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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JAMES J. McDERMOTT, Regional	)	CV 08-1551 (SVW) (MANx)
Director, Region 31 of the	)	
National Labor Relations Board,	)	ORDER DENYING PETITION FOR
for and on behalf of the	)	TEMPORARY INJUNCTION UNDER SECTION
NATIONAL LABOR RELATIONS BOARD,	)	10(J) OF THE NATIONAL LABOR
	)	RELATIONS ACT [1]
Petitioner,	)	
	)	
v.	)	
	)	
AMPERSAND PUBLISHING L.L.C.	)	
d/b/a THE SANTA BARBARA NEWS-	)	
PRESS,	)	
	)	
Respondent.	)	

**I. Introduction**

Petitioner James J. McDermott, Regional Director of the 31st Region of the National Labor Relations Board ("the Board"), seeks a temporary injunction on behalf of the Board pursuant to Section 10(j) of the National Labor Relations Act ("NLRA") against Respondent Ampersand Publishing, L.L.C. d/b/a The Santa Barbara News-Press ("News-Press"). (Pet., at 1.) The injunction is sought pending final disposition before the Board of a complaint ("the Complaint") based

1 on unfair labor practice charges filed by Graphic Communications  
2 Conference, International Brotherhood of Teamsters ("the Union").  
3 Petitioner issued the filings constituting the Complaint on May 31,  
4 2007. (Pet. Mem., at 1.) A hearing on the Complaint was held before  
5 Administrative Law Judge William G. Kocol ("the ALJ"), which  
6 commenced on August 14, 2007 and ended on September 26, 2007. (Id.)  
7 The ALJ issued a final recommendation finding Respondent committed  
8 numerous unfair labor practices under Section 8 of the NLRA on  
9 December 26, 2007 and ordering appropriate equitable relief. (Id.;  
10 Pet. Ex. 2, at 57-106.) Petitioner seeks an injunction requiring  
11 Respondent to rescind its prior alleged unfair labor practices by  
12 reinstating eight discharged employees and removing all references to  
13 prior disciplinary actions arising from union activity in their  
14 personnel files. The proposed injunction also requires Respondent to  
15 refrain in the future from committing a variety of specific unfair  
16 labor practices. (Pet., at 11-13.)

## 17

## 18 **II. Factual Background**

## 19

20 Respondent owns and operates the News-Press, a daily Santa  
21 Barbara newspaper. (Pet. Mem., at 5.) In April 2006, Wendy McCaw,  
22 owner and chief executive officer of Respondent, appointed herself  
23 and Arthur von Wiesenberger as co-publishers of the News-Press. (Id.)  
24 Subsequently, clashes erupted between publishers and reporters of the  
25 News-Press over issues of content, resulting in the resignation of  
26 seven newspaper employees. (Id., at 5-6.) Beginning in July 2006 a  
27 group of News-Press reporters began meeting with the Union and  
28

1 organizing for union representation. (Pet. Mem., at 6; Pet. Ex. 2, at  
2 40.) On August 10, 2006, the Union filed a petition with the Board to  
3 hold a union election for a unit of Respondent's news department  
4 employees. (Pet. Mem., at 8.) On September 27, 2006, news department  
5 employees voted 33 to 6 to in favor of Union representation in a  
6 Board conducted election. (Id.) On August 16th, 2007, the Board  
7 certified the Union as the exclusive bargaining representative of a  
8 unit of news department employees. (Id.) Respondent was found by the  
9 ALJ to have engaged from August 17, 2006 to February 21, 2007 in a  
10 number of unfair labor practices in violation of Section 8(a)(1) of  
11 the NLRA. (Pet. Ex. 2, at 54-100.) Respondent and the Union began  
12 negotiations still ongoing for a collective-bargaining agreement on  
13 November 13th, 2007. (Id.)

### 14 15 **III. Analysis**

#### 16 17 A. Nature of the Alleged Unfair Labor Practices

18  
19 Before analyzing the appropriateness of equitable relief, the  
20 nature of Respondent's underlying alleged unfair labor practices must  
21 be discussed. The demands of Petitioner's requested injunction are  
22 predicated entirely on violations of Section 8(a)(1) and Section  
23 8(a)(3) of the NLRA found by the ALJ to have been committed by  
24 Respondent. Section 8(a)(1) of the NLRA makes it an unfair labor  
25 practice for an employer "to interfere with, restrain, or coerce  
26 employees in the exercise of the rights" to "form, join, or assist  
27 labor organizations, to bargain collectively through representatives  
28 of their own choosing, and to engage in other concerted activities

1 for the purpose of collective bargaining or other mutual aid or  
2 protection." 29 U.S.C. § 158(a)(1); 29 U.S.C. § 157; see, e.g.,  
3 California Acrylic Industries, Inc. v. N.L.R.B., 150 F.3d 1095, 1099  
4 (9th Cir. 1998); N.L.R.B. v. Mike Yurosek & Son, Inc., 53 F.3d 261,  
5 264 (9th Cir. 1995). "Concerted employee activities are protected  
6 when 'the activities can reasonably be seen as affecting the terms or  
7 conditions of employment.'" Yurosek, 53 F.3d at 266 (quoting Gatliff  
8 Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir. 1992). An employer  
9 hence violates Section 8(a)(1) "by engaging in activity that tends to  
10 chill an employee's freedom to exercise" rights protected by the  
11 NLRA. California Acrylic Industries, 150 F.3d at 1099.

12 Section 8(a)(3) of the NLRA makes it an unfair labor practice,  
13 "by discrimination in regard to hire or tenure of employment or any  
14 term or condition of employment to encourage or discourage membership  
15 in any labor organization." 29 U.S.C. § 158(a)(3). An employer  
16 therefore violates Section 8(a)(3) by disciplining or discharging an  
17 employee for engaging in union-related activity. See NLRB v.  
18 Transportation Management Corp., 462 U.S. 393, 395 (1983), abrogated  
19 on unrelated point, Director, Office of Workers' Compensation  
20 Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 268  
21 (1994). A violation of Section 8(a)(3) as a general matter also  
22 amounts to a violation of Section 8(a)(1). See Id.

23 In analyzing whether violations of Section 8(a)(3) and  
24 violations of Section 8(a)(1) derivative of Section 8(a)(3)  
25 violations occurred, the ALJ properly applied the shifting burden  
26 analysis laid down by the Board in Wright Line, 251 NLRB 1083 (1980)  
27 and approved by the Supreme Court in Transportation Management Corp.,  
28 462 U.S. at 404. (Pet. Ex. 2, at 50.) Under the analysis outlined in

1 Wright Line, the petitioner "must prove by a preponderance of the  
2 evidence that union animus was a substantial or motivating factor in  
3 the adverse employment action. The elements commonly required to  
4 support such a showing are union or protected concerted activity by  
5 the employee, employer knowledge of that activity, and union animus  
6 on the part of the employer." Consolidated Bus Transit, 350 NLRB No.  
7 82, slip op. at 2 (Aug. 31, 2007). If petitioner makes this showing  
8 "the burden then shifts to the employer to prove, as an affirmative  
9 defense, that it would have taken the same action even in the absence  
10 of the employee's union activity." Id. at 3.

