

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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August 29, 2003

W-2910

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Accel, Inc. (8-CA-33013; 339 NLRB No. 134) Lewis Center, OH Aug. 21, 2003. The Board found that the administrative law judge correctly applied Board law in concluding that eight employees who walked off their assembly line to protest the Respondent's decision to deny them a scheduled work break engaged in protected activity and that the Respondent violated Section 8(a)(1) of the Act by discharging them for their work stoppage. The Respondent contended that the work stoppage was unprotected because it was a disproportionately disruptive response to a trivial grievance, citing several court decisions holding that employees' means of protecting a managerial decision that involves the conduct, selection, or discharge of a supervisor must be "reasonable" in order to be protected. The Board found no merit in the Respondent's argument. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Food and Commercial Workers Local 1059; complaint alleged violation of Section 8(a)(1). Hearing at Delaware, OH, Aug. 21-22, 2002. Adm. Law Judge Paul Bogas issued his decision Oct. 10, 2002.

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A.P. Painting & Improvements, Inc., t/a All Pro Painting Co. (29-CA-24353, 24368; 339 NLRB No. 157). West Hempstead, NY Aug. 21, 2003. In the absence of exceptions, the Board adopted the administrative law judge's conclusion that by discharging employee John Koshmieder, the Respondent violated Section 8(a)(1) and (3) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The two issues before the Board were: (1) the General Counsel's challenge of the judge's failure to address the allegation that statements made by the Respondent's Vice President Stephen Dunne while unlawfully discharging employee John Koshmieder violated Section 8(a)(1) of the Act; and (2) the Respondent's challenge of the judge's finding that its offer to reinstate Koshmieder was invalid because it was conditioned on his acceptance of a restriction on his statutory right to organize fellow employees.

Members Walsh and Acosta found the additional violation sought by the General Counsel and affirmed the judge's finding that the Respondent's reinstatement was invalid. In his partial dissent, Member Schaumber found that the Respondent made a valid offer to reinstate Koshmieder, untainted by an unlawful no-solicitation condition. Unlike his colleagues, Member Schaumber contended that Koshmieder's right to employment with Respondent, and its backpay obligation to him, ended when Koshmieder failed to report to work in accord with the valid reinstatement offer.

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Painters District Council No. 9; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn on Nov. 15, 2001. Adm. Law Judge Howard Edelman issued his decision Feb. 22, 2002.

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Bartlett Heating & Air Conditioning, Inc., and Robert Bartlett, Inc., successors, alter egos, and/or single employer (13-CA-39134; 339 NLRB No. 131) Mt. Prospect, IL Aug. 20, 2003. The Board granted the General Counsel's motion for summary judgment based on the Respondents' failure to comply with the terms of the settlement agreement approved by the Regional Director on October 12, 2001. Member Liebman dissented in part. [\[HTML\]](#) [\[PDF\]](#)

The agreement required the Respondents to (1) make whole Michael Bauer in the amount of \$21,054.08 and make whole Robert Wailley in the amount of \$945.92; and (2) post a notice to employees regarding the complaint allegations. The Board ordered the Respondents to immediately remit \$17,891.94, the outstanding balance as of December 12, 2001, to the Region to be disbursed to the discriminates in accordance with the settlement agreement.

Although the General Counsel's motion alleged that the Respondents have failed to comply with the notice-posting requirement of the settlement agreement, Chairman Battista and Member Schaumber said that the Respondents will not be required to post a notice. They found the language in the agreement ambiguous regarding what remedies would be warranted to remedy the Respondents' violations in the event of noncompliance, and did not find it appropriate to provide for any remedies beyond the payment of \$22,000, less any amounts already remitted. Chairman Battista and Member Schaumber stated that unlike their colleague, they found that this ambiguity limits the remedy and in a default judgment proceeding such as this, the Board should be reluctant to impose a remedy by default in the absence of clear language in the noncompliance clause.

Member Liebman dissented from her colleagues' failure to provide the Board's full standard remedies. She found the majority's conclusion regarding the noncompliance clause counterintuitive, stating: "Any ambiguity in the noncompliance clause, . . . should be resolved in favor of following the Board's customary approach and against the wrongdoer."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Michael Bauer, an Individual; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment Feb. 25, 2002.

* * *

Bell-Atlantic-Pennsylvania, Inc. (4-CA-23255, 23418; 339 NLRB No. 139) Philadelphia, PA Aug. 21, 2003. The Board deferred to an arbitration award and dismissed the complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by promulgating a rule prohibiting employees who had visible contact with customers from wearing "Road Kill" shirts containing insignia and by suspending employees for wearing the shirts. The Union grieved the suspensions and an arbitration panel upheld the suspensions and denied the grievance. The arbitrator found that the Respondent's prohibition of the Road Kill T-shirt was in furtherance of its desire to maintain its public image. [\[HTML\]](#) [\[PDF\]](#)

The Road Kill T-shirt, red and white in color, contains the words "Info Superhighway" in large letters over a cartoon-type image of a squashed rodent like animal lying in a pool of blood in the middle of a road. The squashed carcass is labeled "Bell Atlantic employees" and is described at the bottom of the shirt as "Road Kill." The shirt also depicts an overpass in which trucks labeled as "Bell Atlantic" and "AT&T" pass above the Road Kill scene. The arbitrator found that the wearing of the Road Kill T-shirts, depicting employees as squashed and lying in a pool of blood, was dispositive to the Employer's public image interests.

