

**COMMITTEE ON THE DEVELOPMENT OF THE LAW UNDER THE NLRA
2005 MID-WINTER MEETING**

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**THE DUBIOUS ORIGINS AND QUESTIONABLE VALIDITY OF THE BOARD'S
RULE THAT, ABSENT A "CLEAR AND PRESENT DANGER," AN EMPLOYER
MUST FURNISH STRIKE REPLACEMENTS' NAMES AND ADDRESSES**

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I. INTRODUCTION

An employer has a duty, under Section 8(a)(5) of the National Labor Relations Act, to bargain in good faith with the union representing its employees; this duty under the Act includes an obligation, when requested, to furnish information that is relevant to the union's discharge of its statutory obligations as the employees' representative. Where, following a strike, a union requests identifying information pertaining to strike replacements (e.g., names and addresses), the employer often resists disclosing the information on the ground that it may lead to violence toward, or harassment of, the replacement workers. In such circumstances, the National Labor Relations Board requires that the employer furnish the information, unless there is a "clear and present danger" of violence or harassment to the strike replacements. In theory, if it finds a clear and present danger, the Board requires the employer to propose reasonable alternatives by which the union's need for the information may still be served. In practice, the Board is exceedingly reluctant to find a clear and present danger and, therefore, does not reach the question of reasonable alternatives. The Board's reluctance to find a clear and present danger is hardly surprising, as this standard was originally designed as a barrier to prevent undue government infringement of the First Amendment right to free speech. Thus, the clear and present danger test vigorously protects a union's right to presumptively relevant information, but to the detriment of the strike replacements' competing interests.

The clear and present danger test is, in effect, a *per se* requirement that employers furnish strike replacements' identifying information upon request; it accords undue weight to a union's right to relevant information, while paying little more than lip service to other legitimate interests. The United States Supreme Court has not directly addressed the Board's use of the clear and present danger test, but has expressly rejected "the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979).

Some federal Circuit Courts of Appeal have taken issue with the clear and present danger test, finding it inconsistent with the Supreme Court's teachings in *Detroit Edison*. Those courts have applied a modified test, similar to that which the Board applies where an employer resists a union's request for presumptively relevant information by asserting employees' privacy or confidentiality interests as a defense. In those cases, the Board applies a slightly less stringent

test, requiring the employer to first demonstrate a "legitimate and substantial" confidentiality interest. If the employer clears that threshold, it must then offer an accommodation to satisfy the union's need for the information without sacrificing confidentiality. If the employer cannot satisfy both prongs of this test, it must furnish the information. Only if the employer establishes a legitimate and substantial confidentiality interest, proposes a reasonable accommodation and the union, without justification, refuses the accommodation, may the employer lawfully withhold the requested information. The courts that have rejected the Board's clear and present danger test have emphatically criticized its failure to adequately consider third parties' (e.g., strike replacements') legitimate interests; and the Board has taken note.

On July 19, 2004, the Board's Associate General Counsel, Richard A. Siegel, issued a memorandum containing "Casehandling Instructions for Charges that Concern Information Requests about Strike Replacements." OM 04-72. According to the Memorandum, "the General Counsel wishes to formulate a comprehensive position" regarding the "important and recurring issue" of the "divergence between the Board's traditional standard and that applied by some courts" for determining whether an employer must furnish information pertaining to strike replacements (such as names, home addresses and telephone numbers"). As the Memorandum notes, "the Board has traditionally found such information presumptively relevant and required its production unless the employer can establish 'a clear and present danger' that the union will misuse the information." The Board, however, recognizes that reviewing courts "have analyzed the issue more broadly, looking to whether, in 'the totality of the circumstances,' a confidentiality interest outweighs the union's need for information."

The practice of applying different standards for assessing union requests for presumptively relevant information, based primarily upon the wording of the employer's defense, is troubling. The clear and present danger test is a nearly insurmountable hurdle, and should never have been applied to these cases. Although the legitimate and substantial interest test appears more reasonable, it, too, is inappropriate for assessing a union's right to strike replacements' identifying information. Both tests turn on defenses raised by the employer on behalf of third parties—strike replacements, but both tests are dismissive of the strike replacements' legitimate interests. A much simpler solution, which would reasonably accommodate all parties' interests, can and should be adopted.

II. THE EVOLUTION OF THE CLEAR AND PRESENT DANGER TEST

A. THE TEST WAS CREATED TO PROTECT FIRST AMENDMENT RIGHTS DURING A TIME OF WAR

In 1919, the United States Supreme Court faced a constitutional dilemma: whether, and, if so, under what circumstances, may an individual's First Amendment right to free speech be abridged? The Court held that this fundamental right must yield where its unfettered exercise presented a "clear and present danger" to a national interest in a time of war. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

The United States prosecuted Schenck (and others) for, among other things, conspiracy, espionage, causing and attempting to cause insubordination in the United States military forces, and obstructing military recruiting and enlistment while the Nation was embroiled in World War I. *Id.* at 48-49. The defendants asserted a First Amendment right to free speech. In upholding their convictions, the Court held that "the character of every act depends upon the circumstances. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* at 49, 52 (internal quotations and citations omitted). The Court explained that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Id.* "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*

B. THE BOARD ADOPTED THE CLEAR AND PRESENT DANGER TEST TO RESOLVE LABOR ISSUES

The Supreme Court created the "clear and present danger" test for the specific purpose of balancing individuals' constitutional rights against substantial public interests. Given the unique significance of constitutional rights, the Court held that First Amendment rights could be infringed only where it was clear that allowing their unfettered exercise would create an immediate danger of significant harm to the public (such as "falsely shouting fire in a theatre and causing a panic"). *See, e.g., Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that such limitations are tolerated only "when necessary to advance a

significant and legitimate state interest”). The Court has also noted that limitations of such rights are “recognized only in exceptional cases.” *Near v. Minnesota*, 283 U.S. 697, 719 (1931). The Board has adopted this constitutional standard to protect a union’s right to obtain strike replacements’ identifying information.

