

**ABOUT THE WEEKLY SUMMARY**

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

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November 9, 2000

W-2764

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*Caterpillar, Inc.* (33-CA-9876-3; 332 NLRB No. 101) Peoria, IL Oct. 31, 2000. The Board vacated prior decision and orders in accordance with its March 19, 1998 Order granting the parties' joint motion to vacate. The Order vacating, pursuant to the parties' settlement, provided that upon ratification of the proposed new central agreement described in the joint motion, these decisions and orders would be immediately vacated: *Caterpillar, Inc.*, 321 NLRB 1130 (1996); *Caterpillar, Inc.*, 321 NLRB 1178 (1996); *Caterpillar, Inc.*, 322 NLRB 674 (1996); *Caterpillar, Inc.*, 322 NLRB 690 (1996), clarified 322 NLRB 920 (1997); and *Caterpillar, Inc.*, 324 NLRB 201 (1997). By letter dated March 23, 1998, the Union notified the Board that the contract ratification had occurred. The Board wrote in vacating the cited decisions: [\[HTML\]](#) [\[PDF\]](#)

Because questions are often raised regarding the effect of such a vacatur, however, we wish to make clear the significance we attribute to an order to vacate when granted, as here, pursuant to an settlement, rather than as the result of a determination on the merits that the vacated decision was in error. In the case of the latter, the vacated decision is eliminated for all purposes, including precedential effect. When we vacate a decision pursuant to a settlement, however, unless we indicate otherwise in our order vacating, it is vacated only insofar as there is no longer a court-enforceable order in the case and the decision has no preclusive effect on the parties (i.e., it will have no res judicata or collateral estoppel effect against the parties). Likewise, because the Board's findings of fact and conclusions of law with respect to the parties have been vacated, those findings and conclusions may not be used to establish a proclivity to violate the Act, unless, of course, the parties to the settlement agree that they may be so used. There will remain a published decision in the case, and that decision may be cited as controlling precedent with respect to the legal analysis therein. See *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 fn. 3 (1997), where the Board majority cited and overruled *Highland Yarn Mills*, 310 NLRB 644 (1993), which was vacated as moot at 315 NLRB 1169 (1994), following a non-Board settlement. We follow this policy because we agree with the United States Court of Appeals for the Seventh Circuit that a judicial tribunal 'ought not allow the social value of [a] precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement.' *Matter of Memorial Hospital of Iowa County*, 862 F.2d 1299, 1302 (7th Cir. 1988).

We are aware that the courts appear to take the view that the only way to preserve a case as controlling precedent is to deny the application for vacatur, and will generally give only persuasive, rather than controlling precedential weight to the legal analysis in vacated decisions. . . . However, the Board generally has not chosen to follow the same practice with respect to its own decisions.

In a footnote, Member Hurtgen said he would follow the court rule, i.e., a vacated opinion has persuasive, but not controlling, authority. He does not "think it prudent to have one rule for federal courts and another for the NLRB," noting that *Matter of Memorial Hospital* is not to the contrary.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

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*Albertson's, Inc.* (19-CA-24232, et al.; 332 NLRB No. 104) Spokane and Vancouver, WA and Bend and Redmond, OR Oct. 31, 2000. On a stipulated record, Chairman Truesdale and Member Liebman concluded that the Respondent violated Section 8(a)(1) of the Act by ordering the representatives of Food and Commercial Workers Local 555 and Teamsters Local 582 who were engaged in peaceful soliciting protected by the Act, to leave the immediate exterior of its retail grocery stores 230, 233, 235, 240, 246, 248, 580, 581, 587, 588, and 589, and by causing the police to remove their representatives from these properties in some instances. [\[HTML\]](#) [\[PDF\]](#)

Member Hurtgen, dissenting, found the Respondent has drawn a permissible line, i.e., one that is not condemned by the Act between (1) solicitations by charitable groups which are well known to the community and (2) solicitations by political groups, commercial groups which seek to sell goods or services, and charitable groups which are unknown to the community. "The Union falls on the forbidden side of the line, i.e., it is not a charitable organization," he said in finding there is no violation of the Act.

Local 582 sought access to solicit the Respondent's customers to boycott products sold by the Respondent and produced by an employer with whom Local 582 had a labor dispute. Local 555 sought access to solicit the Respondent's employees to become members of Local 555. The Respondent allowed various organizations to have regular and frequent access to the immediate exterior of its stores to solicit both employees and customers in fund-raising endeavors.

The majority wrote in finding that the Respondent's disparate enforcement of its no-solicitation rule against the representatives of Local 555 and 582 violated the Act:

In so finding, we are mindful of the Supreme Court's decision in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). But, as we have stated in prior cases, it does not require a contrary result. *Be-Lo Stores*, 318 NLRB 1 at 11 (1995), enf. denied 156 F.3d 268 (4th Cir. 1997). Contrary to the suggestion of the Respondent and our dissenting colleague, the Court's holding in that constitutional case does not govern the statutory issues presented in this case. At issue here is whether the Respondent has interfered with employees' statutory rights under Section 7 of the Act. The Court's reference in dicta to 'entities of a similar character' addresses the question of First Amendment access to a 'limited public forum.' In *Babcock & Wilcox*, . . . the Court explicitly addressed the interplay of employees' Section 7 rights and employer's property rights and found discrimination where an employer's prohibited and found discrimination where an employer prohibited union distribution and permitted 'other distribution.'