Members Liebman and Acosta found that the General Counsel and the Charging Party failed to meet their burden by showing that the award is repugnant to the Act. They found also that although the Road Kill shirt was protected under Section 7, it was not repugnant or "palpably wrong" for the arbitrator to find that employees' Section 7 interests may give way to the Respondent's legitimate interests in protecting its public image under the circumstances of this case.

Member Liebman joined in deferring to the arbitration award insofar as it covered employees who worked in customer homes and businesses, but not to the extent that it covers customer contract employees who worked exclusively on roadways, in manholes, and on telephone poles.

Member Schaumber joined his colleagues in deferring to the arbitrator's award, and thus, did not reach the issue of whether the discipline violates Section 8(a)(3) and (1) of the Act. As to the employees who work outside, he noted that the parties stipulated, and the arbitrator found, that the employees have contact with customers and the public. Like Member Acosta, Member Schaumber would therefore not differentiate among customer contact employees and treated the arbitrator's award finding a legitimate interest in banning the T-shirts as applying to all.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Communications Workers Local 13000; complaint alleged violation of Section 8(a)(1) and (3). Parties waived their right to a hearing before an administrative law judge.

* * *

Carpenters Pacific Northwest District Council (DWA Trade Show and Exposition Services) (36-CC-1016-1, 1017-1; 339 NLRB No. 129) Portland, OR Aug. 18, 2003. Members Liebman and Walsh reversed the administrative law judge and dismissed the complaint in its entirety alleging that the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act by engaging in secondary picketing at a common situs and that the Respondent's object in picketing was to force or require neutral parties to cease doing business with the Charging Party, DWA Trade Show and Exposition Services. Chairman Battista dissented. [\[HTML\]](#) [\[PDF\]](#)

The judge found that the picketing was unlawful under *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950) because the picket signs did not state that the Respondent's dispute was solely with the Charging Party, and as the signs referred to neutral parties Dental Show and Sysco Food Show, those signs evinced a secondary object.

Members Liebman and Walsh wrote that under *Moore Dry Dock*, a rebuttable presumption that the object of picketing at a common situs is lawful arises if a union can show that it has complied with the following criteria: (1) the picketing was limited to times when the situs of the dispute was located on secondary premises; (2) the primary employer was engaged at its normal business at the situs; (3) the picketing took place reasonably close to the situs; and (4) the picketing clearly disclosed that the dispute was only with the primary employer. They found that the first three criteria are satisfied; therefore the only relevant inquiry was whether the Respondent's picket signs clearly disclosed that the picketers' dispute was only with the Charging Party. Contrary to the judge and Chairman Battista, they did not find that the picket signs demonstrate an intent to create confusion as to which employer the Respondent intended to target with its picketing.

Dissenting, Chairman Battista argued that the Respondent's picketing failed the fourth *Moore Dry Dock* criterion. He wrote that under the fourth criterion, "a union must ensure that its picketing clearly discloses that its dispute is only with the primary employer. By prominently including the names of the Charging Party's clients (neutrals) on its picket signs, the Respondent created confusion as to the target of its picketing. The Respondent thereby failed to clearly ensure that the public would understand that its dispute was only with the Charging Party." See *West Kentucky Building Trades Council (Daniel Constr. Co.)*, 192 NLRB 272, 276 (1971).

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by DWA Trade Show and Exposition Services; complaint alleged violation of Section 8(b)(4)(ii)(B). Hearing at Portland on Oct. 16, 2002. Adm. Law Judge Clifford H. Anderson issued his decision Feb. 4, 2003.

* * *

Carter's Inc. (7-CA-43097, 7-RC-21554; 339 NLRB No. 140) Petoskey, MI Aug. 21, 2003. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act by, among others, making changes to employee wages, benefits, and its employee handbook before a second election held in Case 7-RC-21554 on May 19, 2000 (Food and Commercial Workers Local 876 lost 43-22). The Respondent excepted only to the judge's conclusions that its implementation of wage increases and handbook policy changes violated Section 8(a)(3) and (1). The Board agreed with the judge that the timing of the implementation of the changes, occurring shortly before the second election, raised an inference of coercion that the Respondent failed to rebut by establishing an explanation for the timing of its actions other than the election. [\[HTML\]](#) [\[PDF\]](#)

The judge recommended, with Board approval, that the Union's objections 1, 6, 7, 10, 11, 12 and 13 be overruled, and that the Union's objections 2, 3, 4, 5, 8, 9, and 14 be sustained. The Board set aside the second election and directed that a new election be held.

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Food and Commercial Workers Local 876; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Petoskey on Jan. 17, 2001. Adm. Law Judge Jerry M. Hermele issued his decision March 28, 2001.

* * *

Caraustar Mill Group, Inc. d/b/a Cincinnati Paperboard (9-CA-38996; 339 NLRB No. 137) Cincinnati, OH Aug. 21, 2003. The Board affirmed the administrative law judge's dismissal of the complaint allegation that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it unilaterally changed its "traditional time" shift policy to eliminate trades of less than a full shift. No exceptions were filed to the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by requiring Charging Party Paper Workers Local 5-0609 to vacate in-plant office space. Member Liebman wrote a separate concurring opinion "to deal with precedent that the majority does not address." [\[HTML\]](#) [\[PDF\]](#)

Members Schaumber and Acosta agreed with the judge that sections 2 and 4 of article XXIV of the parties' collective-bargaining agreement exempt the trading policy from the Company's bargaining obligation and allowed the Respondent to change its shift trading policy unilaterally.

