

## 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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September 5, 2003

W-2911

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*Alexandria Clinic, P.A.* (18-CA-15371; 339 NLRB No. 162) Alexandria, MN Aug. 21, 2003. Chairman Battista and Members Schaumber and Acosta reversed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating its striking nursing employees and dismissed the complaint in its entirety. Member Acosta also wrote a

separate concurrence. Members Liebman and Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The Respondent's licensed practical nurses and medical assistant employees (nurses) on August 25, 1999, rejected the Respondent's final contract offer and voted to strike. In accordance with Section 8(g)'s requirement that labor organizations give health care institutions 10- days advance written notice of the date and time of its intended strike, the Union informed the Respondent that it would strike the clinic on September 10, 1999, starting at 8 a.m. On September 7, members of the Union's negotiating committee changed the commencement time of the strike from 8 a.m. to noon. Although the Union was aware of this change, it was decided that neither the nurses nor the Respondent was to be notified. The employees were told that someone would come to get them when it was time to strike.

The Respondent hired temporary nurses to replace the striking nurses and when the walkout commenced, the replacement nurses were assigned the unit nurses' work. On September 13 the Respondent sought an explanation as to "why the Union chose to delay the commencement of the strike and why the Union did not give the clinic advance notice of this change in plan." The Union replied by letter, stating that "[u]nder statute, we gave the proper notice to strike and went out on strike within the allowable time." Claiming that this response was legally inadequate, the Respondent wrote to the striking nurses that their walkout was "in violation of the notice provisions of Section 8(g)" and that their employment was, therefore, terminated.

The issue presented in this matter was whether the judge correctly found that the Respondent committed unfair labor practices when it discharged its nursing employees because of the failure to comply with the literal requirements of Section 8(g), i.e. there was a delay in the start of the economic strike of 4 hours after the time set forth in the Union's 10-day notice to the Respondent.

The judge determined that, despite the strike's delay of 4 hours beyond the specified hour of 8 a.m., the Union's noon-time strike did not violate Section 8(g). In reaching this conclusion, the judge relied on *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979), where the Board held that Section 8(g) was not to be "rigidly applied" in accordance with its statutory language which provides for extension of strike time by "written agreement of both parties." The judge asserted that no supplemental notice was necessary in this matter because the "strike and picketing began within a reasonable time after the scheduled time [and] . . . the Union was in substantial compliance with Section 8(g)."

Chairman Battista and Member Schaumber noted that the last sentence of Section 8(g) says that the 10-day "notice, once given, may be extended by the written agreement of both parties." Thus, they asserted, a union cannot unilaterally extend the commencement time of its strike and to the extent that the Board's decision in *Greater New Orleans* holds to the contrary, they overruled it.

Concurring, Member Acosta noted that Section 8(g) of the Act expressly states that a labor organization, before commencing a strike at a health care institution, "shall not less than 10 days prior to such action, notify the institution in writing" and that the "notice shall state the date and time that such action will commence." He said in his view, because the statutory language is unambiguous, "we cannot depart from it." Member Acosta agreed with Chairman Battista and Member Schaumber that the Board inappropriately relied on legislative history to turn the plain statutory language on its head. Therefore, he joined them in overruling *Greater New Orleans*.

Dissenting, Members Liebman and Walsh concluded that the relevant statutory language is ambiguous with respect to the situation presented here. They wrote:

Read together, Section 8(g) and 8(d) simply do not compel the result the majority reaches. . . . [T]he Board must interpret the Act, taking into account not merely the words of Section 8(g) and 8(d), but also the purpose of these provisions and of the Act as a whole. . . . Applying a rule of reason derived from these legitimate guides to Congressional intent<sup>3</sup>and not the majority's mechanical approach<sup>4</sup>demonstrates that the discharged nurses did not lose the protection of the Act and that their employer did indeed violate Section 8(a)(3) and (1) by discharging them. The contrary result reached today would surely appall the Congress that enacted Section 8(g), even if it does not trouble the majority.

(Full Board participated.)