The Respondent and our dissenting colleague also argue that the Respondent is not discriminating against union activity, but is prohibiting all solicitation by political grounds, 'unfamiliar charitable organizations,' and noncharities seeking selling opportunities. We find no merit in this argument.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Food and Commercial Workers Local 555 and Teamsters Local 582; complaint alleged violation of Section 8(a)(1). Parties waived their right to a hearing before an administrative law judge.

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*Fleming Companies, Inc. (formerly Malone & Hyde, Inc.)* (26-CA-17054; 332 NLRB No. 99) Southaven, MI Oct. 31, 2000. Chairman Truesdale and Member Hurtgen found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide General Drivers, Salesmen & Warehousemen's Local 984 with information necessary to pursue employee Richard Mack's grievance. Specifically, the Respondent unlawfully failed to provide a complete copy of Mack's personnel file; copies of work rules applicable at the time of Mack's discharge in 1988; the names, addresses, and telephone numbers of bargaining unit members employed by the Respondent's predecessor in 1988; and copies of rules on attire in effect around the time of Mack's discharge and copies of any disciplinary actions for alleged attire and DOT violations for the period 1985 to 1988. Chairman Truesdale and Member Hurtgen, citing *Anheuser-Busch*, 237 NLRB 982 (1978), reversed the judge and found that the Respondent had no duty to comply with the Union's request for copies of statements taken from witnesses. [\[HTML\]](#) [\[PDF\]](#)

In a separate concurring opinion, Members Fox and Liebman said they would overrule *Anheuser-Busch* and find that, under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1976), the Respondent violated Section 8(a)(5) and (1) by refusing to provide the requested names of witnesses. However, in the absence of a majority for that position, they agreed that *Anheuser-Busch* required dismissal of the allegation.

The union ceased representation of the bargaining unit in January 1992, but it remained obligated to process Mack's grievances because they were filed while the collective-bargaining agreement was in effect. In June 1992, a Federal district court found that the collective-bargaining agreement in effect at the time of the discipline also obligated Malone & Hyde to take Mack's grievances to arbitration and, in 1994, the Sixth Circuit affirmed that decision in *General Drivers v. Malone & Hyde, Inc.*, 23 F.3d 1039 (6th Cir. 1994), cert. denied 513 U.S. 1057 (1994). The Respondent purchased and became the successor to Malone & Hyde, Inc. in 1994.

(Chairman Truesdale and Members Fox, Liebman, and Hurtgen participated.)

Charges filed by General Drivers, Salesmen & Warehousemen Local 984; complaint alleged violation of Section 8(a)(1) and (5). Hearing held May 5, 1997. Adm. Law Judge Lawrence W. Cullen issued his decision June 9, 1997.

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*Kalustyans* (22-RC-11765; 332 NLRB No. 73) Union, NJ Oct. 23, 2000. The Board, in finding that the hearing officer erred in sustaining the Petitioner's challenges, concluded that the intent of the parties to include the three challenged voters in the unit as shipping clerks is clear and that the Petitioner failed to show that their inclusion would be inconsistent with any express statutory provisions or established Board policies. The Board overruled the challenges to the ballots of Kerri Goad, Michelle Hill-Taylor, and Nancy Stratford, and directed the Regional Director to open and count the ballots and to issue a revised tally of ballots and the appropriate certification. [\[HTML\]](#) [\[PDF\]](#)

The parties agreed to a unit including "shipping clerks" and excluding "office clerical employees," as sought by the Petitioner (Teamsters Local 575). The tally of ballots for the election held on August 4, 1999 showed 21 for and 18 against the Petitioner, with 3 determinative challenged ballots. The Petitioner challenged the three voters on the grounds that they were office clerical employees. In recommending that the challenges be sustained, the hearing officer found that the parties' objective intent regarding the challenged voters was ambiguous because the voters lacked bona fide job titles and a significant part of their job duties involved functions not directly related to the shipping of the Employer's merchandise. Using community of interest principles, he found that the challenged voters are office clerical employees and not shipping clerks and that they do not have a community of interest with the unit employees.

(Members Fox, Liebman, and Hurtgen participated.)

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*Newspaper & Mail Deliverers of New York & Vicinity (City & Suburban Delivery System)* (34-CB-2202, et al.; 332 NLRB No. 77) New Rochelle, NY Oct. 25, 2000. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing or attempting to cause City & Suburban Delivery System not to hire Charging Parties Willie Miles, Eduardo Valentin, and Jimmy Clark as regular situation-holders because they had, or the Respondent believed they had, worked during a strike or lockout. The Board explained that it need not decide in this case whether the Respondent's recommendations of casual employees for positions as regular situation-holders amounts to a nonexclusive referral system, to which the duty of fair representation does not apply. It agreed with the judge that the General Counsel established that the Respondent refused to recommend the Charging Parties for positions as regular situation-holders in retaliation for their protected activity, which is a violation of Section 8(b)(1)(A) independent of the duty of fair representation. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Willie Miles, Eduardo Valentin, and Jimmy Clark; complaint alleged violation of Section 8(b)(1)(A) and (2).

