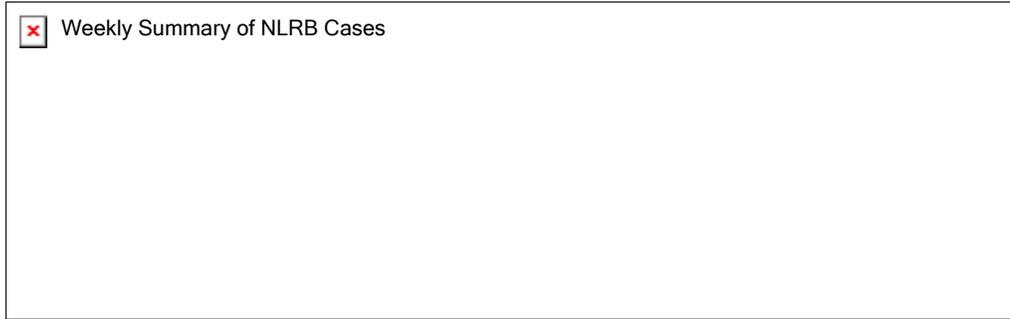


ABOUT THE WEEKLY SUMMARY

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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Electric, Inc. and Cebcor Service Corp. (4-CA-24429; 335 NLRB No. 26) Royce City, TX Aug. 27, 2001. In this supplemental decision, a Board majority of Members Liebman and Truesdale reversed the administrative law judge's recommended order to place backpay in escrow for one year so the Respondents and/or the General Counsel would be able to examine interim earnings by discriminatees Conroy and James. The two backpay claimants were not present during the compliance proceeding because neither the General Counsel nor the Respondents requested their appearance. The majority said "the Respondents did not carry out their responsibility to obtain Conroy's and James' appearance by either asking or subpoenaing them to attend the hearing." [\[HTML\]](#) [\[PDF\]](#)

In dissent, Member Hurtgen believed the judge's order was correct and as a matter of fundamental fairness the Respondents should be given a chance to request the presence of the discriminatees at a hearing to examine them regarding interim earnings.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Hearing at Philadelphia, PA on Feb. 28, 2000. Adm. Law Judge George Alemán issued his supplemental decision March 20, 2000.

* * *

Midwest Power Systems, Inc. (18-CA-12545; 335 NLRB No. 23) Des Moines, IA Aug. 27, 2001. This case, a supplemental decision to 323 NLRB 404 (1997), was remanded to the Board on Feb. 18, 1998 by the U.S. Court of Appeals for the District of Columbia Circuit to resolve the issue of whether retiree benefit plan documents are incorporated by reference in the parties' collective-bargaining agreements. The majority of Members Liebman and Truesdale conclude that retiree plan documents were not incorporated. "The relevant contract clauses refer specifically to the provision of employee insurance plans by separate agreement and make no reference to retirement benefit or plans," the majority stated. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Chairman Hurtgen stated "because I find that the language in the collective-bargaining agreements, the stipulations of the parties, and the parties' arguments on remand do not resolve the issue raised by the court, I would remand this case for a hearing before an administrative law judge."

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

* * *

MacDonald Machinery Co. (25-RC-9930; 335 NLRB No. 27) South Bend, IN Aug. 27, 2001. The Board majority of Chairman Hurtgen and Member Truesdale agreed with the hearing officer's recommendation to overrule the Petitioner's objection that the Employer engaged in objectionable conduct by soliciting and promising to remedy employee grievances during the critical period before an election on April 20, 2000. The petitioner lost (3 votes for, 4 votes against). [\[HTML\]](#) [\[PDF\]](#)

Dissenting Member Liebman would sustain the objection because the Employer solicited grievances after the petition was filed. Previously, she pointed out, the Employer had only reacted to employee initiatives.

The majority, however, states:

The significant point is that, both prior to the onset of the union campaign and after, the Employer was willing to listen to the complaints of its employees and to respond to them. There was neither a need nor a warrant to change this practice simply because of the union campaign. The ultimate question is whether there has been a promise of benefits in order to influence a union campaign. ... [W]e conclude there was no such promise.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

* * *

The Baltimore Sun Company (5-CA-28862; 335 NLRB No.10) Baltimore, MD Aug. 27, 2001. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to apply the extant collective-bargaining agreement to the Brand Builders Department employees accreted to the unit and, instead, insisting on bargaining for the accreted employees over terms and conditions of employment already covered by the extant collective-bargaining agreement. The status of the unit of employees represented by the Union recently was affirmed as an appropriate unit by the Board in *Baltimore Sun Co.*, 330 NLRB No. 167 (2000). The unit includes "all employees employed in the promotions and events department (the name thereafter was changed to the Brand Builders Department), including the design manager, but excluding all professional employees, guards, the director, the creative manager and all other supervisors as defined in the Act." [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Newspaper Guild Local 35; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Baltimore on Oct. 23, 2000. Adm. Law Judge Richard H. Beddow Jr. issued his decision Jan. 31, 2001.

* * *

Central Parking System, Inc. (20-RM-2831; 335 NLRB No. 34) San Francisco, CA Aug. 27, 2001. The Board majority of Members Liebman and Truesdale concluded the Regional Director properly dismissed the Employer's RM petition for an election in a separate unit consisting of employees in a company (Allright Parking) the Employer had acquired. Following the acquisition in 1999, the Union sought recognition of the Allright employees - relying on an "after-acquired clause" in the collective-bargaining agreement to which it is a party with the Employer. The Union interpreted the clause to mean the Employer, upon proof of majority status, would recognize the Union as the bargaining representative of employees at facilities subsequently acquired by the Employer. [\[HTML\]](#) [\[PDF\]](#)

The Employer refused to recognize the Union, asserting that Allright, a subsidiary of the Employer, was the employer of the employees at the facilities in question, and that Allright was not a party to any collective-bargaining agreement with the Union. The Union subsequently filed a grievance and requested that the matter be referred to arbitration. Consistent with its previously stated position, the Employer rejected the Union's request to proceed to arbitration. Thereafter, the Union filed a complaint in Federal district court to compel arbitration of the dispute.

On May 18, 2000, the Employer filed the instant petition for an election in a separate unit consisting of the employees at Allright's San Francisco facilities. The Regional Director administratively dismissed the petition on the basis that the Union had not made a demand for recognition in the petitioned-for unit but, rather, had sought to add the employees at issue to its existing unit.

Citing Houston Division of the *Kroger Co.*, 219 NLRB 388, 389 (1975), and *Pall Biomedical Products Corp.*, 331 NLRB No. 192, slip op. at 2 (2000), the majority said "the assertion of an after-acquired clause is a claim that the Employer has waived its right to demand an election." Accordingly, it held that "the Union's demand for recognition based on an alleged contractual

'after-acquired' clause does not entitle the Employer to demand an election under Section 9(c)(1)(B)."

The majority pointed out that the Union did not seek to represent the employees in the petitioned-for unit, i.e., a separate unit of the employees at Allright's facilities.