Charges filed by Minnesota Licensed Practical Nurses Assn.; complaint alleged violation of Section 8(a)(1) and (3). Hearing in Alexandria, Jan. 24-27, 2000 and Minneapolis on February 3, 2000. Adm. Law Judge John H. West issued his decision June 16, 2000.

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*American Steel Erectors, Inc.* (1-CA-37051; 339 NLRB No. 152) Greenfield, NH Aug. 26, 2003. Chairman Battista and Member Schaumber dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by refusing to consider David Paquette for hire in 1998 because of his affiliation with, and concerted activities on behalf of Iron Workers Local 474, and by telling Paquette that he was not being considered for hire because of his union activities. Member Liebman dissented. [\[HTML\]](#) [\[PDF\]](#)

This case involves whether Paquette, an apprentice coordinator and instructor for the Union, lost the protection afforded to Section 7 concerted activity when he voiced his objections to the Respondent's application for certification of its apprenticeship program during meetings of the New Hampshire Apprenticeship Council.

Chairman Battista and Member Schaumber held that even assuming that Paquette was initially engaged in protected activity when he opposed the Respondent's application for certification of its apprenticeship program, he lost any Section 7 protection, when through use of deliberate and outrageous exaggerations, he accused the Respondent of unsafe practices. The majority noted that during one meeting, Paquette told the Council "putting ironworkers up on steel is like throwing babies into the Merrimack River if they worked for [the Respondent]." Although Paquette did not use obscenities and was not loud or threatening, his comments portrayed the Respondent as a concern with a callous indifference to the safety of its employees, Chairman Battista and Member Schaumber explained. They decided that Paquette's statements rendered him unfit for future employment with the Respondent, finding that his remarks satisfied the standard of *Dreis & Krump*, 221 NLRB 309, 315 (1975) (standard is whether remarks were "so flagrant, violent, or extreme as to render the individual unfit for further service").

Dissenting Member Liebman pointed out that Paquette was a paid advocate, seeking to persuade a state agency, and that his statement should be assessed in that context. She noted that Paquette was not an employee of the Respondent when he made his statement, that he owed the Respondent no duty of loyalty then, and that the issue is not whether the Respondent was privileged to discipline or discharge a current employee, but whether it was free to refuse to consider Paquette for employment after he left his union position. Member Liebman found that Paquette's language was not so extreme that it made him categorically unfit for future service with the Respondent. She believes the result of the majority decision "will be to chill union advocates," adding that "they must now watch their words carefully when they criticize an employer from whom they may one day seek a job."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by David Paquette, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Boston on Dec. 1, 1999. Adm. Law Judge Richard H. Beddow, Jr. issued his decision March 2, 2000.

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*Bakery Workers Local 205* (Metz Baking Co.) (30-CD-167-1; 339 NLRB No. 141) Milwaukee, WI Aug. 21, 2003. The Board concluded that the employees of Metz Baking Company, represented by Bakery Workers Local 205 instead of employees represented by Teamsters Local 344 are entitled to perform the work of the stocker/receiving clerk position at the Employer's Milwaukee, Wisconsin facility. In making the award, the Board relied on the collective-bargaining agreement, employer's preference and past practice, and efficiency and economy. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Acosta participated.)

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*Beverly Health and Rehabilitation Services, Inc., et al.* (10-CA-32797, 10- RC-15153; 339 NLRB No. 161) Oneonta, AL Aug.

21, 2003. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about her union activity and the union activity of other employees (complaint par. 13), threatening employees with loss of benefits if they supported Food and Commercial Workers Local 1657 (complaint par. 14), threatening employees with adverse changes in working conditions if they chose union representation (complaint par. 15), and soliciting employee grievances and impliedly promising to remedy them if employees ceased supporting the Union (complaint pars. 16-17). Chairman Battista would find violations as to complaint pars. 13-16, but would not find a violation as to complaint par. 17. [\[HTML\]](#) [\[PDF\]](#)

The Board also agreed with the judge that the violations (complaint pars. 14 and 16), which occurred during the critical period constituted objectionable conduct and that a second election is warranted.