11 Applying this analysis, the ALJ found relevant to the Petition  
12 that Respondent violated Section 8(a)(1) and 8(a)(3) of the NLRA  
13 between August 31, 2006 and February 6, 2007 by instructing employees  
14 to remove buttons and signs supportive of the Union from their  
15 persons and vehicles, coercively interrogating employees with regard  
16 to their Union-related activity, issuing letters of suspension to  
17 employees because of their Union-related activity, giving lower  
18 evaluations to employees because of their Union-related activity, and  
19 discharging eight reporters employed by the News-Press for Union-  
20 related activity. (Pet. Ex. 2, at 99; Pet. Mem., 10-18.)

21  
22 B. Standard for Equitable Relief

23  
24 Under most circumstances, a federal district court does not have  
25 jurisdiction over fair labor standards disputes. The Board  
26 adjudicates these disputes at the "trial" level and the Court of  
27 Appeals reviews the Board's decisions. Miller ex rel. NLRB v. Cal.  
28 Pac. Med. Ctr., 19 F.3d 449, 458 (9th Cir. 1994) (en banc). The Court

1 of Appeals' review of a Board decision is deferential: "The Board's  
2 [remedial] order will not be disturbed unless it can be shown that  
3 the order is a patent attempt to achieve ends other than those which  
4 can fairly be said to effectuate the policies of the [National Labor  
5 Relations Act]." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203,  
6 216 (1964).

7 Section 10(j) of the NLRA, 29 U.S.C. § 160(j), creates an  
8 exception to the district court's lack of jurisdiction over fair  
9 labor practices:

10 The Board shall have power, upon issuance of a complaint as  
11 provided in subsection (b) of this section charging that any  
12 person has engaged in or is engaging in an unfair labor  
13 practice, to petition any United States district court, within  
14 any district wherein the unfair labor practice in question is  
15 alleged to have occurred or wherein such person resides or  
16 transacts business, for appropriate temporary relief or  
17 restraining order. Upon the filing of any such petition the  
18 court shall cause notice thereof to be served upon such person,  
19 and thereupon shall have jurisdiction to grant to the Board such  
20 temporary relief or restraining order as it deems just and  
21 proper.

22 29 U.S.C. § 160(j). "[I]n determining whether interim relief under  
23 10(j) is 'just and proper,' district courts should consider  
24 traditional equitable criteria." Miller, 19 F.3d at 459. Hence, "[t]o  
25 secure relief under section 10(j), the Regional Director [of the  
26 Board] must show 'either (1) a combination of probable success on the  
27 merits and the possibility of irreparable harm or (2) the existence  
28 of serious questions going to the merits, the balance of hardships

1 tipping sharply in its favor, and at least a fair chance of success  
2 on the merits.'" Scott ex rel. N.L.R.B. v. Stephen Dunn & Associates,  
3 241 F.3d 652 (9th Cir. 2001) (quoting Miller, 19 F.3d at 456). "If the  
4 respondent concedes the substance of the unfair labor practice  
5 charge, or if the Board demonstrates that it is likely to prevail on  
6 the merits, we presume irreparable injury" and no further inquiry is  
7 necessary. Miller, 19 F.3d at 459-460. However, if the Board can make  
8 only a "colorable evidentiary showing" then the Court must engage in  
9 an irreparable injury analysis and balancing of the hardships. Id. at  
10 459. "This is in keeping with our normal sliding scale standard of  
11 injunctive relief." Id. The burden for a showing of likelihood of  
12 success in the 10(j) context is low in light of "the district court's  
13 lack of jurisdiction over unfair labor practices, and the deference  
14 accorded to NLRB determinations by the courts of appeals." Id. at  
15 460. "[T]he Board can make a threshold showing of likelihood of  
16 success by producing some evidence to support the unfair labor  
17 practice charge, together with an arguable legal theory." Id.  
18 "Essentially, the Regional Director [of the Board] must demonstrate  
19 'a better than negligible chance of success' to get into the  
20 injunction game." Aguayo v. S&F Market Street Healthcare, LLC, 2006  
21 WL 941183, at \*2395 (C.D. Cal. Mar. 22, 2006) (quoting Scott, 241 F.3d  
22 at 662). But see infra, at 27-28 (determining that, due to the First  
23 Amendment issues present in this case, a higher bar must be applied  
24 to the Petition).

25 In applying these criteria, the Court must operate "through the  
26 prism of the underlying purpose of § 10(j), which is to protect the  
27 integrity of the collective bargaining process and to preserve the  
28 Board's remedial power while it processes the charge." Miller, 19

1 F.3d 459-60. The Court should always be cognizant that "[t]he public  
2 interest is an important factor in the exercise of equitable  
3 discretion." The public interest at issue in 10(j) cases of course  
4 "is to ensure that an unfair labor practice will not succeed because  
5 the Board takes too long to investigate and adjudicate the charge."  
6 Id. at 460.

7  
8 C. Impact of Presence of First Amendment Issues

9  
10 Respondent urges the Court in this case to both dispense with  
11 the usual deference accorded to the Board's interpretation of the  
12 NLRA and apply a higher bar for granting equitable relief because the  
13 injunction sought by Petitioner potentially infringes Respondent's  
14 First Amendment rights as an owner and publisher of a newspaper.<sup>1</sup>  
15 (Supp. Opp., at 3.) In Overstreet v. United Broth. of Carpenters and  
16 Joiners of America, the Ninth Circuit held that "the position of the  
17 NLRB is not entitled to special consideration" where there is a  
18 "significant risk" that granting the injunction sought will  
19 "sanction[] a violation of the First Amendment." 409 F.3d 1199, 1210  
20 (9th Cir. 2005). "[B]ecause constitutional decisions are not the  
21 province of the NLRB (or the NLRB's Regional Director or General  
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23  
24 \_\_\_\_\_  
25 <sup>1</sup> Respondent also urges the Court to dispense with the usual deference  
26 owed the Board because the bringing of the Petition is unauthorized  
27 under Section 10(j). Respondent argues that the bringing of the  
28 Petition was not expressly consented to by the Board as is required  
under the NLRA for Section 10(j) petitions. (Supp. Opp., at 9.) As  
the Court finds the presence of First Amendment issues in this case  
requires the Court to dispense with the usual deference owed the  
Board, the Court chooses not to reach this separate statutory  
argument seeking the same result.

