

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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October 10, 2003

W-2916

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Active Transportation Co., L.L.C. (11-CA-19328; 340 NLRB No. 47) Mt. Holly, NC Sept. 30, 2003. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to execute, on request, a written contract incorporating the agreement concerning unit employees' health insurance and pensions, which it reached with Teamsters Local 71 in September 2001. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 71; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Winston-Salem on July 11, 2002. Adm. Law Judge Keltner W. Locke issued his decision Aug. 8, 2002.

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Air Contact Transport, Inc. (5-CA-29322; 340 NLRB No. 81) Lorton, VA Sept. 30, 2003. The Board affirmed the administrative law judge's finding that employee Gary Good engaged in protected concerted activity at the Respondent's goodbye luncheon for its terminal manger when he raised his hand and stated that he "had some questions on behalf of

[himself] and other coworkers," and that the memo Goode received from the Respondent on September 22, 2000, reprimanding him for his protected concerted activity at the luncheon was unlawful. The Board also agreed with the judge that the Respondent discharged Good in violation of Section 8(a)(1) of the Act, relying on *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), not the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Member Walsh agreed with the judge that Goode's discharge also violated Section 8(a)(1) under a *Wright Line* analysis.

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(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Gary Goode, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Washington, D.C., April 15-16, 2002. Adm. Law Judge Karl H. Buschmann issued his decision July 31, 2002.

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Air Flow Equipment, Inc. (7-CA-44131-1; 340 NLRB No. 62) Kalamazoo, MI Sept. 29, 2003. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by implying to employees that selecting a union to represent them would be futile, threatening them with unspecified consequences if they tried to organize a union, interrogating employees about the union activities of other employees, encouraging and assisting employees to withdraw their signed authorization cards, and informing employees that it would no longer make personal loans to them if Sheet Metal Workers Local 7 were selected; and violated Section 8(a)(3) by discharging employee Eric Furtaw. [\[HTML\]](#)

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Contrary to his colleagues, Member Schaumber found that the General Counsel did not prove by a preponderance of the evidence that the comment made by Company Owner and President Dick DeYoung at an employee meeting concerning the Respondent's continued ability to make personal loans if the Union came in was a threat to withdraw an existing benefit in violation of Section 8(a)(1).

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Sheet Metal Workers Local 7; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Kalamazoo, Nov. 8-9, 2001. Adm. Law Judge Jane Vandeventer issued her decision Feb. 22, 2002.

* * *

Alaska Ship and Drydock, Inc. (19-CA-27490, et al.; 340 NLRB No. 95) Ketchikan, AK Sept. 30, 2003. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(1) of the Act by maintaining an employee handbook provision that interferes with employee discussion of their pay rates or salaries and an employee handbook provision that requires employees to obtain management authorization to distribute literature on its premises at any time, threatening to discharge employees who possess or sign union authorization cards, and threatening employees for discussing their wages among themselves. It modified the recommended Order and notice to accurately reflect the violations found. [\[HTML\]](#) [\[PDF\]](#)

The Board, in adopting the judge's finding that the maintenance of the Respondent's wage discussion policy violated Section 8(a)(1), found, contrary to the judge, that the Respondent did in fact proffer a business justification for the policy, but that it is insufficient to warrant reversal of the judge's finding of a violation. The Respondent claimed that, because the employees are not aware that the hourly wage rates are based on different skill levels, the wage discussion policy is designed to prevent "hurt feelings" that would result should the employees become aware that they are being paid different hourly wage rates.

In adopting the judge's conclusion that the Respondent's wage discussion policy violated Section 8(a)(1), Chairman Battista and Member Schaumber noted that the policy is not simply a confidentiality policy, but expressly bans the discussion of wages. *Cf. Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). They also noted that, from late 2000 to 2001, the Respondent's work force swelled from no more than 50 to more than 200 employees, and thus a significant number of employees were

brought under the handbook provisions for the first time during the period covered by the complaint; and that although the employee handbook did not specify a form of discipline for failure to adhere to the wage discussion policy, the Respondent violated Section 8(a)(1) when Supervisor Carney told employee Mike Hamilton that he would be in "big trouble" if he talked about wages.

No exceptions were filed to the judge's recommended dismissal of the allegation that the Respondent discharged David Harvey in violation of Section 8(a)(3) and (1).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Carpenters Local 2520; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Ketchikan, Nov. 5-6, 2002. Adm. Law Judge William L. Schmidt issued his decision March 14, 2003.

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Alliance Steel Products, Inc. (8-CA-32650; 340 NLRB No. 65) Alliance, OH Sept. 30, 2003. In the absence of exceptions, the Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Donald Braham, Gary Combs, Nelson Lanham, Scott Stiffler, and Marcus Grinter and by issuing written warnings to and discharging Debra Watson; and violated Section 8(a)(1) by removing a union flyer from a bulletin board on which nonwork-related materials were allowed to be posted. The Board found merit in the General Counsel's exception and held, contrary to the judge, that the Respondent violated Section 8(a)(1) by threatening employees with discharge on or about July 2, 2001. It concluded that Plant Manager Bob Balint's threat on July 2 to fire Stiffler "on the spot" if he continued to talk about the union reasonably tended to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Canton, Sept. 9-12, 2002. Adm. Law Judge Arthur J. Amchan issued his decision Nov. 14, 2002.

* * *

American Alpha Construction, Inc. (13-CA-40937-1; 340 NLRB No. 48) West Chicago, IL Sept. 26, 2003. Absent good cause being shown for the Respondent's failure to file a timely answer to the complaint, the Board granted the General Counsel's motion for default judgment insofar as the complaint alleges that the Respondent committed violations of Section 8(a)(1) and (3) of the Act, including refusing to hire and/or consider for hire four job applicants. It found that the undisputed complaint allegations are sufficient to establish the violations under the standards of FES, 331 NLRB 9 (2000), supp. decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). The Board however held in abeyance a final determination of the appropriate affirmative remedy because the complaint fails to allege how many available positions the Respondent had for the discriminatee applicants. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Bricklayers Illinois Local 21; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment July 18, 2003.

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Bulkmatic Transport Co. (8-CA-33405; 340 NLRB No. 74) Cleveland, OH Sept. 30, 2003. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally failing and refusing to deduct and remit to the Union proper dues from the unit employees since on or about May 1, 2002. [\[HTML\]](#) [\[PDF\]](#)

The parties' master agreement contained, among others things, the dues checkoff obligation and provisions pertaining to union

security and expired March 31, 2003. Their rider agreement contained articles relating to matters such as wages, and health and welfare and pension benefits and expired April 30, 2002. The Respondent ceased to deduct and remit dues to the Union upon expiration of the rider agreement but before the expiration of the master agreement.

The Board found that the parties intended the provisions of the rider agreement and the master agreement would expire at different times, and that the separate expiration dates were not inconsistent clauses in the collective-bargaining agreements. It did not rely on the judge's conclusion that the master agreement contained substantial terms and thus would be a contract bar. Rather, the Board relied upon the fact that the master agreement contained the checkoff clause, and thus the expiration date of that contract governed the termination date for checkoff.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 407; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Cleveland, Oct. 24-25, 2002. Adm. Law Judge Margaret G. Brakebusch issued her decision Oct. 25, 2002.