Chairman Battista and Member Acosta agreed with the judge that the Respondent's shown proclivity to violate the Act justifies a broad order, but they disagreed that a corporatwide order and notice posting provisions are necessary, after finding that this case is distinguishable from other cases where the Board has ordered corporatwide remedies involving this Respondent. They wrote: "In those cases, the Respondent committed multiple violations at multiple locations with high-ranking corporate and regional offices either visiting the facilities at issue and playing a role in the unlawful conduct, or taking prominent roles in directing, approving, or knowingly failing to prevent unlawful actions. Here, the Respondent committed three types of unfair labor practices at one facility with a state manager being the perpetrator in two instances. As such, this case involves discrete violations at an individual facility, and, as in other similar cases, involving this Respondent, traditional remedies are warranted."

Member Liebman, dissenting on this issue, would find that corporatwide remedies are appropriate, saying: "It seems that the majority infers that the regional corporate official who visited this facility and committed unfair labor practices was acting alone and on an ad hoc basis. In my view the opposite inference is warranted. It seems more likely that the regional manager was present at this facility for a reason, namely, to implement the Respondent's corporate labor policies and to conduct himself in a manner consistent with those policies. To that end, he was successful." Member Liebman added that issuance of a corporate remedy is consistent with the Board's findings in *Beverly Health & Rehabilitation Services* (commonly known as *Beverly IV*), 335 NLRB 635 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003), and "promotes the likelihood that our remedies will have a deterrent effect at all the Respondent's facilities."

Chairman Battista and Member Acosta, in finding a corporatwide remedy is not warranted, distinguished *Beverly IV* from this case. They noted that in *Beverly IV*, the Board explicitly named five "high ranking corporate and regional officials who played prominent roles in directing, approving, or knowingly failing to prevent unlawful actions," including the company president, two vice presidents, and two regional managers. 335 NLRB at 639. In this case, Chairman Battista and Member Acosta found no such evidence of high-level management involvement in the unlawful conduct, stating: "Indeed, our dissenting colleague can only say that there is a 'likelihood' that the lawful conduct emanated from a central source. That 'likelihood' is not supported by concrete evidence of central direction. Contrary to our dissenting colleague, the involvement of one state human resources manager, who is not alleged to have had any involvement in corporate policy making, does not provide that support."

(Chairman Battista and Members Liebman and Acosta participated.)

Charge filed by Food and Commercial Workers Local 1657; complaint alleged violation of Section 8(a)(1). Hearing at Birmingham on Oct. 17, 2001. Adm. Law Judge Keltner W. Locke issued his decision Nov. 29, 2001.

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*Communications Workers Local 13000 (Verizon Communications, Inc.)* (6-CB-10814, 10830; 340 NLRB No. 2) Pittsburgh, PA Aug. 29, 2003. The administrative law judge found, and the Board agreed, that the Respondent Union violated Section 8(b)(1)(A) of the Act by prosecuting and firing Susan Irving and Margaret Eichner in 2002 for working mandatory overtime and not obeying its directive to engage in unprotected activity, which would subject them to lawful discipline by Verizon. [\[HTML\]](#) [\[PDF\]](#)

On August 4, 2000, the Union, to get concessions from Verizon in negotiations for a new contract, issued a directive that its

members work "No" overtime, "forced or voluntary till we get a contract" and that "At end of tour<sup>3</sup>/<sub>4</sub>leave/go home." The Union promised: "There will be no contract till there is complete amnesty for disciplinary action taken against any member taking part in this action on 8/4 & 8/5/2000" (2 days before the expiration of the old contract).

Eichner volunteered to work overtime from 5 p.m. until midnight after her day shift on August 4 and Irving also volunteered to work overtime on August 5. After being advised that the Union did not want the employees to work overtime on August 4 and 5, both employees notified their supervisors but were advised that they had to stay on the job or they would be subject to disciplinary action.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Susan L. Irving and Margaret L. Eichner, Individuals; complaint alleged violation of Section 8(b)(1)(A). Hearing at Pittsburgh, Dec. 11-12, 2002. Adm. Law Judge Marion C. Ladwig issued his decision April 21, 2003.

