, 253 F.3d at 25). In coming to its decision, the Board was mindful of an employer's legal duty to keep its workplace free from harassment. Addressing a rule against profane language, it made clear, "[E]mployers have a legitimate right to adopt prophylactic rules banning such language because employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual, and other harassment' and 'abusive language can constitute verbal harassment triggering liability under state or federal law.'" Id. at 647 (quoting *Adtranz*, 253 F.3d

at 27).

The Board ultimately upheld the challenged rules in *Lutheran Heritage* which prohibited employees from:

> Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises).
>
> . . .
>
> Harassment of other employees, supervisors and any other individuals in any way.
>
> . . .
>
> Verbally, mentally or physically abusing a resident, a member of a resident's family, a fellow employee or a supervisor under any circumstances. This includes physical and verbal threats.

Id. at 654–655. Examining these rules, the Board concluded that a reasonable employee would understand them only to embrace activity of a certain magnitude, i.e., actions that rise to the level of harassment, leaving Section 7 activity unrestricted. Id. at 648 ("We see no justification for concluding that employees will interpret the rule unreasonably to prohibit conduct that does not rise to the level of harassment . . . .").

Subsequent cases in which the Board has applied the *Lutheran Heritage* standard are instructive. In *Hyundai Shipping Agency, Inc.*, 357 NLRB 860 (2011), the employer's rule barred "[t]hreatening, intimidating, coercing, harassing or interfering with the work of fellow employees or indulging in harmful gossip." The challenge to the rule centered on the prohibition of "indulging in harmful gossip. Citing the dictionary definition of "gossip" ("'rumor or report of an intimate nature' or 'chatty talk'"), the Board found employees would not reasonably construe the rule to prohibit Section 7 activity. Id., slip op. at 861–862. Turning to *Palms Hotel & Casino*, 344 NLRB 1363 (2005), the rule in that case banned "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." Id., 344 NLRB at 1367–1368. Upholding the rule against challenge, the Board explained that the type of bad behavior named, like the profane language proscribed in *Lutheran Heritage*, was not "inherently entwined" with protected activity. Id. at 1368. It further noted, "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id.

On its behalf, the General Counsel cites to cases in which the Board reached the opposite conclusion. These also serve to define the contours of a permissible antiharassment rule. *Advance Transportation Co.*, 310 NLRB 920, 925 (1993) (rule barring "harassment, intimidation, distraction, or disruption of another employee unlawful because "it is vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying Respondent with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act. "citing *Great Lakes Steel*, 236 NLRB 1033 (1978), enfd. 625 F.2d 131 (6th Cir. 1980)). More recently, the Board had little trouble finding that a rule banning "derogatory statements concerning any employee, supervisor, the hotel and/or the parent corporation" infringed on Section 7 rights. *HTH Corp.*, 356 NLRB 1397, 1421 fn. 21 (2011). The Board also rejected a rule that prohibited "negative conversations about associates or managers."[13] *KSL Claremont Resort, Inc.*, 344 NLRB 832, 832 (2005). It thought the rule could reasonably be construed to forbid employees from discussing complaints about supervisors with their coworkers. Id.

Considering the above cases, a few guiding principle can be gleaned. First, the Board is tolerant of language that connotes severe or extreme behavior, words like "abuse," "intimidating," or "coercing."[14] It believes that employees will understand these terms to restrict only words and actions that constitute mere ad hominem aggression or exceed the bounds of basic decency and decorum (four-letter words for instance). See *Lutheran Heritage*, 343 NLRB at 648. Second, terms that are ambiguous, generic, and mild, e.g., "derogatory statements," "negative conversations," and "distraction or disruption of other employees," spell a rule's doom. Significantly, these rules "fail to define permissible conduct" leaving the employer with a threatening power to apply them as it sees fit. *Advance Transp.*, 310 NLRB at 925. Third, rules that protect supervisors are less likely to be found lawful than those that merely ban harassment of employees. *Compare Claremont Resort*, 344 NLRB at 832, *with Hyundai Shipping*, 357 NLRB 860 (2011).

Respondent's harassment policy is as follows:

> [Respondent] strives to provide a work environment free of sexual or any other kind of harassment whether committed by or against a supervisor, co-worker, customer, vendor or visitor based on a person's race, color, religion, national origin, citizenship, ancestry, age, disability, marital status, sexual orientation, arrest and court record, military/veteran's status, or any other classification protected by federal or state law. Employees shall not engage in any behavior that ridicules, belittles, intimidates, threatens or otherwise demeans co-workers or others associated with the Company. [Respondent] will not tolerate harassment in any form—conduct, speech, written notes, photos, cartoons or electronic mail.