The judge, in dismissing the complaint, applied a "clear and unmistakable" waiver standard to the conduct consistent with Board precedent. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 NLRB 180 (1983). In *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), the court found appropriate a "contract coverage" analysis, rather than a clear and unmistakable waiver analysis, where the contract covers the issue in dispute. Members Schaumber and Acosta found that dismissal of the complaint is warranted under either standard. Member Liebman relied on the judge's clear and unmistakable waiver analysis.

In dismissing the complaint, Member Schaumber found it unnecessary to pass on whether section 4 of the contract constituted a waiver of the conduct at issue in this case.

Member Liebman agreed that, in conjunction, sections 2 and 4 of the collective-bargaining agreement amounted to a waiver of the Union's right to bargain over a change in the "trading time" shift policy.

Member Acosta noted Member Liebman's concurrence, setting forth her view that the contract provisions raise more compelling circumstances for finding a waiver than do certain other cases previously decided by the Board. He did not find it necessary to discuss whether the present case raises a more compelling circumstance for finding a waiver than do those cases. He believes that dismissal is appropriate under either a contract coverage or waiver analysis, and observes that to the extent that waiver is questioned in this case, a contract coverage analysis provides clear grounds for dismissing the complaint.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Paper Workers Local 5-0609; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Cincinnati on Sept. 10, 2002. Adm. Law Judge Karl H. Buschmann issued his decision Jan. 10, 2003.

* * *

Corner Furniture Discount Center, Inc. (2-RC-22448; 339 NLRB No. 146) Bronx, NY Aug. 21, 2003. The Board, finding no merit in the Employer's exceptions to the administrative law judge's disposition of its Objection 2, overruled the objection and certified Teamsters Local 531 as the exclusive collective-bargaining representative of the employees in the appropriate unit. The tally of ballots showed 6 votes for and 5 against, the Petitioner, with no challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

In agreement with the judge, Members Liebman and Acosta rejected the Employer's contention that prounion employee Terence Cosgrove interfered with the election by threatening three bargaining unit employees that how they voted would become known by the Union and that if they voted against it, they would suffer reprisals. They agreed that Cosgrove's statements do not warrant setting aside the election, that the record failed to establish that Cosgrove was the Union's agent

when he made the statements, and that viewed as third-party conduct, the statements were not objectionable conduct which would tend to create a general atmosphere of fear and reprisal rendering a free election impossible.

In his concurring opinion, Member Schaumber wrote he joined his colleagues in overruling the Employer's objection and in their determination that Cosgrove was not an agent of the Union with respect to the alleged objectionable conduct. However, he said he wrote separately because he reached the same conclusion using a somewhat different path. One aspect of the majority's opinion with which he disagreed was the matter of determining whether the Employer met its burden of proving Cosgrove had apparent authority as the Union's agent when he made allegedly objectionable statements. Another aspect with which Member Schaumber disagreed with the majority was the implication in their decision that an employee who, like Cosgrove, organized and spoke at union campaign meetings, solicited authorization cards, and played a leading role in the campaign, could not, without more, be the apparent agent of the union for all statements and activities related to the campaign. He would find Cosgrove an agent clothed with apparent authority when he made the statements at issue.

(Members Liebman, Schaumber, and Acosta participated.)

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Curwood, Inc., A Div. of Bemis Co., Inc. (30-CA-15245-1, 30-RC-6203-04; 339 NLRB No. 148) Oshkosh, WI Aug. 21, 2003. Members Schaumber and Acosta agreed with most of the administrative law judge's decision that the Respondent, in response to the Union's organizing drive, unlawfully solicited grievances and made unlawful promises, threats, and other statements in various documents that interfered with an election held in Case 30-RC-6203-04, including his recommendation for a new election. They reversed the judge's findings that the Respondent (1) unlawfully threatened that customers and jobs would be lost if the employees chose Graphic Communications Local 77-P; (2) unlawfully solicited grievances in a June 12, 2000 memorandum to employees; and (3) unlawfully solicited employee grievances and unlawfully interrogated employees in a June 30, 2000 letter. [\[HTML\]](#) [\[PDF\]](#)

Members Schaumber and Acosta found no merit in the General Counsel's cross-exceptions to the judge's failure to address four additional grievance solicitation allegations arising from a July 18, 2000 "question and answer" document distributed to employees.

Member Liebman, dissenting in part, agreed with her colleagues' unfair labor practice findings, that a new election is required, and with their reversal of the judge's unlawful-interrogation finding involving the Respondent's June 30 letter. She found it unnecessary to pass on the judge's unlawful-solicitation finding in the June 30 letter. Member Liebman believes the majority's conclusion that the Respondent's June 30 letter did not unlawfully threaten employees with the loss of their jobs, if they chose to union, is inconsistent with *NLRB v. Gissel Packing*, 395 U.S. 575 (1969); and that the majority erred in reversing the judge's finding that the Respondent unlawfully promised, through its June 12 memorandum, to resolve employee grievances solicited earlier.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Graphic Communications Local 77-P; complaint alleged violation of Section 8(a)(1). Hearing at Oshkosh, Dec. 6-7, 2000. Adm. Law Judge Robert A. Giannasi issued his decision Feb. 2, 2001.