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Campbell Electric Co., Inc. (25-CA-27041-1; 340 NLRB No. 93) Mishawaka, IN Sept. 30, 2003. The administrative law judge found, and the Board agreed, that the Respondent committed numerous violations of Section 8(a)(1) of the Act. It also found that by discharging Michael Fenrick and Michael Popovich on January 11, 2000; discharging Matthew Petruska on February 7; accelerating the resignation of Robert Kellogg on February 21; and discharging Brian Zache on February 24, the Respondent violated Section 8(a)(3) and (1). [\[HTML\]](#) [\[PDF\]](#)

The General Counsel excepted to the judge's remedy for the unlawful discharges of Popovich and Petruska. The judge found that both of them, before their terminations, had plans to resign their employment that were sufficiently definitive to toll their backpay as of the date of their planned departures.

Members Liebman and Walsh agreed that Popovich had specific and definitive plans to resign before he was unlawfully terminated, but not Petruska. At the time of his discharge, Petruska was contemplating giving notice of his resignation, but he did not do so because he was waiting for the union apprenticeship placement test results. The majority rejected the judge's finding that Petruska would have left his employment within two weeks of receiving the test results and modified the Order directing the Respondent to offer Petruska full reinstatement to his former job or, if the job no longer existed, to a substantially equivalent position.

Chairman Battista, dissenting in part, disagreed with the majority's decision to modify the judge's remedial order regarding discriminatee Petruska. He agreed with the judge's finding that prior to the Respondent's unlawful discharge of him, Petruska had formed a definite intention to resign his employment with the Respondent. Chairman Battista noted that the judge accordingly declined to order the Respondent to offer Petruska reinstatement, and tolled the backpay period as of the time that Petruska would have resigned his employment even if the discharge had not occurred.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 153; complaint alleged violation of Section 8(a)(1) and (3). Hearing at South Bend, Nov. 1-2, 2000. Adm. Law Judge Eric M. Fine. issued his decision April 5, 2001.

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City Stationery, Inc. (24-CA-9070, 24-RC-8213; 340 NLRB No. 70) Caguas, PR Sept. 30, 2003. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(1) of the Act by discharging 20 warehouse employees because of their protected concerted activities in seeking to discuss possible wage increases with its president, and, except for a few employees who had already been reinstated or who had waived reinstatement and backpay pursuant to settlement agreements, ordered the discriminatees reinstated with backpay. Further, in agreement with the judge, the Board ordered that the 16 challenged ballots, all cast by discriminates, in a Board-conducted representation election held on

December 3, 2001, be opened and counted and that the Regional Director issue a revised tally of ballots and an appropriate certification. [\[HTML\]](#) [\[PDF\]](#)

The election resulted in 3 for and 6 against, Teamsters Local 901, with 17 challenged ballots. The 17th ballot was challenged by the Union on the basis of the voter's familial relationship with an officer of the Respondent and that ballot is not at issue in these proceedings.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Teamsters Local 901; complaint alleged violation of Section 8(a)(1). Hearing at San Juan, March 26-27, 2002. Adm. Law Judge William N. Cates issued his decision June 17, 2002.

* * *

Cora Realty Co., LLC a/k/a 301 Holdings, LLC and Chestnut Holdings of New York Inc. (2-CA-32008; 340 NLRB No. 55) Bronx, NY Sept. 29, 2003. The Board held, contrary to the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act, following its September 1998 takeover of the operations at an apartment building at 2170 University Avenue, Bronx, NY, by unilaterally changing unit employees' wages and benefits, but not by changing their work schedules, without prior notice to or providing Service Employees Local 32E an opportunity to bargain about the changes. [\[HTML\]](#) [\[PDF\]](#)

The judge found that the Respondent, although a successor employer, was not a "perfectly clear" successor obligated to consult with the Union before setting the employees' initial terms and conditions of employment. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The Board did not pass on the issue of whether the Respondent fell within the "perfectly clear" caveat to the general rule of *Burns* that a successor employer is free to set the initial terms and conditions of employment. Assuming arguendo that the Respondent was free to set the initial terms, it explained that, in setting the initial terms and conditions, the Respondent told the employees that scheduling would change, thereby implicitly telling them that all other terms and conditions would remain the same. In these circumstances, the Board concluded that the Respondent could not thereafter unilaterally depart from the other terms and conditions of employment.

On other issues, the Board found, in agreement with the judge, that the Respondent adopted the Union's multiemployer agreement with the Bronx Realty Advisory Board (BRAB) on October 21, 1998 and failed to apply the agreement to unit employees since that date in violation of Section 8(a)(5) and (1); and that the Respondent discharged Juan Velasco because of his Union membership in violation of Section 8(a)(3) and (1). In another agreement with the judge, the Board found that the Respondent did not unlawfully suspend and discharge Manual Mendez.

Finding merit in the Respondent's exception that "301 Holdings, LLC" is a separate entity and not another name for "Cora Realty, LLC," the Board deleted the reference to "301 Holdings, LLC" from the Order and the notice.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Service Employees Local 32E; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York, Sept. 13 and 14 and Oct. 18, 1999. Adm. Law Judge Raymond P. Green issued his decision March 6, 2000.

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Corporate Interiors, Inc. (17-CA-20750, 20979; 340 NLRB No. 85) Olathe, KS Sept. 30, 2003. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act in numerous respects, including calling the police to seek the removal of union organizers attempting to apply for jobs, attempting to videotape and videotaping pickets, and interrogating employee-applicants and employees about their union membership and sympathies; and violated Section 8(a)(3) and (1) by refusing to consider for hire 12 job applicants and laying off Lee Murphy. [\[HTML\]](#) [\[PDF\]](#)

In adopting the judge's findings of the Section 8(a)(3) refusal-to-hire/consider violations, Chairman Battista does not rely on either the judge's discussion of the dissenting opinion of Members Liebman and Walsh in *Aztech Electric Co.*, 335 NLRB 260 (2001), or the judge's discussion of the asserted Section 7 right of three of the union applicants to wear "anti-Respondent" T-shirts.

The Board, finding merit in the Charging Party's exception, reversed the judge's dismissal of the allegation that the Respondent's owner, Roger Kilma, during an office phone call and with an employee standing nearby, violated Section 8(a)(1) by threatening a union organizer with physical harm, and found the violation.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Carpenters District Council of Kansas City & Vicinity; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park, July 17-20, 2001. Adm. Law Judge Margaret G. Brakebusch issued her decision Nov. 23, 2001.

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CSX Hotels, Inc. d/b/a The Greenbrier (11-CA-19537; 340 NLRB No. 92) White Sulphur Springs, WV Sept. 30, 2003. Members Liebman and Walsh, in agreement with the administrative law judge, held that the Respondent violated Section 8(a)(1) of the Act by contacting the police in order to seek the removal or arrest of the union representatives who were engaged in lawful picketing. *Wild Oats Community Markets*, 336 NLRB 179, 182 (2000). [\[HTML\]](#) [\[PDF\]](#)

Dissenting, Chairman Battista found that the Respondent lawfully contacted the police based on a concern that there was a potential traffic safety problem. In his view, citizens have a constitutional right to contact governmental authorities with respect to their reasonable concerns. He wrote: "That right is enshrined in the First Amendment, i.e., the right to petition the government for redress of grievances."

