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.

Weekly Summary of NLRB Cases

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CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

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Correction: The caption for *Freeman Decorating* (336 NLRB No. 1) that appeared in the October 12 issue, should have

indicated that charges were filed by IATSE only. The Carpenters Union was a respondent, not a charging party.

Equipment Trucking Co., Inc., and Smith Trucking Co., Singer Employer (14-CA-25052 (formerly 33-CA-12592); 336 NLRB No. 20) Winchester, IL Sept. 28, 2001. The Board majority of Members Liebman and Truesdale, contrary to dissenting Chairman Hurtgen, agreed with the administrative law judge that Respondent vice president Darrell Howard's March 23, 1998 comment to employee Larry Northrup was an unlawful implied threat of discharge. Howard's comment, that the Respondent's president would run the Company "any way she wanted, and if [he] didn't like it, find another job" was made in response to Northrup's statement of support for the Union and of concern that the withdrawal of recognition would adversely affect his retirement. In finding a violation of Section 8(a)(1) of the Act, the majority stated: [HTML] [PDF]

> The Board has long held that such statements by an employer implicitly threaten discharge because they convey the impression that the employer considers complaining about working conditions and engaging in union activity incompatible with continued employment. See *Padro Dodge,* 205 NLRB 252 (1973), and *Stoody Co.,* 312 NLRB 1175, 1181 (1993).

In his opinion dissenting in part and concurring in part, Chairman Hurtgen agreed with the judge that Howard's March 23 comments violated Section 8(a)(1) in that "they unlawfully conveyed to employees the futility of Union representation," but would reverse his finding that the incident constituted an 8(a)(1) implied threat of discharge.

Chairman Hurtgen agreed with the judge that the Respondent's unfair labor practices were serious and numerous, and agreed with his colleagues that an affirmative bargaining order was warranted. Beyond the remedial relief of an affirmative bargaining order, he would authorize the Regional Director to appoint, at the Union's request, a mediator for bargaining--chosen from a list of those qualified from an American Arbitration Association panel for the Regional Office area which includes the Respondent.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Teamsters Local 916; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Winchester, Oct. 28, 1998. Adm. Law Judge Lawrence W. Cullen issued his decision Dec. 17, 1998.

* * *

Hardesty Company, Inc., d/b/a Mid-Continent Concrete (26-CA-17571; 336 NLRB No. 18) Van Buren and Fort Smith, AR Sept. 28, 2001. The Board affirmed the administrative law judge's findings that the Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act and committed various other violations of Section 8(a)(1) and (5). In reaching the bad-faith bargaining finding, Chairman Hurtgen, concurring in part, would rely principally on statements by Respondent's agents. He stated: [HTML] [PDF]

> In these statements, the Respondent vowed to end the bargaining relationship after the certification year had expired, threatened to insure a union loss in a new election by appointing prounion bargaining-unit employees to supervisory positions, told employees that they would have higher wages and new trucks if they reject union representation, and predicted that the Union would accomplish "absolutely zero" in negotiations.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Teamsters Local 373; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Fort Smith, March 19-20, 1997. Adm. Law Judge D. Randall Frye issued his decision Sept. 29, 1998.

* * *

McKenzie Engineering Co. (33-CA-11408; 336 NLRB No. 26) Fort Madison, IA Sept. 28, 2001. In a Supplemental Decision and Order, the Board adopted the administrative law judge's recommended order that the Respondent pay four discharged employees (journeymen union carpenters) $130,516 plus interest (representing backpay accruing from Nov. 1, 1995; one employee died on Oct. 21,1999). The Respondent is further ordered to pay $70,091 to 19 nonunion replacement employees to make them whole for fringe benefits that accrued from Nov. 1, 1995 to April 30, 1997. [HTML] [PDF]

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Hearing at Peoria, IL, Nov. 6-7, 2000. Adm. Law Judge Marion C. Ladwig issued his decision July 20, 2001.

* * *

Nova Plumbing, Inc. (21-CA-32275; 336 NLRB No. 61) Santa Ana, CA Sept. 28, 2001. Reversing the administrative law judge, the Board majority of Members Liebman and Walsh held that the collective-bargaining agreement entered into between the parties unequivocally established that the Union attained the status of majority bargaining representative under Section 9 (a). Therefore, it found that the Respondent's withdrawal of recognition from, and refusal to meet with, the Union, as well as the Respondent's cessation of contributions to certain contractually-established funds and use of the Union's referral system violated Section 8(a)(5) and (1) of the Act. In reaching this holding, the majority applied the test set forth in the Board's recent decision in *Central Illinois Construction,* 335 NLRB No. 59 (2001). [HTML] [PDF]

The majority found that the parties' recognition clause "leaves no reasonable doubt that the parties intended a 9(a) relationship" and "clearly meets the standards set forth by the Board in *Central Illinois.*" Given that the parties entered into a 9(a) relationship, the majority stated:

> [A]bsent a showing of good-faith uncertainty regarding majority support for the Union, the Respondent could not withdraw recognition and repudiate the Agreement. Because the evidence is insufficient to support a finding of a good-faith uncertainty concerning the Union's majority status, we find that the Respondent's withdrawal of recognition from, and its refusal to bargain with, the Union, as well as its cessation of contributions to certain contractually-established trusts and its cessation of use of the Union's hiring hall services, violated Section 8(a)(5) and (1) of the Act.

