

National Labor Relations Board



Weekly Summary of NLRB Cases

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Press Release ([R-2631](#)): Joanne Mages Appointed Deputy Regional Attorney in NLRB's Indianapolis, IN Regional Office

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AG Communications Systems Corp. and Lucent Technologies, a single employer (33-CA-14450; 350 NLRB No. 15) Chicago, IL June 29, 2007. A Board panel unanimously found, contrary to the administrative law judge's decision dismissing the complaint in its entirety, that AG Communications Systems Corporation (AG) and Lucent Technologies: (1) comprised a single employer; (2) that as a single employer it was not required to bargain over its management decision to integrate a bargaining unit of AG employees represented by Electrical Workers IBEW Local 21 (IBEW Local 21) into a bargaining unit of Lucent employees represented by Communications Workers (CWA) because that was a core entrepreneurial management decision exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); but (3) that it failed to satisfy its duty to bargain with IBEW Local 21 concerning the effects of its integration decision and thereby violated Section 8(a)(5) and (1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The Board panel divided, however, over whether the Board's standard remedy for an effects bargaining violation—that set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)—was appropriate in this case. A panel majority (Chairman Battista and Member Schaumber) determined that a *Transmarine* remedy—requiring a respondent to engage in effects bargaining with a concomitant limited backpay remedy—was not warranted under the unusual circumstances of this case. The majority, emphasizing that the Respondent in fact engaged in effects bargaining with CWA over its integration decision, found that there remained little or nothing over which Respondent could effects bargain with IBEW Local 21; that CWA in fact achieved positive results in effects bargaining for the former AG employees; and that the former AG employees thus suffered no detriment from the Respondent's failure to engage in effects bargaining with IBEW Local 21.

Member Walsh, in dissent, found that the Board's core purpose to protect the process of collective bargaining compels the imposition of the traditional *Transmarine Navigation* remedy for an effects-bargaining violation. Member Walsh cited in support that the Respondent affirmatively concealed for months its integration decision from IBEW Local 21; the Respondent thus intentionally frustrated IBEW Local 21's right to engage in meaningful effects bargaining on behalf of affected employees; that under the majority decision IBEW Local 21 will have been deprived of any opportunity to engage in effects bargaining; and that the results of Respondent's effects bargaining with CWA are irrelevant because the Board does not sit in judgment upon the substantive terms of collective bargaining agreements.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 21; complaint alleged violation of Section 8(a)(5) and (1). Hearing at Chicago, April 4-8, 2005 and June 6-7, 2005. Adm. Law Judge Arthur J. Amchan issued his decision August 12, 2005.

Church Homes d/b/a Avery Heights, (34-CA-9168; 350 NLRB No. 21) Hartford, CT June 29, 2007. This proceeding was on remand from the Second Circuit Court of Appeals. *New England Health Care Employees Union, District 1199, SEIU v. NLRB*, 448 F.3d 189 (2d Cir. 2006). The Board found that, under the terms of the court's remand which constitutes the law of the case, the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate permanently replaced economic strikers upon their unconditional offer to return to work. [\[HTML\]](#) [\[PDF\]](#)

The Respondent had kept secret from the Union its hiring of permanent replacements for striking employees, while hiring as many permanent replacements as it could before the Union caught on. The court found that the logical implication of the Respondent's secrecy was that it had acted with an unlawful motive to break the Union by secretly hiring permanent replacements. The Board reviewed the evidence – including a key credibility resolution – and found that the record was insufficient to refute the inference of the Respondent's unlawful motive.

(Chairman Battista and Members Schaumber and Walsh participated.)

El Paso Electric Co. (28-CA-19551, 20017; 350 NLRB No. 14) El Paso, TX June 29, 2007. The Board reversed the administrative law judge and dismissed the complaint allegation that the Respondent's chief executive officer and president Gary Hedrick violated Section 8(a)(1) of the Act by impliedly threatening to discharge union supporters by suggesting that they should seek other work if they were unhappy. See, e.g., *Paper Mart*, 319 NLRB 9 (1995) (finding unlawful an employer's statement that if an employee was not happy, the employee could seek employment elsewhere). Because witnesses gave conflicting testimony about what Hedrick said, and the judge failed to resolve those testimonial discrepancies with credibility findings, the Board found the evidence of an unlawful statement to be in equipoise and on that basis found that the General Counsel failed to carry his burden of proving that Hedrick made an unlawful statement in violation of Section 8(a)(1). See *RC Aluminum Industries*, 343 NLRB 939, fn. 2 (2004). [\[HTML\]](#) [\[PDF\]](#)