In dissent, Chairman Hurtgen would not dismiss the RM case. He stated:

My colleagues have dismissed the RM petition here based solely on a claim concerning an *alleged* 'after acquired' clause. The issues of whether there is such an agreement and whether such an agreement is a waiver of the Employer's right to an election, are the subject of a demand for arbitration. In sum, there has been no finding of waiver, and hence there is no basis for dismissal of the RM petition....

Unquestionably, the Union is demanding recognition as the representative of the Allright employees. If the Union had confined its demand to those employees, the RM petition could be processed, and an election would be held (absent a waiver). However, by seeking to accrete these employees into the extant unit, i.e., add them without an election, the RM petition is dismissed. Surely, this is an anomalous result, wholly at odds with Sections 7 and 9.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

* * *

Overnite Transportation Co. (26-CA-17397, et al.; 335 NLRB No. 33) Memphis, TN Aug. 27, 2001. The Board majority of Members Liebman and Truesdale agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Tollie Graves and Marcus Cole, and by reducing Horace Quinn's hours the day after the election, but that it did not violate the Act by discharging Quinn. However, it reversed the judge's findings that the Respondent's implementation of more stringent loading dock policies was lawful. The majority also reversed his finding that the General Counsel failed to meet his initial burden of establishing that the discharges of Sidney Wyrick, Steve and Anna Spillers, and Mark Cole were unlawfully motivated, and remanded these allegations to the judge for further consideration.

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Chairman Hurtgen dissented in part. He would affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) by discharging employees Sydney and Anna Wyrick, Steve Spillers, and dispatcher Mark Cole. In agreement with the judge he would find that the General Counsel failed to establish that antiunion animus was a motivating factor in these discharges. Regarding the discharges, he stated:

It may be true, as the majority states, that the Respondent harbored antiunion animus. However, the existence of antiunion animus alone is not sufficient to establish a violation of Section 8(a)(3). Rather, the General Counsel must establish a nexus between the animus and the adverse action alleged to be unlawful. In agreement with the judge, I would find that no such nexus was established in this case.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Teamsters Local 667 and individuals; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Memphis on several dates from April 22 - Aug. 11, 1998. Adm. Law Judge Pargen Robertson issued his decision Nov. 13, 1998.

* * *

Merrill Iron and Steel, Inc. (18-CA-15009; 335 NLRB No. 11) Schofield, WI Aug. 27, 2001. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act in its selection of four production employees active in the Union's organizing campaign for permanent layoff on September 22, 1998, in order to retaliate against them for their union support and activism and to discourage other employees from doing so in the future. It also agreed with the judge's finding that a fabrication superintendent unlawfully threatened employees by telling them that he

intended to get rid of union organizers before any union came about. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by the Paperworkers International; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Wausau June 8 - 10, 1999. Adm. Law Judge William J. Pannier III issued his decision Dec. 1, 1999.

* * *

A.G. Mazzocchi, Inc. and Maztec Environmental, Inc., as alter egos and a *Single Employer d/b/a Mazzocchi Wrecking* (22-CA-24212; 335 NLRB No. 32) East Hanover, NJ Aug. 27, 2001. The Board adopted the administrative law judge's finding that the Respondent's failure to assign work to three discriminatees because of their protected union activities violated Section 8(a)(3) and (1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Teamsters Local 560; complaint alleged violation of Section 8(a)(3) and (1). Hearing at New York, NY, Feb. 27 and March 1, 2001. Adm. Law Judge D. Barry Morris issued his decision June 5, 2001.

* * *

Chariot Marine Fabricators Corp. and Mariah Boats, Inc. (14-CA-24551, et al.; 335 NLRB No. 30) West Frankfort and Benton Mariah, IL Aug. 27, 2001. The Board adopted the administrative law judge's finding that the Respondent unlawfully closed its Chariot plant in West Frankfort, IL, in order to chill unionism at its Mariah facility six miles away in Benton, thereby eliminating all 13 production and maintenance employees and truck drivers on April 30, 1997. Among other violations in the complaint, upheld by the Board, the Respondent had an employee handbook that contains a provision that implicitly threatens retaliatory conduct if employees sought representation. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Southern Illinois Laborers' District Council; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Benton, May 4 - 8 and June 1 - 3, 1998. Adm. Law Judge C. Richard Miserendino issued his decision April 23, 1999.

* * *

L.W.D., Inc., et al. (26-CA-18390, et al.; 335 NLRB No. 24) Calvert City, KY Aug. 27, 2001. The Board majority of Members Truesdale and Walsh reversing the administrative law judge's bench decision, held that the Respondent violated Section 8(a)(1) of the Act by effectively threatening employees -- in an Oct. 2, 1997 letter, with the loss of their jobs if they selected the Union as their bargaining representative. The letter, signed by the Respondent's president as well as the owner, stated in part: "This is a very serious matter for you and your families, so please think about it carefully. Then, on the day of the election, vote as if your job depends on it." [\[HTML\]](#) [\[PDF\]](#)

Dissenting in part, Chairman Hurtgen said he would dismiss the 8(a)(1) allegation since at the time the letter was given to employees there had been no layoffs or job losses. Thus, employees would not read into it a threat of job loss, he said.

The Board adopted the judge's finding that a statement by the Respondent's president, William O'Brien to recently laid off employee James Malone that the employees had been told "to vote as if their jobs depended on it" constituted an unlawful threat linking the election outcome with job security. In agreeing with the majority on this violation, Chairman Hurtgen observed that "the O'Brien statement to Malone was unlawful in context, but that does not mean that statement made 2 months earlier in a different context [i.e. the Respondent's Oct. 2, 1997 letter] is unlawful." He pointed out, in contrast to the circumstances in *Dutch Boy, Inc.*, 262 NLRB 4 (1982) -- a case cited by the majority -- no unlawful layoffs preceded the issuance of the letter.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by and Oil, Chemical and Atomic Workers International; complaint alleged violation of Section 8(a)(1). Hearing at Calvert City, on several dates June 15 - 18, July 6 - 9, and Aug. 27 - 28 and 31, 1998. Adm. Law Judge Keltner W. Locke issued his decision Dec. 23, 1998.