Chairman Hurtgen, in dissent, concluded that the General Counsel has not established a 9(a) relationship. He stated:

> In sum, if a union can establish actual majority support, or if it can point to language which provides that it had majority support, it can be the 9(a) representative. The critical issue is whether a majority of the employees chose the union. The issue is not whom the union represents. If the employees did not choose the union, we should not risk foisting a 9(a) union on the employees.... I find that the Union and the Respondent did not have a 9(a) relationship. Thus, it is of no significance whether the Respondent had a good-faith uncertainty as to the Union's majority status.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Plumbers Southern California Pipe Trades District Council No. 16; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles, Dec. 14-17, 1998. Adm. Law Judge Clifford H. Anderson issued his decision May 10, 1999.

* * *

Pan-Osten Company (26-CA-18679; 336 NLRB No. 23) Glasgow, KY Sept. 28, 2001. The Board, reversing the administrative law judge, found that Todd Holmes was not shown to be a statutory supervisor of the Respondent when he engaged in conduct alleged to be a violation of Section 8(a)(1) of the Act during a 1998 union organizing campaign. "We conclude that the General Counsel, who has the burden in this case, has proffered no evidence that Holmes possessed any of the indicia of a supervisor at the time the relevant events took place," the Board held. [HTML] [PDF]

Dissenting in part, Chairman Hurtgen disagreed with Members Liebman and Truesdale that supervisor Mike Ward unlawfully interrogated employee Douglas Springer about a union meeting. He said: "There is no evidence as to the precise question asked by Ward. My colleagues seek to supply only the general testimony, but no specifics."

(Chairman Hurgten and Members Liebman and Truesdale participated.)

Charge filed by Sheet Metal Workers Local 433; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Nashville, TN, Dec. 10-11, 1998. Adm. Law Judge Howard I. Grossman issued his decision March 29, 1999.

* * *

Plumbers Local 91 (Brock & Blevins) (10-CB-7170, 7171; 336 NLRB No. 43) Birmingham, AL Sept. 28, 2001. Applying recent precedent that issued after the administrative law judge's decision on July 2, 1999, the Board reversed his findings that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by improperly deviating from its hiring hall procedures, bypassing Charging Parties Arthur Moorehead and George Henrey on the Respondent's out-of-work list, and failing to refer them for certain job referrals. See *Stage Employees Local 720 (AVW Audio Visual),* 332 NLRB No. 3 (2000); *Plumbers Local 375 (H.C. Price Construction),* 330 NLRB No. 55 (1999); *Plumbers Local 342 (Contra Costa Electric),* 329 NLRB 688 (1999) (*Contra Costa I*), revd. and remanded sub nom. *Jacoby v. NLRB,* 233 F.3d 611 (D.C. Cir. 2000), on remand *Plumbers Local 342 (Contra Costa Electric),* 336 NLRB No. 44 (2001) (*Contra Costa II*). [HTML] [PDF]

The Board held in *Contra Costa I* and reaffirmed in *Contra Costa II,* that mere negligence in the operation of an exclusive hiring hall does not constitute a breach of the duty of fair representation or a violation of Section 8(b)(1)(A) and (2). In the instant case, the Board found that the Respondent did not operate its exclusive hiring hall unlawfully by bypassing Moorehead and Henrey. In the case of Moorehead, a welder, business agent John Eaves cut some corners from the hiring hall's "first in, first out" rule, resulting in Moorehead getting bypassed. In Henrey's case, the Board found Eaves' failure to refer the pipefitter "resulted from the union dispatcher's good-faith but mistaken belief that the employee did not want to work during the period in question."

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Arthur L. Moorehead and George G. Henrey, individuals; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Birmingham, March 1, 1999. Adm. Law Judge Keltner W. Locke issued his decision July 2, 1999.