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*Electrical Workers (IBEW) Local 236* (3-CA-23141; 339 NLRB No. 156) Schenectady, NY Aug. 21, 2003. The Board adopted the administrative law judge's recommendation and dismissed the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Frederick Nirsberger for engaging in protected concerted activities. It approved the judge's finding that Nirsberger forfeited his right to co-worker representation under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), by insisting on a representative who was unavailable to be present during an investigatory interview. [\[HTML\]](#) [\[PDF\]](#)

At the interview with Respondent's business manager Tim Paley, Niresberger invoked his *Weingarten* rights and asked for Jerry Comer, an International Representative who worked for the International and acts as a liaison between the International and its local unions. Comer works out of his home, 120 miles and 2 hours' drive from the Respondent's offices. In response to Nirsberger's request for representation by Comer, Paley told Nirsberger: "You can have anybody you want here, but I want to finish this conversation." Nirsberger refused to continue the conversation without Comer and left the office. Paley then discharged Nirsberger.

The General Counsel asserted that Nirsberger's request for representation was protected under Section 7 and that his discharge was unlawful because Respondent terminated Nirsberger solely for invoking his *Weingarten* rights, not for requesting a third-party representative. However, as Comer was not Nirsberger's coworker, the Board found that Nisberger did not act in a concerted manner with a coworker for mutual aid or protection.

(Chairman Battista and Members Walsh and Acosta participated.)

Charge filed by Frederick M. Nirsberger, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Albany on Nov. 13, 2001. Adm. Law Judge Joel P. Biblowitz issued his decision Jan. 2, 2002.

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*Gadsden Tool, Inc.* (10-CA-30005-2; 340 NLRB No. 3) Rainbow City, AL Aug. 29, 2003. Contrary to Chairman Battista, Members Liebman and Walsh agreed with the administrative law judge's finding that the Retail, Wholesale and Department Stores Union's failure to submit dues authorizations to the Respondent did not excuse the Respondent from its obligation to remit dues to the Union. It ordered the Respondent to pay retroactive dues to the Union in the amount of \$14,904, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). [\[HTML\]](#) [\[PDF\]](#)

In the prior decision, 327 NLRB 164 (1998), the Board found that the Respondent violated Section 8(a)(5) of the Act by engaging in bad-faith bargaining for an initial contract and by failing to execute a collective-bargaining agreement to which the parties agreed on February 18, 1997. The Respondent thereafter petitioned the U.S. Court of Appeals for the 11th Circuit for review and, on December 1, 2000, the court enforced the Board's Order.

Chairman Battista would reverse the judge's finding that the Respondent is obligated to remit retroactive dues payments to the Union. Chairman Battista contended that although the parties' collective-bargaining agreement makes clear that the submission of dues-checkoff authorizations is a prerequisite to the obligation to deduct and remit dues, the Union did not submit any dues-checkoff authorization cards until December 1, 2000, after the Board's Order was enforced. He noted that the contract makes clear that the Respondent's duty to deduct dues from the employees' pay and to remit these funds to the Union is contingent on the Union's furnishing signed checkoff authorizations to the Respondent. Chairman Battista wrote: "It is not disputed that, during the relevant period, the Union failed to furnish any authorizations to the Respondent."

(Chairman Battista and Members Liebman and Walsh participated.)

Adm. Law Judge Jane Vandevanter issued her supplemental decision Jan. 24, 2002.

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*Pieper Electric, Inc., PPC Holdings, Inc.* (Single Employer) (30-CA-15504; 339 NLRB No. 160) Milwaukee, WI Aug. 21, 2003. Members Schaumber and Acosta reversed the administrative law judge's findings and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish Electrical Workers IBEW Local 494 certain requested information. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The Union requested the names of all Local 494 employees who were participating or had been solicited to participate in the Respondent's Employee Stock Purchase Plan (ESPP) after the Respondent's announcement that PPC Holdings would be implementing an employee ownership program. The purpose of the Union's request was section 12.05 of the parties' collective-bargaining agreement, which restricts stock ownership by covered employees. The Respondent argued that the names of ESPP participants were irrelevant to the Union's duties as a collective-bargaining representative because the Union's purpose was to impose internal union discipline on ESPP participants.