The majority held that the Respondent has shown no legally protected injury at the hands of the picketers and no judicially cognizable interest in procuring enforcement of the traffic laws. As the judge found, they said there is no evidence of an actual or potential traffic problem as a result of the picketing.

The Union, which represents employees at the Lynch Construction Co., learned on June 12, 2002 that Lynch was performing work traditionally performed by operating engineers on the premises of the Respondent, using nonunion employees of the Respondent. The Union began picketing at the gate used by Lynch on June 20 after an unsuccessful attempt to resolve the issue with Lynch's management. The Respondent admits that the Union's pickets were on public property.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Operating Engineers Local 132; complaint alleged violation of Section 8(a)(1). Hearing at Lewisburg on June 21, 2002. Adm. Law Judge Benjamin Schlesinger issued his decision May 2, 2003.

* * *

Exxon Chemical Co. (22-CA-23546; 340 NLRB No. 51) Linden, NJ Sept. 29, 2003. The primary issue alleged in the complaint was whether the Respondent violated Section 8(a)(1) and (5) of the Act when it refused to designate an arbitrator pursuant to the procedures set forth in its collective-bargaining agreement with Teamsters Local 877 and refused to arbitrate the grievances. The administrative law judge found, and Members Liebman and Walsh agreed, that the Respondent was in violation of the Act. Chairman Battista dissented from this finding. [\[HTML\]](#) [\[PDF\]](#)

In its grievances filed January 30, 1999, the Union contended that the Respondent had not provided the employees with the contractually required 6-month notice of layoff; had failed to match a contribution to the employees' thrift fund based upon a severance pay; and had unilaterally decided to transfer the Exxon thrift fund to another thrift fund. The judge determined that the issues raised by the grievances are clearly covered by the grievance-arbitration procedure under the parties' collective-bargaining agreement and that there is no exclusion from arbitration.

In his partial dissent, Chairman Battista did not agree that the Respondent's refusal to designate an arbitrator and to proceed to arbitration on three specific grievances violated Section 8(a)(5). He claimed that the Respondent has not abrogated the arbitration provisions of the contract but has refused to arbitrate three grievances. Unlike his colleagues who said that the Respondent has repudiated the agreement, he claimed that the Respondent had simply taken the position that the three grievances are not arbitrable.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 877; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, Nov. 14, 2000 and Jan. 22, 2001. Adm. Law Judge Howard Edelman issued his decision March 28, 2001.

* * *

Freedman Die Cutters, Inc. (29-CA-25110; 340 NLRB No. 46) Long Island, NY Sept. 30, 2003. The Board upheld the administrative law judge's decision that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing operations at its facility and laying off all of its unit employees without prior notice to and affording Paper Workers Local 107 an opportunity to bargain with the Respondent regarding the effects of the plant closing on the unit employees. No exceptions were filed to the judge's grant of the General Counsel's motion for partial default judgment regarding complaint paragraphs 3, 6, 7, and 8. The Board adopted the judge's grant of default judgment with respect to complaint paragraphs 4 and 5. [\[HTML\]](#) [\[PDF\]](#)

Member Schaumber found the Respondent's answer sufficient to raise an issue for hearing with respect to complaint paragraph 5, which alleges the Union's labor organization status within the meaning of Section 2(5). He concluded however that the General Counsel met the burden of proof on this issue by other undisputed factual allegations of the complaint and by evidence adduced at the hearing.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Paper Workers Local 107; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on Jan. 29, 2003. Adm. Law Judge Joel P. Biblowitz issued his decision Feb. 14, 2003.

* * *

Golden State Foods Corp. (36-CA-8426; 340 NLRB No. 56) Portland, OR Sept. 29, 2003. The Board agreed with the administrative law judge that the Respondent suspended and discharged employee Danny L. Davidson because of his activities for Teamsters Local 162 in violation of Section 8(a)(3) and (1) of the Act; and threatened employees with job loss, and loss of work and pay if they supported the Union, and promised employees new driving routes if they did not support the Union, in violation of Section 8(a)(1). Members Liebman and Walsh also agreed with the judge that the Respondent created the impression that employees' Union activities were under surveillance, in violation of Section 8(a)(1), through comments the Respondent made to several employees in the context of its unlawful threats of job loss. Chairman Battista would find that the Respondent was denied due process with respect to this allegation and would reverse the judge's finding that the Respondent created an impression of surveillance in violation of Section 8(a)(1). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Danny L. Davidson, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Portland, Dec. 7, 2000 and Jan. 16-17, 2001. Adm. Law Judge Thomas Michael Patton issued his decision Aug. 14, 2001.

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Guardian Automotive Trim, Inc. (25-CA-28140-1, 28140-2; 340 NLRB No. 63) Evansville, IN Sept. 30, 2003. The Board, agreeing with the administrative law judge that the Respondent failed to show that it would have terminated the employees had they not engaged in union activities, affirmed the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jimmie Powell and Brian Smith because of their activities for the Electrical Workers (IUE) International.

In affirming the judge's conclusion that the Respondent's proffered basis (insubordination) for the discharges was pretextual, Chairman Battista and Member Schaumber did not rely on all of his findings. Member Walsh would adopt the judge's decision in all respects. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber relied particularly on disparate treatment to show the Respondent's antiunion motive for discharging Powell and Smith. They noted that the Respondent failed to follow its own progressive discipline policy and did not issue a lesser corrective action to Powell and Smith as it did in disciplining other employees for similar conduct. Chairman Battista and Member Schaumber did not rely on the judge's findings that the Respondent conducted an incomplete and skewed investigation of the October 14, 2001 incident involving the employees, or that the discipline imposed by the Respondent's was not in proportion to their misconduct. And, they did not rely on the judge's finding that the Respondent's general animus was demonstrated in an earlier Board case finding that the Respondent violated the Act. *Guardian Automotive Trim, Inc.*, 337 NLRB No. 53 (2002).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by the Electrical Workers (IUE) International; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Evansville, Oct. 1-2, 2002. Adm. Law Judge Ira Sandron issued his decision Dec. 31, 2002.

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Hotel & Restaurant Employees Local 2 (Castagnola, Inc. of San Francisco d/b/a Castagnola's Restaurant) (20-CB-11531; 340 NLRB No. 52) San Francisco, CA Sept. 30, 2003. The Board adopted the administrative law judge's decision dismissing the complaint allegations that the Respondent violated Section 8(b)(3) of the Act by refusing to bargain with the Employer. It agreed with the judge's conclusion that the Employer's attorney summarily rejected all of the Union's proposals, had no counterproposals, and did not want to change anything. The Union accepted the Employer's bargaining position and did not respond to the Employer's subsequent letters advising the Union to inform the Employer if it wished to continue bargaining. The Board wrote that the Union, having accepted the Employer's bargaining position, saw no need to respond and did not act unlawfully in failing to resume negotiations. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Castagnola's Restaurant; complaint alleged violation of Section 8(b)(3). Hearing at San Francisco on November 29, 2001. Adm. Law Judge Burton Litvack issued his decision July 11, 2002.