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Des Moines Register and Tribune Co. (18-CA-16243-1; 339 NLRB No. 130) Des Moines, IA Aug. 20, 2003. The Board reversed the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting, as a condition of continued negotiations for a new collective-bargaining agreement, that the Union bargain concerning a nonmandatory subject of bargaining: the number of full-time journeymen positions in the Respondent's mailroom. [\[HTML\]](#) [\[PDF\]](#)

The judge held that the language of section 3.02(E) of the parties' expired 1998-2001 collective-bargaining agreement created a lifetime job guarantee for 40 journeymen situation holders; that the provision did not expire with the agreement, but was

effective until the last of the 40 situation holders in the unit left the work force; and that the Union was not required to bargain over it when negotiating a new contract. He also found that, even if the number of full-time journeymen positions was a mandatory subject, the disputed contractual language constituted a "clear and unmistakable" waiver of the Respondent's right to bargain over this issue without the Union's consent.

The Board, finding that the language of section 3.02(E) is ambiguous as to the duration of the provision, decided that the General Counsel failed to show that section 3.02(e) became a contract term that survived expiration of the 1998-2001 agreement. It said:

Contrary to the judge's finding, the language in question^{3/4}which recites that the "40 full-time situations will be maintained *for as long as* 40 of the Journeyman situation holders employed as of the signing of the contract continued to be employed and desiring a full-time situation"^{3/4}does not, by its terms, indicate that the arrangement was intended to survive the expiration of the collective- bargaining agreement and to be effective until the last situation leaves the Respondent's employ. Although the language could bear that interpretation, it also could mean only that the number of situations would not be reduced (unless a situation holder left) during the life of the contract. In this respect, the usual rule of contract interpretation is that, without further clarifying language, the duration of a provision of a collective-bargaining agreement is determined by the terms of the overall agreement. . . . The collective- bargaining agreement here had a 3-year term, and section 3.02(E) does not contain any language expressly extending its duration beyond that term. Consequently, the Respondent's interpretation of the language as creating only a minimum number of situations, subject to renegotiation at the expiration of the 1998-2001 agreement, is at least as plausible as the Union's interpretation that it was meant to be a lifetime job guarantee.

Concluding that the General Counsel failed to show that the number of situations is a permissive of bargaining under Section 8 (d) or that the Respondent waived its right to bargain over the subject, the Board held that the Respondent did not violate the Act by insisting to impasse on this issue.

(Members Liebman, Schaumber, and Acosta participated.)

Charges filed by Teamsters Local 358; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Des Moines on April 24, 2002. Adm. Law Judge Bernard Litvack issued his bench decision April 24, 2002.

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Dish Network Service Corp. (29-CA-24670; 339 NLRB No. 147) Farmingdale, NY Aug. 21, 2003. Members Liebman and Acosta affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act, through General Manager Daniel McCann, by telling employees that the Respondent did not recognize the Union's shop stewards as the employees' collective-bargaining representative; and violated Section 8(a)(5) and (1) by refusing to provide a copy of a disciplinary consultation sheet to Steward Sean Ambrose and telling Ambrose that he should make his request to his union representative, who could then ask for the information from the Respondent's attorney. Member Schaumber dissented in part. [\[HTML\]](#) [\[PDF\]](#)

On December 12, 2001, technician Derrick Durant reported to the manager's office to return his paperwork. Three company officials were in the office, including McCann. McCann asked Durant to sign an employee consultation form that memorialized a verbal warning given to Durant two days earlier. Durant refused to sign the form and asked that a shop steward be present. While in the office, Durant saw union steward Brian Feldman walking by and asked him to come into the office. McCann remarked that Feldman could not enter the office because "we have no contract; therefore we don't recognize shop stewards."

Member Schaumber found McCann's remark was at most de minimis. He noted that his colleagues conceded that McCann lawfully refused to permit Steward Feldman to be present because employees do not have a *Weingarten* right to representation at a meeting devoted entirely to the administration of predetermined discipline. Member Schaumber wrote:

[W]hen the remark is properly considered within the context of the disciplinary situation in which the statement was made, a context in which the Respondent was not legally required to permit a steward's presence in the first place, and in light of

evidence that prior to the time the remark was made the Respondent did recognize and deal with stewards of the newly certified Union, it cannot be said that McCann's isolated and offhand remark reflects a policy of refusing to deal with the stewards as the bargaining representatives of unit employees. It, therefore, warrants, neither the issuance of a Board order nor the imposition of a remedy. Rather, where, as here, a collective-bargaining relationship is in its infancy and the parties are still negotiating a first collective-bargaining agreement, the Board should hesitate before permitting either party to interrupt and distort the bargaining process by pursuing a rigid and mechanistic application of the Act to such an isolated and incidental remark.

The majority, saying it was not persuaded by the dissent's arguments, pointed out that the issue is whether McCann's statement reasonably tended to coerce employees in the exercise of their Section 7 rights. The majority found it did.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Communications Workers Local 1108; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on May 7, 2002. Adm. Law Judge Steven Davis issued his decision June 27, 2002.

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Ferndale Foods, Inc. (19-CA-28279; 339 NLRB No. 155) Ferndale, WA Aug. 21, 2003. Absent good cause being shown for Respondent's failure to file an answer, Members Walsh and Acosta granted the General Counsel's motion for summary judgment. The majority held that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Antonio Angula because he joined and assisted Food & Commercial Workers Local 440 and engaged in concerted activities. Member Schaumber dissented. [\[HTML\]](#) [\[PDF\]](#)

Members Walsh and Acosta rejected the same arguments that Member Schaumber referred to in *Patrician Assisted Living Facility*, 339 NLRB No. 149 (2003). They do not reach their colleague's assessment of the Respondent's assertions in the context of his analytical framework that the Board rejected in *Patrician*.