* * *

W.D.D.W. Commercial Systems & Investments, Inc., d/b/a Aztech Electric Co. et al. (21-CA-29201, et al.; 335 NLRB No. 25) Irvine, CA Aug. 27, 2001. This is a "salting" case involving the activities of members and agents for three IBEW Locals directed towards three Respondent Employers: CLP, a nonunion construction employee leasing company, and two of its nonunion construction contractor clients, Aztech Electric Co. (Aztech), and Fuji Electric Corp. (Fuji). The 8(a)(3) and (1) complaint included several allegations of specific discrimination against individual "salts" but the primary focus was on two subjects: (1) Respondent CLP's "30-percent rule," a policy of not hiring or considering any applicant whose recent wage history differs by 30 percent from CLP's starting wages, and (2) CLP's defense that paid union organizers are not employees within the meaning of Section 2(3) of the Act because the salting tactics of their unions created a "disabling conflict" with CLP. [\[HTML\]](#) [\[PDF\]](#)

The Board majority of Members Liebman, Truesdale, and Walsh affirmed the administrative law judge's finding that CLP's 30-percent rule was inherently destructive under a Great Dane Trailers' analysis, and therefore unlawful, because it effectively excluded from eligibility for hire virtually all applicants who had recently worked for unionized employers. Chairman Hurtgen dissented. He disagreed that the 30-percent rule was unlawful. However, the majority disagreed with the judge's further finding of merit in CLP's "disabling conflict" defense with respect to IBEW Local 441's salting campaign. The judge found that this Union's campaign had an objective of eliminating nonunion employers' operations, rather than organizing their employees, within its jurisdiction. He concluded that paid union organizers of a union pursuing such an objective were not statutory employees. He further suggested that Respondent CLP might be entitled to presume that any applicant from Local 441 was a paid union organizer, so that the General Counsel would bear the burden in compliance proceedings of proving which victims of the unlawful 30-percent rule were not paid union organizers.

In a separate concurring opinion, Members Liebman and Walsh stated:

The Act recognizes both the reality and the legitimacy of economic conflict between employers and employees. Indeed, the Act affirmatively protects concerted employee activity that is unavoidable, and even deliberately, inconsistent with employers' economic interest. Unlike our colleagues, we would not deem employees' pursuit of such activities a 'disabling conflict' or 'inimical to [an] employer's operations.'

Our colleagues would do so, we believe, because they fear the implications of IBEW Local 441's rhetoric and its candid acknowledgment that it is engaged in economic warfare. These fears, however, are insufficient to deprive the paid organizers, whom we all acknowledge are statutory employees, of the rights and privileges accorded that status. *Town & Country* . . . teaches that in the absence of objective evidence, we may not presume or infer a disabling conflict. IBEW Local 441's rhetoric and conduct here was aggressive, but it was wholly protected. It did not cross the line into illegality or disloyalty, or otherwise lose its protected character, however offensive our colleagues may find it.

Concurring in part, Member Truesdale stated:

I conclude that Respondent CLP has shown that IBEW Local 441 had a declared institutional policy of putting nonunion employers such as Respondent CLP out of business, that its paid 'salts' encouraged and pursued this policy through the filing of as many unfair labor practice charges as possible, without regard for their merit, and that this policy and the tactics used to further it were not reasonably related to organizing or any other legitimate interests of Local IBEW 441, its members, and the employees it represents. A disabling conflict therefore existed between IBEW Local 441 and targeted nonunion employers, including Respondent CLP. Under these circumstances, as in *Sunland Construction*, supra, Respondent CLP was entitled for as long as the conflict existed

to take steps aimed at protecting itself from injury by refusing to hire or to retain in its employ individuals whom it knew were paid agents of that union.

However, Member Truesdale agreed with Members Liebman and Walsh that Respondent CLP has committed the alleged 8(a)(3) violations and that it is not entitled to litigate the disabling conflict issue as a *Wright Line* defense in future stages of this proceeding. He noted that "CLP has only raised a disabling conflict issue in the limited context of its erroneous legal argument that paid union salts of a union enmeshed in a disabling conflict are not statutory employees."

Chairman Hurtgen said the possible tolling of backpay should not be precluded from litigation in supplementary proceedings. He stated further:

I agree with Members Liebman and Walsh that union activity does not become unprotected simply because, as a consequence thereof, the employer may be economically harmed by that activity. However, where, as here, the purpose of IBEW Local 441 and its employee-supporters is simply to injure the Employer, I believe that conduct in pursuit of that goal is unprotected. Thus, if a union and its supporters know that organizing the employer's employees is futile, and set out to punish the employer (and its employees) for their nonunion status, their conduct is unprotected.

Members Liebman and Walsh appear to take the position that it is protected activity for a union to seek to drive a nonunion employer out of business, if the ultimate goal is to protect the standards of unionized employees elsewhere. I disagree. The union can seek to organize the nonunion employer, and/or can seek to have him conform to 'area standards,' but I know of no case that would protect a blatant effort to drive him out of business.

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

Charges filed by Electrical Workers IBEW Locals 441, et al.; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Los Angeles, San Francisco, and Seattle on various days between Sept. 11, 1995 - Nov. 8, 1996. Adm. Law Judge Gerald A. Wacknov issued his decision Sept. 3, 1997.

* * *

Laborers Local 334 (Kvaerner Songer, Inc.) (7-CB-12525, 12667; 335 NLRB No. 50) Washington, PA Aug. 27, 2001. The Board in an opinion by Members Liebman and Truesdale affirmed the administrative law judge's finding that the Respondent unlawfully refused to allow the Employer to hire applicant Stites. Chairman Hurtgen, in a concurring opinion, did not believe the complaint encompassed the allegation. The complaint alleged that the Respondent Union refused employee Stites a referral out of that hall, and that the Respondent Employer therefore did not hire him. [\[HTML\]](#) [\[PDF\]](#)

The judge disagreed with the complaint's allegation that there was an exclusive hiring hall, but found a violation by the Respondent Union.

Chairman Hurtgen noted that the complaint contained an alternative contention that "even if the hiring hall was not an exclusive one, the Respondent Employer violated the Act by not hiring Stites. However, the complaint did not allege an alternative contention in regard to the Respondent Union."

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Arthur C. Stites, an individual; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Detroit, MI March 12, 2001. Adm. Law Judge William G. Kocol issued his decision May 1, 2001.

* * *

Crown Textile Co. and Specialty Textile Products, Inc. (10-CA-29382, 29886; 335 NLRB No. 12) Talladega, AL Aug. 27, 2001. The Board majority of Members Liebman and Walsh reversed the administrative law judge's dismissal of allegations

that Specialty Textile Products, Inc. (STP), a successor to Crown Textile Co., violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. [\[HTML\]](#) [\[PDF\]](#)

The facts of this case are as follows: On October 15, 1996, STP purchased two plants from Respondent Crown Textile Company (Crown). On October 16, STP took over the operations at those plants. On October 24 or 25, STP received a petition, signed by an overwhelming majority of the bargaining unit employees, stating that the bargaining unit employees did not want representation by the Union or any other labor organization. On October 29, the Union demanded recognition and requested bargaining with STP concerning the employees' terms and conditions of employment. After receiving the Union's request, STP refused to recognize or bargain with the Union based on the employees' petition.

The majority, in finding a violation, stated: "Manifestly, STP's obligation to recognize and bargain with the Union had attached when it refused to bargain. Both predicate events required by *St. Elizabeth Manor* to establish a bargaining obligation had transpired." The majority held that STP was not privileged to rely on the employee petition in refusing to bargain with the Union, based on the "successor bar" rule enunciated in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

In the dissenting view of Chairman Hurtgen, "consistent with *Fall River*, the Union no longer maintained majority support (or at least there was uncertainty on this issue) by the time it requested recognition and bargaining. Therefore, STP did not violate the Act by thereafter refusing to recognize and bargain."