Members Schaumber and Acosta determined that the ESPP does not constitute "wages" because employees receive no "emolument of value" and that the ESPP does not come within the scope of "other conditions of employment" because it does not operate as a retirement plan. They wrote: "Accordingly, we find that the ESPP does not come within the scope of those subjects of bargaining made mandatory by Section 8(d) of the Act: wages, hours, or other terms and conditions of employment."

Contrary to his colleagues, Member Walsh would find that the Respondent unlawfully refused to provide the Union with the information it requested about employee participation in the ESPP. He said that the ESPP, which provides its employees with substantial advantages related to their purchase of the Respondent's stock, is clearly a mandatory subject of bargaining.

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Electrical Workers (IBEW) Local 494; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Milwaukee on Aug. 5, 2002. Adm. Law Judge Bruce D. Rosenstein issued his decision Nov. 1, 2002.

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*Riverbay Corp., d/b/a CO-OP City and Marion Scott Real Estate, Inc.* (2-CA-33290, 33830; 340 NLRB No. 4) Bronx, NY Aug. 29, 2003. No exceptions having been filed by the Respondent, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(2) and (1) of the Act by recognizing Party-in-Interest Painters Local 1456 and executing a collective bargaining contract with Local 1456 at a time when the Respondent did not employ any employees who were members of Local 1456 or who had authorized Local 1456 as their collective-bargaining representative. Neither the Respondent nor the Parties-in-Interest (Local 1456 and Painters District Council No. 9) excepted to the judge's recommended order requiring the rescission of the collective-bargaining agreements between them. [\[HTML\]](#) [\[PDF\]](#)

The Parties-in-Interest asserted that the recommended order should be clarified in two respects, noting that the language of the notice did not conform to the language of paragraphs 1(b) and (c) of the Order. They requested that the "permissive 'shall not

require' language in the Order should be replaced with the mandatory 'will not withdraw' language in the proposed notice of posting," and that the Board "clarify exactly what is meant by 'wages or other benefits or other terms or conditions of employment established by' the agreements." The Board rejected both requests but reconciled the language of the Order and Notice by issuing a new Notice that conforms with paragraphs 1(b) and (c) of the judge's Order. See, e.g. *Windsor Castle Health Care*, 310 NLRB 579, 594 and 596 (1993).

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Johnny Olivio and Narciso Rafael Luna, Individuals; complaint alleged violation of Section 8(a)(1) and (2). Hearing at New York, Dec. 5-6, 2002. Adm. Law Judge Eleanor MacDonald issued her decision April 17, 2003.

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*Wal-Mart, Inc.* (21-CA-34515; 339 NLRB No. 153) Lake Elsinore, CA Aug. 21, 2003. Chairman Battista and Member Acosta reversed the administrative law judge and held that the Respondent did not violate Section 8(a)(1) of the Act by soliciting and/or resolving employee grievances to dissuade employees from supporting the Union during the period January through April 2000. In accordance with this finding, they dismissed the complaint in its entirety. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The issue to be determined was whether during the union organizing campaign the Respondent solicited grievances in a manner that was significantly altered from its past practice and methods. The judge found that the Respondent's solicitation of grievances during the critical period was extraordinary in incident, pervasiveness, and managerial level involved. The judge stated: "It is reasonable to infer that Respondent's solicitous omnipresence during the union campaign demonstrated Respondent's ability to address and resolve employee needs and inherently implied a promise to remedy grievances."