1 Counsel), the tasks of evaluating the constitutional pitfalls of  
2 potential interpretations of the [NLRA] and of interpreting the  
3 [NLRA] to avoid those dangers are committed *de novo* to the courts."  
4 Overstreet, 409 F.3d at 1209.<sup>2</sup> This rule operates as a corollary to  
5 the traditional constitutional avoidance doctrine requiring courts to  
6 construe federal statutes so as to avoid raising "serious  
7 constitutional problems . . . unless such construction is plainly  
8 contrary to the intent of Congress.'" Id. at 1209 (quoting Edward J.  
9 DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,  
10 485 U.S. 568, 575 (1988)). The standard for finding a "significant  
11 risk" of a First Amendment violation under Overstreet is low. In  
12 order to determine whether there is a significant risk of a First  
13 Amendment violation a court "need not decide whether the First  
14 Amendment *does* protect the [enjoined actions], or even whether it  
15 probably does." Overstreet, 409 F.3d at 1209 (emphasis in original).  
16 In Overstreet, the Ninth Circuit found that the Board's requested  
17 injunction of union members' display of banners and distribution of  
18 handbills on public property posed a significant risk of infringing  
19 the union members' First Amendment rights. Id. at 1212. Though there  
20 was no controlling authority that definitively established that the  
21 injunction infringed the union members' First Amendment rights, the

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23 <sup>2</sup> Though Overstreet involved an injunction requested under Section  
24 10(1) of the NLRA as opposed to Section 10(j), the panel in  
25 Overstreet noted that there was no reason the statutory differences  
26 between the two types of injunctions "should affect the courts'  
27 standard for determining whether to grant an injunction applied for."  
28 409 F.3d at 1205. Therefore, the Court sees no reason why the holding  
of Overstreet as to the impact of the First Amendment on the  
appropriate standard of review is not applicable to the instant  
Petition. Petitioner has not attempted to make any argument to the  
contrary.

1 panel found sufficient supportive authority with analogous facts "to  
2 recognize that the [union members'] argument is a plausible, and  
3 quite possibly meritorious, one." Id. at 1211. Hence, in order to  
4 demonstrate that the injunction significantly risks infringing  
5 Respondent's First Amendment rights, Respondent need only raise a  
6 plausible First Amendment argument not necessarily clearly  
7 established by existing authority. See also N.L.R.B. v. Catholic  
8 Bishop of Chicago, 440 U.S. 490, 502 (1979) (indicating that the  
9 Court could find that application of the NLRA to church-operated  
10 schools posed "significant risk" of violating First Amendment  
11 guarantees without resolving Board's counter-argument).

12 The Ninth Circuit in Overstreet also separately noted that,  
13 "where . . . there is at least some risk that constitutionally  
14 protected speech will be enjoined, only a particularly strong showing  
15 of likely success, and of harm . . . could suffice." Id. at 1208  
16 n.13. The meaning of this statement in the context of the Overstreet  
17 decision is somewhat enigmatic. It appears to hold that, even if a  
18 court does not find that a proposed injunction significantly risks  
19 violating the guarantees of the First Amendment, if it finds that the  
20 proposed injunction is in "some risk" of doing so, the court should  
21 require a particularly strong showing with regard to all the  
22 equitable factors, while still providing ordinary deference to the  
23 position of the Board with regard to its interpretation of the NLRA.  
24 Presumably, the type of risk that would qualify as "some risk" is  
25 less than a "significant risk." However, as the Court finds the  
26 injunction significantly risks infringing Respondent's First  
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1 Amendment rights, the Court need not delve in to the issue of what  
2 minimal level of risk would qualify as "some risk" under Overstreet.

3 The Court's view is that Respondent is correct in its assertion  
4 that issuing Petitioner's requested injunction significantly risks  
5 infringing the First Amendment rights of Respondent. The Supreme  
6 Court long ago determined that as a general matter an agency of the  
7 press has no "special immunity" from application of the NLRA or any  
8 general law. Associated Press v. National Labor Relations Board, 301  
9 U.S. 103, 132-33 (1937). Since this decision, the Supreme Court has  
10 clarified that there are certain decisions of agencies of the press  
11 that can in fact be excepted from general regulations. Specifically,  
12 in holding unconstitutional a statute requiring newspapers to afford  
13 equal space to political candidates to answer criticisms by a  
14 newspaper, the Supreme Court has declared:

15 The choice of material to go into a newspaper, and the  
16 decisions made as to limitations on the size and content of  
17 the paper, and treatment of public issues and public  
18 officials-whether fair or unfair-constitute the exercise of  
19 editorial control and judgment. It has yet to be demonstrated  
20 how governmental regulation of this crucial process can be  
21 exercised consistent with First Amendment guarantees of a free  
22 press as they have evolved to this time.

23 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1971).

24 In line with this ruling, the D.C. Circuit subsequently refused to  
25 uphold an order issued by the Board against a newspaper requiring it  
26 to reinstate a discharged columnist and resume publication of his  
27 weekly column on the grounds that it interfered with the newspaper's  
28

1 First Amendment-protected editorial discretion. Passaic Daily News v.  
2 N.L.R.B., 736 F.2d 1543, 1558-59 (D.C. Cir. 1984). Respondent asserts  
3 that these rulings indicate that the injunction sought by Petitioner  
4 significantly risks violating Respondent's constitutionally protected  
5 editorial discretion in a number of ways. Though the Court is not  
6 entirely persuaded by all of Respondent's arguments in this vein, the  
7 Court does find that in at least one manner Petitioner's requested  
8 injunction in its entirety does pose a significant risk of violating  
9 Respondent's First Amendment rights.

10 Respondent asserts that its First Amendment rights are violated  
11 by the sought after injunction in essentially three analytically  
12 distinct ways, of which the Court finds two to be of definite  
13 concern. First, Respondent argues that the aspects of the requested  
14 injunction requiring it to reinstate certain discharged reporters and  
15 not discharge its current reporters for union activity would  
16 inherently infringe its First Amendment rights by forcing it to  
17 publish reporters' articles against its will. (Supp. Opp., at 7-8.)  
18 Hence, Respondent argues, even if the injunction were otherwise  
19 warranted, the Court cannot force Respondent to reinstate the  
20 discharged reporters or retain its current reporters without  
21 violating Respondent's First Amendment rights. Respondent points most  
22 relevantly to Passaic, where the D.C. Circuit refused to affirm a  
23 Board injunction reinstating a newspaper's weekly columnist and  
24 ordering resumption of his column.<sup>3</sup> The Court regarded such an

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26 <sup>3</sup> Respondent also relies on Collard v. Smith Newspapers, but the  
27 holding in that case found only that the First Amendment provided the  
28 defendant newspaper a "legitimate reason" to discharge a reporter  
such that it could not be found liable for wrongful discharge in  
contravention of public policy under West Virginia law. 915 F. Supp.