Chairman Hurtgen said even if he subscribed to the rule in *St. Elizabeth Manor*, a case in which he dissented, he would uphold the judge's dismissal of the refusal-to-bargain allegation. He stated:

Under *St. Elizabeth Manor*, an employee petition is not cognizable if it arises after the duty to bargain has attached. And, under *St. Elizabeth Manor*, the duty to bargain attaches when a substantial and representative complement has been hired *and* a demand for recognition has been made. In the instant case, the demand for recognition was not made until October 29. Thus, the employee petition of October 24 or 25 was timely.

My colleagues abandon the distinction between petitions dated before the duty to bargain attaches and those dated after. They assert that the employees' decertification efforts are untimely irrespective of whether they occur before or after the commencement of the duty to bargain....[T]his is contrary to the precise wording of *St. Elizabeth Manor*.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by UNITE; complaint alleged violation of Section 8(a)(5) and (1). Hearing at Birmingham, June 18, 1997. Adm. Law Judge Robert C. Batson issued his decision Feb. 13, 1998.

* * *

Teamsters Local 890 (Basic Vegetable Products) (32-CB-5120-1; 335 NLRB No. 55) King City, CA Aug. 27, 2001. The Board majority of Chairman Hurtgen and Member Truesdale affirmed the administrative law judge's finding that the Respondent Union unlawfully videotaped replacement employees, their vehicles, and license plates as they entered and exited the Charging Party's facility during a 1999 strike. [\[HTML\]](#) [\[PDF\]](#)

The majority noted that the Board has held that "photographing or videotaping license plates and/or occupants of vehicles crossing a picket line, when coupled with abusive remarks or other conduct having a reasonable tendency to instill fear of retribution in the minds of replacement or crossover employees, violates Section 8(b)(1)(A)." It stated further:

In light of the Respondent's routine videotaping of replacement employees entering and leaving the Employer's facility, at times when no violence or intimidating acts were taking place, employees could reasonably believe, under all the circumstances of this case, that the Respondent was videotaping them in order to learn their identities, and that the Respondent might "react adversely" to their failure to honor its picket line.

In dissent, Member Walsh said "the Union's purposes for videotaping the replacement workers, their vehicles, and license plate numbers were entirely lawful." He said the Union's reasons for collecting this information were to assist in recording any threats or violence by replacement workers as well as violations of law by the Employer, and to gather corroborating evidence in the event of unwarranted accusations against the picketers. Member Walsh would dismiss the complaint since he did not find the videotaping coercive in violation of Section 8(b)(1)(A). He pointed out that "the Union's purposes for videotaping replacement workers, their vehicles, and license plate numbers were lawful, and the videotaping was not accompanied by words or conduct that would have a reasonable tendency to cause the employees to fear retribution for not honoring the picket line."

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charge filed by Basic Vegetable Products, L.P; complaint alleged violation of Section 8(b)(1)(A). Hearing at Salinas, Jan. 26, 2000. Adm. Law Judge Mary Miller Cracraft issued her decision May 24, 2000.

* * *

Ray Black & Sons Construction, Inc. (14-CA-25168, et al.; 335 NLRB No. 38) Mt. Vernon, IL Aug. 27, 2001. The Board reversed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) withdrawing recognition from the Union because Respondent failed to show, in its defense, that the bargaining unit had declined to a stable single-employees unit; and (2) refusing to provide the Union with certain requested information. It found that the unit at issue was a stable single-employee unit when the Respondent withdrew recognition. Therefore, the Board concluded that the Respondent's withdrawal of recognition was lawful, and Respondent was thus under no obligation to provide the Union with the requested information. [\[HTML\]](#) [\[PDF\]](#)

The Board said the unit description was "facially ambiguous" since it includes "All employees who are primarily engaged in the performance of electrical work," but it does not state a period of time during which "primarily engaged" is to be measured.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IBEW Local 702; complaint alleged violation of Section 8(a)(5) and (1). Hearing at St. Louis, MO on April 26, 2000. Adm. Law Judge William G. Kocol issued his decision Aug. 1, 2000.

* * *

Dakota Premium Foods (18-RC-16679; 335 NLRB No. 19) St. Paul and Newport, MN Aug. 27, 2001. Affirming the hearing officer's report, Members Liebman and Walsh overruled the Employer's objections to an election held July 21, 2000 and certified Food and Commercial Workers Local 789 as the exclusive representative of all full-time and regular part-time production and maintenance workers employed at the Employer's plant located in South St. Paul, Minneapolis facility, and shipping employees employed at the Employer's Newport facility. Chairman Hurtgen, dissenting, would sustain the Employer's objection, set aside the election, and order that a new election be held. [\[HTML\]](#) [\[PDF\]](#)

The Employer's objection contended that the sample ballot distributed to the employees was defaced with the "Yes" box checked and argued that these altered sample ballots gave employees the misleading impression that the Board supported the Union. Consistent with his dissent in *Systrand Manufacturing Corp.*, 328 NLRB No. 111 (1999), Chairman Hurtgen would require a clear written disclaimer on the face of any altered sample ballot, or in the alternative, an oral disclosure by the defacing party that is responsible for the altered sample ballot. Because the altered sample ballot in this case was accompanied by no such disclaimer, he found merit in the Employer's objection and would set aside the election.

Members Liebman and Walsh said ". . . our dissenting colleague seeks to establish a new 'bright line' test in which he would require that an altered sample ballot circulated as election campaign propaganda must contain either a written or oral disclaimer. As in *Systrand*, we decline to modify well-developed Board precedent with respect to the use of altered or defaced sample ballots as election propaganda." They held that the hearing officer appropriately applied the Board's two-part analysis set out in *SDC Investments*, 274 NLRB 557 (1985), in determining that the Union's distribution of marked sample ballots was

not objectionable because employees receiving these documents could easily conclude that they came from the Union. The majority also agreed with the hearing officer that the language on the Board's revised Notices would have effectively disclaimed any participation by the Board in the preparation of the sample ballot, and would have sufficiently reassured employees of the Board's neutrality in the election.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Tri-County Manufacturing and Assembly, Inc. (9-CA-37528, et al.; 335 NLRB No. 16) Williamsburg, KY Aug. 27, 2001. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by: threatening employees that the Respondent would cease to exist if they became unionized; threatening employees that the Respondent would "depart" if they became unionized; threatening employees that the Respondent would "not exist in Williamsburg" if they became unionized; "daring" employees to come forward and contradict the Respondent's denial of an unfair labor practice allegation; and stating to employees that it would not sign a collective bargaining agreement. It also affirmed the judge's finding that the Respondent's suspension and discharge of Robert Moore violated Section 8(a)(1) of the Act. No exceptions were filed to the dismissal of the 8(a)(1) and (3) allegations concerning employee William Hamilton. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Corbin on Jan. 23 and 24, 2001. Adm. Law Judge Paul Bogas issued his decision May 7, 2001.