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Indian River Memorial Hospital, Inc. (12-CA-21201; 340 NLRB No. 58) Vero Beach, FL Sept. 30, 2003. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its shift schedules and on-call procedures without providing notice to Teamsters Local 769 of any proposed changes and, upon request bargaining with the Union concerning the changes on behalf of unit employees. The judge found, and the Board agreed, that the Respondent's conduct was unlawful because the change involved a mandatory subject of bargaining, the Respondent implemented it after the Union's recognition, the Respondent failed to prove it decided to make the change before recognizing the Union, and the Union requested bargaining about the change. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 769; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Vero Beach on Dec. 14, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision Jan. 8, 2002.

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Jack Cooper Transport Co., Inc. (26-CA-19350; 340 NLRB No. 78) Nashville, TN Sept. 30, 2003. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to

supply information requested by Teamsters Local 89. The judge based his finding on Local 89's shared interest with the other local unions covered by a multiemployer bargaining agreement in making sure that the employers covered by the agreement followed its terms. The Board, however, relied solely on the specific evidence establishing that Local 89 had reason to believe that the Respondent was operating within Local 89's jurisdiction on a "defunct" competitive agreement and in a manner that directly affected the employees represented by Local 89. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 89; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Nashville on April 8, 2002. Adm. Law Judge Keltner W. Locke issued his decision May 8, 2002.

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Jackson Hospital Corp. d/b/a Kentucky River Medical Center (9-CA-37734, et al.; 340 NLRB No. 71) Jackson, KY Sept. 30, 2003. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(1) of the Act by threatening employees, videotaping and creating the impression of videotaping striking employees, both without lawful justification; and Section 8(a)(3) and (1) by discharging Clara Gabbard, Sandra (Barker) Hutton, Eileene Jewell, Debbie Miller, Lois Noble, Maxine Ritchie, Laotta Sizemore, and Melissa Turner; issuing warning notices to Diana Taulbee; and suspending Debbie Miller. [\[HTML\]](#) [\[PDF\]](#)

The Board also found, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Steelworkers since August 11, 2000. The Board deemed it unnecessary to pass on that portion of the judge's decision concerning the allegation that the Respondent unlawfully refused to meet and bargain with the Union from April 26 through August 11, 2000. The General Counsel and the Union excepted to the judge's dismissal of this allegation. The Board found that the violation sought would be cumulative to the Section 8(a)(5) violation the judge found and would not affect the remedy in this case since no unilateral changes were alleged to have occurred from April 26 through August 11, 2000.

After the record closed, the judge granted the General Counsel's motion to reopen the record to litigate two additional alleged discriminatees. During the reopened hearing, testimony was adduced that Supervisor Jan Pelfrey stated that the employees who engaged in the strike "had to go." The judge considered the evidence as relevant to the originally alleged discriminatees as well as the two additional alleged discriminatees. The Board found, contrary to the Respondent's assertion, that there was no "understanding" between the General Counsel and the Respondent that the evidence in the reopened hearing would be limited to the two additional alleged discriminatees. And, it decided that, even absent Pelfrey's statements, the record in the initial phase contained abundant evidence of threats, including multiple threats of discharge, supporting the judge's finding of antiunion animus and that the General Counsel met his initial burden of proof regarding the 8(a)(3) allegations.

Member Schaumber found no need to rely on Pelfrey's statements in the analysis of the 8(a)(3) allegations. He also does not pass on the alleged 8(a)(1) threat by Supervisor Hicks, inasmuch as the finding of a violation would be cumulative of other 8(a)(1) threat findings and would not affect the remedy for this unlawful conduct.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by the Steelworkers; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Jackson various dates between June and Nov. 2000 and Jan. and Aug. 2001. Adm. Law Judge David L. Evans issued his decision Feb. 20, 2002.

* * *

Jerry Cardullo Ironworks, Inc. (29-CA-24655, et al.; 340 NLRB No. 69) Bayshore, NY Sept. 30, 2003. The Board affirmed the administrative law judge's decision, as modified, and held that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by, among others: failing to provide Iron Workers Local 455, on request, with relevant and necessary information; unilaterally granting a wage increase without first notifying and affording the Union an opportunity to bargain with respect to

the change; insisting as a condition of agreeing to terms of a successor agreement that the Union agree to withdraw a National Labor Relations Board complaint, a demand for a trust fund audit, a pending arbitration, and other nonmandatory proposals; refusing to execute the 2002-2005 collective-bargaining agreement, although the terms and conditions of employment had been agreed upon; discharging and laying off employees because of their union membership and activities; and summoning law enforcement officials to remove union agents visiting the Respondent's facility for the purpose of policing and enforcing its collective-bargaining agreement with the Union, notwithstanding a broad visitation clause. [\[HTML\]](#) [\[PDF\]](#)

The Board amended the judge's remedy, modified the recommended Order, and substituted a new notice to conform to the Board's standard remedial language and the facts of the case. It ordered the Respondent to execute the 2002-2005 collective-bargaining agreement requested by the Union on September 25, 2002, and to comply with the terms of the agreement retroactive to July 1, 2002, the effective date of the agreed-upon collective-bargaining agreement. To the extent that the Respondent has failed to comply with the terms of the contract, the Board ordered the Respondent to make whole its employees for any loss of earnings and other benefits they may have suffered as a result of that failure and to make payments to any benefits funds in the amount required by the contract, including paying any additional amounts applicable to such delinquent payments. The Respondent shall reimburse unit employees for any expenses ensuing from its failure, if any, to make such required payments or contributions.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Ironworkers Local 455; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Brooklyn on Jan. 29, 2003. Adm. Law Judge Howard Edelman issued his decision May 30, 2003.

* * *

King Soopers, Inc. (27-CA-16965; 340 NLRB No. 75) Denver, CO Sept. 30, 2003. Members Liebman and Walsh agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with PACE Local 5-920 before implementing a policy regarding the use of new technology by employees in the Respondent's pharmacies. [\[HTML\]](#) [\[PDF\]](#)

In May 2000, the Respondent installed in its pharmacies prescription accuracy scanners, which are used by pharmacists to prevent errors in filling prescriptions. Shortly after installing the scanners, the Respondent issued its Prescription Accuracy Scanner Policy requiring that all of its pharmacists and technicians use the scanners on all prescriptions filled. The Scanner Policy provided that "this is a zero tolerance policy and failure to comply will be grounds for discipline up to and including termination." On Dec. 4, 2000, the Respondent informed the Union of its intent to implement a revised scanner policy, but it refused to bargain over the policy prior to its implementation on Dec. 11.

The majority agreed with the judge that the Respondent was required to bargain with the Union over both the original and revised scanner policies prior to their implementation.