The Board also reversed the judge's finding that the Respondent violated Section 8(a)(3) by issuing an unsatisfactory performance evaluation to and later discharging Cecilia Rodriguez, finding instead that the General Counsel has failed to show that anti-union animus was a motivating factor in Rodriguez' evaluation and discharge under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). But the Board affirmed the judge's finding that the Respondent violated Section 8(a)(3) by disciplining Sira Fanely. Finding that most of the Respondent's proffered reasons for disciplining Fanely were pretextual and that the Respondent's labor relations representative Manny Hernandez admitted that the Respondent made lunch schedule changes to "straighten out" Fanely, the Board found that that Fanely's union activities were a motivating factor in her

discipline. And because most of the Respondent's proffered reasons for her discharge were pretextual, the Board found the Respondent failed to show under *Wright Line* that it would have disciplined Fanelly even absent her union activities, and thus violated Section 8(a)(3).

The Board also affirmed the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally altering its rules regarding cashier shortages and overage limits and its employees' lunch schedules, but found it unnecessary to decide whether the unilateral lunch schedule change also violated Section 8(a)(3) because such a finding would not materially affect the remedy. In the absence of exceptions, the Board affirmed the judge's dismissal of allegations that the Respondent unilaterally implemented rules regarding monitoring of employee interactions and tardiness in violation of Section 8(a)(5).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Electrical Workers IBEW Local 960; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at El Paso, Feb. 15-16, 2005. Adm. Law Judge Lana H. Parke issued her decision April 4, 2005.

J.J. Cassone Bakery, Inc. (2-CA-32559, et al.; 350 NLRB No. 6) Portchester, NY June 26, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating employees, by making various threats, by demanding that employees cease organizing activities, by announcing new benefits to employees and denying benefits to some, by announcing that the Union would ask for proof that employees were legally authorized to work which would cause them to be discharged, by creating the impression of surveillance, and by informing employees that it would be futile to support the Union. [\[HTML\]](#) [\[PDF\]](#)

The Board also affirmed the judge's findings that the Respondent violated Section 8(a)(1) and (3) by suspending employees Adan Aguilar and Robert Lostanau, by suspending and discharging employees Cesar Calderon and Cabrilio Flores, and by discharging employees Jose Mario Castro and Lorenzo Macua.

Finally, the Board affirmed the judge's findings that these unfair labor practices warranted setting aside the election.

The Board reversed the judge's finding that the Respondent unlawfully discharged Aguilar, finding instead that the Respondent had established that even in the absence of Aguilar's union activity it would have discharged him. No exceptions were filed to the judge's finding that the General Counsel had met his initial burden of proving a discriminatory motive for Aguilar's discharge.

Chairman Battista and Member Schaumber concluded that the Respondent had shown that it had a reasonable belief that Aguilar had engaged in criminal misconduct by threatening employee Marcelino Cortes with bodily injury and that it had acted on that belief in discharging him. In support of that conclusion, they relied on Cortes' version of this incident, Cortes' decision to involve the police and in Aguilar's arrest. They also found this decision was validated by a state court protective order that was issued against Aguilar.

Member Liebman dissented from the finding that the Respondent's discharge of Aguilar was lawful. She found that the Respondent had not carried the substantial burden of establishing its defense. She relied on the fact that Aguilar had been unlawfully suspended for an indefinite period that began 5 weeks before his discharge, that the Respondent had provided no basis for prejudging the veracity of Aguilar and another employee whom it had declined to interview, that it conducted a one-sided investigation contrary to its normal practice, and orchestrated the most significant aspects of the involvement by the police regarding Aguilar, who was publicly arrested in view of other employees at the plant just before the election.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Steven Davis issued his supplemental decision Feb. 22, 2006.