* * *

Awrey Bakeries, Inc. and Council 30, United Distributive Workers Union (RWDSU) (7-CA-43042(2), 7-CB-12585(2); 335 NLRB No. 6) Livonia, MI Aug. 24, 2001. The Board agreed with the administrative law judge that the Respondent Employer and Respondent Union violated Section 8(a)(1) and 8(b)(1)(A) of the Act respectively, by maintaining a clause in their collective-bargaining agreement which limits union activity in the workplace. It modified the judge's recommended Order to rescind that portion of the parties' agreement which reads "The Union agrees that its members shall not carry on any Union activities on Company time during working hours. . . ." No exceptions were filed to the judge's finding that the Respondent Union violated Section 8(b)(1)(A) or to his recommended dismissal of the 8(a)(5) unfair labor practice allegation. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Douglas Wiseman, an individual; complaint alleged violation of Section 8(a)(1) and (5) and Section 8(b)(1)(A). Hearing at Detroit on Feb. 5, 2001. Adm. Law Judge Jane Vandeventer issued her decision May 11, 2001.

* * *

Pea Ridge Iron Ore Company, Inc. (14-RC-12165; 335 NLRB No. 21) Sullivan, MO Aug. 24, 2001. Members Liebman and Walsh, in reversing the Regional Director's conclusion that no eligible voter was possibly disenfranchised by the late opening of the polls, held that where the election was decided by one vote, the late opening of the polls potentially affected the results of the election. Relying on *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996), the majority said: "When election polls are not opened at their scheduled times, the proper standards for determining whether a new election should be held is whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised." Therefore, they sustained the Employer's objection and ordered that the election be set aside and a new one held. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Chairman Hurtgen would uphold the election and certify the union. He agreed with the majority that the Board does not accept post-election statements regarding the subjective reasons for an employee's failure to vote but found the instant case does not involve such statements. Chairman Hurtgen asserted that the objective evidence here affirmatively shows that no

employees were possibly disenfranchised because of the 7-minute delay in opening the polls and that their failure to vote was attributable to other factors.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Watkins Contracting, Inc. (21-CA-33379; 335 NLRB No. 17) San Diego, CA Aug. 27, 2001. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with information consisting of a list of current employees, their addresses, job classifications, rate of pay, telephone numbers, if any, and a list of present job locations including site addresses. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended it had no duty to furnish the information because it had provided similar information to the Union in July 1998. By letter dated March 23, 1999, the Union requested information "pertaining to negotiations" which the judge found was essentially a request for an update. The Respondent did not reply. In a letter dated April 2, 1999, the Respondent stated that since the parties were at impasse, it was under no obligation to continue negotiations until another proposal was submitted by the Union.

The Board noted that no exceptions were taken of the judge's decision concerning the availability of the requested information from other sources, or concerning the Respondent's confidentiality claim. It agreed with the Respondent's argument that the judge's recommended Order is overly broad in certain respects and modified the recommended Order to remedy more precisely the violation found by the judge.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charge filed by Laborers Local 882; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Diego on Aug. 29, 2000. Adm. Law Judge Jay R. Pollack issued his decision March 23, 2001.

* * *

Trans-Lux Midwest Corp. (18-CA-14523; 335 NLRB No. 22) Des Moines, IA Aug. 27, 2001. The Board, on a stipulated record, held that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the IBEW Local 347 as the exclusive representative of its production and maintenance employees. [\[HTML\]](#) [\[PDF\]](#)

The Board held that the Respondent is a Burns successor to Fairtron Corp. As an additional basis for finding that the Respondent unlawfully refused to recognize the Union, Members Liebman and Walsh relied on *St. Elizabeth Manor, Inc.*, 329 NLRB No. 341 (1999), as extended to the unfair labor practice context by *Inn Credible Caterers*, 333 NLRB No. 110 (2001). They said "In these cases, the Board found that once a successor's duty to bargain attaches, and for a reasonable time thereafter, there can be no challenges to the union's majority status. Thus, for a reasonable period of time, there is an irrebuttable presumption of the union's majority status. Applying these principles to the facts of this case, we find that the Respondent's obligation to recognize and bargain with the Union attached on May 19, when the Respondent had hired a substantial and representative complement of employees, a majority of whom had been employed by Fairtron, and the Union had demanded recognition. The Respondent's June 5 refusal to recognize the Union therefore was not privileged, in light of the 'successor bar' rule enunciated in *St. Elizabeth Manor and Inn Credible Caterers*."

Chairman Hurtgen does not subscribe to the Board's decision in *St. Elizabeth Manor*, from which he dissented. For the reasons stated in his concurring opinion in *Inn Credible Caterers*, he also does not support the extension and application of *St. Elizabeth Manor* to the unfair labor practice context and does not join in his colleagues' finding that these decisions form an additional basis for the instant violation or for the affirmative bargaining order. Chairman Hurtgen noted that although he agreed with his colleagues that the instant statistics on union membership do not establish that the Union has lost majority support, he nevertheless found those statistics suggestive.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 347; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing before an administrative law judge.

* * *

Jacee Electric, Inc. (4-CA-28979, 4-RC-19914; 335 NLRB No. 46) Morrisville, PA Aug. 27, 2001. Members Truesdale and Walsh agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Justin Waid, threatening to close its business if employees selected Electrical Workers IBEW Local 269 as their collective-bargaining representative, and promising Waid benefits if he abandoned his union support. They also agreed that the Respondent violated Section 8(a)(3) and (1) by laying off Robert Hearon on February 25, 2000, because of his suspected union activities, and that the challenge to Hearon's ballot cast in a March 28, 2000 election should be overruled, stating: "[W]here the layoff represented sharp departure from past practice, where the latest reason proffered by the Respondent does not withstand scrutiny, and where the Respondent has presented shifting defenses, we find that the judge was warranted in rejecting the Respondent's explanation as pretextual." [\[HTML\]](#) [\[PDF\]](#)

Chairman Hurtgen, dissenting in part, concluded that the Respondent has shown that, based on the unavailability of work for Hearon, it was justified in laying him off, and the challenge to his ballot should be sustained.

The tally of ballots for the election held in Case 4-RC-19914 showed one vote for and one vote against, the Union, with three challenged ballots, including that of Hearon. The Regional Director determined that a hearing was warranted on the challenges to the ballots of Hearon and Ann Cowan. The challenge to Cowan's ballot was sustained.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 269; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on July 19, 2000. Adm. Law Judge Arthur J. Amchan issued his decision Sept. 20, 2000.