Member Schaumber, concurring in part and dissenting in part, agreed that the Respondent violated Section 8(a)(5) and (1) when it implemented the scanner policy with a "zero tolerance" disciplinary standard on June 7, 2000, but not when it implemented a revised policy on December 11. In his view, the judge erred when he primarily focused on the disciplinary component of the scanner policies without adequately explaining why the subject matter of the scanner policies do not reflect a managerial decision that lay at the core of entrepreneurial control.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by PACE Local 5-920; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Denver on Dec. 11, 2000. Adm. Law Judge Albert Metz issued his decision Feb. 22, 2001.

* * *

Le Marquis Hotel, LLC (2-CA-34440; 340 NLRB No. 64) New York, NY Sept. 30, 2003. The Board adopted the

administrative law judge's decision that the Respondent violated Section 8(a)(1), (2), and (3) of the Act by recognizing and signing a contract containing a union-security clause with Industrial Service, Transport and Health Employees District 6, at a time when District 6 did not represent a majority of its employees. The Respondent excepted only to the judge's application of the Board's dual card doctrine, which it contended is no longer valid precedent in finding that the Respondent violated the Act. [\[HTML\]](#) [\[PDF\]](#)

The Respondent recognized District 6 on the basis of authorization cards signed by 17 of 28 unit employees. The judge found that Charging Party (Hotel and Allied Services Local 758, SEIU) obtained cards from nine employees, who also signed cards for District 6, before the Respondent recognized District 6. He wrote: "[T]he employees by signing their Local 758 cards intended to clearly repudiate their District 6 membership, and to support Local 758 as their bargaining representative." Thus, the judge held that the dual cards preclude a finding that District 6's cards represent the unambiguous choice of those employees as their representative and the cards cannot be counted toward establishing District 6's majority status.

Member Liebman noted her previously expressed view that the dual card rule should be abandoned on the ground that an employee, by signing authorization cards for each of two rival unions, indicates a willingness (absent an explicit revocation of one card by the other) to be represented by either union, and that both cards should therefore be counted toward, respectively, a majority showing of support for each union. See *Alliant Foodservice*, 335 NLRB 695, 698-699 (2001) (Member Liebman dissenting). In this case, she pointed out that the cards signed for Charging Party Local 758, explicitly revoked the cards previously signed for District 6, and the judge correctly found that a majority showing was not made.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Hotel and Allied Services Local 758, SEIU; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing at New York, Aug. 15-16, 2002. Adm. Law Judge Steven Fish issued his decision Jan. 22, 2003.

* * *

Life Care Centers of America, Inc. d/b/a Lakeside Health Center (12-CA-22172; 340 NLRB No. 57) West Palm Beach, FL Sept. 29, 2003. The Board upheld the administrative law judge's finding that the Respondent unilaterally discontinued its matching contribution to its 401(k) plan by failing to give notice to the Union, or affording it an opportunity to bargain, in violation of Section 8(a) (1) and (5) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by SEIU 1199 Florida; complaint alleged violation of Section 8(a)(1) and (5). Hearing on Dec. 2, 2002. Adm. Law Judge George Carson II issued his decision Jan. 17, 2003.

* * *

McClendon Electrical Services, Inc. (16-CA-22434; 340 NLRB No. 73) Austin, TX Sept. 30, 2003. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging employee Dan Elgin for participating in a picket line established by the Union to protest alleged unfair labor practices of the Respondent. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended that had the judge properly analyzed the case under *Wright Line*, he would not have found that Respondent violated by Act by its discharge of Elgin. The Board rejected this contention, finding that the General Counsel satisfied his burden under *Wright Line* by showing that Elgin's protected conduct was a substantial or motivating factor in the Respondent's decision to discharge him, and that the Respondent did not meet its burden by showing that it would have discharged Elgin even in the absence of his protected conduct. The Respondent argued that Elgin would have been terminated in any event for two reasons: (1) he failed to give notice to his supervisor before leaving the worksite; and (2) poor work performance.

As to reason (1), the Board held that the Act generally does not require employees to give notice to their employers before

ceasing work in connection with a labor dispute. *International Protective Services*, 339 NLRB No. 75 (2003). Therefore, it found Elgin's failure to give such notice did not afford the Respondent a lawful basis for discharging him. With respect to reason (2), the Board noted that Elgin's disciplinary notice stated that he was being discharged for "failure to complete shift" which the Respondent explained was his absence from the job while on the picket line and "insubordination," which was Elgin's thinking he could come and go from the jobsite as he pleased without notifying his supervisor. The Board held that Elgin's absence from the job while on the picket line was protected by the Act, and he had the right to do so without giving advance notice to the Respondent and, accordingly, neither reason constituted a lawful ground for taking adverse action against Elgin.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers (IBEW) Local 520; complaint alleged violation of Section 8(a)(1). Hearing at Austin on April 25, 2003. Adm. Law Judge William N. Cates issued his decision May 13, 2003.

* * *

The Philadelphia Coca-Cola Bottling Co. (4-CA-31026; 340 NLRB No. 44) Philadelphia, PA Sept. 29, 2003. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a bonus incentive program for its quality control employees, and by granting bonuses to those employees. [\[HTML\]](#) [\[PDF\]](#)

The Respondent excepted to the judge's conclusion that union shop stewards were not authorized to act as the Union's agents to receive notice of proposed unilateral changes such as the incentive bonus program. The Board agreed with the judge's conclusion that the Respondent failed to establish that notice of the bonus program to a shop steward, if it had been made, would have served as notice to the Union.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 830; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Philadelphia on Aug. 21, 2002. Adm. Law Judge George Aleman issued his decision Feb. 6, 2003.

* * *

Quality Mechanical Insulation, Inc. (28-CA-18031-1, et al.; 340 NLRB No. 91) Phoenix, AZ Sept. 30, 2003. The Board adopted the administrative law judge's findings that the Respondent committed numerous violations Section 8(a)(1) of the Act. Among others, it held that the Respondent interrogated its employees regarding their union membership, activities, and sympathies; threatened its employees with unspecified reprisals to discourage them from engaging in union and other concerted activities; prohibited its employees from speaking with, or taking papers from, organizers on behalf of the Union, or any other union; coerced or intimidated its employees by suggesting that bodily harm be done to an organizer of the Union, or any other union; threatened employee-applicants with trespassing and to summon police; and engaged in surveillance of employee-applicants by photographing them. [\[HTML\]](#) [\[PDF\]](#)

The Board modified the judge's conclusions of law, recommended Order, and notice to more closely conform to the facts of the case and further modified the recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997).

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Arizona Asbestos Workers Local 73; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix on nine days between March 17 and 28, 2003. Adm. Law Judge Gregory Z. Meyerson issued his decision July 7, 2003.