* * *

E.S. Sutton Realty Co. (2-CA-30365; 336 NLRB No. 33) New York, NY Sept. 28, 2001. The Board majority Chairman and Hurtgen and Member Liebman, reversing the administrative law judge, found that Respondent Sutton unlawfully refused to consider and to hire five employees and that as a successor employer it failed in its obligation to recognize and bargain with the Union, and by changing employees' terms and conditions of employment. Sutton abruptly ended its relationship with janitorial services contractor Crisfield and hired its own cleaning employees upon learning that Crisfield intended to recognize the Union and settle pending unfair labor practice charges. By the time union-represented workers sought jobs, none were left. In finding a violation, the Board stated: [HTML] [PDF]

> A clear preponderance of all the relevant evidence demonstrates that Sutton's staffing process was tainted by antiunion animus from beginning to end. The judge did not fully address all of the inconsistencies in the record,

> relying instead on witnesses whose testimony, contradicted by the documentary evidence, she herself described as inaccurate and incomplete.

Member Walsh dissented and would adopt the judge's dismissal of the complaint. Contrary to Chairman Hurtgen and Member Liebman, he would not reverse the judge's assessment of the credibility of Anderson Curtis, a union member who had worked for many different cleaning contractors at Sutton's building on 291 Broadway in New York City for 31 years. Sutton hired Curtis as a supervisor right after canceling the Crisfield contract. Member Walsh stated:

> To borrow from the standard applied in the Second Circuit, I would not reverse a judge's decision to credit a witness unless that witness' testimony was hopelessly incredible or flatly contradicted either by the law of nature or undisputed documentary testimony. *Beverly Enterprises v. NLRB,* 139 F.3d 135, 142 (1998); *Kinney Drugs v. NLRB,* 74 F.3d 1419, 1427 (1996). Notwithstanding the failure of Curtis' testimony to match the dates on the employment documents in question, I cannot find that Curtis' testimony, on the key facts on which the judge's decision was based and on which she credited him, failed either one of those tests.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Service Employees Local 32B-32J; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, May 27-28, 1998. Adm. Law Judge Eleanor MacDonald issued her decision Feb. 19, 1999.

* * *

Vico Products Co. (7-CA-40016, 40572(2); 336 NLRB No. 45) Plymouth, MI Sept. 30, 2001. The Board affirmed the administrative law judge's findings that (1) the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its decision to relocate its caliper pin production from its Plymouth, Michigan, facility to its Louisville, Kentucky, facility and to lay off 33 employees at the Plymouth facility; and (2) the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union over the effects of that decision. However, the Board disagreed with the judge that the employees' union activities were not a motivating factor in the Respondent's relocation decision. Accordingly, it reversed the judge on this issue and found that the relocation of the caliper pin operation and the layoff of the 33 unit employees were violative of Section 8(a)(3). [HTML] [PDF]

The Board found merit to the cross-exceptions of the General Counsel and Charging Party that the record evidence did not support the judge's conclusion that Schultz made the relocation decision in December 1996, some two months before the Union came on the scene, and that the judge erred in his *Wright Line* analysis by failing to properly consider whether the relocation decision was motivated by the employees' union activities. "[T]he judge simply accepted as true [company president] Schultz's testimony that he made the decision to relocate the caliper pin operation to Louisville in December 1996," the Board stated.

The Respondent implemented the relocation and layoffs on July 3-4, 1997, less than three months after the Union had won the election and been certified as the bargaining representative of the Respondent's employees. As to the Respondent's knowledge of the employees' union activities, as early as March 1997, Schultz received a document signed by employees that set out employee rights under Section 7 of the Act. "Schultz's testimony that he made the relocation decision in December 1996, which the judge simply assumed to be true, standing alone, cannot suffice as a defense to the 8(a)(3) allegation," the Board asserted.

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by the Auto Workers (UAW): complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Detroit, March 2-6, and May 4-8, 1998. Adm. Law Judge Bruce D. Rosenstein issued his decision Oct. 1, 1998.

* * *

Clark Distribution Systems, Inc. (13-CA-38348-1, -2; 336 NLRB No. 60) Matteson, IL Oct. 1, 2001. The Board affirmed the

administrative law judge's findings that the Respondent engaged in various violations of Section 8(a)(1) and (3) of the Act arising in the context of an unsuccessful union organizing campaign. After the Union lost the election on Aug. 13, 1999 (it also lost an election in 1997), the Respondent in November 1999, decided to transfer work from its Matteson, IL facility to its Kansas City, KS facility. Thereafter, the Respondent decided to reduce the Matteson work force by nine employees. In January 2000, it offered a severance package to the first nine employees to accept the offer. Only three employees accepted the severance package. The Respondent then selected for layoff the six employees with the most disciplinary write-ups in 1999. [HTML] [PDF]

The judge found, and the Board agreed, that the Respondent (1) violated Section 8(a)(1) by soliciting employee grievances during the election campaign and promising to remedy those concerns; (2) violated Section 8(a)(1) by conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process; and (3) violated Section 8(a)(3) by devising and executing a discriminatory scheme in order to rid itself of union supporters.