1 injunction as a clear infringement of the newspaper's First  
2 Amendment-protected editorial discretion. However, the court made  
3 clear it was specifically troubled by the mandate of publication  
4 contained within the order issued by the Board, qualified only by  
5 vague language in the order stating the publication would be "subject  
6 to the same lawful standards and requirements that Respondent, as an  
7 employer, imposes or may impose on its employees." 736 F.2d at 1559.  
8 The court noted that "an order that merely directed the [publisher]  
9 to not discriminate against [the columnist] on the basis of his union  
10 activity would present a much closer case." Id. On remand, the Board  
11 formulated a new, more specific order that went unchallenged  
12 requiring the newspaper to restore the columnist to his position and  
13 "decide whether to publish his submissions based upon any factors  
14 other than his union or protected activity; provided that nothing in  
15 this Order shall be interpreted as a requirement that the Respondent  
16 publish any of the columns submitted by [the columnist]." Herald  
17 News, 276 NLRB 605, 606 (1985). The Court believes it would be  
18 possible to issue a similarly crafted injunction in this case.  
19 However, the D.C. Circuit regarded even such an injunction as  
20 presenting a close case. Therefore, the Court cannot say that the  
21 limited aspects of the requested equitable relief ordering  
22 reinstatement of the discharged reporters and circumscribing the  
23 acceptable reasons for discharge of current reporters pose no  
24 significant risk of a First Amendment violation. It should be noted  
25 this finding is not applicable to the various aspects of the proposed  
26 injunction not related to the reinstatement of former News-Press

27 \_\_\_\_\_  
28 805, 812 (S.D.W. Va. 1996).

1 reporters and potential discharge of current News-Press reporters.  
2 Furthermore, this finding is ultimately subsumed by the Court's  
3 finding that the entire requested injunction significantly risks  
4 infringing Respondent's First Amendment rights on the final basis  
5 discussed below. See infra, at 15-28.

6 Second, Respondent asserts that though the ALJ found union  
7 animus to be the motivation behind all of Respondent's alleged unfair  
8 labor practices where such motivation was a necessary part of the  
9 violation, Respondent claimed and continues to claim that its true  
10 motive for a number of these actions was the disciplining of  
11 reporters for previously engaging in biased reporting in  
12 contravention of News-Press policy. Respondent argues that because  
13 these assertions relating to its motives create a factual dispute as  
14 to whether many of its actions against its employees related to the  
15 exercise of its editorial discretion, the issuing of various aspects  
16 of the requested injunction would risk violating its First Amendment  
17 rights. (Supp. Opp., at 8.) It is clearly established that the Board  
18 may inquire into the motives of a newspaper publisher for purposes of  
19 finding a violation of the NLRA and need not defer to the publisher's  
20 claims that its actions were motivated by reasons related to  
21 editorial control. The Supreme Court explicitly rejected any view to  
22 the contrary in Associated Press, stating that "[c]ourts deal with  
23 cases upon the basis of the facts disclosed, never with nonexistent  
24 and assumed circumstances." 301 U.S. at 132. The D.C. Circuit  
25 subsequently reiterated this view in Passaic and affirmed the Board's  
26 inquiry into, and ultimate rejection of, a newspaper's claimed anti-  
27 bias motives for its retaliatory actions against employees. 736 F.2d  
28

1 at 1556. In the instant action, the ALJ found where necessary that,  
2 despite Respondent's claims to the contrary, Respondent's actions  
3 against employees were retaliation for union activity or support and  
4 not motivated by concerns about biased reporting. (Pet. Mem. Ex. 2,  
5 at 29-106.) These fact-intensive determinations are generally  
6 entitled to deference. See, e.g., Silverman v. J.R.L. Food Corp., 196  
7 F.3d 334, 337-38 (2d Cir. 1999). Were the Court to find it highly  
8 unlikely that these findings would be overturned by the Board, it  
9 could conclude that a grant of equitable relief did not significantly  
10 risk an infringement of Respondent's First Amendment rights in this  
11 respect. However, as the Court finds the entire requested injunction  
12 significantly risks infringing Respondent's First Amendment rights on  
13 the separate basis discussed immediately below, the Court will not  
14 explore this argument further.

15 Finally and most centrally, Respondent asserts that the union  
16 activity committed by the employees in this case was in large part  
17 directed at limiting Respondents' exercise of its editorial  
18 discretion. As such, Respondent argues that by preventing Respondent  
19 from disciplining employees engaged in such activity, the proposed  
20 injunction in its entirety infringes on Respondent's First Amendment  
21 right to maintain its editorial discretion. (Supp. Opp., 3-5.) In so  
22 arguing, Respondent takes the view that a newspaper has a First  
23 Amendment right to retaliate through discharges and other standard  
24 disciplinary tools against concerted or union activity demanding, in  
25 part, the ceding of that newspaper's First Amendment-protected  
26 editorial discretion. In Respondent's view, any such activity is  
27 rendered effectively unprotected by the First Amendment and so cannot  
28 form the basis for a Section 8(a)(1) or (a)(3) violation.

1 Before analyzing whether this argument is plausible, it is  
2 necessary to determine whether it has a proper factual basis. The  
3 Court finds that Respondent is correct in asserting that employees'  
4 Union-related activity had as a central demand the ceding of an  
5 aspect of Respondent's editorial discretion. The ALJ opinion made  
6 note of the fact that, at a July 13th Union meeting, employees  
7 drafted a letter delivered to Travis Armstrong, the editorial editor  
8 of the News-Press, which had four demands. The very first demand was:

9 Restore journalism ethics to the Santa Barbara News-Press:

10 implement and maintain a clear separation between the

11 opinion/business side of the paper and the newsgathering side.

12 (Pet. Ex. 2, at 41.) The employees requested a response within 72  
13 hours to the demands in the letter. (Id.) These demands were repeated  
14 or displayed at Union-led demonstrations on five separate dates prior  
15 to the Union election. (Id., at 41-43.) Specifically, on July 20th,  
16 Marty Keegan, identified as the Union's lead organizer, read the  
17 demands at a Union demonstration and stated that the organizing  
18 employees would call for a customer boycott if these demands were not  
19 met. The organizing employees ultimately did call for such a customer  
20 boycott and intermittently engaged in subsequent public organized  
21 activity in support of the Union throughout the period the alleged  
22 unfair labor practices occurred. (Id., at 15, 26-106.) The ALJ did  
23 not make any finding that the first demand relating to journalism  
24 ethics was ever retracted, as the ALJ did for the third of the  
25 original demands insisting that the News-Press invite back the  
26 newspaper employees who previously resigned. (Id.) As such, the Court  
27 must conclude this was a demand of the Union campaign backed by  
28 public organized activity putting economic pressure on Respondent

1 before and at the time the alleged unfair labor practices occurred.  
2 Furthermore, in light of the fact that this was a central and oft-  
3 repeated demand of the Union campaign, the Court must assume, having  
4 not been presented any evidence to the contrary, that this continues  
5 to be a demand of the Union.

6 It is the Court's view that the above mentioned demand goes to  
7 the heart of Respondent's editorial discretion. In discussing this  
8 demand, the ALJ quoted the testimony of Melinda Burns, one of the  
9 discharged employees, who stated:

10 To keep its credibility, a newsroom has to have independence  
11 from the editorial side of the paper . . . . The editorial side  
12 is the opinion side. The publisher's opinion is in the  
13 editorials. The news side has to have the independence and  
14 freedom to report the news, gather the news . . . and not to be  
15 pressured by the publisher to report it or gather it in a  
16 certain way.