Hearing at White Plains, July 27-29 and Sept. 2, 1999. Adm. Law Judge Michael A. Marcionese issued his decision Dec. 3, 1999.

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*Chardan, Inc. d/b/a Perfect Art* (29-CA-22767, 29-RC-9054; 332 NLRB No. 78) Maspeth, NY Oct. 24, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act and interfered with the election held in Case 29-RC-9054 by these acts: interrogating employees about their membership in UNITE Local 155, creating the impression that its employees' union activities were under surveillance, soliciting grievances from employees and promising to increase benefits and improve working conditions to induce them not to select the Union as their collective-bargaining representative, and threatening employees with unspecified reprisals and to close its business operations because of their union membership and activities. The Board set aside the election held on May 27, 1999 and directed a second one. The tally of ballots shows 17 for the Intervenor (Production Workers Local 17-18), 9 for the Petitioner (UNITE Local 155), 1 against the participating labor organizations, and 4 challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

Member Hurtgen agreed that the election should be set aside, but based solely on the judge's findings that the Respondent violated Section 8(a)(1) by: (1) the threat to close its facility; (2) the implied preelection promise of a postelection wage increase; and (3) the coercive interrogation of employee Castillo. Contrary to his colleagues, Member Hurtgen found no merit in the allegations that the Respondent unlawfully solicited and made an implied promise to correct grievances, created the impression of surveillance, and threatened unspecified reprisals for voting for UNITE.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by UNITE Local 155; complaint alleged violation of Section 8(a)(1). Hearing at Brooklyn, Nov. 29-30, 1999. Adm. Law Judge Howard Edelman issued his decision March 28, 2000.

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*Tri-State Generation and Transmission Assn.* (27-CA-16299-1; 332 NLRB No. 88) Denver, CO Oct. 26, 2000. The Board affirmed the administrative law judge's dismissal of a complaint which alleged that the Respondent refused to furnish certain information to Electrical Workers (IBEW) Local 111 in violation of Section 8(a)(5) and (1) of the Act. The Board relied solely on the basis of the specific nature of the request for information, the Union's stated bases for the request, and the prevailing circumstances at the time the request was made. "Without passing on the ultimate merits of the Union's prospective accretion claim, we agree with the judge that the information request was premature," the Board stated. It disagreed also with the Union's alternative assertion, first raised after the charge was filed in this proceeding, that the requested information was relevant in the context of preserving the work of the Respondent's existing bargaining unit. [\[HTML\]](#) [\[PDF\]](#)

The Respondent is a public utility engaged in the generation and distribution of electricity. Before 1992, its service territory consisted of eastern Colorado and parts of Wyoming and Nebraska. In that year, it acquired a number of Colorado-Ute's generating and transmission facilities servicing western Colorado. The operations and maintenance employees at the acquired facilities were represented by the Union as the time of the acquisition, and the Union negotiated a recognition agreement with the Respondent to continue to represent those employees who worked in the territory formerly serviced by Colorado-Ute.

In October 1998, the Respondent sent a letter to its employees, including those represented by the Union, announcing a possible consolidation with Plains Electric Generation and Transmission, Inc. (Plains). In March 1998, the two entered into a merger agreement that was contingent on approval by the New Mexico regulatory authorities. On January 26, 1999, before the merger agreement was completed, the Union sent the Respondent a request for information concerning Plains' employees. The Union claimed that the Plains employees would be accreted into the bargaining unit and that the information was relevant to "the preservation of the work of the bargaining unit."

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Electrical Workers (IBEW) Local 111; complaint alleged violation of Section 8(a)(1) and (5). Hearing at

Denver on Nov. 30, 1999. Adm. Law Judge James L. Rose issued his decision Feb. 17, 2000.

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*Encino-Tarzana Regional Medical Center* (31-CA-23592; 332 NLRB No. 90) Tarzana, CA Oct. 27, 2000. Affirming the administrative law judge's recommendation, the Board dismissed complaint allegations that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally suspending its "call off" procedure to determine staffing during the 3 days following the Union's 1-day economic strike. [\[HTML\]](#) [\[PDF\]](#)

On receiving the Union's 8(g) notice of intent to strike for 24 hours, the Respondent made arrangements with a temporary staffing agency for a professional staff to serve as temporary replacements for the strikers. The Staffing Agency required the Respondent to provide each temporary replacement a minimum guarantee of 48 hours' work. It is uncontested that, during the 3 days at issue, the temporary employees were lawfully on the job and that there was insufficient work for both the strikers and the so-called "crossover" employees who made themselves available for work during the 1-day strike.