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Patrick Anthony and Jason Lamatsch, individuals; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Chicago, Oct. 23-25, 2000. Adm. Law Judge William G. Kocol issued his decision Dec. 29, 2000.

* * *

Wolfe Electric Co. (17-CA-18957; 336 NLRB No. 48) Lincoln, NE Oct. 1, 2001. The Board, affirming the administrative law judge's supplemental decision, held that the Respondent discriminatorily refused to hire nine journeymen electricians ("salts") on July 8, 1996, based on their Union affiliation. Under the Board's FES standard, the discriminatees are entitled to reinstatement and backpay. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Electrical Workers (IBEW) Local 265; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Lincoln, Jan. 5-7, 1998. Adm. Law Judge Albert A. Metz issued his decision April 15, 1998 and his supplemental decision Sept. 29, 2000.

* * *

Capehorn Industry, Inc. (22-CA-22095; 336 NLRB No. 29) Clifton, NJ Sept. 28, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate various economic strikers on their unconditional offer to return to work. The Board rejected the Respondent's defense that its engagement of a permanent subcontractor to perform certain unit work justified not reinstating the striking workers whose jobs were assumed by the contractor. [HTML] [PDF]

Citing *Land Air Delivery,* 286 NLRB 1131 (1987), review denied 862 F.2d 354 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989), the Board noted that "an employer's use of temporary measures--such as temporary subcontracting or the use of temporary replacements--does not result in the same detrimental loss of striker reinstatement rights as does permanent subcontracting." It added:

> Thus, permanent subcontracting cannot be treated as the equivalent of these other measures. We find that an employer must establish a legitimate and substantial business reason for implementing the permanent subcontract during a strike.
>
> Having rejected the Respondent's claim that the replacement workers it hired were permanent, and that the Respondent's execution of a permanent subcontract was supported by *any* business justification, we find that the Respondent has failed to demonstrate a legitimate and substantial justification for its failure to reinstate all of the former strikers--those who had been temporarily replaced, and those whose jobs have been permanently subcontracted.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by UNITE Local 169; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Newark, July 20 - 21 and Aug. 27, 1998. Adm. Law Judge Raymond P. Green issued his decision Oct. 30, 1998.

* * *

Laborers Local 860 (Anthony Allega Cement Contractor, Inc.) (8-CD-480; 336 NLRB No. 28) Valley View, OH Sept. 28, 2001. In this proceeding under Section 10(k) of the Act, the Board concluded that employees represented by Laborers Local 860, rather than IBEW Local 38, are entitled to perform duct bank and manhole placement and/or construction on the Runway 5L-23R construction project at Cleveland Hopkins International Airport. One of the factors cited by the Board is that the Employer has consistently assigned the disputed work to employees represented by the Laborers in prior projects, and "there is an unbroken area practice of Laborers performing the disputed work at the airport in the past." [HTML] [PDF]

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

* * *

Drew Division of Ashland Chemical Co., a division of Ashland Oil, Inc. (22-CA-21748; 336 NLRB No. 38) Kearny, NJ Sept. 28, 2001. The Board affirmed the administrative law judge's conclusion that the Respondent violated Section 8(a)(5) and (1) and 8(d) of the Act by locking out its employees within 60 days from the Union's notification of its intent to terminate their contract 8(d)(1) notice. In a footnote, Chairman Hurtgen and Member Truesdale stated they disagreed with the judge's reliance on *Carpenters Dist. Council of Denver,* 172 NLRB 793 (1968), in which a union was found in violation of Section 8(d)(4) for striking within 60 days of the employer's Section 8(d)(1) notice. They found the analysis of Section 8(d)(3) notice obligations set forth in *United Artists Communications,* 274 NLRB 75 (1985), a more persuasive authority. [HTML] [PDF]

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

Charges filed by Teamsters Local 97; complaint alleged violation of Section 8(a)(5) and (1) and 8(d). Hearing at Newark on April 6, 1999. Adm. Law Judge Steven Davis issued his decision on Aug. 12, 1999.