* * *

Verizon Information Systems (22-RC-12067; 335 NLRB No. 44) Somerset, Paramus, and Malton, NJ Aug. 27, 2001. Chairman Hurtgen and Member Liebman, with Member Walsh dissenting, found that the "Memorandum of Agreement Regarding Neutrality and Card Check Recognition" (Agreement) executed by the Employer and the Communications Workers of America, constitutes a bar to the petition filed by the CWA seeking to represent a unit of sales and related classifications of employees at the Employer's Somerset, Paramus, and Malton, New Jersey offices. In a separate concurring opinion, Member Liebman noted that her decision in this case is consistent with her decision in *Central Parking System*, 335 NLRB No. 34. [\[HTML\]](#) [\[PDF\]](#)

The Employer sells advertising in printed and electronic phone directories throughout the U.S. and consists of former employees of Bell Atlantic's directory companies and GTE's directory services. The Agreement applies to the "Directory South Sales" (south sales) employees in New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia.

The majority, in dismissing the instant petition, relied on the fact that the Petitioner invoked the provisions of the Agreement in seeking to organize the Employer's employees and that the Petitioner itself filed the petition. It would not have found that the Agreement bars the petition had the Petitioner instead chosen to file a representation petition with the Board initially, and never invoked the Agreement. And, it did not find that the Petitioner would be barred from filing a petition if it could establish that the Agreement was no longer binding.

The majority said the issue is not, as dissenting Member Walsh contends, whether the Petitioner "clearly and unmistakably" waived its right to a representation petition, but rather whether the Petitioner—having elected to proceed under the Agreement and derived benefits from it—should be permitted to pick and choose which provisions it wishes to invoke and which it prefers to avoid. Finding that the question is one of estoppel, the majority noted that the Petitioner does not contend that the Agreement is no longer operative or applicable to this case. It wrote: "Here, by agreeing to a card-check and voluntary

recognition procedure, the Employer was induced to believe that the Petitioner would not file a petition with the Board, and the Employer relied to its detriment on the Union's actions by providing information to the Union and proceeding to arbitration. It is for these reasons-not, as the dissent asserts, "because of a pending arbitration on the scope of the appropriate unit"-that we hold this Agreement bars this Petitioner from filing this petition at this time."

Member Walsh noted that his colleagues failed to offer any explanation as to how the Agreement's language permits the filing of a representation petition prior to when the Agreement is invoked, but prohibits the filing of a petition after it is invoked; that there is no basis for finding a clear and unmistakable waiver in the Petitioner's agreement to arbitrate the parties' dispute over the unit; that equitable estoppel is inapplicable at this time; and that the Board has consistently held that it will not defer questions of representation to arbitration where determination of the issues does not depend upon contract interpretation but involves application of statutory policy, standards and criteria.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Operating Engineers Local 17 (Hertz Equipment Rental Corp.) (3-CB-7607; 335 NLRB No. 47) Tonawanda, NY Aug. 27, 2001. Chairman Hurtgen and Member Truesdale in upholding the administrative law judge's decision that the Respondent violated Section 8(b)(1)(A) of the Act by blocking ingress and egress to the Employer's facility, denied the Respondent's motion to dismiss the complaint and to reassign the case to another Region for a new investigation because the Respondent's counsel was not present when the Board agent assigned to investigate the charge took an affidavit from the Respondent's organizer and agent, Gerald Franz. [\[HTML\]](#) [\[PDF\]](#)

Member Walsh, concurring in the result, found the Board agent did not follow proper procedure in interviewing the Respondent's agent without the presence of his counsel and that, as a matter of fundamental fairness, the Board agent should have waited at least until he was assured that the counsel knew about the interview before going forward. He agreed however with the judge that the Respondent has not in fact shown that it was prejudiced by the conduct of the investigation, noting that no party sought to introduce Franz' affidavit, Franz was not called as a witness, and the Respondent has neither contended nor shown that its decision not to call Franz as a witness was influenced by the manner in which his affidavit was taken.

The Board agent initiated contact with Franz before any notice of appearance had been received and made an appointment to take his affidavit. Prior to the date of the appointment, the Respondent's counsel entered a notice of appearance, which requested that all contacts with the Respondent be initiated through counsel. Upon receiving this notice, the Board agent attempted to contact the Respondent's attorney and left a phone message advising him of the scheduled appointment to take Franz's affidavit. The Board agent also called Franz and asked if he wished to go forward with the affidavit in light of the entry of appearance. Franz voluntarily agreed. Franz's affidavit was not used at the hearing, and Franz was not called to testify by any party.

Chairman Hurtgen and Member Truesdale found the investigation of the charge complied with Section 10056.6 of the Board's Case Handling Manual, noting that, while counsel is normally to be notified of interviews of supervisors or agents conducted in the course of investigating a charge, and given an opportunity to be present, the witness ultimately has the right to be interviewed, without the presence of counsel, if that is the witness' desire. They disagreed with Member Walsh's assertion that finding there was no misconduct is somehow foreclosed by the Board's March 1, 2000 Order denying the Respondent's motion to dismiss the complaint and transfer the case to another Region. Chairman Hurtgen and Member Truesdale noted the Order, by its express terms, referred the entire matter, including the motion to dismiss the complaint to the judge assigned to the case, and reserved any ruling by the Board until the issuance of the judge's final decision in this case, upon the filing of exceptions by any party and, thus, they declined to read into the prior order their colleague's interpretation.

In Member Walsh's view, a fair reading of the earlier order reveals that the Board panel recognized that the Board agent's conduct might have been improper, but concluded that dismissal of the complaint may not be the proper remedy. He wrote: "Instead, the panel suggested that a remedy might only be appropriate if the Respondent could show that it was somehow prejudiced at the hearing because of the actions of the Board agent. I consider that prior ruling to be the law of the case. My colleagues, however, ascribing no substantive meaning to the ruling at all, have decided to rule that the Board agent's actions

were proper." Member Walsh found it unnecessary to rule on whether the Board Agent's conduct was proper or not, but since his colleagues concluded that such a ruling is necessary, he set forth his contrary view.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charge filed by Hertz Equipment Rental Corp.; complaint alleged violation of Section 8(b)(1)(A). Hearing at Buffalo on April 10, 2000. Adm. Law Judge George Alemán issued his decision July 17, 2000.

* * *

Yuker Construction Co. (7-CA-42275, et al.; 335 NLRB No. 28) Gaylord, MI Aug. 30, 2001. Members Liebman and Truesdale agreed with the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Randy Newberry and Dennis Purgiel for engaging in a protected concerted discussion regarding their wages, hours, and working conditions. The judge found, and the majority agreed, that the General Counsel failed to prove that protected concerted activity was a motivating factor in the discharges, and alternatively that the Respondent would have discharged Newberry and Purgiel even in the absence of that activity based on the belief that they were seeking other employment while being paid by Respondent. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The Respondent operates a commercial hauling business that slows down considerably during the winter months. Around the fall of 1999, the Respondent arranged to haul merchandise for Wal-Mart during the upcoming winter in an attempt to supplement its revenues and avoid layoffs. The Respondent offered this work to its drivers at 32 cents per mile. Newberry and Purgiel had a conversation over their company-issued Nextel phones about the wages offered for Wal-Mart work, refusal to work for those wages, the imminent layoffs, and the need to find interim employment. Benny Yuker, the Respondent's president, overheard their conversation.