The Board emphasized that the General Counsel's complaint did not allege that the Respondent was obliged to reinstate the economic strikers immediately upon their unconditional offer to return to work, notwithstanding its contractual obligation to guarantee temporary replacements from the Staffing Agency a minimum of 4 day's pay. It explained: "The narrow issue is whether, during that 3-day period, the Respondent was obliged to displace crossovers with returning strikers whenever the latter had a superior claim under the Respondent's 'call off' procedure." The Board wrote in agreeing with the judge that the circumstances in this case are sufficiently analogous to those presented in *TWA v. Flight Attendants Union*, 489 U.S.A. 426 (1989), to warrant dismissal of the complaint:

In the circumstances presented here, the temporary employees provided by the Staffing Agency are analogous to the permanent replacements in *TWA*. That is so because, for the duration of the 3-day period at issue, the General Counsel has conceded their right to remain on the job in preference to the strikers. Thus, here, as in *TWA*, the seniority and other factors that form the basis for returning strikers' claims would function only to put strikers back on the job in preference to the crossovers, while leaving the Staffing Agency temporaries in place. That is not a permissible result under the principles of *TWA* and warrants our dismissal of the complaint.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by American Federation of Nurses Local 535, Service Employees; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Los Angeles on June 28, 1999. Adm. Law Judge Mary Miller Cracraft issued her decision Sept. 23, 1999.

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*General Electric Co.* (6-CA-24454, 26117; 332 NLRB No. 91) Washington, WV Oct. 27, 2000. On remand from the D.C. Circuit, Chairman Truesdale and Member Hurtgen dismissed the complaint allegation that the Respondent's handbill entitled, "The Real Question," suggested that the employees faced futile bargaining and an inevitable strike if they voted for Electrical Workers (UE), in violation of Section 8(a)(1) of the Act. The sole issue on remand is whether the Board should reaffirm its earlier adoption of the administrative law judge's finding that the Respondent's handbill was unlawful. 321 NLRB 662. The Court compared the handbill language with that in *UARCO, Inc.*, 286 NLRB 55 (1987) and *Coleman Co.*, 203 NLRB 1056 (1970), in which the Board found nearly identical statements to be lawful. Agreeing with the Court, Chairman Truesdale and Member Hurtgen found that the language in issue is lawful and that the cited cases are not distinguishable. [\[HTML\]](#) [\[PDF\]](#)

Member Fox, dissenting, would reaffirm the Board's original finding that the handbill violated Section 8(a)(1). She would distinguish the Board's decision in *UARCO, Inc.* and overrule the decision in *Coleman Co.*

(Chairman Truesdale and Members Fox and Hurtgen participated.)

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*Cold Heading Co.* (7-CA-38768, 38768(2); 332 NLRB No. 84) Warren, MI and Hudson, IN Oct. 31, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (5) of the Act by routing two Formax headers to its Hudson, IN facility and removing and transferring machinery from its Warren, MI facility to the Hudson facility; and violated Section 8(a)(1) by threatening employees with plant closure and job loss if they supported an affiliation between the Cold Heading Employees Committee (the Committee) and the UAW and interrogating them about their support for the affiliation. [\[HTML\]](#) [\[PDF\]](#)

Chairman Truesdale and Member Hurtgen found no merit in the General Counsel's exceptions to the judge's findings that a majority of ballots were cast against affiliation and therefore the Respondent's refusal to recognize and bargain with the Committee, as affiliated with the UAW, did not violate the Act. Counsel for the General Counsel contended that the Committee never agreed to re-include the leaders in the bargaining unit after the parties had agreed to exclude them. The judge found that the parties never reached a final and binding agreement to alter the unit's scope and the leaders, as members of the unit, were eligible to vote in the affiliation election. Chairman Truesdale and Member Hurtgen, in agreeing with the judge that the leaders were included in the unit, noted that the position has been included in the unit through successive contracts and that insufficient evidence was presented at the hearing to justify a change in the historical bargaining unit. Having agreed that a majority of the employees voted against affiliation, Chairman Truesdale and Member Hurtgen found it unnecessary to pass on the Respondent's procedural challenges to the affiliation election.

Member Liebman, dissenting in part, would rely on equitable principles to find that the Respondent is estopped from challenging the affiliation and that it unlawfully refused to bargain with the Committee as affiliated with the UAW. The Chairman and Member Hurtgen noted that the General Counsel never litigated the case on that theory nor made that argument in its exceptions and thus declined to address the equitable estoppel analysis in this case.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by the UAW; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Detroit, Jan. 29-31 and April 7-8, 1997. Adm. Law Judge Margaret M. Kern issued her decision Sept. 17, 1997.

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*Health Resources of Lakeview* (4-RC-19816; 332 NLRB No. 81) Lakewood, NJ Oct. 25, 2000. The Board overruled the challenge to the ballot of part-time housekeeper Dorothy Chulsky, finding, contrary to the hearing officer, that the Petitioner failed to sustain its burden to establish that Chulsky is a statutory supervisor. The Board remanded the proceeding to the Regional Director to open and count the ballots of Chulsky and Patricia Terry and to issue a revised tally of ballots and the appropriate certification. The tally of ballots for the election held on November 18, 1999 shows eight ballots for and seven against Service Employees Local 1115, with two challenged ballots. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the challenge to the ballot of Patricia Terry. [\[HTML\]](#) [\[PDF\]](#)