1. Standard-Coosa-Thatcher Co., 85 NLRB 1358 (1949)

The Board appears to have first invoked the clear and present danger test in 1949, in connection with an employer’s interrogation of employees regarding their feelings toward the union and their voting intentions.¹ *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949), *overruled on other grounds*, *Blue Flash Express, Inc.*, 109 NLRB 591 (1954). There, the employer argued that it had a free speech right to interrogate employees. The Board noted that “[o]ne test applied to determine whether speech may be prohibited is the ‘clear and present danger’ test.” *Id.* at 1379, *quoting Schenck v. United States*, 249 U.S. 47 (1919). Relying on *Schenck*, without further explanation, the Trial Examiner concluded that “[i]nherent in questioning of employees by employers is the danger that information elicited will be used for the purpose of discriminating against union adherents.”² *Id.* Interestingly, the Board also held that: “Interrogation by an employer not only invades the employee’s privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act.” *Id.* at 1361. As demonstrated below, the Board routinely accords minimal weight to employees’ “privacy” rights, where an employer attempts to protect them. The Board adopted the Trial Examiner’s findings, without discussing the clear and present danger test.

2. Webster Outdoor Advertising Co., 170 NLRB 1395 (1968)

In *Webster Outdoor Advertising Co.*, the union, during post-strike bargaining, questioned whether strike replacements were being paid higher wages than had been paid to striking employees. 170 NLRB 1395, 1396 (1968), *enf. den.*, *Sign and Pictorial Union v. NLRB*, 419

¹ Although the Board had previously used the phrase—finding that strikers’ picket line actions presented “a clear and present danger of bodily harm [to supervisors] if they had elected to enter the plant” and were, therefore, unprotected, it did not cite or discuss its origin. *The International Nickel Co.*, 77 NLRB 286, 287 (1948).

² The Board’s implicit presumption that employers will misuse information stands in stark contrast to its presumption that unions will not. *See, e.g., Excelsior Underwear, Inc.*, 156 NLRB 1236, 1244 (1966).

F.2d 726 (D.C. Cir.1969). The employer denied that claim, and the union asked to see payroll records. The employer offered to discuss “any specific question on how any particular replacement has been treated,” but was “rather hesitant to turn over to the Union a list of replacements without some assurances that information is really necessary to the Union and, further that it won't be used to further facilitate harassment of replacements.” *Id.* The union never responded, and did not renew its request. *Id.* The record indicated that strike replacements “had been harassed, threatened, and assaulted by some of the striking employees,” and that one striker “had been convicted . . . for assaulting a replacement with a gun.” *Id.* “Under these circumstances,” the Board found the employer “was justified in seeking assurances that the payroll information was necessary for legitimate union purposes and would not be used to facilitate further harassment of replacements.” *Id.* The Board found it significant that the employer “did not categorically reject the Union's request,” but “merely expressed reluctance about turning payroll information over to the Union until adequate assurances had been given and legitimate need established.” *Id.*

While the Board's decision leaves much to be desired, it does acknowledge that alternatives may be devised to satisfy a union's need for information without sacrificing other parties' interests—even where the employer's defense is based on the potential for harassment of strike replacements. The phrase “clear and present danger” does not appear in this case.

3. United Aircraft Corp. v. NLRB, 434 F.2d 1198 (2d Cir. 1970)

In the context of a union's request for employees' identifying information, the clear and present danger test appears to have first been applied not by the Board, but by the Second Circuit Court of Appeals. In *United Aircraft Corp.*, an employer declined to furnish employees' names and addresses, withholding the information “to protect the employees' right of privacy at their homes, particularly in view of the violence which occurred at the homes of nonstrikers” 181 NLRB 892, 903 (1968). The Board found that the employer had violated the Act, as there was no “present threat” of violence. *Id.* The Second Circuit enforced the Board's order, but altered the language of the test: “In determining whether the disclosure of addresses to a union violates the employees' right to privacy, the crucial factor appears to be the likelihood of a clear and present danger to the employees involved.” *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970). The Board had not used the phrase “clear and present danger.”

4. Shell Oil Co. v. NLRB, 457 F.2d 615 (9th Cir. 1972)

The Ninth Circuit was next to invoke the clear and present danger test in the context of a union's request for strike replacements' identifying information, specifically citing the Second Circuit's decision as the source of the test. *Shell Oil Co. v. NLRB*, 457 F.2d 615, 618-19 (9th Cir. 1972), citing *United Aircraft Corp.*, 434 F.2d at 1207. The Ninth Circuit denied enforcement of the Board's order to supply the names and addresses of strike replacements, following a strike in which there had been harassment of nonstriking employees "at individual employees' homes." *Id.* at 616. The union sought the information not only for purposes of mailing, but also to "make personal visits to employees' homes in order to organize them." *Id.* at 617. The employer, concerned that the addresses might fall into the wrong hands and lead to harassment or violence, offered to pay the cost of unlimited mailings of union correspondence to the employees by a commercial service. The court found, contrary to the Board, that it was "[established] beyond cavil that there was a clear and present danger of harassment and violence," and that the employer's concern was "bona fide." *Id.* at 618-619, 620. Again, the Board had not mentioned the phrase "clear and present danger."

5. ACC Typographers, Inc., 253 NLRB 1019 (1981)

The first case in which the Board actually invoked the clear and present danger test in the context of a union's request for strike replacements' identifying information appears to be *ACC Typographers, Inc.*, 253 NLRB 1019 (1981). The employer declined to furnish the information based on "past acts of harassment and violence against the striker replacements." *Id.* at 1023. The Administrative Law Judge, citing *Shell Oil Co. v. NLRB*, found no "clear and present danger" because the employer's witness could not recall when, specifically, violence had occurred during the 30-month strike, and had not actually witnessed any violence. *Id.*, citing 457 F.2d 615, 620 (9th Cir. 1972). The ALJ also found it significant that "no criminal sanctions were ever levied against any of the strikers, and there is no evidence that union officials were involved in or aware of the alleged violence and harassment." *Id.* Finding that the employer's "asserted fears are unfounded and pretextual," and citing *United Aircraft Corp. v. NLRB*, the ALJ concluded that the employer's refusal to furnish the information violated Sections 8(a)(1) and (5) of the Act. *Id.*, citing 434 F.2d 1198 (2d Cir. 1970). The Board affirmed, expressly noting that the employer "excepted solely to the Administrative Law Judge's findings that the Union's

request for the home addresses of Respondent's present employees was presumptively relevant to the Union's role as collective-bargaining representative and that those addresses were not privileged from disclosure.” *Id.* at 1019.