Contrary to his colleagues, Member Schaumber would deny the General Counsel's motion for default judgment. In his view, the Respondent has established "good cause" for its failing to file a timely answer to the complaint. He wrote: "The majority's strict construction of the 'good cause' requirement in Section 102.20 of the Board's Rules and Regulations is inconsistent with the construction given that same term by the federal courts, lacks a sound policy basis and poses an undue risk of injustice."

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Food & Commercial Workers Local 44; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment March 7, 2003.

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McClatchy Newspapers, Inc. d/b/a The Fresno Bee (32-CA-17299, 17499; 339 NLRB No. 158) Fresno, CA Aug. 21, 2003. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its existing practices regarding length of lunch period; shift selection; shift schedules; double shifts; hours; days and shift schedules of union employees (including creating new shifts and changing shift starting times); and vacation relief; without prior notice to and affording Graphic Communications Local 404 an opportunity to bargain with regard to such changes. [\[HTML\]](#) [\[PDF\]](#)

The Board also agreed with the judge's finding that the Respondent was not obligated to bargain with the Union over its decisions to implement a corporatewide, computerized employee benefits system (PeopleSoft), and a new printing system (Two Parts to the Field, or TPF), because those decisions were made before the election which resulted in the certification of the Union. See *Howard Plating Industries*, 230 NLRB 178, 179 (1977).

The judge further found that the Respondent was free unilaterally to change the employees' unpaid lunch period or shift

schedules, even though these changes resulted from the postelection implementation of TPF, after concluding that the Respondent was required to bargain only over "the effects of these changes."

Members Schaumber and Acosta found however that, under established Board precedents, the lunch period and shift changes were themselves the discretionary "effects" of preelection decisions on terms and conditions of employment and the Respondent was consequently required to bargain over them. They also disagreed with the judge that the Respondent was obligated to bargain over the effects of a unilateral change in the Respondent's payroll period and their dissenting colleague that the Respondent was required to bargain over the change in the payroll period itself, saying the change and its effects was, at most, a ministerial and de minimis effect of the implementation of PeopleSoft.

Dissenting in part, Member Liebman noted that she and her colleagues agreed on the controlling legal principles and differed only with respect to factual matters related to two of the unilateral changes at issue. In her view, the Respondent could not lawfully change its payroll period or its method for assigning overtime without bargaining with the Union, as both of these changes and their effects were material and substantial.

(Members Liebman, Schaumber, and Acosta participated.)

Charges filed by Communications Workers Local 404; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Fresno, Aug. 5 and 6, 1999. Adm. Law Judge Mary Miller Cracraft issued her decision Dec. 1, 1999.

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Glasforms, Inc. (10-CA-33715, et al.; 339 NLRB No. 144) Birmingham, AL Aug. 21, 2003. Members Liebman and Acosta affirmed the administrative law judge's finding that by issuing a written warning to William Bailey, suspending him, changing his job description, and discharging him, all in direct retaliation for Bailey's support for the Steelworkers, the Respondent violated Section 8(a)(3) and (1) of the Act. Member Schaumber, concurring in part and dissenting in part, would find that the Respondent has established, as an affirmative defense, that it would have revised Bailey's job description and discharged him even absent his union support and the Respondent's antipathy towards the Union. [\[HTML\]](#) [\[PDF\]](#)

Bailey was suspended for 3 days without pay for allegedly refusing to perform part of his assigned job duties. Upon his return to work, the Respondent presented him with a revised job description which required him to do amounts of work that he had not previously been required to do, and which he had indicated that he was unable to do while performing his other duties. When Bailey refused to sign the revised job description, the Respondent fired him. The majority claimed that were it not for the Respondent's antiunion animus, the Respondent would not have insisted on the increase in Bailey's duties, would not have produced the new job description, and would not have fired him for refusing to sign it.

Member Schaumber agreed with the judge and his colleagues that the Respondent has failed to rebut the General Counsel's case as required under *Wright Line*, 251 NLRB 1083 (1980). He reached a different conclusion with respect to Respondent issuing a revised job description to Bailey and discharging him when he refused to sign it. He concluded that Respondent has shown that it would have taken the same action in the absence of the perception that Bailey had prounion sympathies.

(Members Liebman, Schaumber, and Acosta participated.)

Charges filed by Leroy Boyd, an Individual and Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Birmingham on Feb. 3, 2003. Adm. Law Judge Lawrence W. Cullen issued his decision April 15, 2003.

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Dunbinclipped Inc. t/a Great Clips (5-CA-29452; 339 NLRB No. 143) Belair, MD Aug. 21, 2003. In the absence of good cause being shown for the Respondent's failure to file a legally sufficient answer, Members Walsh and Acosta granted the General Counsel's motion for summary judgment and found that the Respondent, by discharging employee Henrietta Hindle, violated Section 8(a)(1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The majority deemed that under Section 102.20 of the Board's Rules and Regulations, the Respondent's response stating, "The allegations in the Complaint are denied. Respondent demands strict proof thereof," failed to address any of the factual or legal allegations of the complaint, and is legally insufficient under the Board's Rules.

Dissenting, Chairman Battista would not take the drastic step of imposing a forfeiture on Respondent's right to contest the allegations of the complaint, and unlike his colleagues, would not grant default judgment. He noted that it is not unusual for a respondent/defendant, in answer to a complaint in a civil case, to simply say "denied" with respect to individual paragraphs of the complaint, finding such denials are routinely accepted.