Madison Square Garden Ct, LLC (34-RC-1812; 350 NLRB No. 8) Hartford, CT June 28, 2007. The Board majority of Chairman Battista and Member Schaumber reversed the Regional Director's finding that supervisors' prounion conduct, including their solicitation of union authorization cards, did not constitute objectionable conduct under *Harborside Health Care, Inc.*, 343 NLRB 906 (2004). Applying *Harborside* to the facts of this case, the majority found that the supervisors held "meaningful authority over event staff employees;" that the supervisors' conduct in soliciting union authorization cards from their direct subordinates was inherently coercive absent mitigating circumstances; and that the supervisors' prounion conduct materially impacted the election's outcome. Accordingly, the majority reversed the Regional Director's decision to overrule the Employer's objections, and directed a second election. [\[HTML\]](#) [\[PDF\]](#)

In her dissent, Member Liebman noted that *Harborside Healthcare* was "wrongly decided," and that it should not be applied retroactively to conduct that was lawful at the time it occurred. Moreover, Member Liebman found that even applying the *Harborside* standard to the present case, the card solicitations herein were not objectionable because mitigating circumstances tempered any possible impact of the solicitations.

(Chairman Battista and Members Liebman and Schaumber participated.)

Medieval Knights, LLC (22-RC-12727; 350 NLRB No. 17) Newark, NJ June 29, 2007. Contrary to the hearing officer, a Board majority found that statements made by labor consultant Peter List to unit employees 1 week before the election were not objectionable. Consequently, the Board certified the election results, in which the Joint Petitioners did not receive a majority of the valid ballots cast. [\[HTML\]](#) [\[PDF\]](#)

The Employer's business involves staging medieval events. The Joint Petitioners filed a petition to represent a unit of show employees at the Employer's Lyndhurst, NJ facility. In August 2006, about 1 month before the election, the Employer hired labor consultants Peter List and James Hulsizer to educate employees and management about the election and bargaining processes. At meetings held with employees 1 week before the election, the consultants conducted a collective-bargaining exercise involving hypothetical employers and employees. During the presentation, List stated, among other things, that an employer did not have to agree on any specific proposals, that all negotiations were different, and that the bargaining process could take weeks, months, or more than a year. According to credited testimony, List said that an employer could "stall out" the negotiations by "giving in to lesser items or addendums . . . but not really getting anything done." Witnesses could not remember List's exact words, but it was undisputed that List's presentation was about a hypothetical employer, and at no time did he say that Medieval Knights would engage in any particular bargaining conduct.

Members Schaumber and Kirsanow found that List's statements about a hypothetical employer merely described "the possible pitfalls for employees of the collective-bargaining process." *Standard Products Co.*, 281 NLRB 141, 163 (1986) (citations omitted). Employees could understand that the presentation described a hypothetical employer's bargaining strategy, and List did not state or imply that the Employer in this case would engage in the same conduct. In similar situations, the Board has found such statements unobjectionable. See, e.g., *Manhattan Crowne Plaza*, 341 NLRB 619 (2004).

In dissent, Member Walsh found that, under the circumstances, the employees would consider List's statements within the context of their own employment and infer that, if the Unions won the election, the Employer would rely on the strategy List described to avoid coming to terms. Member Walsh stated that List's hypothetical exercise described sham bargaining whereas the cases relied on by the majority described good faith bargaining or factually accurate events. Thus, Member Walsh would set aside the election.

(Members Schaumber, Kirsanow, and Walsh participated.)

Postal Workers Long Island NY Area Local (29-CB-13164, 13195; 350 NLRB No. 22) Valley Stream, NY June 29, 2007. In agreement with the administrative law judge, the Board found that the Respondent Union violated Section 8(b)(1)(A) and (b)(2) of the Act by causing the Employer to discontinue assigning overtime to employee George O'Malley. The judge found that O'Malley was eligible for overtime assignments, having signed the overtime-desired list as

required by the collective-bargaining agreement, but that the Respondent, motivated by animus against O'Malley's exercise of his Sec. 7 right not to be a union member, unlawfully insisted that the Employer not assign him overtime. [\[HTML\]](#) [\[PDF\]](#)

Because the remedy for this violation would not be materially affected by finding that the Respondent also violated Sec. 8(b)(2) by filing a grievance against the Employer for assigning O'Malley 8 hours of overtime, Chairman Battista and Member Walsh found it unnecessary to decide whether the judge erred in failing to find this alleged violation. Member Schaumber stated that he would find the violation.