6. The Clear and Present Danger Test in Other Labor Contexts

The Board has not limited its application of the clear and present danger test to information requests made by unions. In *Apple City Electric, Inc.*, a group of employers requested that a union (with which they had a multi-employer labor agreement) furnish a list of names and addresses of individuals who used the union’s hiring hall. 275 NLRB 1290, 1292 (1985). Relying on *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the union argued that disclosure of the list would subject its members to discriminatory treatment by the employers. The Board found that there was “nothing in the stipulated record, however, to support the Respondent's asserted concern that the Employers will engage in harassing or unlawful conduct. Since there is no ‘clear and present’ danger justifying the refusal to supply the information, the first amendment cases the Respondent relies upon are inapplicable here.”

The Board had applied the clear and present danger test in the context of alleged conflicts of interests between unions and employers’ competitors, at least as early as 1954. *See, Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). “In order to find that a union has a disabling conflict of interest, the Board requires a showing of a ‘clear and present’ danger of interfering with the bargaining process.” *Guardian Armored Assets, LLC*, 337 NLRB 556, 558 (2002), quoting *Alanis Airport Services*, 316 NLRB 1233 (1995). In this context, the Board has expressly acknowledged that the burden of proving a clear and present danger “is a heavy one.” *Id.*, citing *Garrison Nursing Home*, 293 NLRB 122 (1989).

III. THE SUPREME COURT REQUIRES CONSIDERATION OF ALL PARTIES’ LEGITIMATE INTERESTS

A. *DETROIT EDISON CO. v. NLRB*, 440 U.S. 301 (1979)

In this case the union requested that the employer disclose certain information regarding employee aptitude tests, so that the union could prepare for grievance arbitration. The employer furnished much of the information but refused, on grounds of confidentiality, to disclose the actual test questions, employee answer sheets and the scores linked with the names of the

employees who received them. The Board, concluding that all the items were relevant to the grievance and would be useful to the union, ordered the employer to furnish the materials, subject only to certain restrictions regarding the union's use of the information. *Detroit Edison Co.*, 218 NLRB 1024 (1975), *enforced*, *NLRB v. Detroit Edison Co.*, 560 F.2d 722 (6th Cir.1977).

The United States Supreme Court reversed the Sixth Circuit, and found considerable fault with the Board's reasoning. The Court took issue with the Board's conclusions, which rested "on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979). To the contrary, "such an absolute rule has never been established, and we decline to adopt such a rule here." *Id.* Moreover, a "union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." *Id.* at 315. Rather, the "duty to supply information under § 8(a)(5) turns upon the circumstances of the particular case, and much the same may be said for the type of disclosure that will satisfy that duty." *Id.* at 315-16 (internal quotations and citation omitted), *citing, e. g., American Cyanamid Co.*, 129 NLRB 683, 684 (1960).

One of the most significant aspects of *Detroit Edison* is the Court's holding that the employer's offer to provide a union with employees' test scores only upon receipt of consent forms signed by the employees "satisfied its statutory obligations under § 8 (a)(5)." *Id.* at 317. The employer had argued, in part, that providing the employees' scores without their consent would violate their privacy interests and may subject them to harassment. *Id.* at 308; 218 NLRB at 1035. The Court found the Board's decision erroneous "[i]n light of the sensitive nature of the information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities." *Id.* at 319-20. The Court described these circumstances as but one example of situations "in which an employer's conditional offer to disclose may be warranted." *Id.* at 318.

This case is significant because the Court flatly rejected the notion that a union's right to relevant information necessarily trumps considerations of privacy, confidentiality, harassment and other concerns. It established the requirement that the Board consider the circumstances of

each case, including the sensitivity of the information requested, the burden imposed on the union by any alternatives to full disclosure offered by the employer and the evidence, or lack of evidence, that the employer is attempting “only to frustrate” the union. Although the Board has acknowledged the import of *Detroit Edison* where an employer asserts a confidentiality or privacy defense in response to a union’s request for presumptively relevant information, it has not modified its approach where an employer asserts a fear of violence or harassment.

B. THE BOARD APPLIES A DIFFERENT TEST WHERE AN EMPLOYER ASSERTS A CONFIDENTIALITY OR PRIVACY DEFENSE

In *Minnesota Mining & Mfg. Co.*, the Board acknowledged the impact of *Detroit Edison*: “The Supreme Court has recently emphasized, in *Detroit Edison* . . . that union interests in information arguably relevant to collective bargaining do not necessarily always predominate over all other interests, however legitimate.” 261 NLRB 27, 30 (1982), *enfd. sub nom. Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). The Board noted that the “Court instead observed that there are situations in which an employer's conditional offer to disclose may be warranted, and stressed the need for an adequate accommodation of the employer's legitimate and substantial test secrecy concerns.” *Id.* The Board found it “clear from the Court's discussion that, in dealing with union requests for relevant but assertedly confidential information, we are required to balance a union's need for such information against any ‘legitimate and substantial’ confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information.” *Id.* The Board accepted that the “accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.” *Id.*

The Board revisited the issue in *Pennsylvania Power & Light Co.*, where the employer asserted a confidentiality defense on the ground that divulging the names of employees who informed management of other employees’ drug use could result in witness intimidation and harassment. 301 NLRB 1104 (1991). In discussing the employer’s obligation to furnish this presumptively relevant information, the Board noted that the Court, in *Detroit Edison*, “was especially critical of [the Board’s] failure to accord proper weight to the employer's need to keep the information confidential” *Id.* at 105-06. The Board, however, found “the Court’s comments on confidentiality particularly instructive,” and noted the Court’s holding that the

employer “had a ‘well-founded interest’ in preserving employee confidence . . . and that there would be only a ‘minimal burden’ placed on the union in complying with the company’s offer of disclosing the [information] only on receipt of a consent form from the examinees.” *Id.*, quoting *Detroit Edison*, 440 U.S. at 319. The Board then found that the employer had a legitimate and substantial interest in maintaining the confidentiality of informants’ names in connection with its efforts to prevent drug use in a nuclear power plant. The Board also considered the safety interests of a third party (the public), finding that these outweighed the union’s need for the information in the form requested. *Id.* at 1107. Although this case involved both confidentiality and harassment defenses, the Board did not apply the clear and present danger test.