Chulsky worked in the housekeeping department and spent most of her time doing vacuuming and laundry. John Brzyski was the housekeeping supervisor until he left the facility in April 1999. From April through late August 1999, there was turnover in the supervisor position. According to part-time housekeeper Shannon Hall, Chulsky served as acting supervisor until the end of September when Chris Sodano was hired as the supervisor. Sodano regularly worked weekdays. The Petitioner maintained that Chulsky is a supervisor, at least on weekends.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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*J.E. Higgins Lumber Co.* (20-UC-389; 332 NLRB No. 109) Sacramento, CA Oct. 31, 2000. Chairman Truesdale and Member Liebman granted the Union's request for review of the Regional Director's Decision and Order as it raised substantial issues solely regarding his reliance on *Greenhoot, Inc.*, 205 NLRB 250 (1973), in clarifying the contractual unit to exclude individuals jointly employed by the Employer-Petitioner and TLC Transportation Staffing, Inc. They remanded the issue on review to the Regional Director for further consideration consistent with *M.B. Sturgis, Inc.*, 331 NLRB No. 173, in which the

Board overruled *Lee Hospital*, 300 NLRB 947 (1990), and clarified *Greenhoot*. The request for review was denied in all other respects. [\[HTML\]](#) [\[PDF\]](#)

Member Hurtgen, concurring in the remand, wrote separately to set forth his "strong view" that the Board in carrying out its new policy in this area must make sure that it acts to protect the Section 7 rights of contingent employees. He wrote:

My concern is highlighted by *Jeffboat* [*Division, American Commercial Marine Service Company*, 331 NLRB No. 173], and the instant case. In *Jeffboat*, the union sought to add the 'contingent' employees, by *means of accretion*, to an extant unit of user employees. The same is true in the instant case. Thus, the Union seeks to add these employees to the existing unit *without their vote*. The Board's remand leaves that issue open. If the Union succeeds, I fear that the Section 7 rights of these employees would be undermined. Ironically, a policy designed to protect Section 7 rights, may wind up undermining these rights.

Based on the above, I would not, without an employee vote, add the supplier/user employees to an extant unit of user employees, unless the test for accretion is satisfied.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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Technology Service Solutions (27-CA-13971, 13971-3; 332 NLRB No. 100) Englewood, CO Oct. 31, 2000. Chairman Truesdale and Member Hurtgen affirmed the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by refusing to provide Electrical Workers (IBEW) Local 111 with a prepetition list of names and addresses of bargaining unit employees where there was no reasonable alternative means for the Union to communicate with the employees, but they did not adopt all of the judge's findings or reasoning. "[T]he General Counsel simply fell short of proving his contention that the Union had no reasonable means of communicating with the bargaining unit employees unless the Respondent provided it with the names and addresses," the majority held. Member Fox, dissenting, did not agree with her colleagues' application of *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to the issue, nor did she agree with their conclusion. [\[HTML\]](#) [\[PDF\]](#)

The Respondent installs, services, and repairs computer systems nationwide. The appropriate unit covers all the Respondent's 236 customer service representatives (CSRs) in its south-central region (Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming).

The majority wrote:

The dissent finds fault in our applying *Lechmere's* 'no reasonable alternative means' exception to this case. Rather than applying the *Lechmere* standard, the dissent would apply an ill-defined, more lenient standard, which would require the Respondent to supply the employees' names and addresses to the Union even in circumstances when it is not shown that the Union lacks a reasonable means to communicate with the unit employees. The dissent contends that this new standard is warranted because of the assertedly 'unique' characteristics of the bargaining unit that, according to the dissent, largely isolate the employees and restrict them from exercising their organizational rights.

Contrary to the dissent, the 'lack of reasonable alternative means' standard is, in our view, the appropriate one in the present case. Under existing case law, an employer has no obligation to provide the names and addresses of its employees to a union that wishes to organize them. Unless ordered as an unfair labor practices remedy, an employer's provision of its employees' names and addresses to a union is required only when, following the union's filing of an election petition accompanied by a sufficient showing of interest, the Board directs an election or approves the parties' consent-election agreement. *Excelsior Undewear*, *supra*. Nevertheless, in the present case, even though no election had been directed or agreed to, the General Counsel alleged that the Respondent violated the Act by denying the Union's request for the Respondent's employees' names and addresses 'where there was no reasonable alternative means for the Union to communicate with the Unit employees.' By using this language, the

General Counsel invoked the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and its precursor, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which generally permit an employer to bar nonemployee union organizers from trespassing on its property unless there is no reasonable alternative means for the union to communicate its organizational message to the employer's employees.

The Board reversed the judge and found that the Respondent violated Section 8(a)(1) when Customer Service Manager Leonard "cautioned" employee Phillips against sending messages to other employees regarding unionization. The Board in 1997 vacated the judge's original decision and order dismissing complaint and, remanded the proceeding. 324 NLRB 298. In his supplemental decision, the judge recommended dismissal of the entire complaint, largely on the basis on credibility resolutions discrediting the General Counsel's principal witnesses.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Adm. Law Judge James M. Kennedy issued his supplemental decision Feb. 2, 1999.