The Board affirmed the judge's finding that Respondent did not violate the Act by insisting that the Employer not assign overtime to employee Marc Dralus. Although the Board disagreed with the judge's finding that Respondent was not motivated by animus against Dralus' exercise of his Sec. 7 right of refusing to join the Union, the Board agreed with the judge that a violation was not established because Respondent demonstrated that, notwithstanding Dralus' exercise of his Sec. 7 rights, it would have insisted that Dralus not be assigned overtime because he failed to sign the overtime-desired list.

(Chairman Battista and Members Schaumber and Walsh participated)

Charges filed by Marc Dralus and George O'Malley, individuals; complaint alleged violation of Section 8(b)(1)(A) and (b)(2). Hearing at Brooklyn on Oct. 10, 2006. Adm. Law Judge Raymond P. Green issued his decision on Jan. 3, 2007.

The Research Foundation of the State University of New York Office of Sponsored Programs (3-RC-11184, et al.; 350 NLRB No. 18) Albany, Buffalo, and Syracuse, NY June 29, 2007. The Board majority of Members Kirsanow and Walsh found, contrary to the Acting Regional Director, that *Brown University*, 342 NLRB 483 (2004), is inapplicable to this Employer, and that the petitioned-for Research Project Assistants (RPAs) are statutory employees. The Board majority reinstated the petitions and remanded them to the Regional Director for further appropriate action consistent with this Decision on Review. [\[HTML\]](#) [\[PDF\]](#)

The Petitioner filed three petitions seeking to represent RPAs at the Employer's Albany, Buffalo, and Syracuse locations. The Employer is a private, not-for-profit "educational corporation" established under the laws of the State of New York. The parties stipulated that the Employer "is not an academic institution and therefore does not issue academic degrees." The parties also stipulated that the Board has statutory jurisdiction over the Employer, and that the Employer is the sole employer of the RPAs. The RPAs are enrolled as students at the State University of New York (SUNY), which is exempt from the Board's jurisdiction. In 1977, the Employer entered into an agreement with SUNY assigning management and administrative authority over SUNY sponsored research programs to the Employer.

The Acting Regional Director found in the Supplemental Decision that like the graduate student assistants enrolled at *Brown*, the RPAs have an educational relationship with the Employer because the RPAs must be enrolled at SUNY to work for the Employer, their work assignments bear a substantial relationship to their dissertations, the Principal Investigator on their research project often simultaneously serves as their dissertation advisor, and they end their careers as RPAs once they receive their degrees.

Contrary to the Acting Regional Director and the dissent, the majority found that unlike *Brown*, the Employer is not a university or college and does not confer degrees or admit students. Although the Employer is a not-for-profit “educational corporation,” the parties stipulated that that the Employer is “not an academic institution.” In addition, the RPAs are solely employed by the Employer.

Moreover, the majority found that the undisputed evidence demonstrates the existence of an economic relationship between the RPAs and the Employer, rather than an educational relationship as in *Brown*. The majority stated:

[P]ursuant to an agreement with SUNY, the Employer receives, administers, and manages government and private donor awards for SUNY’s sponsored research programs. Under that agreement, the Employer employs research and other personnel, including the RPAs, ‘who shall be deemed to be employees of the [Employer] and not the University.’ The RPAs are employed and receive compensation, including benefits, under awards administered by the Employer; their compensation is subject to the Employer’s compensation benchmarks; and they are placed on the Employer’s payroll by the Employer’s Human Resources office. In addition, the parties stipulated that the Employer’s labor and employment policies apply to the RPAs.

The majority rejected the premise of the Acting Regional Director and the dissent that RPAs, like the graduate student assistants in *Brown*, have a primarily educational relationship with the Employer. The majority found that the evidence cited by the Acting Regional Director in support of her finding that the RPAs have an educational relationship with the Employer demonstrates the RPAs’ primarily educational relationship with SUNY, not with the Employer.