The Respondent has a longstanding company program called "Coaching By Walking Around" (CBWA) which involved managers spending time with employees at the employees' jobs and being available to listen, advise, and instruct. After the advent of the union organizing campaign, Respondent "stepped up" the intensity of the CBWA. Chairman Battista and Member Schaumber held that the "stepped up" activity included countercampaigning and noted it was not unlawful to engage in such activity. The majority found that the evidence established that the occurrence of soliciting and remedying grievances during the critical period was substantially consistent with past practice.

Member Walsh found that in direct response to the Union's organizational campaign, the Respondent flooded the Lake Elsinore store with high-level managers who systematically solicited employee complaints, requests, and grievances. He wrote that this was a significant departure from the Respondent's more limited past practice of soliciting and remedying employee grievances and, therefore, unlawful.

(Chairman Battista and Members Walsh and Acosta participated.)

Charges filed by Food and Commercial Workers Local 1167; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Temecula on May 28 and at Lake Elsinore on May 29, 2002. Adm. Law Judge Lana H. Parke issued her decision July 17, 2002.

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*Webco Industries, Inc.* (17-CA-19047, 19120; 340 NLRB No. 1) Sand Springs, OK Aug. 28, 2003. Members Liebman and Walsh affirmed the administrative law judge's supplemental findings, with two exceptions, and ordered the Respondent to pay Charles Thornton \$18,030.10 in backpay, \$3,128.03 for profit sharing, and \$16,849.38 in 401(k) contributions. Member Schaumber dissented in part. [\[HTML\]](#) [\[PDF\]](#)

In one disagreement with the judge, the majority found that the record established that Thornton did not qualify for attendance bonuses throughout the period leading up to his discharge. It reduced his gross earnings from the beginning of the backpay period through July 31, 2000, when the bonuses were eliminated and also reduced the profit sharing and 401(k) contributions

through July 31, 2000 because they were based on gross wages.

On the second issue, the majority deleted the provision from the judge's recommended Order, which related to his finding that if Thornton incurs higher income tax liability as a result of receiving his backpay in a lump sum, the Respondent should be required to reimburse him for the additional taxes. It noted that the General Counsel did not seek this relief in the underlying case; that the Board's prior order, as enforced, contained no such provision; and that to provide the requested remedy at this stage would require the Board to amend its Order and possibly to return to court to seek enforcement of the amended Order. "We think that this is not the time to raise this issue; the General Counsel should have made this argument to the Board in the earlier proceeding," the majority held. Member Liebman agreed that the relief was not timely sought but nonetheless believes that this form of relief would be appropriate if timely sought.

Member Schaumber joined his colleagues in all but two aspects of their decision. One, before awarding Thornton any bonuses for attendance and safety, he would require the General Counsel to introduce evidence of Thornton's attendance and safety record during his interim employment; and two, he would not award Thornton moneys for his claimed weekly purchases of work clothes without some evidence substantiating that claim, either in the form of receipts, a credible explanation why the receipts are unavailable, or some corroborative evidence of the need and the cost.

The Board's decision in the underlying unfair labor practice proceeding is reported at 327 NLRB 172 (1998). The U.S. Court of Appeals for the Tenth Circuit enforced the Board's decision. 217 F.3d 1306 (2000). The Respondent reinstated Thornton on September 25, 2000 and this proceeding concerns the amount of Thornton's make-whole relief.

(Members Liebman, Schaumber, and Walsh participated.)

Adm. Law Judge Albert A. Metz issued his decision Dec. 28, 2001.

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*Zimmerman Plumbing & Heating Co., Inc.* (7-CA-41389; 339 NLRB No. 138) Kalamazoo, MI Aug. 25, 2003. Agreeing with the administrative law judge, Members Liebman and Walsh held that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to offer former unfair labor practice striker Tim O'Brien positions that were substantially equivalent to his prestrike job that became available in 1998; that the Respondent further violated Section 8(a)(3) and (1) by failing to consider O'Brien for other nonequivalent positions in 1998 because of his activities for Plumbers Local 357; and that the Respondent did not unlawfully fail to consider former unfair labor practice striker James Fogoros for nonequivalent positions. The judge concluded that the Respondent did not consider, and would not have considered, Fogoros for the nonequivalent positions that became available in 1998 because it did not believe Fogoros, as a skilled journeyman would be interested in the less skilled positions. [\[HTML\]](#) [\[PDF\]](#)

Member Schaumber, concurring in part and dissenting in part, agreed that the Respondent unlawfully failed to recall O'Brien to positions which were substantially equivalent to his prestrike position, but not by refusing to consider him for nonequivalent positions. He also agreed that the Respondent did not unlawfully refuse to consider Fogoros for nonequivalent positions. He would dismiss this allegation on the additional ground that Fogoros never applied for such positions.