* * *

K-Mart Corp. (7-CA-42082, 7-RC-21537; 336 NLRB No. 37) Canton, MI Sept. 28, 2001. The Board, agreeing with the administrative law judge, found that the Respondent had engaged in various Section 8(a)(1) violations during a union organizing campaign, including the Respondent's General Manager Bellarose telling employees to report to management any perceived harassment by Union supporters; Bellarose threatening employees that whether they would be given the opportunity to work at a leased Toys R Us annex in the future depended on the outcome of the election; and a threat during two captive-audience speeches on May 4 and 5, 1999, by Senior Vice President Mixon that it would be futile to elect a union at the Canton, MI facility. [HTML] [PDF]

A majority of Members Liebman and Truesdale found that the Respondent unlawfully posted an announcement of a 50-cent-per-hour wage increase on May 12, 1999. The majority pointed out that the Respondent "seized on and emphasized the wage increase in the 25th-hour preelection meetings as part of the Respondent's final push to discourage union support." Mixon's letter to employees announcing the wage hike "boasted that this increase would add up to over $1000 per year for most employees," it noted.

Dissenting in part, Chairman Hurtgen concluded "the Respondent's decision to increase wages was made in the normal course of business and was not motivated by a desire to influence employees to vote against the Union."

> In my view, as it is established that the wage increase itself was lawful and as the Respondent's May 11 announcement of the wage increase by memo was consistent with the Respondent's past practice, the Respondent's mention of the pay increase at its May 12 preelection meetings was clearly lawful. Contrary to my colleagues, the

> Respondent's mention of the pay increase in the preelection meetings cannot itself be condemned as inconsistent with past practice.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by the Auto Workers (UAW); complaint alleged violation of Section 8(a)(1). Hearing at Detroit, Sept. 20 - 23, 1999. Adm. Law Judge C. Richard Miserendino issued his decision March 28, 2000.

* * *

Exceptional Professional, Inc. d/b/a EPI Construction (17-CA-19272, et al.; 336 NLRB No. 16) Nixa, MO Sept. 28, 2001. The Board remanded to the administrative law judge for further consideration in view of *FES,* 331 NLRB No. 20 (2000), the complaint allegation that the Respondent unlawfully refused to consider for hire or to hire 10 applicants. It agreed with other findings by the judge, including that the Respondent violated Section 8(a)(1) of the Act by informing its employees that it would be futile to select the Union as their bargaining representative; creating the impression among its employees that their union activities were under surveillance; promulgating a rule that discriminatorily prohibited employees from talking about the Union or any other labor organization while working, interrogating its employees about their union membership, activities, and sympathies; and threatening its employees with layoff if they supported the organizing efforts of the Union. The Board reversed her finding that the Respondent violated Section 8(a)(4) and (1) by establishing a grievance and arbitration procedure restricting the rights of employees to use the processes of the NLRB. Finding the record factually insufficient to support a violation of the Act, it stated: [HTML] [PDF]

> The complaint alleged that, about July 29, the Respondent established a grievance and arbitration procedure that restricted its employees' right to use the processes of the NLRB. The violation was alleged to have occurred about July 29, [1997] apparently because that was the date on which the Respondent, through its attorney's letter, informed the Union that the Respondent had a grievance and arbitration procedure. However, as the judge noted, the Respondent's grievance and arbitration procedure has never been used and the Respondent has never distributed the procedural guidelines and forms for it to its employees. Additionally, there is no evidence that the employees have been informed that the Respondent has implemented a grievance and arbitration procedure. Although the Respondent notified the Union of the procedure's existence, the Union was not the Respondent's employees' representative. Moreover, neither the Respondent's letter to the Union nor the attached grievance form indicated that the grievance and arbitration procedure was mandatory.

Chairman Hurtgen dissented in part from his colleagues in the majority, Members Truesdale and Walsh, affirming the judge's finding that Fred Stewart, the Respondent's president, violated the Act by stating to employees on July 30 or 31 that he "was not going to join the Union and it was probably going to cost him some money, but he was not going to join and that's where he stood." He would not find a violation, and stated:

> This is no more than an expression of Stewart's opinion that he did not want a union at his place of business, and that he was prepared to shoulder the costs of opposing the Union's campaign. Stewart's expression of opinion was not coercive and did not reasonably convey a threat of reprisal if employees selected the Union. As such, it was protected by Section 8(c). Nor did Stewart express a threat of futility.

In a footnote, the majority responded about this point as follows:

> Fred Stewart's statement is unlawful not because it threatened retaliation for supporting the Union. Rather, it is unlawful because it threatened that supporting the Union would be futile. There is no need to find that such a statement carries a warning of retaliation in order to find the statement unlawful. In any event, the Respondent's assurances against reprisal ring hollow in light of the Respondent's contemporaneous unfair labor practices, including its unlawful layoff of several employees because of their union activities.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Carpenters District Council of Kansas City and Vicinity Locals 311 and 978; complaint alleged violation of Section 8(a)(1), (3) and (4). Hearing at Springfield, Nov. 18 - 21 and March 24 - 26, 1998. Adm. Law Judge Mary Miller Cracraft issued her decision Aug. 5, 1998.