17 (Pet. Ex. 2, at 51.) This quote makes clear what independently is  
18 fairly obvious to the Court: the separation of the opinion/business  
19 side of the paper and the newsgathering side is a demand related to  
20 content control falling within the publisher's editorial discretion.  
21 Therefore, it is the Court's view that Respondent's final First  
22 Amendment argument must be dealt with.

23 The ALJ reached a different and, in the Court's consideration,  
24 erroneous view of this demand. The ALJ, on the basis of the testimony  
25 presented, determined as a general matter "that the union campaign  
26 was not part of an effort to let the reporters rather management  
27 [sic] control the content of the newspaper." (Pet. Ex. 2, at 25.) The  
28 ALJ took the view that the Union campaign was only generally asking

1 Respondent to "restore journalistic integrity" to the News-Press.  
2 (Id., at 23.) The ALJ could envision demands discussed by the  
3 employees that the Union could make, such as by-line protection, that  
4 would restore journalistic integrity in the employees' view without  
5 interfering with Respondent's editorial discretion.<sup>4</sup> As such, the ALJ  
6 concluded that the Union campaign demands to restore journalistic  
7 integrity related to legitimate terms and conditions of employment of  
8 its reporters and did not pose a threat to Respondent's First  
9 Amendment rights, relying on The Capital Times Co., 223 NLRB 651, 653  
10 (1976), overruled on other grounds, Peerless Publications, Inc., 283  
11 NLRB 334 (1987). (Pet. Ex. 2, at 51.) Therefore, the ALJ determined  
12 that the employees' Union activities were not rendered unprotected by  
13 any of the Union demands. (Id.) In making this determination, the ALJ  
14 did not acknowledge that the Union campaign was not simply making  
15 general demands to restore journalistic integrity, but making a  
16 specific demand related to the content of the News-Press.  
17 Furthermore, this demand was not a general exhortation to Respondent  
18 to act or a communication made by some of the organizing employees  
19 but in fact a central demand of the Union campaign continually backed  
20 from early on in its history by public demonstrations and a Union-  
21 organized customer boycott putting economic pressure on Respondent.<sup>5</sup>

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22  
23 <sup>4</sup> It should be noted the ALJ found the employees discussed seeking  
24 other measures, in particular a pledge from the publisher to not  
interfere with newsgathering and reporting. (Pet. Ex. 2, at 40-41.)

25 <sup>5</sup> Petitioner's citation to cases indicating that as a general matter  
26 communications made by employees during the course of otherwise  
27 protected activity are themselves protected and cannot render the  
28 concerted activity during which they occur unprotected are therefore  
inapposite. See, e.g., Dries & Kump Mfg. Co. V. NLRB, 544 F.2d 320,  
329 (7th Cir. 1976). (Pet. Supp. Resp., at 2-3.) These cases provide

1 As noted above, the factual determinations of an administrative law  
2 judge are entitled to deference. See supra, at 15. The Court is  
3 therefore loath to question any of the ALJ's factual determinations.  
4 Nonetheless, the Court must reject as clearly erroneous the ALJ's  
5 view that the Union campaign was not, at least in part, aimed at  
6 forcing concessions from Respondent directly related to its exercise  
7 of editorial discretion. The ALJ's view on this point is contradicted  
8 by the ALJ's own specific findings with regard to the history of  
9 Union-related activities at the News-Press.

10 With regard to the persuasiveness of Respondent's argument  
11 arising from the Union campaign's demand relating to Respondent's  
12 editorial discretion, the Court, even following supplemental  
13 briefing, has not been offered any clear legal guidance by either  
14 party. Tornillo and Passaic do establish the general proposition that  
15 the NLRA may not circumscribe a newspaper's editorial discretion.  
16 However, the alleged First Amendment violation in the instant case is  
17 far different than those at issue in those cases. In both Tornillo  
18 and Passaic, the injunction at issue sought in some fashion to force  
19 publication of specific content by the newspapers at issue, thus  
20 actually directing the publishers' exercise of their editorial  
21 discretion. In this case, the injunction seeks to prevent Respondent  
22 only from disciplining its employees who engaged in activities aimed  
23 to pressure it into limiting its exercise of its editorial  
24 discretion. As such, the alleged infringement of Respondent's First  
25 Amendment rights is more indirect, and thus Respondent's claim of

26 \_\_\_\_\_  
27 no guidance in the present case for the additional reason that none  
28 involved communications even potentially touching on an employer's  
First Amendment rights.

1 First Amendment protection is broader, in this case than in prior  
2 cases. Yet it is clear that the requested injunction does burden  
3 Respondent's exercise of its editorial discretion. Petitioner argues  
4 that the injunction does not pose a burden because Respondent is free  
5 not to bargain with employees on their stated demands. (Pet. Supp.  
6 Resp., at 5-6.) However, as already noted, these demands were not  
7 mere requests but were instead backed by public concerted activity  
8 placing economic pressure on Respondent to acquiesce. Respondent,  
9 were there no NLRA regime, would be able to retaliate for these  
10 actions through typical disciplinary means. By preventing Respondent  
11 from doing so, the sought after injunction amounts to state action  
12 limiting Respondent's ability to combat pressure placed on it to  
13 limit its exercise of editorial discretion. Again, this burden is  
14 indirect, but it is undeniably real.

15       Though the Court finds the burden placed on Respondent's  
16 editorial discretion to be cognizable, it remains to be determined  
17 whether that burden potentially rises to the level of a First  
18 Amendment violation. Petitioner argues it does not. Petitioner first  
19 urges the Court to heed the opinion of the ALJ, who found no  
20 potential First Amendment violation in Petitioner's application of  
21 the NLRA to Respondent. (Supp. Rep., at 2-4.) However, the Court does  
22 not find the ALJ's dismissal of Respondent's concerns well-founded.  
23 The ALJ held that even if the employees' concerted activity seeking  
24 to restore journalistic integrity could be viewed as somewhat  
25 infringing on Respondent's First Amendment rights, it was nonetheless  
26 protected under the reasoning of Peerless Publications, 231 NLRB 244  
27 (1997), addressing a remand from the D.C. Circuit in Newspaper Guild  
28 Local 10, v. NLRB, 636 F.2d 550 (D.C. Cir. 1980). (Pet. Ex. 2, at

1 52.) The decision in Peerless dealt with a situation in which  
2 employees sought to collectively bargain with a newspaper publisher  
3 with regard to the publisher's promulgation of a code of ethics and  
4 related work rules designed to protect the newspaper's editorial  
5 integrity. The code of ethics included standards for objectivity and  
6 accuracy in reporting, though primarily at issue were its provisions  
7 prohibiting the receiving of gifts by reporters that could create  
8 conflicts of interest. Newspaper Guild, 636 F.2d at 555. The  
9 publisher claimed such rules were not proper subjects of bargaining.  
10 The D.C. Circuit stated:

11 [E]ditorial integrity of a newspaper lies at the core of  
12 publishing control. In a very real sense, that  
13 characteristic is to a newspaper or magazine what machinery  
14 is to a manufacturer. At least with respect to most news  
15 publications, credibility is central to their ultimate  
16 product and to the conduct of the enterprise. Moreover . .  
17 . editorial control and the ability to shield that control  
18 from outside influences are within the First Amendment's  
19 zone of protection and therefore entitled to special  
20 consideration. In order to preserve these qualities, a news  
21 publication must be free to establish without interference,  
22 reasonable rules designed to prevent its employees from  
23 engaging in activities which may directly compromise their  
24 standing as responsible journalists and that of the  
25 publication for which they work as a medium of integrity.  
26 636 F.2d at 560-61. However, the court also stated that "the degree  
27 of control which may be exercised by a publication in this regard is  
28 not open-ended, but must be narrowly tailored to the protection of

1 the core purposes of the enterprise." Id. at 561 fn 36. In light of  
2 this view, the D.C. Circuit ordered the Board to strike a balance in  
3 the case "between an employer's freedom to manage his business in  
4 areas involving the basic direction of the enterprise and the right  
5 of employees to bargain on subjects which affect the terms and  
6 conditions of their employment." Id. at 562. The D.C. Circuit noted  
7 that to strike this balance the Board would need to "distinguish  
8 between those provisions of the Code which, while central to the  
9 [newspaper's] interest in the preservation of its legitimate  
10 managerial prerogatives, affect the employees only minimally, and  
11 those which, although not essential to the publication's freedom to  
12 conduct its business, do have a significant impact on the employees."  
13 Id. at 561.

14 On remand from the D.C. Circuit, the Board issued a ruling in  
15 line with its instructions. The Board initially stated:

16 We reaffirm the view that protection of the "editorial integrity  
17 of a newspaper lies at the core of publishing control," and that  
18 in order to preserve such, a news publication is free to  
19 establish reasonable rules designed to prevent its employees  
20 from engaging in activity which would "directly compromise their  
21 standing as responsible journalists and that of the publication  
22 for which they work as a medium of integrity," without  
23 necessarily being required to bargain initially. It follows from  
24 this privilege-which is directly incident to a newspaper's  
25 integrity-that the newspaper will be similarly exempt from  
26 mandatory bargaining about disciplinary action for employee  
27 breach of the basic rule.  
28

1 283 NLRB at 335 (internal citations omitted). In order to balance  
2 the newspaper's right to protect its editorial integrity with the  
3 employees' bargaining rights as required by the holding in Newspaper  
4 Guild, the Board declared a publisher could only promulgate and  
5 enforce a rule or code of conduct governing employee behavior without  
6 bargaining if the rule on its face was: "(1) narrowly tailored in  
7 terms of substance, to meet with particularity only the employer's  
8 legitimate and necessary objectives, without being overly broad,  
9 vague, or ambiguous; and (2) appropriately limited in its  
10 applicability to affected employees to accomplish the necessarily  
11 limited objectives." Id. at 335. The Board then proceeded to find the  
12 work rules and code of ethics at issue subject to bargaining in their  
13 entirety due to their over-breadth and frequent vagueness. Id. at  
14 336.

15 The ALJ in the case at bar determined that as Respondent's rules  
16 related to reporter bias, "seen from the view of some employees,  
17 could be viewed vague [sic] and ambiguous" they were potentially  
18 proper subjects of bargaining and hence an appropriate target for  
19 employee concerted activity. (Pet. Ex. 2, at 52.) The Court views  
20 this determination as a misapplication of Peerless to the facts of  
21 the case. This case does not involve, as the ALJ erroneously found, a  
22 union request to generally bargain over the promulgation and  
23 enforcement of ethical and work rules related to reporter behavior  
24 and preparation of content. This case instead involves a specific  
25 demand by a union campaign regarding the publisher's preparation of  
26 content for its newspaper - i.e., the separation of the News-Press's  
27 news and editorial sections. See supra, at 16-19. Accordingly, the  
28 ALJ's analysis of the vagueness of Respondent's ethical rules

1 relating to bias is not relevant to the legitimacy of the Union's  
2 activities. It is not in fact clear how the reasoning of Newspaper  
3 Guild and Peerless applies to the facts of this case at all.

4 Furthermore, even if the Court were to accept the ALJ's view of the  
5 facts and of the applicability of Newspaper Guild and Peerless to  
6 those facts, the sensitivity of the inquiry mandated by Newspaper  
7 Guild and undertaken in Peerless would not allow the Court to find  
8 that there is no significant risk the ALJ's analysis will not be  
9 sustained. Therefore, the ALJ's wholesale dismissal under the  
10 reasoning of Peerless of Respondent's First Amendment concerns is not  
11 an adequate basis for concluding that a grant of equitable relief  
12 will result in no significant risk of a First Amendment violation.

13 Petitioner in its final supplemental brief to the Court raised  
14 another, in the Court's view unpersuasive, argument premised on the  
15 holding in Newspaper Guild. Petitioner notes that nothing in the D.C.  
16 Circuit's analysis in that case "suggests that the union's demands  
17 were unlawful or that the employees' desire to bargain over issues  
18 related editorial control subjected them to discipline." (Pet. Supp.  
19 Resp., at 6.) This is true, but ultimately inconclusive, as the  
20 employer in that case was not found to have taken any retaliatory  
21 action against the union for activities placing economic pressure on  
22 the employer. Therefore, the court in Newspaper Guild was never  
23 required to deal with the constitutional issue of what freedom a  
24 newspaper possesses to combat union demands, backed by economic  
25 pressure, to bargain over subjects related to their editorial  
26  
27  
28

1 discretion.<sup>6</sup> Hence, the Court cannot draw the conclusion Petitioner  
2 desires from the holding in Newspaper Guild.

3 Petitioner finally urges the Court to reject Respondent's First  
4 Amendment claims because "there is no evidence that Respondent has  
5 taken any adverse employment action against an employee for" conduct  
6 related to journalistic integrity. (Pet. Mem., at 4 fn 3.) The ALJ  
7 did conclude that application of the NLRA in this case implicated no  
8 First Amendment rights for the additional reason that Respondent's  
9 disciplinary actions against organizing employees were not driven by  
10 a "genuine[] concern[] about the effort to restore journalistic  
11 integrity [sic]." (Pet. Ex. 2, at 53.) The ALJ based this  
12 determination on the fact that many who supported the Union's efforts  
13 remained employed, which in the ALJ's view indicated that Respondent  
14 was truly concerned only with "ridding itself of prominent union  
15 supporters." (Id.) The thrust of this argument appears to be that  
16 even if the union activity at issue was partially directed at  
17 affecting the Respondent's editorial discretion, Respondent's  
18 disciplining of certain employees was not motivated by any desire to  
19 maintain its editorial control but instead merely by general animus  
20 toward the Union. As such, Respondent's disciplining of its employees  
21 was not related to any attempt to exercise or maintain its editorial  
22 prerogatives. The Court finds this analysis highly problematic as it  
23 rests on a false dichotomy. The Union was organized, in part, to  
24 affect Respondent's editorial discretion and undertook continual

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25  
26 <sup>6</sup> It appears the union in Newspaper Guild did threaten a strike in an  
27 attempt to pressure the newspaper to bargain over its work rules at  
28 one point in the bargaining history, but the newspaper chose to  
respond in a non-confrontational manner by only nullifying its prior  
enforcement of the work rules. 636 F.2d at 554.