The Board in 2001 affirmed the judge's findings that the Respondent unlawfully failed to recall O'Brien in 1998 to certain positions that were substantially equivalent to his prestrike job. Contrary to the judge, it found that none of the positions that became available in 1998 were substantially equivalent to Fogoros' prestrike job and dismissed the allegation that the Respondent unlawfully failed to recall Fogoros to substantially equivalent positions. The Board remanded to the judge the Respondent's contention that O'Brien and Fogoros had previously abandoned their employment relationship with the Respondent by accepting substantially equivalent employment elsewhere. 334 NLRB 586.

Members Liebman and Walsh agreed with the judge that the Respondent failed to establish that O'Brien intended to abandon his reinstatement rights by accepting interim employment at another employer. In finding that the Respondent unlawfully failed to consider O'Brien for nonequivalent positions that became available, Members Liebman and Walsh noted O'Brien's repeated inquiries of the Respondent about any available work and when he could start working for the Respondent again.

They found that O'Brien's words reasonably put the Respondent on notice to consider him for any available position.

Member Schaumber noted that there is no evidence that O'Brien ever applied with the Respondent for nonequivalent positions or that he ever intended to apply for such positions. He wrote: "O'Brien was lawfully entitled to return to a substantially equivalent position after the strike. His inquiries evidence his anxiousness to do so. Such inquiries are not uncommon. That is the end of the matter."

(Members Liebman, Schaumber, and Walsh participated.)

Adm. Law Judge Bruce D. Rosenstein issued his supplemental decision Jan. 29, 2002.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Huntington Hospital, an affiliate of Southern California HealthCare Systems* (SEIU Nurse Alliance Local 121 RN) Pasadena, CA August 26, 2003. 31-CA-25790; JD(SF)-54-03, Judge William L. Schmidt.

*Sunglass Products Inc. d/b/a Personal Optics* (Laborers Local 882) Fullerton and Anaheim, CA August 19, 2003. 21-CA-34562, 34732; JD(SF)-53-03, Judge Lana H. Parke.

*McClain E-Z Pack, Inc.* (Paper, Allied-Industrial, Chemical and Energy Workers) Selma, AL August 26, 2003. 15-CA-16812, 16913; JD(ATL)-57-03, Judge George Carson II.

*MEMC Electronic Materials, Inc.* (Machinists) St.Louis, MO August 28, 2003. 14-CA-27036, 27251; JD-92-03, Judge Paul Bogas.

*Publix Super Markets, Inc.* (Food & Commercial Workers and Individuals) Miami, FL August 28, 2003. 12-CA-21391-3, et al.; JD(ATL)-46-03, Judge Lawrence W. Cullen.

*Nations Rent, Inc.* (Operating Engineers Local 150) South Bend, IN August 28, 2003. 25-CA-27257-1, et al.; JD-90-03, Judge Margaret M. Kern.

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### 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.)*

*Artesia Ready Mix Concrete, Inc.* (Operating Engineers Local 3) (32-CA-18823-1, 19385-1; 339 NLRB No. 159) Tulare, CA August 21, 2003.

*(In the following case, the Board granted the General Counsel's motion for summary judgment in the absence of good cause being shown for the Respondent's failure to file a timely answer to the complaint.)*

*Country Lane Construction, Inc.* (Michigan Regional Council of Carpenters Local 1234) (7-CA-44949; 339 NLRB No. 154) Goshen, IN August 27, 2003.