* * *

Raley's (20-CA-24837, 25166; 336 NLRB No. 30) West Sacramento, CA Sept. 28, 2001. Reversing the administrative law judge, the Board majority of Members Liebman and Truesdale held that section 1.1 (the recognition clause) of the parties' collective bargaining agreement required the Respondent to recognize the Union as the bargaining representative of the unit employees at two stores (Yuba City and Grass Valley) on presentation of majority support. The majority remanded the case to the judge for litigation of the issue of whether the Union had majority support when it demanded recognition at the two stores. [HTML] [PDF]

The judge found that the employer had not waived its right to a Board-conducted election and dismissed the complaint, which alleged the Respondent had violated Section 8(a)(5) and (1) of the Act.

The majority found *Kroger Co.,* 219 NLRB 388 (1975), to be controlling:

> The language of section 1.1, the recognition clause, is similar to that of the recognition clause in *Kroger* in all essential respects. Here, as in Kroger, the Respondent has agreed to recognize the Union as the sole bargaining representative for all of its employees working at its stores within a designated geographical territory, which in this case is the geographical jurisdiction of [UFCW] Local 588.

Contrary to the judge, the majority said "there is no factual basis for distinguishing *Kroger* from this case on the basis that the two disputed stores here were preexisting." The majority also did not find it significant that the stores in this case were already within the Union's geographical jurisdiction prior to the 1992 - 1995 contract, even though this was not the situation in Kroger.

In dissent Chairman Hurtgen stated:

> My colleagues engage in verbal revisionism in their attempt to render nugatory the decisive fact of *Kroger II*--and the fact which informs *Kroger II's* analytical framework--i.e., that an employer's contractual waiver of its right to a Board-conducted election applies only to stores that are newly added to the geographical coverage of the contract during the term of the contract in which the employer has agreed to such a waiver. Unable to reconcile the fact that *Kroger II* applies only to newly added stores, whether termed 'after acquired' or 'additional,' with the fact that the stores at issue here were 'preexisting' stores, my colleagues simply say that this difference 'is a difference without significance.'

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Food & Commercial Workers Local 588; complaint alleged violation of Section 8(a)(5) and (1). Hearing at San Francisco, Sacramento, Yuba City, and Maryville on various dates between April 21 - July 6, 1998. Adm. Law Judge Jay R. Pollack issued his decision Oct. 22, 1998.

* * *

Beverly Health and Rehabilitation Services, Inc., et al. (6-CA-28130-1, et al.; 336 NLRB No. 25) Chambersburg, PA Sept. 28, 2001. The Board denied the General Counsel's and the Charging Parties' motions seeking reconsideration of the Board's prior decision reported at 331 NLRB No. 121 (2000). In its earlier decision, the Board found that the November 29, 1996 complaint alleging that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a defamation lawsuit against the Charging Parties and District 1199P President Thomas DeBruin should be held in abeyance pending the outcome of the lawsuit. Additionally, it dismissed the allegation in the December 23, 1996 amended complaint to the extent that it alleged the Respondent violated the Act by failing to stay its lawsuit after the General Counsel issued his November 29, 1996 complaint in this case. [HTML] [PDF]

Relying on *Sears Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), and *Loehmann's Plaza,* 305 NLRB 663, 670 (1991), the General Counsel and the Charging Parties contended that the Board erred in finding that issuance of the General Counsel's complaint did not preempt the Respondent's defamation lawsuit. The Board, contrary to the General Counsel and Charging Parties stated:

> we do not believe that *Sears* and *Loehmann's Plaza* compel the conclusion that, once a complaint is presented to the Board involving a state court defamation suit, the suit should be preempted. The Sears court clearly drew a distinction between preemption principles in trepass cases arising out of union picketing or handbilling and defamation cases.

In accordance with the framework set out in *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), the Board saw no reason to reconsider the instant case. It reiterated Justice Brennan's observation in his concurring opinion in Bill Johnson's:

> [A]s the Court makes clear . . . the Board's ability to enjoin prosecution of a state suit is not the measure of its ability to determine that such prosecution constitutes an unfair labor practice or of its ability to provide other remedies to vindicate federal labor policy. [Id. t 753.]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Bricklayers International (W.R. Weis Co., Inc.) (13-CD-579; 336 NLRB No. 51) Chicago, IL Oct. 1, 2001. The Board determined that W.R. Weis' employees represented by the Bricklayers are entitled to perform the unloading, handling, stockpiling, hoisting and installation of relief angles to support stone, and the unloading, handling, stockpiling, hoisting, and installation of multipurpose supports on the jobsite at 520 North Michigan Avenue, Chicago, Illinois. In making the award, it relied on the factors of collective-bargaining agreements, employer preference and past practice, and efficiency and economy of operations. [HTML] [PDF]