1 action to do so. It therefore does not seem possible to parse, at  
 2 least in the manner the ALJ sought to do, Respondent's animus toward  
 3 the Union generally from its desire to protect its editorial  
 4 discretion. The motives necessarily overlapped in this case. As a  
 5 result, the Court cannot view the ALJ's determinations in this regard  
 6 as defeating Respondent's final First Amendment argument.<sup>7</sup>

7 In sum, the Court has not been provided any authority or  
 8 argument by Petitioner that clearly forecloses Respondent's claim of  
 9 First Amendment protection for all its alleged unfair labor  
 10 practices.<sup>8</sup> There is a tension in this case between the enforcement of

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11  
 12 <sup>7</sup> Petitioner's related argument that "Respondent never asserted that it  
 13 disciplined or discharged any employee for raising their concerns  
 14 about journalistic integrity" is also unpersuasive. (Pet. Mem., at 4  
 15 fn 3.) Petitioner asserts that Respondent's stated reason for acting  
 16 against certain employees engaged in Union-related activity was not  
 17 because of the Union character of their activities but because of the  
 18 "disloyal", "disruptive", or "defamatory" nature of their activities.  
 19 (Pet. Mem., at 10 fn 9.) Hence, Petitioner argues, Respondent's  
 20 actions against these employees was not motivated by any desire to  
 21 protect itself from the Union and its demands related to editorial  
 22 discretion, but instead merely to protect itself from disruption,  
 23 defamation, or disloyalty. Whatever the persuasiveness of this  
 24 distinction, it lacks factual support. Merely because Respondent  
 25 raised the disruptive, disloyal, or defamatory nature of some  
 employees' Union-related activity as justification for Respondent's  
 actions against these employees, does not mean that this was in fact  
 the Respondent's motive for its actions. In each of the instances  
 cited by Petitioner in support of this argument the ALJ either made a  
 specific finding that Union animus was the true motive for  
 Respondent's actions or made no finding as to motive. (Pet. Ex. 2, at  
 63, 79, 89-90.) In either case, the Court lacks a basis to conclude  
 definitively that animus toward the Union and its demands was not the  
 motive for the Respondent's actions. As such, the Court cannot  
 dismiss Respondent's First Amendment concerns as to any part of the  
 injunction on this rationale.

26 <sup>8</sup> Petitioner argues the reasoning of Hausch v. Donrey of Nevada, 833 F.  
 27 Supp. 822, 830 (D. Nev. 1993), demonstrates why Respondent's First  
 28 Amendment arguments lack substance. However, in Hausch the issue for  
 the court was whether a newspaper had a First Amendment right to  
 refuse promotion and ultimately discharge a managerial editor on the

1 the NLRA and the protections of the First Amendment that has not been  
2 specifically resolved by prior decisions. Respondent's argument as to  
3 the proper resolution of this tension seeks to extend or extrapolate  
4 from the reasoning of prior decisions to the facts at bar. Whether  
5 that argument will be accepted by the Board and any subsequent  
6 reviewing court or will be found to reach too far is irrelevant to  
7 the Court's determination. It is not the Court's role under Section  
8 10(j) and Overstreet to attempt to resolve the First Amendment issues  
9 raised in this case, but only to ascertain whether these issues  
10 present a significant risk of a First Amendment violation arising  
11 from a grant of equitable relief. In the Court's view, Respondent's  
12 argument, while untested, is, like that at issue in Overstreet,  
13 legitimate and plausible. 409 F.3d at 1211. The Court is therefore  
14 compelled to determine that on the authorities presented there is a  
15 significant risk that the reasoning of Tornillo and Passaic could be  
16 extended to bar the requested injunction in its entirety. As such,  
17 under Overstreet, the Court must dispense with the usual deference

18  
19 basis of sex in violation of Title VII. The court concluded it did  
20 not, stating:

21 Defendants have not alleged or demonstrated that there is any  
22 relationship between their ability to choose their Editor on the  
23 basis of sex, race, or any of the other characteristics  
24 prohibited by Title VII, and their ability to control the  
25 content and character of their newspaper's message.  
26 833 F. Supp. at 832. Hence, Hausch only stands for the proposition,  
27 already laid down down in Associated Press and Passaic, that, without  
28 an argument as to their specific relationship to the exercise of its  
editorial discretion, a newspaper's personnel decisions with regard  
to editorial employees are not as a matter of course rendered free  
from regulation by the protections of the First Amendment. In the  
present case, Respondent is making a cognizable argument that its  
decisions to retaliate against employees for union support did  
specifically relate to the exercise of its editorial discretion.  
Whatever the persuasiveness of that argument, the reasoning of Hausch  
does not in any way foreclose it.

1 afforded the Board's interpretation of the NLRA and require a  
2 particularly strong showing for a grant of equitable relief. 409 F.3d  
3 at 1208-10.

4  
5 D. Likelihood of Success

6  
7 The ALJ has found in favor of Petitioner on all relevant claims  
8 brought in the Complaint. (Pet. Ex. 2, at 57-106.) Respondent asserts  
9 that it has filed with the Board 227 exceptions of law to the ALJ's  
10 decision of which it discusses only five in its briefing to the  
11 Court. (Supp. Opp., at 15.) Petitioner states it intends to file a  
12 reply to each of these exceptions with the Board. (Supp. Rep., 6-7).  
13 In light of the difficult First Amendment issues central to this case  
14 and improperly resolved by the ALJ, the Court as an initial matter  
15 certainly cannot find that Petitioner has such a strong likelihood of  
16 success as to presume irreparable harm. The Court will not further  
17 determine whether Petitioner can nonetheless show at least probable  
18 success or a fair chance of success on the merits. As the Court  
19 determines below that Petitioner has not made a sufficiently strong  
20 showing of irreparable harm or shown that the balance of hardships  
21 favor a grant of equitable relief, the requested injunction cannot be  
22 granted regardless of any showing by Petitioner of fair or even  
23 probable success on the merits.