C. APPLYING TWO DIFFERENT TESTS REFLECTS A FALSE DICHOTOMY BASED ON THE DEFENSE ASSERTED

The Second Circuit’s decision in *United Aircraft Corp. v. NLRB*, 434 F.2d 1198 (2d Cir. 1970), is commonly cited as the genesis of the clear and present danger test in cases involving union requests for strike replacements’ identifying information. As previously noted, in *United Aircraft Corp.*, the employer declined to furnish the names and addresses of strike replacements, on the ground that it would violate their privacy interests in light of past strike violence. 181 NLRB 892, 898 (1970). The Board concluded that the employer had violated the Act, as there was no “present threat” of violence. *Id.* at 903. The Second Circuit then gratuitously construed the Board’s test as requiring “the likelihood of a clear and present danger to the employees involved”—words that the Board had not used. 434 F.2d at 1207.

The defense asserted in *United Aircraft Corp.* clearly was based on both privacy interests and fear of violence or harassment. In subsequent cases, however, the Board has applied different tests, depending upon the defense asserted. This distinction is particularly difficult to justify or explain, given that *United Aircraft Corp.*, involved a merged privacy/harassment defense, and was decided based on the absence of any “present threat.” The common origins and characteristics of the two defenses are obvious, and are more significant than their differences.

In *Fleming Companies, Inc.*, Members Fox and Liebman, concurring, discussed the significance of *Detroit Edison* and its impact on the Board’s decision in *Pennsylvania Power &*

Light Co., where the Board considered confidentiality claims based on fears of witness intimidation and harassment:

The requirement in *United Aircraft and Transport of New Jersey* of a specific evidentiary showing in support of an asserted confidentiality defense presaged the Supreme Court's balancing-of-interests test in *Detroit Edison*. The Board in *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982), *enfd. sub nom. Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983), found that *Detroit Edison* requires it to balance a union's need for information against any “legitimate and substantial” confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

As subsequently refined, the test requires that (1) the party asserting a “legitimate and substantial” confidentiality interest has the burden of demonstrating the interest, and (2) if the burden is met, an accommodation must be sought to resolve the competing need for the information and the justified confidentiality concerns, *Pennsylvania Power & Light Co.*, *supra* at 1105-1106.

332 NLRB 1086, 1090 (2000). Members Fox and Liebman also noted that, in *Pennsylvania Power*, the Board “found that the specific factual considerations supporting the employer's interests in protecting informants against the ‘potential for harassment’ outweighed the union's need for the informants' names to process drug testing grievances.” *Id.* The Board emphasized, in *Pennsylvania Power*, “the substantial public safety interest in assuring that nuclear and fossil power production plants are drug-free workplaces and the obvious potential for harassment of informants reporting on criminal activity,” and allowed the employer to provide merely summary information. *Id.*

The *Fleming Companies* concurrence illustrates the common origins and themes of the “clear and present danger” and “legitimate and substantial interests” tests, as well as the relevance of *Detroit Edison* to both. Unfortunately, the Board treats *Detroit Edison* as applying only where an employer asserts a confidentiality defense. It ignores the Court's holdings where an employer asserts as a defense the possibility of violence or harassment. Thus, the manner in which the defense is articulated determines the test applied, without regard for the fact that the interests being defended are essentially the same under both defenses.

IV. THE SEVENTH AND EIGHTH CIRCUITS HAVE HARSHLY CRITICIZED THE BOARD'S USE OF THE CLEAR AND PRESENT DANGER TEST

A. CHICAGO TRIBUNE I

In July 1985, during contract negotiations, unions representing Chicago Tribune employees called an economic strike, which “was marred by violence directed against the replacement workers whom the company hired to operate the mail room while the regular employees were out on strike. Tires were slashed, death threats made, windows shot out, a supervisor's garage firebombed.” *Chicago Tribune v. NLRB* (Chicago Tribune I), 965 F.2d 244, 246 (7th Cir. 1992). During the strike, “the union asked the company to give it the names of the replacement workers, ostensibly so that it could verify that the company had indeed hired these people, which would determine how many of the striking workers would be entitled to reinstatement when the strike ended.” *Id.* The employer refused the union's request, “on the ground that the replacement workers might be harassed further, as once their names were known their addresses and phone numbers could easily be obtained from the telephone book.” *Id.* Instead, the employer “offered the union two alternatives: providing the names of the replacements to an accounting firm that would verify their employment, and providing the union with the birth date of each worker and a part of his or her social security number.” *Id.* The union rejected both, without explanation.

The union filed an unfair labor practice charge, and the Board found that the employer had violated the Act. “The administrative law judge, seconded by the Board, pronounced the alternatives that the company had offered ‘reasonable’ but held nonetheless that the union was entitled to the names.” 965 F.2d at 246. The Board found that the union had a presumptive right to the information, “which the company could defeat only by showing that there was a ‘clear and present danger’ that the union would use the names for purposes of harassment.” *Id.*

The Seventh Circuit took issue with the Board’s “position in a number of cases that a union has a statutory right to the names of replacement workers unless the company can prove a ‘clear and present danger’ of harassment.” *Id.* “That position,” the court held, “should not be taken literally,” as “[n]o statute entitles a union to the names of replacement workers.” *Id.* Rather, “[i]n deciding whether the duty to bargain in good faith (29 U.S.C. § 158(a)(5)) requires [a] party to disclose the information in the form demanded, the judge must have due regard for

the interests of third parties, including workers, even replacement workers.” *Id.* at 247. Under the circumstances, the court found that the “pattern of violence that marked the strike was bound to arouse concern in [the strike replacements’] minds about their personal safety should their names be disclosed.” *Id.* The court also noted that the employer had offered “alternatives to the names that, so far as anyone has been able to show, were completely adequate.”³ *Id.*