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

* * *

Meaden Screw Products, Co. (13-CA-34483(E); 336 NLRB No. 22) Burr Ridge, IL Sept. 28, 2001. The Board reversed the recommended Order of the administrative law judge and denied the Respondent's application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA). It also reversed the judge's finding of no substantial justification for either the General Counsel's predecisional settlement posture in the underlying case or the General Counsel's filing of exceptions to the judge's 1997 decision. [HTML] [PDF]

The judge, in his supplemental decision, ruled that the General Counsel was precluded from "relitigat[ing] the issue of substantial justification in an answer where the General Counsel ha[d] already chosen to litigate that issue by filing a motion to dismiss." He found that the Applicant was entitled to an EAJA award because the General Counsel was not substantially justified in filing exceptions to the 1997 judge's decision because they challenged only his credibility resolutions. Contrary to the judge, the Board found that "[e]ven accepting the judge's credibility resolutions, the General Counsel reasonably argued that the judge should have drawn other inferences from the record that would have supported the General Counsel's position." *Europlast Ltd.,* 311 NLRB 1089 (1993), affd. 33 F.3d 16 (7th Cir. 1994).

In the prior decision, 325 NLRB 762 (1998), the Board adopted the judge's findings and dismissed the complaint in its entirety. The Respondent filed its EAJA application and, thereafter, the General Counsel submitted a motion to dismiss the application and an answer, claiming that his prosecution of the unfair labor practice case was substantially justified throughout all phases of the case.

(Members Liebman, Truesdale, and Walsh participated.)

Adm. Law Judge William G. Kocol issued his supplemental decision Nov. 10, 1998.

* * *

Wild Oats Markets, Inc. d/b/a Wild Oats Community Markets (14-CA-24815; 336 NLRB No. 14) Ladue, MO Sept. 28, 2001. Members Liebman and Truesdale, in agreement with the administrative law judge, held that the Respondent violated Section 8 (a)(1) of the Act by attempting to cause the removal of union representatives engaged in protected handbilling and picketing activity in the parking lot in front of the Respondent's store. The Board majority concluded that the Respondent, by initiating a chain of events that culminated in the attempted removal of non-employee union representatives engaged in lawful, protected activity from the parking area in front of the Respondent's store, interfered with the Section 7 rights of the employees. Applying the principles of *Food For Less,* 318 NLRB 646 (1995) enfd. in relevant part 95 F.3d 733 (8th Cir. 1996), they found that the Respondent did not possess a property interest that entitled it to exclude the non-employee union representatives from the parking lot in which they were handbilling and picketing. [HTML] [PDF]

In dissent, Chairman Hurtgen pointed out that the Respondent could not and did not take steps to oust the pickets, that it called the owner-manager, i.e., the party that had control over the area in which the Union's activity occurred, and asked what the owner's policy was. The owner concluded that the policy was that the pickets should be removed, told the pickets to leave, and called the police when they refused to do so. "[T]he Respondent simply went to the owner who had control of the property, and the owner then took the action," the Chairman said, finding that the property owner had the right to take steps to oust the union representatives. *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Food & Commercial Workers Local 655; complaint alleged violation of Section 8(a)(1). Hearing at St. Louis on March 17, 1998. Adm. Law Judge David L. Evans issued his decision June 22, 1998.

* * *

Plumbers Local 342 (Contra Costa Electric, Inc.) (32-CB-4435; 336 NLRB No. 44) Martinez, CA Sept. 28, 2001. In the earlier proceeding, 329 NLRB 688 (1999), the Board found that the Respondent Union's negligent failure to refer the Charging Party, Joe Jacoby, to a job in the proper order from its exclusive hiring hall did not violate its duty of fair representation and Section 8(b)(1)(A) and (2) of the Act. In reaching its decision, the Board overruled *Iron Workers Local 118 (California Erectors),* 309 NLRB 808 (1992), and other decisions to the extent they held that even a negligent failure to refer in the correct order violates the duty of fair representation. The Board relied on the Supreme Court's decisions in *Steelworkers v. Rawson,* 495 U.S. 362 (1990), and *Air Line Pilots Assn. v. O'Neill,* 499 U.S. 65 (1991), where it read those decisions together to mean that "mere negligence" in the operation of an exclusive hiring hall does not violate the duty of fair representation. [HTML] [PDF]

On December 12, 2000, the United States Court of Appeals for the District of Columbia Circuit reversed the Board. *Jacoby v. NLRB,* 233 F. 3d 611 (D.C. Cir. 2000). The court held that the Board's reading of *Rawson and O'Neill (*which were not hiring hall cases) could not be reconciled with the court's earlier holding that the Supreme Court in *O'Neill* did not intend to weaken the standard of review applicable to hiring hall operations. The court remanded the case to the Board to determine whether the Union's negligent conduct was an unfair labor practice, in light of what the court found to be "the union's heightened duty of fair dealing in the context of a hiring hall."