(Chairman Battista and Members Walsh and Acosta participated.)

Charge filed by Henrietta Hindle, an Individual; complaint alleged violation of Section 8(a)(1). General Counsel filed motion for summary judgment May 2, 2001.

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Lalique, N.A., Inc. (22-RC-12182; 339 NLRB No. 145) Carlstadt, NJ Aug. 22, 2003. The hearing officer recommended, and the Board agreed, that that the Employer failed to show that Petitioner Novelty Workers Local 223 made an objectionable promise of a direct medical benefit if employees voted for it. Accordingly, it certified the Petitioner as the bargaining representative of the employees in the appropriate unit. The tally of ballots for the election held April 19, 2002 showed 8 for and 4 against the Petitioner, with no challenged ballots [\[HTML\]](#) [\[PDF\]](#)

The Employer contended that the Petitioner promised free medical coverage as an automatic benefit of membership, rather than as a benefit to be negotiated. The Board affirmed the hearing officer's recommendation overruling the objection "based on the totality of the circumstances, i.e., Petitioner's campaign leaflets, along with what Petitioner communicated to employees at its meeting, and the credible testimony of employee witnesses, that employees were fully informed that free medical benefits [were] dependent on the parties' collective-bargaining negotiations."

(Members Liebman, Schaumber, and Walsh participated.)

* * *

Laneco Construction Systems, Inc. (15-RC-8311; 339 NLRB No. 132) Baton Rouge, LA Aug. 21, 2003. The Board adopted the hearing officer's recommendation to overrule the Employer's challenges to the ballots cast by seven voters and to sustain the Petitioner's challenges to the ballots cast by 12 voters. It directed the Regional Director to open and count the ballots of Aaron Begnaud, John Begnaud, Joey Fontenot, Robert Parezo, Sterling Paul, Rodney Primeaus, and Linda Soileau at a time and place to be set by him and, thereafter, to prepare and serve on the parties a revised tally of ballot. The tally of ballots for the election held November 17, 2000 showed 23 for and 25 against the Petitioner (Carpenters Local 1098) with 29 determinative challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

In the absence of exceptions, the Board also adopted the hearing officer's recommendations to sustain the challenges to six ballots, and to overrule the Petitioner's Objections 1 and 3. Prior to the hearing, the parties agreed to sustain the challenges to four ballots. In view of its direction to open and count seven ballots, the Board found it unnecessary to pass on the hearing officer's disposition of the Petitioner's Objections 4 and 6 at this time.

The Board wrote that if the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's Objections 4 and 6 will be moot and the Regional Director shall issue a certification of representative. However, if the revised tally of ballots shows that the Petitioner has not received a majority of the ballots cast, then the Regional Director shall transfer the case back to the Board for further proceedings.

The Employer claimed that the employees whose ballots it challenged were permanently laid off prior to the election. The Board agreed with the hearing officer that the Employer failed to establish that they had no reasonable expectation of recall. The Petitioner challenged the ballots cast by the 12 journeymen carpenters and helpers who were supplied by an outside

company, claiming that the jointly-employed employees were not covered by the Stipulated Election Agreement. The hearing officer determined that under the Board's traditional community-of-interest principles, a unit limited to the Employer's solely-employed carpenters and helpers was an appropriate unit.

(Members Liebman, Schaumber, and Acosta participated.)

* * *

Patrician Assisted Living Facility (10-CA-33505; 339 NLRB No. 149) Birmingham, AL Aug. 21, 2003. Members Liebman and Acosta, in the absence of good cause being shown for the failure to file an answer, granted the General Counsel's motion for summary judgment and held that the Respondent violated Section 8(a) (1) of the Act by discharging employees Synthia Marshall and Wykeithia Williams. Member Schaumber dissented. [\[HTML\]](#) [\[PDF\]](#)

Following the General Counsel's submission of the motion and the Board's notice to show cause, the Respondent, pro se, filed a response with an affidavit in support and an answer to the complaint. The Respondent contended that its failure to file a timely answer was due to its inability to retain legal counsel and that, because of a lack of legal training, the Respondent's owner was unaware of the gravity of a failure to file a timely answer. The Respondent argued that principles of fairness and equity mandate that its answer to the complaint be accepted by the Board, and not be considered as untimely, because there are genuine issues of disputed fact.

The majority observed that when determining whether to grant a motion for summary judgment, the Board has shown some leniency toward respondents who proceed without benefit of counsel. *Kenco Electric & Signs*, 325 NLRB 1118 (1998). Citing *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998); *Harborview Electric Construction Co.*, 315 NLRB 301 (1994), Members Liebman and Acosta explained that the Board will generally not preclude a determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer, which can reasonably be construed as denying the substance of the complaint allegations. Similarly, they said that where a pro se respondent fails to file a timely answer, but provides a "good cause" explanation for such failure, a default judgment will not be entered against it on procedural grounds.

Members Liebman and Acosta held that merely being unrepresented by counsel does not establish a good cause explanation for failing to file a timely answer and under Section 102.20 of the Board's Rules and Regulations, the Respondent, despite being advised to do so, failed to file an answer to the complaint allegations, and did not provide good cause for its failure to file a timely answer even after it was granted an extension of time.