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*Teamsters Local 282 (TDX Construction Corp.)* (29-CP-597, 29-CB-10074; 332 NLRB No. 82) New York, NY Oct. 30, 2000. Chairman Truesdale and Member Fox wrote in finding, contrary to the administrative law judge, that the Respondent did not violate Section 8(b)(6) of the Act by attempting to cause TDX Construction to employ an onsite steward: "The Respondent's demand for an onsite steward was a good-faith offer to perform relevant work. As such, it does not fall within the limited kind of featherbedding proscribed by Section 8(b)(6)." Member Hurtgen, dissenting, agreed with the judge that the Respondent violated Section 8(b)(6). In so doing, he disagreed with his colleague's application of the relevant precedents to the instant facts. "Because I take a less capacious view of TDX's sphere of activity than my colleagues do, I find that the instant case does not involve a bona fide offer of *relevant* services," Member Hurtgen said. [\[HTML\]](#) [\[PDF\]](#)

No exceptions were filed to the judge's finding that the Respondent violated Section 8(b)(7)(C).

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Queens West Development Co.; complaint alleged violation of Section 8(b)(6) and 8(b)(7)(C). Hearing at Brooklyn, May 21-22, 1997. Adm. Law Judge Steven Davis issued his decision May 29, 1998.

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*FiveCAP, Inc.* (7-CA-39503, et al.; 332 NLRB No. 83) Scottville, MI Oct. 31, 2000. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to notify and bargain with Teamsters Local 406 concerning the elimination of bargaining unit jobs and the reassignment of unit employees; and violated Section 8(a)(3), (4), and (1) in these respects: rescinding previously granted permission for personal time off, requiring the production of subpoenas and doctors' statements in order to return to work where such is not required by personnel policies and procedures, giving unwarranted disciplinary warnings, accusing employees of theft to law enforcement authorities, placing new and unwarranted restrictions on employees' use of facilities, reassigning employees in retaliation for their having engaged in protected activity, placing petty restrictions on employees' use of office equipment, and constructively discharging employees. [\[HTML\]](#) [\[PDF\]](#)

The Board reversed the judge's findings that the Respondent violated the Act by placing employee Florence Feliczak on probation after she had returned to work from a lawful suspension and refusing to allow Melissa Kukla to use a lesson plan that the Respondent had allegedly previously approved.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Teamsters Local 406; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at Ludington on various days between May 11 and July 8, 1998. Adm. Law Judge James L. Rose issued his decision Dec. 17, 1998.

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*Loyalhanna Care Center* (6-CA-28609, et al.; 332 NLRB No. 86) Latrobe, PA Oct. 30, 2000. Members Fox and Liebman found, contrary to the administrative law judge, that nurses Cynthia Clark, Melanie Fritz, and Erica Lewis are not statutory supervisors because they do not exercise independent judgment with regard to any of the indicia of supervisory authority set forth in Section 2(11) of the Act. Therefore, they found that the Respondent violated Section 8(a)(1) of the Act, as alleged, when it threatened Lewis with the loss of her nursing license, issued "friendly reminders" and other disciplinary warnings to Fritz and Lewis, and discharged all three nurses because of their concerted complaints to management officials concerning wages, hours, and working conditions. Member Hurtgen, dissenting, agreed with the judge that Clark, Lewis, and Fritz are supervisors by virtue of their authority to responsibly direct and to assign employees, that their conduct was not protected, and the Respondent did violate the Act by discharging them. [\[HTML\]](#) [\[PDF\]](#)

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by Cynthia Clark, Erica Lewis, and Melanie Fritz, individuals; complaint alleged violation of Section 8(a)(1). Hearing at Pittsburgh on May 14, 1997. Adm. Law Judge Irwin Socoloff issued his decision April 7, 1998.

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*Seton Co.* (6-CA-26593, et al.; 332 NLRB No. 89) Saxton, PA Oct. 31, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act in various respects, including enforcing its no-solicitation/no-distribution rule selectively and disparately applying it only against employees supporting the Mine Workers; videotaping the Union's headquarters and using that image in a pro-company videotape distributed to all employees; refusing to hire and discharging employees because of their union activities; and when Supervisor Jim Donaldson impliedly threatened employees with discipline if they talked about the Union, and more onerous working conditions and plant closure if the Union were selected as the employees' collective-bargaining representative. [\[HTML\]](#) [\[PDF\]](#)

The Board affirmed the judge's finding the complaint allegations 10(b) and (c), 12, 15, 16, and 23(b) are not barred by Section 10(b) of the Act and that, contrary to the Respondent's contentions, it was not denied due process. In so doing, the Board rejected the Respondent's contention that the complaint allegations are untimely because they are not related to earlier charges and amended charges and found, that all the allegations in this proceeding, including those raised in the Respondent's exceptions, share a significant factual affiliation under the "closely related" test. It cited *Ross Stores*, 329 NLRB No. 59 (1999), as an additional basis for finding that all the complaint allegations are not barred by Section 10(b).

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by the Mine Workers; complaint alleged violation of Section 8(a)(1). Hearing at Altoona, April 8-11, 1997, and Bedford, May 12-15, 1997. Adm. Law Judge Wallace H. Nations issued his decision Dec. 31, 1997.