In dissent, Chairman Battista found that the majority overlooked the Employer’s integral role in the RPAs’ education. Although the relationship between the RPAs and SUNY is an educational one that does not mean that the relationship between RPAs and the Employer is an economic one. The dissent emphasized the undisputed fact that the Employer is an educational corporation with a chartered mission “in keeping with the educational purposes [of SUNY].” Moreover, the dissent cited the evidence relied on by the ARD to explain that the Employer participates in the educational mission of SUNY and serves much the same functions for the conduct of research at SUNY as *Brown* did for research by its graduate students. Based on the substantial similarities between the relationships presented in this case and *Brown*, the Chairman would find that the RPAs are not employees within the scope of Section 2(3) of the Act.

(Chairman Battista and Members Kirsanow and Walsh participated.)

The Research Foundation of the City University of New York (2-RC-22721; 350 NLRB No. 19) New York, NY June 29, 2007. The Board affirmed the Regional Director's finding that Research Assistants (RAs) are employees within the meaning of Section 2(3) of the Act. As the Board explained in *Research Foundation of the State University of New York*, 350 NLRB No. 18 (2007), the research project assistants (RPAs) employed by that employer, which serves the same function for the State University of New York (SUNY) that the Employer in this case serves for the City University of New York, are statutory employees within the meaning of Section 2(3) of the Act. The Board reached the same result in this case as it did in *Research Foundation of SUNY* for the same reason: the Employer is not an educational institution, and the RAs have an economic and not an educational relationship with the Employer. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista, concurring, agreed that the RAs are statutory employees because their relationship with the Employer is primarily economic rather than educational. Noting that the instant case has some similarities to *Research Foundation of the State University of New York* because the Employer is an "educational corporation," and must be "in keeping with the educational purposes and objects of [CUNY]," the Chairman nevertheless emphasized several differences between the two cases:

[U]nlike the employer in *Research Foundation of SUNY*, some of the RAs here are enrolled at universities other than the City University of New York (CUNY). That is, status as a CUNY student is not a requisite for working for the Employer. In addition, the RAs perform administrative and editorial work that is typically unrelated to their studies. Although their work is overseen by a grant recipient on the CUNY faculty, that faculty member does not also act as the dissertation adviser. Moreover, the RAs here work with nonstudents who are assigned the same work, and they are paid on an hourly basis at a rate similar to the nonstudents. Rather than financial support for their graduate studies, their compensation thus represents payment in consideration for hours worked. In fact, for financial aid purposes, work as an RA is treated as outside employment.

The Board also ruled on the Employer's request for review with regard to issues that were held in abeyance pending the resolution of the employee status of the RAs, including the scope and composition of the unit, and the supervisory, managerial, and temporary status of the employees in the unit. The Board found that substantial issues were raised solely with regard to the supervisory status of Diana Cassells, Gregory Umbach, Carl Skoggsard, Andre Balog, Ken Yarmy, Tatiana Carayannis, and Barbara Leopold, and the supervisory and managerial status of Lawrence Cowen and Sarah Dwyer. The Supplemental Decision was amended to permit them to vote by challenged ballot. The Employer's request for review was denied in this and all other respects.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Extendicare Health Services, Inc. d/b/a River's Bend Health and Rehabilitation Service (30-CA-16746-1; 350 NLRB No. 16) Manitowoc, WI June 29, 2007. This case involved alleged violations of Section 8(a)(1) and (5) arising in the context of the parties' negotiations for an initial collective-bargaining agreement. [\[HTML\]](#) [\[PDF\]](#)

The Board unanimously adopted the administrative law judge's finding that although the Respondent may have committed a Section 8(a)(5) violation by unilaterally increasing the cost of employee meals without prior notice to AFSCME Local 913 and affording it an opportunity to bargain, the Respondent effectively "cured" that violation by its subsequent actions.

However, the Board majority of Chairman Battista and Member Schaumber reversed the judge's findings of violations of Section 8(a)(1).

The majority found that under the lead case of *Eagle Comtronics*, 263 NLRB 515 (1982), it was lawful for the Respondent to inform employees that the hiring of replacements "puts each striker's continued job status in jeopardy." The majority emphasized that the Respondent did not tell employees that they would permanently lose their jobs or threaten that, as a result of the strike, employees would be deprived of their rights to reinstatement under *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969). Member Walsh dissented, stating that the Respondent went beyond the permissible boundaries set forth in *Eagle Comtronics* when it did not limit its remarks to the truthful statement that economic strikers are subject to permanent replacement and instead "starkly raised the specter of job loss."