Member Schaumber, dissenting, would deny the General Counsel's motion for default judgment. He said that the Board has interpreted the "good cause" provision of Section 102.20 in such a way as to render it almost meaningless. He claimed that it is all but impossible to show "good cause" as the Board construes that phrase and that this harsh interpretation of Section 102.20 is inconsistent with Section 102.121, which provides that the Board's Rules and Regulations "shall be liberally construed." In his view, the majority's decision exemplifies and perpetuates the harshness that has long characterized the Board's decision making in cases before the Board on what until recently was misleading called a motion for "summary judgment." Member Schaumber stated:

Having changed the name, appropriately, to a Motion for Default Judgment, we should change our approach to match. I would draw upon federal judicial precedent in this area, which interprets "good cause" for setting aside a default so as to emphasize the interests of justice over rigid adherence to technical deadlines. In short, I would give effect to the Board's own stated preference for deciding cases on the merits.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Synthia Marshall, an Individual; complaint alleged violation of Section 8(a)(1). General Counsel filed motion for default judgment May 31, 2002.

* * *

SEIU District 1199 (Staten Island University Hospital) (29-CB-10586; 339 NLRB No. 135) Staten Island, NY Aug. 21, 2003. Members Schaumber and Acosta affirmed the administrative law judge's findings that the Respondent, by its organizer and admitted agent, Fabienne Josephs, violated Section 8(b)(1)(A) of the Act by restraining and coercing employees in the exercise of their Section 7 rights by engaging in a series of open confrontations with managers, supervisors, and security guards employed by the Staten Island University Hospital. They wrote: "[A]t a time when a possible strike was imminent, Josephs subjected the Respondent's agents to deliberate, repeated, and unprovoked verbal abuse, including profanity, racial and sexual slurs, and threats of physical harm. On two occasions, Josephs attempted to physically push past the Hospital's agents in order to gain access to areas of the Hospital that had been clearly and lawfully placed off limits to her." [\[HTML\]](#) [\[PDF\]](#)

Members Schaumber and Acosta reversed the judge's finding that Josephs' statement to the Hospital executive vice president and chief operating officer, Dr. Andrew Passeri, and the Hospital's security services supervisor, Dawn McMahon, that they could be replaced, was a threat to cause their discharge. Rather, they found that "Josephs' statement was a lawful response to the Hospital's widely circulated memoranda discussing the possibility of using replacement employees, and could not reasonably be viewed by employees as a threat to accomplish the outser of management officials."

Member Liebman, dissenting in part, agreed with her colleagues that Josephs' threats to replace Passeri and McMahon did not violate the Act. She found no violation is made out by the remaining verbal abuse that Josephs directed at the Hospital's managers and security guards. "What we have here is a union organizer running half-dressed through the Hospital corridors, chanting childish slogans, shouting scatological and racial insults at guards, and humiliating managers without any overt motive," Member Liebman said. She wrote:

Emphasizing the hospital setting here, as well as the combination of Josephs' abusive language over two weeks and her two 'physical confrontations' with security guards, my colleagues conclude that it was the 'obvious' intent of Josephs to 'send a message that Respondent would retaliate against anyone, including employees, who stood in its way.' While I do not condone Josephs' behavior-it may well have amounted to actionable trespass under state law, and it almost certainly was not protected by the Act-I see no basis for finding a violation here. It seems dubious to me that employees would interpret Josephs' actions as sending them any message at all, even directly. The record simply does not establish the required 'unmistakable nexus' between Josephs' conduct and the Section 7 rights of employees, the only legal interests that Section 8(b)(1)(A) is concerned with.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Staten Island University Hospital; complaint alleged violation of Section 8(b)(1)(A). Hearing at Brooklyn on June 16, 1999. Adm. Law Judge Margaret M. Kern issued her decision Dec. 17, 1999.

* * *

United States Postal Service (16-CA-21816(P); 339 NLRB No. 150) Houston, TX Aug. 21, 2003. The Board adopted, in the absence of exceptions, the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide requested relevant information on multiple instances between December 28, 2001, and March 20, 2002. [\[HTML\]](#) [\[PDF\]](#)

Members Liebman and Walsh granted the General Counsel's request and ordered the Respondent to post the notice to employees district-wide. They also imposed a broad remedial Order, and removed language in the Order requiring the Union to re-request information. Member Acosta disagreed with the extraordinary remedies of a district-wide posting and a broad order. Members Liebman and Acosta denied the General Counsel's request that the notice be read aloud. Member Walsh disagreed.

The Respondent has a history of violating Section 8(a)(5) and (1) by failing to provide requested relevant information at many of its locations over the past two decades, particularly within its Houston district. Members Liebman and Walsh found a district-wide posting was necessary in view of the Respondent's repeated violations of the same type in the Houston district in the past, the Respondent's persistence in violating the Act despite repeated warnings not to do so, and the lack of evidence that the Respondent has taken any affirmative steps to control its misconduct.

Member Acosta held: "The violations here were site-specific; to the extent the Respondent's practices give rise to a concern

about the Houston district as a whole, they are addressed by the district-wide posting in United States Postal Service, JD (ATL)-39-02. Because the violation in the present case occurred before we issued that decision, we have no basis for concluding that the remedies ordered there will not be effective in curbing the Respondent's unlawful conduct." Member Acosta noted also that the violations in this case are based on the Respondent's failure to respond to information requests filed by a steward at one facility within the district. Since neither the General Counsel nor the Charging Party has requested a broad order in this case, he found that it is inappropriate to grant one on these facts.

Member Walsh would order that the notice be read aloud to employees in the presence of a Board Agent, but only at the Respondent's North Shepherd Station in Houston, TX because the Respondent's recidivist conduct there is sufficiently egregious to warrant the special remedy. He also noted that the Board has held "the public reading of the notice is an 'effective but moderate way to let in a warning wind of information and, more important, reassurance.'" *United States Postal Service Industries*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).