Member Walsh, finding that the employees' conversation was protected concerted activity in its entirety, applied *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), which sets forth the standard for determining whether an employer has violated the Act by discharging an employee for alleged misconduct arising out of protected activity. He noted that Yuker misunderstood the employees' statements regarding potential interim employment and, based on that misunderstanding, discharged them in the belief that they were actively seeking outside employment while working for him. Thus, the Respondent carried its burden to prove it held an honest belief that Newberry and Purgiel engaged in misconduct, but as the judge concluded, however, Yuker was mistaken. Member Walsh would find the General Counsel carried his burden to prove that Newberry and Purgiel were not guilty of the misconduct for which they were terminated and, under *Burnup & Sims*, the Respondent discharged them in violation of Section 8(a)(1).

The exceptions related only to the judge's dismissal of allegations that the two discharges were unlawful. The judge found that the Respondent violated Section 8(a)(1) in several respects, including interrogating, threatening, and accusing employees of disloyalty because of their activities for Teamsters Local 247, soliciting complaint and grievances from employees and promising to remedy them, and offering employees rides to an NLRB election if they promised to vote against the Union.

(Members Liebman, Truesdale and Walsh participated.)

Charges filed by Teamsters Local 247; complaint alleged violation of Section 8(a)(1). Hearing at Grayling, Aug. 1-2, 2000. Adm. Law Judge Benjamin Schlesinger issued his decision Oct. 5, 2000.

* * *

Lakeland Bus Lines, Inc. (22-CA-21950; 335 NLRB No. 29) Dover, NJ Aug. 27, 2001. Members Liebman, Truesdale, and Walsh reversed the administrative law judge's finding that the Respondent's failure to provide Amalgamated Transit Local 1614 with certain requested financial information did not violate Section 8(a)(5) of the Act, and held that under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and its progeny, the Respondent's conduct constituted a claim of an inability to pay, and that accordingly, the Respondent was required to provide the Union with the requested financial information necessary to support such a claim. Chairman Hurtgen, dissenting, would dismiss the complaint. [\[HTML\]](#) [\[PDF\]](#)

The parties' contract was set to expire in January 1997. Before negotiations began in November 1996 for a successor agreement, the Respondent lost a significant amount of ridership and revenue due to a newly created, subsidized rail line service. The main focus of the negotiations concerned the Respondent's desire for an extended wage freeze and for a modification of the "spread time rules" that would decrease the amount of overtime that employees could earn on their shift. The parties engaged in 11 bargaining sessions, including a final session on February 21, 1997. On February 25, the Respondent submitted its final offer to the Union, which included the extended wage freeze, the spread time proposal, and a one-time payment of \$500 per employee in exchange for the Union's agreement on the spread time modification. The Respondent's president sent a letter that day to employees detailing the Respondent's position. By letter dated February 26, the Union's attorney requested the Respondent to provide financial information.

The majority held "the statements made in the Respondent's February 25 letter to employees, when considered in the context of the Respondent's repeated assertions during negotiations about its loss of ridership and revenue, effectively communicated a claim of a present inability to pay anything more than that contained in its final offer, and that this claim triggered an obligation to furnish the Union with the requested financial information." The Respondent's refusal to furnish the requested information thus violated Section 8(a)(5) and its implementation of its final offer was likewise unlawful because the failure to furnish the requested information precluded the parties from reaching a valid impasse, the majority held. In view of its finding that this case is distinguishable from *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), affd. sub. nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992), the majority found it unnecessary to pass on the contentions of the General Counsel and Charging Party that *Nielsen* should be overruled.

In dissent, Chairman Hurtgen noted his colleagues' failure to reach the central argument raised by the General Counsel and Charging Party, i.e., that the Board should overrule *Nielsen*. He rejected the majority's efforts to achieve that result by purporting to distinguish this case from *Nielsen*. Applying *Nielsen*, the Chairman would dismiss the 8(a)(5) information allegation, finding that, because the Respondent never expressly or implicitly pled an inability to pay the wage increase that the Union sought in negotiations, the Union was not entitled to the requested financial information. As the General Counsel concedes that absent this 8(a)(5) violation, the subsequent impasse was lawful, he would additionally dismiss allegations that the Respondent made unlawful unilateral changes when implementing its bargaining proposals after impasse.

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

Charge filed by Amalgamated Transit Local 1614; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark on Dec. 1, 1998. Adm. Law Judge Raymond P. Green issued his decision Feb. 22, 1999.

* * *

Fruehauf Trailer Services, Inc., a wholly-owned subsidiary of *Wabash National Corp.* (19-CA-25749; 335 NLRB No. 35) Spokane, WA Aug. 27, 2001. Agreeing with the administrative law judge, Members Liebman and Truesdale found that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) failing to meet and bargain with Machinists District Lodge 751 at reasonable times and intervals after the Respondent recognized the Union on April 29, 1997, as the exclusive representative of certain employees at its newly-acquired Spokane, Washington facility, and (2) withdrawing recognition from the Union on November 7, 1997 based on a petition, indicating that 5 of 10 unit employees no longer desired representation; and violated Section 8(a)(1) on August 21, 1997 by denying employee Huston's request for union representation during an investigative interview, and by telling him the reason was that the Spokane facility was "nonunion." In agreement with the judge, they found that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. [\[HTML\]](#) [\[PDF\]](#)

Chairman Hurtgen, dissenting in part, found that the Respondent did not violate Section 8(a)(5) by engaging in bad-faith bargaining and withdrawing recognition.

The Respondent met with the Union only once in the 7-month period between the grant of recognition and its withdrawal of recognition on November 7, 1997. The Respondent argued that its two chosen negotiators did the best they could to deal with the substantial bargaining demands placed upon them by the Respondent's simultaneous acquisition of 23 bargaining units.

Members Liebman and Truesdale held, as did the judge, that the Respondent's contentions "in this regard boil down to a 'busy negotiator' defense," which the Board has consistently rejected. They found no reason to make an exception here. See *Barclay Center, Inc.*, 308 NLRB 1025, 1035-1037 (1992). Members Liebman and Truesdale noted that even when the parties finally met on August 21, 1997 the Respondent "showed little inclination to move the bargaining along. The Respondent neither presented a contract proposal nor offered any substantive response to the Union's initial proposal." And, while at the conclusion of the August 21 meeting the Respondent said it would contact Union Representative McClure about dates for a followup meeting, the Respondent failed to do so. The judge found, and they agreed, that the Respondent's unfair labor practices tainted the petition underlying the Respondent's withdrawal of recognition.

Chairman Hurtgen found that the Respondent did not, within the 10(b) period, employ dilatory tactics; the August 21 meeting was not perfunctory; and the Respondent's proposal for a November 18 meeting did not constitute an unreasonable delay. Finding that the Respondent did not unlawfully fail to bargain in good faith with the Union, he held that the November 4 employee petition was untainted. The Hutson incident, standing alone, was not a sufficient basis on which to conclude that the employee petition was tainted, the Chairman held.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Machinists District Loge 751; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Spokane on March 16, 1999. Adm. Law Judge Timothy Nelson issued his decision Aug. 5, 1999.