* * *

Resort Nursing Home and Kingsbridge Heights Rehabilitation Care Center (29- CA-24886; 340 NLRB No. 77) Far Rockaway and Bronx, NY Sept. 30, 2003. The Board affirmed the administrative law judge's finding that the Respondents, by refusing to execute a collective-bargaining agreement that was mutually agreed to between the Greater New York Health Care Association and New York's Health & Human Services SEIU District 1199, violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

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The Board modified the third paragraph in the remedy section of the judge's decision by, among other things, ordering the Respondents to make whole their employees for any loss of earnings and other benefits they may have suffered and to make such benefit funds whole in accordance with the terms of that contract, including paying any amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

Chairman Battista agreed that under *Chel LaCort*, 315 NLRB 1036 (1994), the Respondents' untimely withdrawal from the multiemployer bargaining unit was not justified by "unusual circumstances." Noting that there are not three votes to overrule it, he found it unnecessary to express an opinion on whether *Chel LaCort* was correctly decided.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by New York's Health & Human Services SEIU District 1199; complaint alleged violation of Section 8(a)(1), (5), and 8(d). Hearing in Brooklyn, Feb. 13 and March 10-12, 2003. Adm. Law Judge Raymond P. Green issued his decision May 15, 2003.

* * *

S&P Electric (13-CA-40583; 340 NLRB No. 53) Addison, IL Sept. 26, 2003. The Board denied the General Counsel's motion for summary judgment as to complaint paragraphs V(d) and VI, having deemed the pro se Respondent's letter filed on February 25, 2003, to be an adequate response as to the allegations. Paragraph V(d) alleges that the Respondent, through Paul Fisher, caused the layoff of Terry S. Jones from E. Stone Electric because Jones had engaged in, or the Respondent believed he had engaged in, union activities, and to discourage employees from engaging union activities. Paragraph VI alleges that the Respondent's conduct was discriminatory and violated Section 8(a)(1) and (3) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The Board granted the General Counsel's motion with respect to the allegations in complaint paragraphs I-IV and V(a)-(c), which the Respondent did not challenge. Paragraphs I-IV pertain to the filing and service of the unfair labor practice charge, jurisdiction, and Fisher's status as owner, supervisor, and agent of the Respondent. Paragraphs V(a) and (c) allege that the Respondent subcontracted with E. Stone Electric to perform work on a time and material basis on a job site located at the Oak Brook Club, Oak Brook, IL, and that the Respondent caused Jones' layoff. Paragraph V(b) alleges that, pursuant to the subcontracting arrangement described in paragraph V(a), on or about September 25, 2002, E. Stone Electric hired Terry S. Jones to perform work at the Oak Brook job site.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 701; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment March 17, 2003.

* * *

Sanderson Farms, Inc. (Production Division) (15-CA-16450; 340 NLRB No. 59) Fernwood, MI Sept. 29, 2003. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating its employees about Food and Commercial Workers Local 1529, impliedly threatening its employees with negative consequences if they become involved with the Union, threatening its employees that it is experiencing problems and will weed out troublemakers who support the Union; and Section 8(a)(3) and (1) when it discharged Bill Noland on November 6, 2001. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Food and Commercial Workers Local 1529; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Magnolia, Sept. 16-17, 2002. Adm. Law Judge Pargen Robertson issued his decision Nov. 20, 2002.

* * *

Santa Maria El Mirador (28-CA-16824; 340 NLRB No. 84) Santa Fe, NM Sept. 30, 2003. The Board reversed the administrative law judge's dismissal of the complaint and found that the Respondent violated Section 8(a)(1) of the Act by: (1) promulgating an overly broad no-access rule; and (2) discharging employee Ed Gellis on October 20, 2000, because he engaged in the protected concerted activity of circulating letters to other employees for their signatures regarding wages, hours, and other terms and conditions of employment. [\[HTML\]](#) [\[PDF\]](#)

The judge found that the primary justification for discharging Gellis was his violation of the no-access rule promulgated by the Respondent in September 2000. The Board, however, found this rule to be unlawful and accordingly, held that Gellis was unlawfully discharged.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Ed Gellis, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Santa Fe on May 30-31, 2001. Adm. Law Judge Thomas Michael Patton issued his decision Sept. 26, 2001.

* * *

The Second Shift, Inc., d/b/a Jobsite Staffing and Jobsite Personnel, Inc., a single employer (12-CA-17521; 340 NLRB No. 43) Altamonte, FL Sept. 29, 2003. The Board adopted, in the absence of exceptions, the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire job applicants Jonathan Carnes, Robert Murphy, Phillip Pelc, and Stephen Williams; and violated Section 8(a)(1) by informing employees that it was futile for union applicants to apply for work, maintaining a work rule prohibiting employees from discussing their wage rates with each other, and interrogating employees concerning their union membership, activities, and sympathies. [\[HTML\]](#) [\[PDF\]](#)

The Board severed and remanded to the judge the refusal-to-hire allegations regarding 13 job applicants that he dismissed and the refusal-to-consider allegations, other than those concerning Carnes, Murphy, Pelc, and Williams, plus the refusal-to-hire violation that the judge found concerning Barry Bostwick, who was not alleged as a discriminatee in the complaint. It decided that the judge's decision failed to set forth sufficient findings and rationale. The 13 job applicants are John Barrington, Richard Buffington, Christopher Downs, Bruce Evans, Jamie Eyler, Richard Forrester, John Bambone Sr., John Bambone Jr., Jason Harrison, Robert Higley, Eric Law, Ken Mortensen, and James Warren.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 756; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New Smyrna Beach, Aug. 26-27 and Sept. 11, 2002. Adm. Law Judge Keltner W. Locke issued his decision Oct. 10, 2002.

* * *

Superior Emerald Park Landfill, LLC (30-CA-16148, 30-RC-6468; 340 NLRB No. 54) Muskego, WI, Sept. 30, 2003. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an overbroad prohibition on solicitation and distribution of literature; granting a wage increase and soliciting and promising benefits; and threatening to freeze wages and benefits, bargain from scratch, refuse to reach a collective-bargaining agreement, and terminate employees engaged in an economic strike. The Board also agreed with the judge that the Respondent's commission of unfair labor practices precluded achievement of the requisite laboratory conditions and undermined the employees' freedom of choice and ordered that a second election in Case 30-RC-6468 be conducted.

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In adopting the judge's finding that the Respondent unlawfully promulgated, maintained, and enforced an unlawful no-

distribution policy, the Board found it unnecessary to pass on the judge's finding that the Respondent promulgated and enforced the policy in reaction to union organizing and with antiunion animus.

Chairman Battista, in adopting the judge's finding that the Respondent unlawfully solicited grievances and impliedly promised to remedy them, found it unnecessary to rely on the statement by Respondent's general manager, Robert Borkenhagen, asking employees to give him a chance to prove himself, and the judge's finding that the Respondent changed from a past practice of passive grievance solicitation to an active practice of grievance solicitation. Chairman Battista also found it unnecessary to pass on the judge's finding that the Respondent violated Section 8(a)(1) when Borkenhagen told employees that if the Union won, bargaining would start from "zero" or "scratch," because this finding would be cumulative of other violations found and would not affect the remedy.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Operating Engineers Local 139; complaint alleged violation of Section 8(a)(1). Hearing at Milwaukee, Jan. 23-24, 2003. Adm. Law Judge Paul Bauxbaum issued his decision May 3, 2003.