The Board majority also found that the Respondent did not violate the Act when it requested that employees report instances of harassment by other employees. Applying the standard of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the majority emphasized: (1) because some instances of harassment are not protected by the Act, the Respondent's request did not explicitly restrict protected activity; (2) employees would not reasonably construe the Respondent's message as requesting reports on protected activity; and (3) the Respondent's request was not promulgated in response to protected activity. Member Walsh, who dissented in *Lutheran Welfare*, also dissented here, stating that the Respondent's request would reasonably tend to encourage employees to report to management protected union activity that they viewed as unwelcome.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by AFSCME Local 913; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Milwaukee on May 5, 2005. Adm. Law Judge Arthur J. Amchan issued his decision June 29, 2005.

Rock Valley Trucking Co., Inc. (30-CA-16997; 350 NLRB No. 10) Janesville, WI, June 25, 2007. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by permanently laying off employee James Teed, because Teed engaged in the protected concerted activity of talking with his fellow employees and the Respondent's general manager about Teed's view that some drivers were being given preferential treatment in their driving assignments. The Board agreed with the judge's finding that the Respondent had knowledge of the activity and that the conversations were a motivating factor in the Respondent's decision to permanently lay off Teed. [\[HTML\]](#) [\[PDF\]](#)

However, the Board did not agree with the judge's analysis regarding the Respondent's animus toward the protected concerted activity. The judge found that in a phone conversation with Teed, the Respondent stated that for a driver to learn another driver's mileage he would have to have gone either into the other driver's assigned vehicle or his personal mailbox to see his payroll records. The Respondent told Teed that either of these actions was a fireable offense. The Board agreed with the judge that this statement did not violate Section 8(a)(1). The Board disagreed, however, with the judge's further finding that the statement nonetheless demonstrated the Respondent's animus towards Teed's protected concerted activity. Because the statement to Teed included an explanation of company policy and the Respondent's valid concern in protecting employee privacy, it could not properly be interpreted to reflect animus against Teed's protected concerted activity. The Board found other indicia of animus, however. Thus, the Respondent left a message on Teed's answering machine asking Teed to meet to discuss talk revolving around seniority and mileage. This meeting turned out to be the meeting at which Teed was laid off. Also, at that meeting, Respondent told Teed, among other things, that he had been selected for layoff because of his attitude and his accusations that the Respondent played favorites in assignments. The Board found the Respondent's statements linked Teed's protected concerted activity of speaking up about the mileage issue with the Respondent's decision to permanently lay off Teed.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by James W. Teed; complaint alleged violations of Section 8(a)(1). Hearing at Milwaukee, Wisconsin, April 24-25 and May 24, 2006. Adm. Law Judge Earl E. Shamwell, Jr. issued his decision Sept. 25, 2006.

Silver Cross Hospital (13-RC-21277; 350 NLRB No. 11) Joliet, IL June 26, 2007. The Board reversed the Regional Director's finding that computer operators at an acute-care facility may be included in a petitioned-for unit of skilled-maintenance employees. The Board found that the computer operators neither possessed the types of skills nor performed the kinds of job duties common to other skilled maintenance classifications; further, the Board found that the facts did not support a finding that the disputed employees were either helpers or assistants to the employees included in the skilled maintenance unit. Because the Board found that computer operators were not skilled maintenance employees, it deemed it unnecessary to pass on the

skilled maintenance status of the electronics technician and PC analyst positions. Accordingly, the Board concluded that the status of those positions would best be resolved through the use of the Board's challenge procedure. The case was remanded to the Regional Director for further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Kirsanow, and Walsh participated.)

St. Margaret Mercy Healthcare Centers (13-CA-38629; 350 NLRB No. 20) Hammond, IN June 29, 2007. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by applying its no-solicitation/distribution rules to the nurses' breakrooms and by removing union literature from the breakrooms. The Board majority of Members Liebman and Walsh also adopted the judge's finding that the Respondent violated Section 8(a)(3) by disciplining employee Deborah Plenus for soliciting a fellow employee to sign a union card while that employee was working at a nurses' station. The majority rejected the Respondent's contention that Plenus was legitimately disciplined pursuant to the Respondent's rule prohibiting solicitation at the nurses' station. In support, the majority noted that employee solicitation at the nurses' stations was a common practice, and that no other employee had been disciplined for other types of solicitation at the nurses' station. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Chairman Battista disagreed with his colleagues that the Respondent's no-solicitation rule was discriminatorily enforced against Plenus. In support, he noted that, with one exception, the permissible solicitations were all charitable or social in nature, and that in his view an employer could draw a lawful distinction between charitable/social solicitations and commercial solicitations.