The court harshly criticized the Board’s use of the clear and present danger test: “Where the Board got the idea that a union’s demand for the names of replacement workers is to be handled not like any other discovery request but by placing on the company an insuperable burden of proving that the union will in fact use the information to harass the workers beats us.” 965 F.2d at 247. The court noted that the test, created in *Schenck v. United States*, 249 U.S. 47 (1919), “debuted in the labor-information setting in *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970).” The court found that the Second Circuit had “rhetorically inflated” the Board’s then current test of “any present threat”⁴ to “‘clear and present danger’ and then mysteriously softened [it] to ‘likelihood of a clear and present danger.’” *Id.*

Taking issue with the Board for applying a constitutional test to protect a union’s right to information, the court wrote: “a formula designed to protect rights of constitutional dignity has no proper application to a demand for a list of names in a garden-variety labor dispute.” 965 F.2d at 247. The court noted the obvious fact that the union was not asserting, and the employer was not attempting to infringe, a First Amendment right. *Id.*

The court held that the “decisive consideration is that, as the administrative law judge acknowledged, every legitimate need of the union for the list of names would have been met by either of the alternatives offered by the company.” *Id.* (citing cases recognizing the relevance of alternatives). The court cited *E.W. Buschman v. NLRB* for its holding that “an unfair labor practice charge is not made out where a company offers a facially reasonable accommodation in a situation involving the release of allegedly confidential information, and where no finding is

³ Interestingly, the court opined that “[t]he union’s unexplained refusal to accept either alternative suggests that it wanted the names not necessarily to harass the replacement workers directly but perhaps to do so indirectly by giving them an additional source of anxiety.” 965 F.2d at 246.

⁴ Citing *United Aircraft Corp.*, 181 NLRB 892, 903, *enforced*, 434 F.2d 1198 (2d Cir. 1970).

made that the conditions offered were unreasonable or were only a pretext for a refusal to advance the bargaining process.” *Id.*, citing 820 F.2d 206, 209 (6th Cir. 1987). The court held that, although in the instant case “the danger is intimidation rather than breach of confidence,” that “is no justification for a lesser degree of protection.” *Id.* The court found the employer’s proposed accommodation was “not merely reasonable on its face but conceded to be reasonable in fact.” *Id.*

B. CHICAGO TRIBUNE II

During the course of events that gave rise to Chicago Tribune I, a second union requested that the same employer provide it with the names and addresses of strike replacements, purportedly so that it could process grievances on their behalf. *Chicago Tribune v. NLRB* (Chicago Tribune II), 79 F.3d 604, 606 (7th Cir. 1996). The employer “withheld their names and addresses to protect their property and safety.” *Id.* The employer offered alternatives, including: “personal communication by [union] representatives on company property during non-work times, posting of [union] notices on company bulletin boards, distribution of [union] information in non-work areas, and any other mutually agreeable alternative to the full disclosure proposed by the [union].” *Id.* When the employer advised the strike replacements of a subsequent union request for their addresses (the union already knew their names at this point), the replacements opposed disclosure of the information. *Id.* at 608. When the employer still refused to furnish the information directly to the union, the union filed an unfair labor practice charge.

The Board found that the employer had violated the Act but the Seventh Circuit refused to enforce the Board’s Order. The court reiterated that “a test designed ‘to protect rights of constitutional dignity has no proper application to a demand for a list of names in a garden-variety labor dispute.’” *Id.*, quoting *Chicago Tribune (I) v. NLRB*, 965 F.2d 244, 247 (7th Cir. 1992). Noting that “the Board in this case relied on the ‘clear and present danger’ analysis from its *Page Litho* decision,” the court announced its decision to “expressly reject the ‘clear and present danger’ test as inconsistent with the totality of the circumstances approach set forth by the Supreme Court in *Detroit Edison*, 440 U.S. at 314.” *Id.*, referring to *Page Litho, Inc.*, 311 NLRB 881 (1993) and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

The court was not persuaded by the fact that five years had passed since the last incident between the strike replacements and the returning strikers, finding that “the Board's decision failed to consider the nature and history of the violence between the groups of employees, the privacy concerns of the replacement workers, or the extensive list of alternative means of communication available to the Pressmen.” 79 F.3d at 607. The court found that “[e]ach of these factors weighs in favor of allowing the Tribune to withhold the replacement employees' home addresses.” *Id.* Moreover, the court found that, “in the context of this dispute, it would be naive to think that replacement workers would find union guarantees of their safety reassuring.” *Id.* at 608. “A rule that focuses solely on the amount of time that has passed since a documented incident of violence fails to take into account the nature of the animosity that exists between former strikers and their replacements.” *Id.*

The court also faulted the Board for failing to consider the strike replacements' privacy interests, noting that even relevant information may be withheld where a confidentiality interest outweighs a union's need for information. *Id.*, citing *East Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993). The court noted that the strike replacements had expressly objected to disclosure, and cited the threats and violence that they had endured. The court found that these factors outweighed the union's minimal need for the information. *Id.* Significantly, the court also noted that the strike replacements worked side-by-side with union members and, if they wished the union to have their addresses, they could easily provide the information themselves. *Id.*

Finally, the court took issue with the Board's failure to consider the availability of alternative methods of satisfying the union's needs. Here, the employer “offered not only to provide third party mailing, but also to allow personal communication with replacement employees by union representatives during non-work times, the posting of union notices on company bulletin boards, and the distribution of union information and materials in non-work areas.” *Id.* In fact, the employer had “agreed to provide information in any mutually agreeable manner proposed by the [union],” but the union would accept nothing less than full disclosure.” *Id.* With respect to the Board's position that the union was entitled to the information so that it could proselytize the strike replacements “as the need arises,” the court held that, although this

goal is “not illegitimate, it hardly rises to the level of ‘need’,” particularly given the numerous alternatives available to the union for communicating with the strike replacements. *Id.*

C. *METTA ELECTRIC CO. v. NLRB*, 360 F.3d 904 (8th CIR. 2004)

In *Metta Electric*, the Board affirmed, without comment, the ALJ’s finding that the employer unlawfully refused to furnish the names, addresses and telephone numbers of strike replacements upon request. 338 NLRB No. 161 (2003). The ALJ recited, as “the rule,” that an employer “may withhold the requested information if it can establish that there is a clear and present danger that the information would be misused by the Union.” *Id.* The ALJ found no clear and present danger, and the Board ordered the employer to furnish the information.