The Board assumed, for the purposes of this decision, that *Rawson and O'Neill* do not compel a finding that negligence in hiring hall operations does not breach a union's duty of fair representation and that a union has a "heightened duty of fair dealing" in the operation of an exclusive hiring hall.

Applying this "heightened duty" standard, the Board reaffirmed the earlier holding that inadvertent mistakes in the operation of an exclusive hiring hall arising from mere negligence do not violate the union's duty of fair representation and such mistakes do not violate Section 8(b)(a)(A) and (2). Consistent with the court of appeals' opinion and the law of the case, the Board reached these conclusions independently of the Supreme Court's statements in *Rawson and O'Neill* and instead, relied on the

decisions prior to *California Erectors.* Accordingly, it reaffirmed the earlier decision overruling *California Erectors* and other decisions to the extent they are inconsistent with this view.

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

* * *

Keller Ford, Inc. (7-CA-43269; 336 NLRB No. 56) Grand Rapids, MI Oct. 1, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(4) of the Act when it discharged employee Bryan Knapp. It found it unnecessary to determine whether the discharge, as contended by the judge, also violated Section 8(a)(3). [HTML] [PDF]

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) when supervisor Leonard Miller told Knapp that talking to other employees about Knapp's insurance copayment was "hazardous to [his] health," reasoning that Knapp was acting solely in his own interest and was not seeking group action. The Board, relying on *K Mart Corp.,* 297 NLRB 80 fn. 2 (1989), found that Miller's statement would reasonably tend to interfere with Knapp's free exercise of his right to discuss his concerns and conditions of employment with his co-workers. Accordingly, it held that the Respondent's broad threat independently violated Section 8(a)(1) regardless of whether Knapp was actually engaged in protected concerted activity.

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Bryan Knapp, an individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Grand Rapids, Feb. 13 and 14, 2001. Adm. Law Judge Benjamin Schlesinger issued his decision May 2, 2001.

* * *

Teamsters Local 107, Carpenters Metropolitan Regional Council, and Laborers Local 332 (Reber-Friel Co.) (4-CD-1003-2, et al.; 336 NLRB No. 41) Philadelphia, PA Sept. 28, 2001. The Board majority of Chairman Hurtgen and Member Truesdale concluded that the Reber-Friel warehouse employees represented by the Carpenters are entitled to perform the work in dispute. In making its award, the majority based its conclusion on the basis of employer preference and current assignment, employer past practice, relative skills, and economy and efficiency of operations. The charges in this proceeding alleged that the Respondents, Teamsters, Carpenters, and Laborers each violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by one or both of the other unions. [HTML] [PDF]

In dissent, Member Liebman noted that this case is an anomaly. In her view, the record does not entitle the Employer to relief under Section 10(k). She said

> The material facts do not neatly fit the profile of a union's lawful use of self-help to preserve its members' work jurisdiction, which we have recognized as an exception to the prohibition in Section 8(b)(4)(D). On one hand, the Teamsters and the Laborers undisputedly used coercive means to obtain work that their members had not previously performed to a significant extent. On the other hand, the Unions' attempts to expand their work jurisdiction were made initially through written agreements with the Employer. The Employer freely chose to give both Unions a substantial, if not conclusive, contractual basis for claiming the work in dispute. . . . the Board's processes should not be made available to shield the Employer from the consequences of its own, dubious actions.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Sempa Energy Solutions (Operating Engineers Local 501) Los Angeles, CA September 17, 2001. 21-CA-34141; JD(SF)-73-

01, Judge Lana H. Parke.

Santa Maria El Mirador (an Individual) Santa Fe, NM September 26, 2001. 28-CA-16824; JD(SF)-80-01, Judge Thomas Michael Patton.

Equitable Life Assurance Society and ITC Fashion Valley Corp. d/b/a Fashion Valley Shopping Center (Graphic Communications Local 432M) San Diego, CA September 26, 2001. 21-CA-33004; JD(SF)-70-01, Judge William L. Schmidt.

Terry's Excavating, Inc. (Operating Engineers Local 139) Milwaukee, WI October 9, 2001. 30-CA-14543(E), 14930(E); JD-133-01, Judge Jerry M. Hermele.

* * *

NO ANSWER TO COMPLAINT

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

B & G Building Maintenance, Inc. (Service Employees Local 82) (5-CA-29225; 336 NLRB No. 17) Silver Spring, MD September 28, 2001.