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*Consolidated Diesel Co.* (11-CA-16183, et al.; 332 NLRB No. 94) Whitakers, NC Oct. 31, 2000. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from distributing union materials on nonworktime in nonwork areas of its facility, removing from nonwork areas of the facility union materials which have been lawfully left there for distribution, and subjecting employees Losada and Wrenn to its Performance Management Process Committee procedure and retaining a record of the charges against them in its employment files, because they engaged in union or protected concerted activities. Member Hurtgen dissented in part. [\[HTML\]](#) [\[PDF\]](#)

The Respondent maintains a harassment policy which defines harassment as any unwelcome action, intended or not, which is considered offensive to a receiver or third party. The policy is implemented through the Respondent's Performance Management Process Committee (the Committee), which is comprised of both employees and management representatives. Harassment charges are first investigated by an employee relations representative, who reports the results to Employee Relations Manager Larry Williams. Williams decides whether the Committee should hear the charges. The Committee has the

power to discipline individuals it finds to have violated the policy, including discharge. Charges were filed against both Losada and Wrenn in connection with separate incidents, involving their distribution of a union newsletter.

Chairman Truesdale and Member Fox noted that Losada and Wrenn's distribution of the newsletter is conduct clearly protected by Section 7 and that there is no contention that the manner in which they exercised their statutory right to distribute literature was so egregious, offensive, or extreme as to lose its protection. "To the contrary, in finding that the conduct of Losada and Wrenn did not constitute misconduct in violation of the Respondent's harassment policy, which finding we adopt, the judge effectively found it was not," they said. In agreeing with the judge that the conduct of Losada and Wrenn did not constitute harassment, Chairman Truesdale and Member Fox relied only on his reference to the "reasonable person" standard.

Member Hurtgen noted that it is undisputed that the Respondent's harassment policy is lawful on its face, and there is no contention that this investigation deviated from that policy. He found that the Respondent lawfully invoked its "Respect for Others" policy to exercise its legitimate right to investigate allegations of employee harassment against Losada and Wrenn, and that the record of that investigation is likewise privileged. In any event, he found that the Respondent neither by its words to the employees, nor by the manner in which it maintained the records, engaged in conduct proscribed by Section 8(a)(1).

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by CDC Workers Unity Committee a/w Electrical Workers (UE); complaint alleged violation of Section 8(a)(1). Adm. Law Judge Robert C. Batson issued his decision June 30, 1997.

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*Plumbers Local 247 (Inland Industrial Contractors)* (15-CB-4364, 4364-2; 332 NLRB No. 95) Alexandria, LA Oct. 31, 2000. The administrative law judge found that the Respondent, by its business manager, Gypin, failed to permit Edwin Funderburk, a member of another local of the International Union, to register on Respondent's out-of-work list, and that it failed to refer him to work, in violation of Section 8(b)(1)(A) and (2) of the Act. The Board agreed that the Respondent violated the Act in the first respect only. [\[HTML\]](#) [\[PDF\]](#)

The Respondent told Funderburk that there was no out-of-work list when in fact, there was. The judge found that the Respondent's failure to register Funderburk was not related to any legitimate reason pertaining to the efficient operation of the hiring hall. The Board found the failure to register Funderburk was in itself a violation of Section 8(b)(1)(A) and (2). Turning to the alleged failure to refer Funderburk to Inland, the evidence showed that the Respondent (through Gypin) talked to Inland about giving work to Funderburk. Inland declined because it was not pleased with his prior work. The Board held: "Thus, Funderburk's nonreferral to Inland was not pursuant to any unlawful action or inaction by Respondent. The evidence also discloses that at the times Funderburk contacted Gypin looking for work, there were no requests for referrals from Inland or from any employer with whom Respondent had an exclusive hiring hall agreement."

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Edwin Funderburk and Ronald Jones, individuals; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Alexandria on Aug. 24, 1998. Adm. Law Judge Lawrence W. Cullen issued his decision Sept. 11, 1998.

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*Goodless Electric Co.* (1-CA-31249, et al.; 332 NLRB No. 96) Springfield, MA Oct. 31, 2000. On remand from the U.S. Court of Appeals for the First Circuit, the Board clarified existing precedent and affirmed its original decision that Electrical Workers (IBEW) Local 7 established its 9(a) representative status during the terms of the parties' 8(f) contract and that the Respondent, therefore, was not free upon expiration of that contract to withdraw recognition from the Union and unilaterally change terms and conditions of employment. 321 NLRB 64 (1996). By doing so and dealing directly with employees, the Respondent violated Section 8(a)(5) and (1) of the Act, and violated Section 8(a)(3) and (1) by constructively discharging its apprentice employees, the Board held. It wrote: [\[HTML\]](#) [\[PDF\]](#)

Having accepted the court's remand, we take the opportunity to provide the explanation that the court found was lacking in our previous decision. In so doing, we acknowledge that the Board's construction industry precedent at the time of the events at issue made no express provision for agreements like the one contained in the parties' 1992 letter of assent. What is distinctive about the 8(f) agreement at issue is that it provides for prospective 9(a) recognition. None of the cases cited by the Board in its initial decision and the court on review deal with such a provision. All the cases dealt with the question whether a union made an unequivocal demand for 9(a) recognition based on a contemporaneous showing of majority status. Accordingly, as the court held, in giving effect to the literal language of the prospective 9(a) recognition clause in the parties' 8(f) agreement, the Board, without 'cogent explanation,' permitted a 9(a) relationship to be established by a means other than those specified in the Board precedent governing the post-Deklewa transformation of 8(f) relationships into 9(a) relationships. 124 F.3d at 330.