The Eighth Circuit declined to enforce the Board’s order, holding that “the employer’s duty to supply information turns on the circumstances of the particular case.” *Metta Electric v. NLRB*, 360 F.3d 904, 912 (8th Cir. 2004), *citing Grinnell Fire Prot. Sys. Co. v. NLRB*, 272 F.3d 1028, 1029 (8th Cir. 2001) (internal quotations omitted). Citing *Grinnell* and *Detroit Edison*, the court held that an employer “may withhold relevant information when the interest in confidentiality outweighs the union’s need for the information. *Id.* (internal citations and quotations omitted). The Eighth Circuit had previously held that, while “employees do not have an extreme privacy interest in their names” they “have a greater privacy interest in protecting the location of their homes, even though there is no evidence of threats of violence.” *Id.*, *citing Grinnell*, 272 F.2d at 1030. The court also cited *Chicago Tribune (I)*, as “holding [that the] employer was required to provide the names of replacement employees, but not their home addresses, because of safety concerns, privacy rights and the union’s ability to communicate with the employees through alternative means.” *Id.*, *citing* 79 F.3d 604, 607-08 (7th Cir. 1996). The court found no “compelling need for the Union to obtain the strike replacement employees’ home addresses and telephone numbers.” *Id.* 912. Consequently, the court upheld the finding that the employer violated the Act by refusing to furnish the strike replacements’ names, but found no violation for withholding their addresses and telephone numbers. *Id.*

Significantly, this employer never asserted either a danger of violence or harassment, or a confidentiality/privacy defense. Rather, the court, *sua sponte*, held that “[t]he confidentiality of

strike replacement employees' home addresses and telephone numbers should always be a factor to weigh against a union's need for such information." *Id.* at 912 n.3.

V. THE CLEAR AND PRESENT DANGER TEST IS INCONSISTENT WITH THE SUPREME COURT'S HOLDING IN *DETROIT EDISON*

The Supreme Court expressly criticized the Board's "proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 317 (1979). The Court specifically faulted the Board's dismissive treatment of the employees' privacy interests. *Id.* at 318-20. The Court expressly held that there are circumstances "in which an employer's conditional offer to disclose may be warranted." *Id.* at 318. The Court emphasized that the Board's conclusion was erroneous "[i]n light of the sensitive nature of the information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities." *Id.* at 319-20. The Board's application of the clear and present danger test conflicts with each of the Court's admonitions.

A. THE TEST IS, IN EFFECT, A *PER SE* RULE THAT EMPLOYERS MUST FURNISH STRIKE REPLACEMENTS' INFORMATION

The Supreme Court has interpreted the clear and present danger test as requiring a finding that the "natural tendency and reasonably probable effect" of the act sought to be prevented must be to create the harm feared. *Debs v. United States*, 249 U.S. 211, 216 (1919). The Board equates a "clear and present" danger to a "proximate" danger. *H.P. Hood & Sons, Inc.*, 182 NLRB 194, 196 (1970) (finding "no 'proximate' or 'clear and present' danger" of abuse of the bargaining process where an employer's competitor made a loan to the union).⁵ The Supreme Court, appropriately, erected a high threshold to protect the constitutional right to free speech. There are, however, significant and obvious differences between a constitutional right and a union's statutory right to presumptively relevant information. The Board's application of the test reflects no recognition of such differences.

⁵ The only other cases in which the Board appears to have applied the clear and present danger test are those in which an employer alleges that a union's affiliation with the employer's competitor creates a conflict of interest.

As the Board applies the clear and present danger test, unions' interests in relevant information consistently predominate over all other interests. This is to be expected, as the Board requires the employer to prove the existence of "contemporaneous acts of violence, intimidation, or harassment." *Chicago Tribune (I)*, 316 NLRB 996, 1003 (1995). This is analogous to the imminence of harm posed by falsely shouting "fire" in a theatre, but is an inappropriate expectation in the context of union's information request. In *Pan American Grain Co.*, for example, the Board found no clear and present danger where the union's request followed the end of the strike by a mere 15 days. 343 NLRB No. 47 (2004). Interestingly, the Board, in that case, applied the clear and present danger test despite the employer merely having declined to provide the employees' name on the ground that it did "not have authorization from those persons to disclose their names." *Id.*

Equally daunting is the Board's requirement that the misconduct be attributable to the union; the Board routinely refuses to consider misconduct that is not clearly undertaken or condoned by union officials. *See, e.g., Page Litho, Inc.*, 311 NLRB 881, 882 (1993) (noting "the Union's lack of involvement in the alleged misconduct"); *Diamond Walnut Growers, Inc.*, 312 NLRB 61, 67 (1993) (noting evidence of "serious misconduct," but declining to attribute it to the union where the perpetrators were unknown or were not union officials). If the Board, as it routinely does, finds no evidence of contemporaneous union misconduct, it will not find a clear and present danger, and will not even consider alternatives proposed by the employer. *Chicago Tribune (I)*, 316 NLRB at 1003. As a guardian of unions' rights to presumptively relevant information, the clear and present danger test is highly effective, but it tramples on all other interests.

B. THE TEST DOES NOT PROPERLY WEIGH EMPLOYEES' INTERESTS

The Board does not consider strike replacements' privacy interests as a factor under the clear and present danger test. In fact, the Board does not even purport to consider such interests unless the employer happens to raise them as a defense, in which case it applies the "legitimate and substantial interest" test. Even where an employer asserts this defense, however, the Board typically requires proof that the employees actually expressed concerns, or accords their privacy interests little weight, or both. The Board, for example, considers individuals' home addresses "no more entitled to be kept private than wage information." *United Aircraft Corp.*, 181 NLRB

892, 903 (1970). This approach is inconsistent with the Supreme Court’s emphasis in *Detroit Edison* on the importance of employees’ privacy interests.

The Board’s view of what best serves strike replacements’ privacy interests is, at best, peculiar—but is instructive. In *Chicago Tribune (I)*, the Board affirmed the ALJ’s supposition that “the privacy of the employee’s home is added protection to an employee manifesting any sympathy with or interest in the union” 316 NLRB 996, 1003 (1995). The Board endorsed this gratuitous speculation, despite the employees having actively opposed disclosure of their information. Strike replacements’ privacy interests, not to mention their Section 7 right to refrain from participating in protected concerted activity, are ill-served by a patriarchal doctrine under which a government agency purports to know better than they what is best for them.