I find that a reasonable employee would not understand this rule to prohibit protected activity. First, I note that the initial sentence (the laundry list of protected categories) sets the tone of the policy. In the eyes of the reasonable employee, the opening sentence makes the policy appear to be, in a manner of speaking, a mini Civil Rights Act. In other words, it gives the appearance that the policy's concern is with those forms of identity-based discrimination (like racial or gender prejudice) that are rightly regarded as taboo in modern society. In addition, the words used in the second sentence—"ridicule," "belit-

[13] I should mention here that the Board in *Hyundai Shipping* distinguished the case before it from *Claremont Resort* on the grounds that the rule in *Claremont* barred comments about supervisors and not just fellow employees. *Hyundai Shipping*, 357 NLRB at 861.

[14] On the other hand (but for similar underlying reasons), the Board is also tolerant of bans on "gossip," an activity that while petty, also carries with it integral negative connotations sufficient to adequately restrict its meaning for employees.

tle," "intimidate," "threaten," and "demean"—possess negative connotations that inform employees that mere criticism or aggressive advocacy, as opposed to threats and bullying, do not fall within the rule's scope. Put another way, these words, unlike words like "criticize" or "protest," are rarely used to praise a person's behavior in the workplace setting. For example, it is never a compliment to call someone a "bully." By the same token, it is the workplace bully who "ridicules" and "belittles" a fellow employee. Admittedly, a word like "demean" is less clear-cut than a word like "threaten." Nevertheless, the Board has given its imprimatur to a rule barring "gossip," an activity also considered mean and malignant that likewise falls short of threats or intimidation.

For these reasons, I find that the rule as a whole would not be reasonably understood by employees to prohibit protected concerted activity. Consequently, I reject the General Counsel's facial challenge.

V. RESPONDENT VIOLATED SECTION 8(A)(1) BY SENDING THE "SPECIAL ALERT"

General Counsel argues that the Special Alert issued by Respondent on November 17 unlawfully restricted unit members' communication with the Union by threatening disciplinary action against employees who assisted the Union in compiling the names of those who worked during the strike for its "Wall of Shame." As noted in *United Technologies Corp.*, 274 NLRB 1069, 1079 (1985), enfd. sub nom. *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.3d 121 (2d Cir. 1986), publishing such a list is protected activity. Respondent's Special Alert stated:

> The Company is aware that [the Union's] negotiating committee has circulated an email to employees/union members that talks about the Union's 'hall of shame' and urges employees to report each other in retaliation for reporting to work during the Union's work stoppage. Employees should review the Company's *Code of Business Conduct and Guideline 201.G11:Workplace Violence* immediately to avoid committing any violations or misconduct.
>
> Unlawful employee conduct that is intended to intimidate, threaten or demean a fellow employee or others associated with the Company is strictly prohibited under both the Company's Code of Business conduct and the Workplace Violence guidelines. Facilitating or assisting with unlawful intimidation or threats toward fellow employees—even if planned to be carried out by others—will also not be tolerated. The threats, bullying tactics, and other hostile treatment that have occurred, directed toward a co-worker based on his or her decision to exercise their legally protected right to report to work during a strike, are forms of prohibited threats and harassment.
>
> Violations of the Code of Business Conduct and/or the Company's guideline on Workplace Violence are subject to discipline, up to and including the termination of employment.
>
> Employees are required to immediately report any unusual or suspicious activity or incident of violent, threatening or abusive behavior to any supervisor, Corporate Security or the Human Resources Department. Threats or assaults must immediately be reported to Corporate Security at 643–7111 (on all islands) or local law enforcement at 911.

(GC Exh. 18.) The Code of Business conduct includes the harassment policy discussed in the preceding section. The underlined terms were web links to the named policies.

I find that a reasonable employee could understand the Special Alert as a threat of discipline for assisting the Union in compiling its "Wall of Shame." A reasonable employee would notice from the outset what prompted the Alert to be sent, namely, the Union email dispatched the same day soliciting support for the Wall. Although the Alert does not expressly declare assisting the Wall project to be a punishable offense, it implies as much. After mentioning the Union email, it reminds employees about the Code of Conduct, stating that employees should read it "immediately to avoid committing any violations or misconduct." The implication is that the action suggested by the email (reporting fellow employees for the Wall of Shame) is at least potentially misconduct that employees should think twice about committing. In the next paragraph, the Alert decries "[f]acilitating or assisting with unlawful intimidation or threats toward fellow employees." An employee could understand this to prohibit the mere communication of an employee's name to the Union for listing on the Wall.

The Respondent makes several points in defense of the Alert. Of tangential relevance is the fact that the Alert uses the past tense, speaking of "the threats, bullying tactics, and other hostile treatment that have occurred," when the Union letter had been sent the same day. I do not read very much into this particular detail however; the Wall of Shame campaign may well have preceded the Union's email. Another detail, the fact that the Alert speaks of "*unlawful* employee conduct," weighs in favor of reading the prohibitions to only encompass unprotected activity. In this regard, Respondent argues that it was past reports of harassment that prompted the letter and that it was this harassment which the Alert was aimed at remedying. It quotes the testimony of its Vice President and General Counsel John Komeiji:

So after the strike concluded, I would get daily reports of employees complaining that someone would make snide comments to them or threatening comments under their breath or talk to someone else. We actually had a physical confrontation between a couple of employees a couple of days before the 17th. So we were getting a lot of complaints from people who had crossed the line who were getting—who believed that they were getting threatened and bullied.