We therefore take the opportunity afforded by the court's remand to clarify that in the construction industry, as in other industries, agreement for future 9(a) recognition are permissible and do not depend for their validity on showing of majority status at the time of the execution of the agreement. Rather, as explained below, where, as here, the parties' agreement so specifies, the union's providing the employer with reliable evidence of its majority status during the term of the 8(f) agreement is sufficient to trigger the employer's contractual obligation to grant 9(a) recognition to the union.

The Board explained further:

Accordingly, we hold that where the parties by express language have agreed that 9(a) recognition will be granted if the union submits proof of majority status during the contract term, the happening of the specified event, without more, triggers the legal consequences agreed on by the parties. In giving effect to prospective 9(a) recognition clauses in 8(f) agreements, we will presume that by providing the employer with reliable proof of majority status, the union is demanding recognition in accordance with the parties' agreement. The question whether the Union provided a contemporaneous showing of majority status will be examined as of the time that the contractually specified evidence is presented to the employer.

On the foregoing grounds, we conclude that a union's performance of the valid majoritarian conditions specified in a prospective 9(a) recognition clause constitutes a legally effective means for achieving 9(a) status in the construction industry. This is, in effect, a third option, in addition to the 'two-option[s]' that the court identified as the only available options for achieving 9(a) status at the time of this dispute. 124 F.3d at 330.

(Chairman Truesdale and Members Fox and Liebman participated.)

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#### **LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES**

*Team Fenex, Ltd.* (Machinists District Lodge 111) Sandoval, IL Oct. 27, 2000. 14-CA-25921; JD-136-00, Judge Richard H. Beddow, Jr.

*Food & Commercial Workers Local 2 (Armour Swift-Eckrich)* (Individual) Overland Park, KS Oct. 24, 2000. 17-CB-5282; JD-139-00, Judge Jerry M. Hermele.

*Proalso Trading Corp./Bimbo Bakeries* (Individual) Chicago, IL Oct. 27, 2000. 13-CA-38328; JD-142-00, Judge Robert A. Giannasi.

*Precipitator Services Group, Inc.* (Boilermakers) Altoona, PA Oct. 27, 2000. 4-CA-24627; JD-143-00, Judge Richard H. Beddow, Jr.

*Netpco, Inc.* (Teamsters Local 61) Granite Falls, NC Oct. 25, 2000. 11-CA-18576; JD(ATL)-54-00, Judge Richard J. Linton.

*Budget Heating and Air Conditioning, Inc.* (Sheet Metal Workers Local 15) Tampa, FL Oct. 30, 2000. 12-CA-20312; JD (ATL)-56-00, Judge Pargen Robertson.

*TTT West Coast, Inc.* (NABET, Communications Workers) New York, NY Oct. 24, 2000. 2-CA-32643; JD(NY)-68-00, Judge Howard Edelman.

*St. Barnabas Hospital* (Security Personnel Officers and Guards International Union) Bronx, NY Oct. 19, 2000. 2-CA-32373; JD(NY)-69-00, Judge D. Barry Morris.

*Eveready Carburetor & Auto Electric Co., Inc., & Now Inc., d/b/a Eveready Manufacturing Company, Joint Employers* (Teamsters Local 239) Queens, NY Oct. 25, 2000. 29-CA-22754-1, 22889; JD(NY)-70-00, Judge Raymond P. Green.

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### **NO ANSWER TO COMPLAINT**

*(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to answer the complaints.)*

*Industrial Experimental & Mfg. Co.* (Auto Workers Local 985) (7-CA-41803; 332 NLRB No. 76) Auburn Hills, MI Oct. 25, 2000.

*Northern Fire Protection* (Road Sprinkler Fitters Local 669) (30-CA-15139; 332 NLRB No. 93) Marinette, WI Oct. 31, 2000.

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### **TEST OF CERTIFICATION**

*(In the following cases, the Board granted the General Counsel's motion for summary judgment on the ground that the respondent has not raised any representation issues that are litigable in the unfair labor practice proceedings.)*

*Life Care Center of America, Inc. d/b/a Life Care Center of Plainwell* (Service Employees Local 79) (7-CA-43102; 332 NLRB No. 79) Plainwell, MI Oct. 26, 2000.

*Golfview Manor Nursing Home, Inc.* (Teamsters Local 261) (6-CA-31168; 332 NLRB No. 80) Aliquippa, PA Oct. 26, 2000.

*Midland King's Daughters Home* (Service Employees Local 79) (7-CA-43024-1; 332 NLRB No. 85) Midland, MI Oct. 26, 2000.

*Dillion Companies, Inc.* (Food & Commercial Workers Local 2) (17-CA-20718; 332 NLRB No. 102) Olathe, KS Oct. 31, 2000.