* * *

Teamsters Local 631 (Vosburg Equipment, Inc. and Bechtel Nevada, Inc.) (28- CB-5102, et al.; 340 NLRB No. 96) Las Vegas, NV Sept. 30, 2003. The Board, on the recommendation of the administrative law judge, dismissed the complaint allegations that the Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by: failing to comply with its hiring hall rules by improperly maintaining an unwritten rule which required a hiring hall registrant to show that he had a commercial driver's license and the necessary endorsements when filing his experience or interest card; dispatching certain employees and refusing to dispatch others; removing an employee's name from the out-of-work list; and refusing to refer an employee to employment because she associated with individuals who opposed the Respondent's officers in an internal union election. [\[HTML\]](#) [\[PDF\]](#)

The Board found no merit in the General Counsel's contention that the Respondent changed its procedure for handling "by name" requests (requests by employers to the Respondent's hiring hall for specific employees) and that this change constituted an unlawful departure from the Respondent's hiring hall rules. In addition to emphasizing that this contention was the gravamen of the General Counsel's exceptions as to the Respondent's alleged failure to follow its hiring hall rules, the Board emphasized the judge's finding that unions are accorded a wide range of discretion in serving the employees whom they represent. "Even if we assumed (as some courts have held) that in the context of an exclusive hiring hall, there is a heightened duty of fair representation, we would still find the Respondent's conduct lawful," the Board explained.

There were no exceptions to the dismissal of the allegations concerning the Respondent's refusal to give Keith Sinclair a copy of its hiring hall rules; discrimination against Wayne King, Connie King, and Phil Spagnolo; Bechtel's request for two forklift drivers; Vosburg's request for a dispatcher, and the alleged removal of Wayne King from the referral list.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Connie K. King, Keith J. Sinclair and Phil Spagnolo, Individuals; complaint alleged violation of Section 8(b)(1)(A) and 8(b)(2). Hearing at Las Vegas, Feb. 1-2 and March 21-22, 2000. Adm. Law Judge Jay R. Pollack issued his decision Feb. 8, 2001.

* * *

Titanium Metals Corp. (28-CA-15910; 340 NLRB No. 88) Henderson, NV Sept. 30, 2003. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by issuing a written warning to David Smallwood, allegedly for poor work performance and failing to cooperate in the related investigation, distributing a newsletter, and encouraging employees to call him during work hours; suspending and later discharging, Smallwood for distributing the newsletter; denying Smallwood's request for union representation during an interview regarding the warning; and maintaining and enforcing an overly broad no-solicitation/no distribution rule. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the judge that the newsletter, which Smallwood published and that dealt with wages, hours, and working conditions and was critical of the Respondent, was not so misleading, inaccurate or reckless, or otherwise outside the bounds of permissible speech, to cause Smallwood to lose the Act's protection.

The judge found it inappropriate to defer to an agreement between the Respondent and the Union purporting to settle Smallwood's grievance over his dismissal. The Board agreed, but only for these reasons. Assuming, without deciding, that the "Letter of Understanding" was a settlement agreement subject to analysis under *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), it decided that the process was not fair and regular and failed to satisfy the standard for deferral.

The Board noted that the agreement was reached without Smallwood's participating or his agreement to be bound by it, that the existence of the agreement was never disclosed to him by the Union (Steelworkers Local 4856) or the Respondent, and that Smallwood only became aware of it when, during preparation for the hearing in this case, the General Counsel made a copy available to him. The Board also pointed out that the "Letter of Understanding" recites several reasons for Smallwood's discharge and that those reasons were not the explanation given to Smallwood when he was discharged, saying: "In the absence of any explanation from the Respondent or the Union for this deviation, the 'Letter of Understanding' appears to be an attempt to disguise the real reason for the discharge: Smallwood's protected, concerted activity of distributing a newsletter that addressed employment conditions and employment related matters."

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by David W. Smallwood, an individual; complaint alleged violation of Seciton 8(a)(1) and (3). Hearing at Las Vegas, Jan. 16-19, 2001. Adm. Law Judge John J. McCarrick issued his decision March 30, 2001.

* * *

Tuv Taam Corp. (29-CA-24329, et al.; 340 NLRB No. 86) Brooklyn, NY Sept. 30, 2003. The Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to comply with an informal settlement agreement approved by the Regional Director on March 26, 2002. [\[HTML\]](#) [\[PDF\]](#)

The Respondent raised issues regarding the remedy and the applicability of the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275 (2002). The Board found no merit in the Respondent's contentions, saying it is not foreclosed by *Hoffman* from awarding a backpay remedy on the basis of the Respondent's bare assertion that the discriminatees might be undocumented workers. Here, the Board found where immigration status has no bearing on whether the Respondent did, in fact, commit the unfair labor practices of which it had been accused, questions regarding employee status must be litigated at compliance, and cannot insulate the Respondent from a decision on the merits of the complaint allegations or the consequences of its unlawful conduct.

(Chairman Battista and Members Liebman and Walsh participated.)

General Counsel filed motion for summary judgment June 19, 2002.

* * *

United Parcel Service (7-CA-41749; 340 NLRB No. 89) Madison Heights, WI Sept. 30, 2003. Members Liebman and Walsh affirmed the administrative law judge's finding and held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Paul Simpson for engaging in protected concerted activity. Member Schaumber dissented. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended that Stimpson was discharged for referring to a coworker in a vulgar, derogatory, offensive, and intimidating fashion after being warned for the same conduct previously. The majority found, in agreement with the judge, that the record clearly reflects that Stimpson engaged in activity protected by Section 7 of the Act by filing numerous grievances, that the Respondent was aware of these grievances, and that the Respondent took an adverse action against Stimpson by suspending and discharging him.

Member Schaumber would dismiss the complaint. He agreed with his colleagues that the General Counsel has met his initial burden of proving that Stimpson's protected activity in filing numerous grievances was a factor motivating his discharge. However, he found that the Respondent rebutted this evidence by showing that it would have discharged Stimpson even absent his protected activity. He said: "It appears to me, by finding an 8(a) (3) discharge here, the majority puts Stimpson in a better position because he engaged in protected activity than he would have been in if he had done nothing. This is a result with which I cannot agree."

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Paul Stimpson, an Individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Detroit on July 13, 1999. Adm. Law Judge Karl H. Buschmann issued his decision Dec. 27, 1999.

* * *

United Services Automobile Association (12-CA-21735; 340 NLRB No. 90) Tampa, FL Sept. 30, 2003. The Board agreed with the administrative law judge, for the reasons set forth in her decision, that Charging Party Loretta Williams engaged in protected concerted activity by distributing fliers anonymously throughout the Respondent's facility, and that the Respondent promulgated unlawful no-solicitation/no distribution rules via e-mail and voice mail. In agreeing with the judge that the Respondent unlawfully interrogated Williams and employee Andrew Snyder regarding employees' protected concerted activity and unlawfully discharging Williams for engaging in such activity, the Board explained its rationale. [\[HTML\]](#) [\[PDF\]](#)

Loretta Williams, an insurance adjuster for the Respondent, distributed 1200 to 1300 fliers anonymously, requesting fellow employees to wear a red ribbon in support of colleagues who had been laid-off as a result of a reorganization plan implemented by the Respondent.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Loretta Williams, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Tampa, Dec. 18-19, 2002. Adm. Law Judge Margaret G. Brakebusch issued her decision Jan. 28, 2003.