Members Liebman and Walsh also adopted the judge's finding that the Respondent violated Section 8(a)(1) by threatening Plenus with unspecified reprisals in response to her protected activity. The majority reasoned that Plenus' conduct (talking to employees about terms and conditions of employment) was protected activity, that her conduct was not of such a serious character to warrant losing the protections of the Act, and that there was no merit to the Respondent's contention that Plenus' conduct interfered with patient care, as the Respondent's key concern was over employee morale rather than interference with patient care. In dissent, Chairman Battista emphasized that Plenus made the critical remarks in the vicinity of a patient's room, and that the Respondent could legitimately act to limit the potential for interference with patient care.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Service Employees Local 73; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago, May 1-2, 2001. Adm. Law Judge Karl H. Buschmann issued his decision Jan. 30, 2002.

Stevens Construction Corp. (30-CA-15489, et al.; 350 NLRB No. 13) Madison, WI June 28, 2007. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by advising employee James Muir that it would be futile to support a union; threatening the termination of all employees if they ever unionized; threatening Muir with arrest and discharge for affiliating with a union or engaging in other protected concerted activity; and maintaining a no-solicitation and -distribution rule for nonemployees. [\[HTML\]](#) [\[PDF\]](#)

In addition, the Board adopted the judge's findings that the Respondent violated Section 8(a)(3) and (1) by barring Muir from returning to work, denying him the opportunity to earn wages for that day, and transferring him to another project because of his union affiliation and protected concerted activity; and by subsequently refusing to hire eight union applicants for available carpenter positions; refusing to hire three union applicants for available concrete laborer and/or cement finisher positions; and disciplining Muir on Feb. 25, 2002.

In finding the discipline unlawful, the Board noted that Muir twice told others that he was a foreman while he in fact was not but was only disciplined after the second occasion, after Muir had engaged in protected concerted activity by calling OSHA to report safety violations at the jobsite and after he had announced that he was a union organizer. The decision of the Respondent to discipline Muir only after it was aware of his protected concerted activity and his status with the union, coupled with its giving another, false reason for the discipline, persuaded the Board that the warning would not have been issued absent Muir's protected concerted activity.

Contrary to the judge, however, the Board found that the Respondent violated Section 8(a)(1) by directing a subcontractor's employee, Robert Hyatt, to refrain from discussing the Union with its employees. After one brief union-related conversation between Hyatt and Ted Roessler, an employee of the Respondent, Respondent officials told Hyatt they did not want him talking to their employees about the Union during working time. There was no evidence that the conversation involved any solicitation. Because the Respondent routinely allowed employees to discuss nonwork-related matters during working time, the Board found the blanket prohibition against any talking about the Union during working time violated Section 8(a)(1) because it only applied to conversations about the Union.

Members Schaumber and Kirsanow further found, in agreement with the judge, that the Respondent did not violate Section 8(a)(1) by threatening Hyatt, with discharge when he refused to stop talking about the union and they told him "You don't seem to understand what I'm saying, so maybe you'll understand later this afternoon." They found no threat of discharge in the statement and declined to consider the statement as a threat of unspecified consequences because the complaint alleged a threat of discharge and due process requires the Board to hold the General Counsel to his theory.

Contrary to his colleagues, Member Walsh would have reversed the judge and found this violation. In his view, the statement was a thinly veiled threat that a reasonable employee would likely construe as threatening discharge or other serious, negative consequences. For Member Walsh, the fact that the Respondent did not utter an express threat of discharge does not render

unfair a finding that it threatened Hyatt with unspecified consequences because at trial the Respondent “was surely on notice of the gravamen of the allegation and therefore able to present a defense.”