Regardless of the defense raised or the test invoked, there is no reasonable basis for concluding that strike replacements, unlike anyone else, do not have a reasonable expectation of privacy in their own homes. Moreover, there is no valid reason to construe strike replacements’ silence (as they are rarely queried on the subject) as evidence that they do not wish to preserve their privacy. There certainly is no justice in ignoring or dismissing strike replacements’ privacy interests solely on the ground that their employer failed or declined to assert them as a defense to a union’s information request. This is precisely the Board’s approach, under both tests.

C. THE BOARD’S APPLICATION OF THE TEST IGNORES THE SENSITIVE NATURE OF THE INFORMATION

The Board will not assume that union misconduct will occur, and believes that it can provide a remedy where it does occur. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1244 (1966) (in the election context). To its credit, the Board takes the position that “[a]ny union receiving a list of union employees is under an obligation to take reasonable steps to see that the list is not improperly disclosed or used.” *Shell Oil Co.*, 190 NLRB 101, 101 (1971). Where, however, the Board’s admonitions and the union’s assurances fail and result in violence against individuals (e.g., physical beatings), the Board is ill-equipped to provide a meaningful remedy.

The circumstances of an organizing campaign and a strike are, as the Court noted in *Detroit Edison*, “far different.” In an organizing campaign, a union and its advocates have an incentive to refrain from harassing or harming employees, even those who oppose the union:

they want to win votes and know that any negative conduct may inure to their detriment. Moreover, only the question of whether to unionize is at stake. Conversely, in the aftermath of an economic strike, union members' livelihoods have been taken by strike replacements. "Replaced strikers in diverse industries have threatened replacements and customers, sabotaged equipment, littered roads with tire puncturing jack rocks, blocked work entrances, damaged cars transporting replacements to work and attempted to force these cars off the road while giving chase, and, less frequently, have rioted, shot, bombed, burned, assaulted, and killed." Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. Davis L. Rev. 1019, 1057 (1996) (internal citations omitted). In *United Aircraft Corp.*, for example, strikers damaged non-strikers' automobiles (including setting fire to one), flooded their cellars, burned their hedges, threw paint bombs through the windows of their homes and attempted to burn one's barn. 181 NLRB 892, 893 (1968).

The likelihood of violence against strike replacements is far greater than is the likelihood of violence in the election context. The reason for this is simple: in the election context, no one has taken anyone else's job. The greater likelihood of persons who have lost their jobs assaulting or harassing those who took their jobs, with or without a union's involvement, is obvious. It is analogous to the relative incentives to harm or harass someone who takes one's food away, versus someone who merely disagrees as how best to obtain one's food. Consequently, the inherent risk of disclosing names and addresses is significantly different in the context of an organizing campaign than it is following a strike. While a presumption favoring disclosure in the former circumstances may be valid, such a presumption under the latter circumstances invites unnecessary risk. Where strike replacements are concerned, the Board's presumptions are at odds with common sense and popular experience, particularly given the Board's inability to provide any meaningful remedy to individuals who could suffer physical harm if the Board's presumptions prove inaccurate.

The Supreme Court has noted the limited efficacy of union assurances: "The restrictions barring the Union from taking any action that might cause the tests to fall into the hands of employees who have taken or are likely to take them are only as effective as the sanctions available to enforce them. In this instance, there is substantial doubt whether the Union would

be subject to a contempt citation were it to ignore the restrictions.” *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979). The Court also found the Board’s available remedies anemic: “Effective sanctions at the Board level are similarly problematic. To be sure, the Board’s General Counsel could theoretically bring a separate unfair labor practice charge against the Union, but he could also in his unreviewable discretion refuse to issue such a complaint. *Id.* at 316 (internal citation omitted). Moreover, “the Union clearly would not be accountable in either contempt or unfair labor practice proceedings for the most realistic vice inherent in the Board’s remedy—the danger of inadvertent leaks.” *Id.*

Under the clear and present danger test, the Board is unlikely to even find it necessary to attempt to fashion a remedy, unless the employer can prove contemporaneous misconduct directly attributable to the union. Even if the Board were to make such findings, however, its ability to provide a meaningful remedy to the victims of violence is minimal. Such unrealistic presumptions are insensitive to the “real world” needs and concerns of strike replacements.

D. THE BOARD’S TEST DISREGARDS MINIMALLY BURDENSOME ALTERNATIVES

As noted, unless it first finds that the employer has proven the existence of a clear and present danger, the Board considers any proposed alternatives to full disclosure “irrelevant.” In *Chicago Tribune(I)*, for example, the ALJ found, and the Board agreed, that the employer’s proposed alternatives were reasonable, but still found a violation of the Act. 965 F.2d 244, 246 (7th Cir. 1992). The Board also found a violation, in *Chicago Tribune (II)*, where the employer offered alternatives, including “personal communication by [union] representatives on company property during non-work times, posting of [union] notices on company bulletin boards, distribution of [union] information in non-work areas, and any other mutually agreeable alternative to the full disclosure proposed by the [union].” 79 F.3d 604, 608 (7th Cir. 1996).

Even where it has discussed employers’ proposed alternatives, the Board routinely finds them inadequate. In *United Aircraft Corp.*, for example, the Board held that the union is entitled to have “effective means of communicating” with bargaining unit members, and concluded that anything short of “personal contacts with employees at their homes” was “inadequate.” 181 NLRB 892, 902-03 (1970). Similarly, in *Diamond Walnut Growers, Inc.*, the Board rejected the

employer's offer to furnish the names and addresses to an independent mailing service, who could then forward information to the employees on behalf of the union. 312 NLRB 61, 67 (1993). The alternative was rejected as "unreasonable" based on testimony that the union needed "an opportunity for face-to-face contact." *Id.*

A union is not entitled to the "most effective" means of communicating with its bargaining unit members. In *Lechmere, Inc. v. NLRB*, the Supreme Court addressed the degree to which a union's right to communicate with employees must be accommodated, albeit in the context of property rights and an organizing campaign. 502 U.S. 527, 540 (1992). The employees lived in "a large metropolitan area," and the union was able to contact "a substantial percentage of them directly, via mailings, phone calls, and home visits." *Id.* The Court held that "direct contact, of course, is not a necessary element of 'reasonably effective' communication; signs or advertising also may suffice." *Id.* Although employers often propose facially reasonable alternatives where a union requests strike replacements' identifying information, the Board routinely rejects them as being less effective than what the union desires. Thus, in practice, reasonable alternatives are largely mythical in this context.