* * *

BellSouth Telecommunications, Inc. and Communications Workers of America (11-CA-17096, 17140, 11-CB-2699, 2688; 335 NLRB No. 18) Charlotte, NC Aug. 29, 2001. The Board held, on a stipulated record, that Respondent BellSouth and Respondent CWA lawfully entered into an agreement requiring employees to wear a company uniform that displays both the employer and the union logos. It dismissed the complaint alleging that BellSouth had violated Section 8(a)(1), (2), and (3) and Respondent CWA had violated Section 8(b)(1)(A) and (2) of the Act by entering into the agreement and that Respondent BellSouth had unlawfully provided monetary support for employees to assist in the procurement of uniforms displaying the CWA insignia. Nonmembers Gary Lee and Jim Amburn, who objected to displaying the union logo, filed the unfair labor practice charges alleging that the Respondents unlawfully agreed to the requirement pursuant to a newly established mandatory uniform policy. [\[HTML\]](#) [\[PDF\]](#)

The Board noted inclusion of the CWA logo was integral to BellSouth's uniform policy, was a prerequisite for establishing a policy through agreement with the Union, and furthered the Company's interest in developing a partnership with the CWA and in symbolically displaying that relationship to the public. It found that the uniform policy-including display of the CWA logo-advances business aims in a manner consistent with Federal labor policy and distinguishable from the bans on insignia present in those circumstances where the Board has found unlawful prohibitions against the wearing of union insignia, even when an employer has demonstrated a legitimate attire policy and seeks to restrict union insignia on the basis of that policy.

The Board pointed to its long history of cases pertaining to employer prohibitions on the wearing of union buttons, insignia, and other paraphernalia in a union electioneering context. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). It acknowledged that this case raises a new, but related, issue: the compelled wearing on a company uniform of a union logo alongside the company logo, pursuant to a collectively bargained agreement between management and labor. Finding that the collectively bargained uniform policy at issue here is lawful, the Board held:

We so find based on application of a balancing standard, akin to the test applied in *Republic Aviation*, which calls for examination of whether 'special circumstances' outweigh the Section 7 interests of employees. In the present context, of course, the 'special circumstances' to be balanced against Section 7 interests are derived from the legitimate interests of both the Employer and the Union, as expressed through the collective-bargaining process that national labor policy endorses. For these reasons, at least in the present context, a requirement that employees wear union insignia cannot be analyzed as if it presented precisely the same issues as a prohibition against wearing such insignia.

The Board decided that the collectively bargained uniform policy was a "special circumstance" which outweighed any intrusion on Section 7 rights. It said that the "compelled wearing of the CWA logo does implicate Section 7, albeit to a lesser degree than the wearing of union insignia in settings where the *Republic Aviation* balancing test has traditionally been applied. To the extent that the CWA logo may objectively be regarded as a personal statement of union support and membership, this message is muted by its placement alongside the BellSouth logo on a company uniform."

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Gary Lee and Jim Amburn, individuals; complaint alleged violation of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2). Parties waived their right to a hearing before an administrative law judge.

* * *

The Majestic Star Casino, LLC (13-RC-20262; 335 NLRB No. 36) Chicago, IL Aug. 27, 2001. Members Liebman and Truesdale agreed with the hearing officer that Petitioner's Objection 3, which alleged that the Employer solicited grievances during a preelection campaign, should be sustained. Chairman Hurtgen, dissenting, would overrule this objection, finding that Employer manager Swift's statement was simply a pronouncement that the Employer would consider the employee grievances. Assuming arguendo that Swift solicited the grievances, he found that she did not promise to remedy them. And, Chief Operating Officer Kelly made it *expressly* clear that no promises were being made, the Chairman said. [\[HTML\]](#) [\[PDF\]](#)

The hearing officer considered determinative challenges in and objections to a mail ballot election held from February 18, 2000 until March 10, 2000. The election resulted in 3 votes for and 8 against the American Maritime Officers, with 7 challenged ballots.

The hearing officer recommended overruling the challenges to the ballots of six mates based on her findings that they were not supervisors within the meaning of Section 2(11). In light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct 1861 (2001), the Board remanded the proceeding to the Regional Director to reopen the record on the issue of whether the Employer's mates "assign" and "responsibly direct" and on the scope and degree of "independent judgment" used in the exercise of such authority. The Board also requested the parties and the Regional Director to consider two recent circuit court decisions, *Brusco Tug & Bar Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001), and *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000), denying enforcement of the Board decisions.

In the absence of exceptions, the Board adopted pro forma the hearing officer's recommendations that Objections 2, 4, 5, 6, and 7 be overruled. The hearing officer made no recommendation regarding Objection 1 (alleging the unlawful suspension and termination of employees Leonard Cohen and Eddie Chase) and the challenge to the ballot of Leonard Cohen, finding that disposition of those issues must await a decision from the General Counsel's Office of Appeals in Case 13-CA-38378. Having been administratively advised that the appeal was denied and Case 13-CA-38378 was dismissed, the Board overruled Objection 1 and sustained the challenge to Cohen's ballot.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Wal-Mart Stores, Inc. (Food & Commercial Workers Local 1000) Tahlequah, OK August 27, 2001. 17-CA-21045-1; JD (ATL)-56-01, Judge William N. Cates.

Mt. Clemens General Hospital (Office Employees Local 40) Mt. Clemens, MI August 27, 2001. 7-CA-43864, JD-119-01, Judge C. Richard Miserendino.

Coon Heating & Manufacturing Corp. (Sheet Metal Workers Local 112) Elmira, NY August 28, 2001. 3-CA-22649; JD-116-01, Judge John T. Clark.

Auto Workers Local 2333 (an Individual) Cleveland, OH August 28, 2001. 8-CB-9023; JD-121-01, Judge Earl E. Shamwell Jr.

St. Louis Material Dealers Association (Teamsters Local 682) St. Louis, MO August 28, 2001. 14-CA-26273-1, et al.; JD-117-01, Judge Robert A. Pulcini.

Marquette Transportation/Bluegrass Marine (Masters, Mates and Pilots, ILA) Paducah, KY August 28, 2001. 26-CA-18650; JD(ATL)-58-01, Judge Lawrence W. Cullen.

U.S. Generating Company (Utility Workers Local 464) Somerset, MA August 30, 2001. 1-CA-36858; JD-122-01, Judge Wallace H. Nations.

The Hearst Corporation (Communications Workers Local 31034) Albany, NY August 30, 2001. 3-CA-22256; JD-118-01, Judge Wallace H. Nations.

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NO ANSWER TO COMPLIANCE SPECIFICATION

(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 compliance specification.)

James M. Ward, d/b/a Mid-South Construction (Tri-State Building and Construction Trades Council) (9-CA-36510; 335 NLRB No. 20) Jemison, AL August 27, 2001.