Finally, the Board unanimously adopted the judge’s finding that the Respondent did not violate Section 8(a)(3) and (1) by disciplining Muir on other occasions alleged in the complaint, or by refusing to hire union applicants Gary Miller and Aaron Zimmerman for available carpenter positions.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Milwaukee and Southern Wisconsin Regional Council of Carpenters, Northern Wisconsin Regional Council of Carpenters, and Laborers Local 464; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Madison, Jan. 7-9, 2003. Adm. Law Judge Bruce D. Rosenstein issued his decision April 7, 2003.

Care Center of Kansas City d/b/a Swope Ridge Geriatrics Center (17-CA-23664, et al.; 350 NLRB No. 9) Kansas City, MO, June 25, 2007. Affirming the administrative law judge’s decision, the Board held that Service Employee Local 2000’s two announced work stoppages were intermittent strikes and thus unprotected conduct. The Board therefore dismissed allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining employees who participated in the strikes. [\[HTML\]](#) [\[PDF\]](#)

During negotiations for a successor contract, the parties were unable to reach agreement on wage increases. The Union, consistent with Section 8(g) for health care providers, gave the Respondent advance notice, and on August 26, 2006, engaged in a 1-day strike. On Sept. 16, 2006, following advance notice, the Union conducted a second 1-day strike. The judge found, and the Board affirmed, that the Union’s conduct was unprotected because it was intermittent, the Union acted in furtherance of a single plan or strategy, and the Union gave no indication that the strikes would not continue. See *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954). The Respondent did not violate the Act, therefore, by disciplining strikers who, among other things, violated its no-call/no-show policy on the strike days. In a footnote, the Board noted that, under Board law, the respondent has the burden to show that the conduct in question is unprotected.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Service Employees Local 2000; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Overland Park, KS, Dec. 12-13, 2006. Adm. Law Judge Gerald A. Wacknov issued his decision on March 1, 2007.

United States Postal Service (15-CA-17506(P); 350 NLRB No. 12) Destin, FL June 28, 2007. The Board affirmed the finding of the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by threatening an employee with a lawsuit and unspecified reprisals because he had filed an unfair labor practice charge with the Board. [\[HTML\]](#) [\[PDF\]](#)

In determining that the threat to sue violated the Act, the Board “assume[d] *arguendo*, without deciding, that the principles of *BE & K* [*BE & K Construction v. NLRB*, 536 U.S. 516 (2002)] are to be applied to a situation where a threat to file a lawsuit is ‘incidental’ to a lawsuit.” The Board found, however, “that where, as here, no actual lawsuit was filed, the threat was not ‘incidental’” and, thus, the threat to sue the employee for filing an unfair labor practice charge violated Section 8(a)(1) of the Act. Because no lawsuit had been filed against the employee, the Board found that the threat to sue in this case “was not preliminary to, or intertwined with, protected litigation or petitioning activity” and was therefore “not entitled to immunity.” The Board affirmed the judge’s finding that the threat to sue the employee for filing an unfair labor practice charge had the reasonable tendency to restrain employees in the exercise of their right to file charges under the Act and accordingly violated Section 8(a)(1).

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Bobby Cline, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Destin on June 20, 2005. Adm. Law Judge Michael A. Marcionese issued his bench decision July 13, 2005.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

A and G Inc. d/b/a Alstyle Apparel (Food & Commercial Workers Local 324) Anaheim, CA June 26, 2007. 21-CA-37029; JD(SF)-21-07, Judge Lana H. Parke.

VT Griffin Services, Inc. (Operating Engineers Local 351) Ft. Sill, OK June 27, 2007. 17-CA-23731, 23754, 17-RC-12467; JD(SF)-22-07, Judge John J. McCarrick.

Superior Electric Co. of Greater Detroit (Electrical Workers [IBEW] Local 252) Detroit, MI June 29, 2007. 7-CA-49715; JD-43-07, Judge David I. Goldman.

Igramo Enterprise, Inc. (Individuals) Queens, NY June 29, 2007. 29-CA-27247; JD(NY)-29-07, Judge Raymond P. Green.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Universal Transport II d/b/a Medstar Medicar (Teamsters Local 714) (13-CA-43908; 350 NLRB No. 23) Bellwood, IL June 29, 2007. [\[HTML\]](#) [\[PDF\]](#)

**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS
IN REPRESENTATION CASES**

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Hormel Foods Corp., Beloit, WI, 30-RC-6659, June 27, 2007 (Members Liebman, Schaumber, and Kirsanow)