(Members Liebman, Walsh, and Acosta participated.)

Charge filed by Letter Carriers Branch 283; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Houston, Nov. 4-5, 2002. Adm. Law Judge George Carson II issued his decision Jan. 14, 2003.

* * *

United States Postal Service (10-CA-32518(P); 339 NLRB No. 151) Atlanta, GA Aug. 21, 2003. The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by denying access to three persons, who sought access to a room on the Respondent's Atlanta Bulk Mail Center (BMC) known as the "contract drivers' lounge" in order to solicit drivers who worked at the Mail Contractors of America (MCOA), a company that provides mail hauling services to the Respondent on contract basis. The three persons were Joe Johnson, an off-duty employee of the Respondent; Will Hardy, an off-duty employee of MCOA; and Lyle Grimes, a union organizer who was not employed by the Respondent or MCOA. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Acosta found that the Respondent violated Section 8(a)(1) by denying access to its employee Johnson, but not by denying access to Hardy and Grimes, who were not employees of the Respondent. They found that the judge erred in concluding that the Respondent's denial of access discriminated against union solicitation and rejected the Union's argument that its collective-bargaining agreement with the Respondent gave Grimes and Hardy a right of access to the lounge to solicit the drivers.

Chairman Battista and Member Acosta found the principles of *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105, 113 (1956), applicable to both Grimes and Hardy. They noted that Grimes is not employed by the Respondent or MCOA, and therefore is unquestionably a "nonemployee." They assumed that Hardy, like other MCOA drivers, worked "regularly" on the Respondent's premises and then determined that he did not work there "exclusively" and that *Lechmere* governs his access to the Respondent's property, like Grimes's.

Member Walsh would find a violation as to Johnson and Hardy. He noted that *Lechmere* allows the Respondent to bar nonemployees from its premises except under very limited circumstances, but that Hardy was not a stranger to the Respondent's property. He pointed out that the Board has held that employees who work on the premises of an employer other than their own have the same access rights enjoyed by the employees of the owner of the premises. *New York New York Hotel and Casino*, 334 NLRB 955 (2001), enfd. denied and remanded 313 F.3d 585 (D.C. Cir. 2002); *Gayfers Department Store*, 324 NLRB 1246, 1250 (1997); *Southern Services*, 300 NLRB 1154, 1155 (1990), enfd. 954 F.2d 700 (11th Cir. 1992). Member Walsh disagreed with his colleagues' reliance on dicta in the cited cases to the effect that an employee of a subcontractor is only protected if he works "regularly and exclusively" on the premises of the Respondent, saying: "Where employees perform services exclusively for another employer and are required to be on that employer's premises on a regular basis pursuant to the work relationship, they should be able to engage in Section 7 activity there, as well as on their own employer's property."

(Chairman Battista and Members Walsh and Acosta participated.)

Charge filed by Postal Workers Atlanta Metro Area Local; complaint alleged violation of Section 8(a)(1). Hearing at Atlanta, April 19-20, 2001. Adm. Law Judge Pargen Robertson issued his decision July 18, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Garden Ridge Management, Inc. (Teamsters Local 745) Dallas, TX August 19, 2003. 16-CA-22275, 22756; JD(ATL)-53-03, Judge Keltner W. Locke.

Atlantic Veal & Lamb, Inc. (UNITE Local 155) Brooklyn, NY August 19, 2003. 29-CA-24484, et al.; JD(NY)-46-03, Judge D. Barry Morris.

Van de Voorde Electric, LLC (Electrical Workers [IBEW] Local 429) Cookville, TN August 19, 2003. 26-CA-20495, JD(ATL)-55-03; Judge Keltner W. Locke.

Teamsters Local 705 (Individuals) Kankakee, IL August 20, 2003. 33-CB-3889, 33-RD-801, JD-87-03; Judge Ira Sandron.

Solvay Iron Works, Inc. (Ironworkers Local 33) Syracuse, NY August 20, 2003. 3-CA-23782-3, JD-89-03; Judge Karl H. Buschmann.

St. Luke's Memorial Hospital, Inc. (Unidad Laboral de Enfermeras y Empleados de la Salud (ULEES) Ponce, PR August 21, 2003. 24-CA-9271, JD-83-03; Judge George Alemán.

CFS North American, Inc. d/b/a Convenience Food Systems, Inc. (Individuals) Frisco, TX August 21, 2003. 16-CA-22135-1, -2, JD(ATL)-54-3; Judge Jane Vandeventer.

Builders, Woodworkers & Millwrights Local 1 (Empire State Regional Council of Carpenters and Carpenters Local 229) Albany, NY August 21, 2003. 3-CB-7986; JD-86-03, Judge Margaret M. Kern.

* * *

NO ANSWER TO COMPLAINT

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

OK Toilet & Towel Supply, Inc. (UNITE) (22-CA-25380, et al.; 339 NLRB No. 142) Elizabeth, NJ August 21, 2003.

* * *

TEST OF CERTIFICATION

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

Trans Tech Logistics, Inc. (Machinists District Lodge 57) (8-CA-34208-1; 339 NLRB No. 133) Toledo, OH August 21, 2003.

Walco International, Inc. d/b/a Holt Products Co. (Steelworkers) (30-CA-16488-1; 339 NLRB No. 136) Madison, WI August

21, 2003.