E. EVEN AS MODIFIED BY THE SEVENTH AND EIGHTH CIRCUITS, THE BOARD'S TEST IS INAPPROPRIATE AND UNNECESSARY

Contrary to the rhetoric of the cases, the conflict in question is not between unions' rights and employers' rights, it is between unions' rights and employees' rights. The clear and present danger test—created to protect constitutional rights—never was, and cannot be, an appropriate tool for weighing these competing interests. There is no valid excuse for applying a higher standard to union requests for strike replacements' identifying information than to requests for other presumptively relevant information. There is little logic in determining which test to apply based solely on the nature of the defense asserted by the employer on behalf of absent third parties. There is no justice in tests that purportedly balance a union's interests against those of absent employees, while presuming that the employees are indifferent to their rights.

Regardless of what the test is called, or how it is applied, the Board tends to find that a union's right to presumptively relevant information outweighs all competing interests asserted by an employer. The Board rarely considers, and routinely discounts, individual employees'

interests. Even as modified by the Seventh and Eighth Circuits, the Board's test includes no mechanism for assessing the strike replacements' actual concerns and desires. Consequently, the strike replacements' interests cannot effectively be weighed. In this respect, all versions of the test thus far considered are fundamentally flawed.

VI. THERE IS A VIABLE ALTERNATIVE

In most circumstances, the problem of accommodating a union's need for relevant information while protecting strike replacements' privacy and other interests could be alleviated with minimal burden to either the union or the employer. The tension arises from a variety of conflicting rights, perceptions and assumptions, which the tests clumsily attempt to resolve in the absence of critical facts.

In each of these cases, the union claimed that it needed the employees' names and addresses to communicate with them in person, or to carry out other representative functions. The employers asserted a defense based on the perceived, but largely speculative, interests of the strike replacements. The Board then purported to balance the strike replacements' perceived interests against the union's right to receive presumptively relevant information. In most cases, neither the union, the employer nor the Board had any objective evidence of the strike replacements' actual feelings regarding the disclosure of their names and addresses, regardless of the temporal proximity of violence or threats. As it is the *strike replacements' interests* that are (supposedly) being weighed against the union's right to their personal information, the employer's duty to furnish the information should be guided by input from the strike replacements. Polling the strike replacements would allow the union to have face-to-face communications with willing recipients of such communication, while protecting those who prefer to refrain from direct interaction with the union. The Board already has a procedure for polling employees, which could easily be adapted to the instant challenge.

In *Struksnes Const. Co.*, in the context of decertification, the Board held that, "[a]bsent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret

ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.” 165 NLRB 1062, 1063 (1967). The Board explained that polling in such circumstance was “clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful.” *Id.* The Board further explained that “this rule is designed to effectuate the purposes of the Act by maintaining a reasonable balance between the protection of employee rights and legitimate interests of employers.” *Id.* (footnotes omitted).

The *Struksnes* rule could be modified, as follows, to resolve the tension between a union’s presumptive right to bargaining unit employees’ names and addresses, and those employees’ personal rights and interests:

the polling of employees, in response to a union’s request for employees’ identifying information, shall not constitute a violation of Section 8(a)(1) of the Act if the following safeguards are observed: (1) the purpose of the poll is to ascertain whether the employees consent to the employer disclosing their identifying information to the union; (2) this purpose is communicated to the employees, (3) assurances against reprisal, by the union or the employer, are given; and (4) the employees are polled through a means that ensures the confidentiality of each employee’s response.

In practice, the employer and the union would jointly select an independent third party to serve as an intermediary for communications with the strike replacements. The employer would provide the third party with a list of the names and addresses of all strike replacements, which the third party would not disclose to the union. The union and the employer would draft a joint letter to the strike replacements, informing them that the union has requested that the employer disclose their names and addresses, and setting forth the union’s asserted need for the information. The letter would also include assurances that: (1) the employer will not be notified of the employee’s response, or failure to respond; and (2) the union will have no way of knowing if the employee’s response is “no,” or if the employee declines to respond. The intermediary would send the letter to each employee, along with a card bearing the employee’s name and address. The card would have spaces to check “yes” or “no,” adjacent to the question: “may the employer disclose your name and address to the union?” Also included in the letter and card would be a stamped envelope, addressed to the third party, in which the employee could return the card. The independent third party would maintain a record of the employees’ responses, and would forward to the union the names and addresses of the employees who answered “yes.” The

independent third party would not disclose any information to the union regarding employees who answered “no” or declined to respond. The independent third party would not disclose any information regarding the employees’ responses, or lack thereof, to the employer.

The union and the employer could bargain over the issue of distributing the costs associated with such a procedure, but such costs should be only marginally higher than the union’s internal mailing costs. Such a procedure, while perhaps not the most effective means by which the union could communicate with the strike replacements, would be a reasonable alternative, and would protect the employee’s interests while imposing only a minimal burden on the union. More importantly, the process would minimize the frequency with which the Board would be called upon to balance these competing interests.

VII. CONCLUSION

As noted by the Seventh and Eighth Circuits, the clear and present danger test has no place in the context of a union’s information request. It is particularly inappropriate as a tool for balancing a union’s right to presumptively relevant information against the interests of absent third parties whose information the union seeks. Moreover, as applied, the test amounts to a virtual *per se* rule that employers always must furnish strike replacements’ identifying information to a union upon request. The test is, therefore, inconsistent with the principles set forth by the Supreme Court in *Detroit Edison*.

The problems with the clear and present danger test, as well as the legitimate and substantial interest test, are compounded by the fact that no test is needed. The Board could, in most cases, accommodate the union’s need to communicate with strike replacements without jeopardizing the strike replacements’ privacy interests or safety, through a simple process of obtaining the employees’ input. While the clear and present danger test may be appropriate elsewhere, it should be retired as a test for balancing interests in the context of union requests for strike replacements’ identifying information.