(Tr. 119:24–120:7). Based on this testimony, Respondent analogizes to *Stanadyne Automotive Corp*., 345 NLRB 85 (2005), vacated in relevant part sub nom *Auto Workers v. NLRB*, 520 F.3d 192 (2d Cir. 2008). In *Stanadyne*, the employer told its employees the following:

> [I]t has come to my attention that some union supporters, not all, but some, are harassing fellow employees. You can disagree with the Company position; you can be for the Union. You can be for anything you want to, but no one should be harassed. Harassment of any type is not tolerated by this company and will be dealt with.

Stanadyne, 345 NLRB at 86 (alteration in original). Despite the express references to "union supporters," the Board found the statement lawful. Id. at 87. It emphasized that the statement was made in the context of unsolicited employee reports of mistreatment and that it reassured employees they were free to support the Union.

Although the details Respondent cites do support an interpretation of the Alert as aimed at collateral, past threats and harassment, I am convinced that a reasonable employee would view the Alert *as a whole* as a message about the Wall of Shame and the Union's email. As for the analogy to *Stanadyne*, I find that it is incomplete. The *Stanadyne* Board emphasized that the employer indicated that employees were free to support the Union. No such explicit, equivalent qualifying language appears in the Alert. Furthermore, the *Stanadyne* statement made clear that it was addressing reports of harassment that it had received. While Respondent argues it had received similar reports of bad behavior, it is not clear from its message that this is the target of the Alert. Rather, it appears that it is the Wall of Shame and the Union email which prompted Respondent to take action.

VI. RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING TO APPLY ITS HARASSMENT RULE TO RESTRICT PROTECTED ACTIVITY

The text of the Special Alert references the Respondent's Code of Business Conduct, which contains its harassment policy. The Alert treats the Code, and the Guideline on Workplace Violence[15] more specifically, as the authoritative basis for the discipline it threatens. As *Lutheran Heritage* teaches, an otherwise lawful rule may be applied in an unlawful manner to restrict Section 7 activity. *Lutheran Heritage*, 343 NLRB at 647. Although I found that mere maintenance of the harassment rule did not constitute a violation of Section 8(a)(1), the Respondent threatened to unlawfully apply it when it sent the Special Alert. Accordingly, I find that the application of the harassment policy as applied against the Wall of Shame campaign violates Section 8(a)(1).

CONCLUSIONS OF LAW

1. By cancelling health, drug, vision, and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

2. By changing its dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike, Respondent violated Section 8(a)(1), (3), and (5).

3. By informing employees who participated in the work stoppage that their life, health, drug, vision, and dental insurance were cancelled, Respondent violated Section 8(a)(1).

4. By email dated November 17, 2011, Respondent applied its Harassment and Intimidation Policy and its Workplace Violence Policy to restrict employee communication with the Union in violation of Section 8(a)(1).

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 unlawfully cancelled health, drug, vision and dental benefits of employees and changed employees' dental insurance benefits and having unlawfully eliminated dental benefits for employees whose employment ended due to a strike, must make employees whole, with interest, for any accrued benefits denied them as a result of the strike to the extent they have not already been made whole.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Hawaiian Telcom, Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Cancelling health, drug, vision, and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011.

(b) Changing its dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike.

(c) Informing its employees who participated in the work stoppage that their life, health, drug, vision, and dental insurance were cancelled.

(d) Applying its Harassment and Intimidation Policy and its Workplace Violence Policy to restrict employee communication with the Union.

(e) In any other like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Make whole with interest all former strikers for any accrued health, drug, vision, and/or dental benefits denied them as a result of their participation in the strike.

(b) Upon request, rescind the unilateral change eliminating dental benefits for employees whose employment ends due to a strike.

(c) 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.

(d) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[17]

[15] This rule is distinct from the harassment policy at issue.

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

[17] 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-

Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2011.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 5, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

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 cancel health, drug, vision, and dental benefits of employees who participated in a work stoppage on November 10 and 11, 2011.

WE WILL NOT change our dental insurance policy to eliminate dental benefits for employees whose employment ends due to a strike.

WE WILL NOT inform our employees who participated in the work stoppage that that their life, health, drug, vision, and dental insurance were cancelled.

WE WILL NOT apply our Harassment and Intimidation Policy and our Workplace Violence Policy to restrict employee communication with the Union.

WE WILL NOT in any like or related manner interfere with, restraining, or coercing you in the exercise of their Section 7 rights.

WE WILL make whole all former strikers who were denied health, drug, vision, and dental benefits which accrued before the November 10–11, 2011 strike.

WE WILL, upon the Union's request, rescind the change to our dental benefits for employees whose employment ends due to a strike.

HAWAIIAN TELCOM, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20–CA–069432 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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