24  
25 E. Irreparable Harm

26  
27 Petitioner asserts that a failure to grant the requested  
28 injunction will result in irreparable harm to the discharged

1 employees and the Union's collective bargaining efforts. Petitioner  
2 asserts that the discharged employees, if not reinstated soon, will  
3 likely be forced to re-locate to seek new employment in order to  
4 support themselves and their families. (Pet. Mem., at 21.) Petitioner  
5 also offers employee testimony showing that the alleged unfair labor  
6 practices in this case have chilled employee support for the Union,  
7 as best evidenced by the sharp decline in regular attendance of Union  
8 meetings. (Pet. Mem., at 19; Pet. Ex. 3, at 6042, 6096.) Petitioner  
9 argues that without an interim order rescinding Respondent's  
10 retaliatory actions against Union supporters and specifically  
11 enjoining further such acts, the Union will continue to lose support  
12 and be "hamstrung in its efforts to negotiate an initial  
13 collective-bargaining agreement." (Pet. Mem., at 21.) Petitioner  
14 argues an interim order will restore support to the Union by  
15 reinstating the employees who formed the Union's core membership and  
16 reassuring current employees that unfair labor practices committed by  
17 Respondent will be timely remedied.<sup>9</sup> (Pet. Mem., at 20-24.) Preventing  
18 an employer from successfully defeating a union campaign through  
19 unfair labor practices clearly falls within the central remedial  
20 purposes of Section 10(j) and also strongly serves the public  
21 interest goals of the NLRA. Miller, 19 F.3d 459-60.

22 Respondent argues that Petitioner has made an insufficient  
23 showing of irreparable harm because over a year and a half has passed  
24 since the unfair labor practices have occurred. (Supp. Opp., at 24.)

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25  
26 <sup>9</sup> Petitioner represents without supporting evidence in its briefing and  
27 through the declaration of attorney Steven Wyllie that seven of the  
28 eight discharged employees have sworn under oath they will accept  
interim reinstatement. (Supp. Rep., at 8; Wyllie Dec., 1-2.)

1 "Delay is only significant if the harm has occurred and the parties  
2 cannot be returned to the status quo or if the Board's final order is  
3 likely to be as effective as an order for interim relief." Aguayo for  
4 and on Behalf of N.L.R.B. v. Tomco Carburetor Co., 853 F.2d 744, 750  
5 (9th Cir. 1988), overruled on other grounds, Miller, 19 F.3d at 458.  
6 In this case, the long delay likely means that the discharged  
7 employees have been already forced to secure other employment such  
8 that the payment of lost wages will to a large degree remedy any harm  
9 to them.<sup>10</sup> With regard to the harm to the Union's efforts, given the  
10 already severely reduced numbers of the Union, it is arguably the  
11 case that an interim order will not render the Union a strong  
12 presence at this time even if nearly all the discharged employees  
13 accepted reinstatement. It is also unclear that an interim order will  
14 banish any current chill on Union support. There is little basis to  
15 believe, given the long delay, that an interim order at this point  
16 will provide any genuine reassurance to employees beyond that  
17 provided by a final Board order that unfair labor practices committed  
18 by Respondent will be timely remedied. Therefore, there is reason to  
19 conclude that an interim order will not be significantly more  
20 effective than a Board order in remedying past harm and preventing  
21 future harm to the discharged employees or the Union's efforts. While  
22 under the typical Miller standard these concerns would likely not  
23 defeat Petitioner's showing of irreparable harm, they do weaken it

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24  
25 <sup>10</sup> Petitioner, on whom the burden for showing irreparable harm rests,  
26 has provided no direct evidence in its briefing indicating the  
27 current employment status of the discharged employees. At hearing and  
28 through the declaration of attorney Wyllie, Petitioner represented  
that nearly all of the discharged employees had in fact already begun  
full or part time employment or studies with other organizations or  
found work as freelance writers and editors. (Wyllie Dec., at 1-2.)

1 sufficiently for the Court to find that Petitioner has not met the  
2 raised bar in this case.

3  
4 F. Balance of the Hardships/Serious Questions

5  
6 The Court also cannot conclude that Petitioner has shown that  
7 the balance of hardships tip sharply in favor of a grant of equitable  
8 relief in combination with the presence of serious questions going to  
9 the merits. The Court does not find that the balance of hardships tip  
10 sharply in Petitioner's favor. No evidence has been presented by  
11 either party as to the current structure of the News-Press or any  
12 re-hiring that has occurred. However, given the long period of time  
13 that has elapsed, it is reasonable to assume that the discharged  
14 employees have been replaced or the News-Press has re-structured. At  
15 hearing, Respondent made representations, albeit unsupported by  
16 evidence, that both had occurred, which Petitioner did not fully  
17 contest.<sup>11</sup> The proposed injunction would likely force Respondent to  
18

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19  
20 <sup>11</sup> Petitioner represents in its briefing without supporting evidence  
21 and noted at hearing that Petitioner has hired nine temporary  
22 employees who are currently performing bargaining unit work,  
23 including reporting, which Respondent contested at hearing.  
24 Petitioner argues that Respondent cannot claim any hardship from  
25 ending the assignments of these temporary employees in order to  
26 reinstate the discharged employees. (Supp. Rep., at 8.) As the burden  
27 of showing that the injunction is just and proper rests on  
28 Petitioner, the Court cannot rely on such an unsupported and  
contested allegation in granting Petitioner's requested injunction.  
Even if the Court did accept this allegation, it does not  
significantly affect the balance of hardships. Petitioner has made no  
allegation that the discharged employees' specific duties have been  
filled substantially, let alone totally, by the nine temporary  
employees. Hence, the Court cannot find that Respondent would only  
need to terminate the assignments of these temporary employees in  
order to reinstate the discharged employees.

1 let go of currently hired employees and re-organize. In addition, it  
2 would prevent Respondent from exercising what it continues to assert  
3 is its First Amendment right to combat Union efforts to limit its  
4 exercise of editorial discretion. As such, the proposed injunction  
5 would prove a fairly severe hardship on Respondent balancing the  
6 hardship that would be visited on the Union and discharged employees  
7 were equitable relief denied. Again, while such burdens on an  
8 employer would likely not defeat a showing for equitable relief under  
9 the typical Miller standard, see Aguayo, 853 F.2d at 750, the First  
10 Amendment issues raised by this case compel the Court to apply a  
11 higher bar and so consider these hardships to Respondent more  
12 seriously. Because of these hardships to Respondent, the Court cannot  
13 conclude that the balance of hardships tips sharply in favor of  
14 Petitioner. Therefore, Petitioner cannot make the requisite showing  
15 for receiving equitable relief on this alternate basis.

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**IV. Conclusion**

The Court is fully cognizant of the deference normally owed the Board and, to a lesser extent, the ALJ. However, the requested injunction in this case implicates First Amendment issues that the ALJ failed to adequately consider. Because of the presence of these First Amendment issues, which are not easily resolvable under the current state of the law, the Court must dispense with the usual deference owed the Board's interpretation of the NLRA and demand an unusually strong showing that a grant of equitable relief is just and proper under Section 10(j). As the Court does not find that Petitioner has made the requisite showing, the Petition is DENIED.

IT SO ORDERED.

DATED: \_\_\_\_\_

*May 21, 2008*



STEPHEN V. WILSON  
UNITED STATES DISTRICT JUDGE