* * *

Wal-Mart Stores, Inc. (11-CA-18629, 18636; 340 NLRB No. 83) Boone, NC Sept. 30, 2003. In agreement with the administrative law judge, the Board dismissed the complaint allegations that the Respondent promulgated, maintained, and enforced an overly broad no-solicitation and no-distribution rule or disparately removed union literature from company bulletin boards in break rooms in violation of Section 8(a)(1) of the Act; and discharged Steven Lockyer in violation of Section 8(a)(1) and (3). The judge found, with Board approval, that the Respondent demonstrated that it would have terminated Lockyer despite his union activity for a timeclock violation. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Steven Lockyer, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Boone, Feb. 20-21, 2000. Adm. Law Judge Margaret G. Brakebusch issued her decision April 21, 2003.

* * *

Wal-Mart Stores, Inc. (17-CA-21045-1; 340 NLRB No. 76) Tahlequah, OK Sept. 30, 2003. Members Liebman and Walsh agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act when it removed Brian Shieldnight from its property because he wore a T-shirt with a union-related message during an off-duty visit to the Respondent's store and violated Section 8(a)(3) and (1) by issuing Shieldnight a written "coaching" based, in part, on his wearing of the T-shirt. Contrary to the judge, the majority found that the Respondent did not violate Section 8(a)(1) by allegedly soliciting grievances from Shieldnight and promising to remedy them in order to discourage him from supporting the Union. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista, dissenting in part, found that the Respondent lawfully disciplined Shieldnight for violating the Respondent's no-solicitation policy. He said that a T-shirt, which tells readers to ask the wearer how they can sign a union card constitutes solicitation. In his view, Shieldnight was soliciting on working time and was lawfully disciplined.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Food & Commercial Workers Local 1000; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tahlequah, August 2-3, 2001. Adm. Law Judge William N. Cates issued his decision Aug. 27, 2001.

* * *

Weldun International, Inc. (7-CA-34343, 34805; 340 NLRB No. 79) Birmingham, MI Sept. 30, 2003. The main issue before the Board in this supplemental decision concerned the backpay formula set forth in the compliance specification implementing its earlier decision reported at 321 NLRB 733 (1996), enfd. in relevant part, *NLRB v. Weldon International*, 165 F.3d 28 (6th Cir. 1998). The Board adopted the administrative law judge's conclusion that the average earnings formula used in the backpay specification is fair, reasonable, and most accurately approximates the earnings the discriminatees would have earned with the Respondent had they not been unlawfully laid off; and ordered the Respondent to make whole the 29 discriminatees by paying them amounts totaling \$932,961.87. [\[HTML\]](#) [\[PDF\]](#)

In the prior decision, the Board found that the Respondent violated the Act by, among others, discriminatorily terminating 29 employees, telling employees that the terminated employees would not be reinstated because of the Steelworkers and the charges filed by the Union, and impliedly threatening employees that the plant would be closed. The Board rejected the Respondent's contentions that the layoffs, including those in the machine department, were justified by valid business reasons. It also found that private settlement agreements entered into by some employees following their layoffs did not preclude a reinstatement order or a backpay remedy, but could potentially limit the amount of backpay due the discriminatees.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Paul Bogas issued his supplemental decision April 11, 2001.

* * *

West Maui Resort Partners, a Limited Partnership, consisting of Signature Capital-West Maui, LLC and WHKG-S GEN-PAR, Inc., d/b/a Embassy Vacation Resorts (37-CA-5472, et al.; 340 NLRB No. 94) Maui, HI Sept. 30, 2003. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by its suspension and discharge of employees Robbie Fronda, Robert Craddick, Kevin Freitas, and George Balagso because of their known or suspected union activities. It reversed the judge's finding that the Respondent violated Section 8(a)(1) by hiring consultant Keith Hunter for the purpose of legitimizing those suspensions and discharges. And, it found that the Respondent did not violate Section 8(a)(1) by Housekeeping Manager Cathy Quevido's questioning of employee Abraham Pena about the result of a representation election. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista, dissenting in part, agreed that the Respondent's suspension and discharge of Fronda were unlawful, concluding, as did the majority, that the General Counsel satisfied his initial burden under *Wright Line*, and the Respondent did not adequately rebut it. He did not agree however that the suspensions and discharge of the three other employees were unlawful. Assuming that the General Counsel satisfied his initial burden, the Respondent has rebutted it, the Chairman reasoned. He noted that, unlike Fronda, the three employees engaged in sexual harassment and misconduct and that the victim-employee hired counsel who threatened to sue under Title VII for such sexual harassment and misconduct.

Chairman Battista also noted that the prior situations of lesser discipline, on which his colleagues rely, did not involve sexual harassment in violation of Federal law and did not involve threatened lawsuits. The Chairman observed that the alleged conduct of the three employees was "serious, and the Respondent's policies permit discharge for such misconduct, even for first offenders. In these circumstances, the Respondent simply wished to avoid a threatened lawsuit and damaging publicity."

No exceptions were filed to the judge's finding that the Respondent violated Section 8(a)(3) by suspending employee Leo Ramelb for 5 days and Section 8(a)(5) by making certain unilateral changes without prior notification to and bargaining with Hotel Employees and Restaurant Employees Local 5; and the judge's dismissal of allegations that the Respondent violated Section 8(a)(3) by issuing warnings to employees Abraham Pena and Noreen Medeiros.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Hotel Employees and Restaurant Employees Local 5; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Maui, Sept. 25-29 and Oct. 2-5, 16, 23-24, 2000. Adm. Law Judge Gerald A. Wacknov issued his decision Feb. 13, 2001.

* * *

Williams Energy Services (16-CA-20164; 340 NLRB No. 87) Galena Park, TX Sept. 30, 2003. The Board reconsidered its prior decision reported at 336 NLRB 160 (2001) in light of *MV Transportation*, 337 NLRB No. 129 (2002), and dismissed the complaint. In the earlier decision, the Board concluded that the Respondent, a successor employer, violated Section 8(a)(5) and (1) of the Act, under the then applicable successor-bar rule set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), by failing and refusing to bargain with PACE Local 4-227 and withdrawing recognition from the Union because there had not been a reasonable period of time for bargaining. [\[HTML\]](#) [\[PDF\]](#)

In this supplemental decision, the Board applied *MV Transportation*, which overruled *St. Elizabeth Manor* and returned to the prior standard that a union in a successorship situation will be entitled only to a rebuttable presumption of majority status. It found that the Union's presumption of majority status has been rebutted based upon the Respondent's receipt of a petition, signed by all of the unit employees, stating that they no longer desired to be represented by the Union, and that the Respondent's withdrawal of recognition and refusal to bargain thus were lawful.

Member Liebman dissented in *MV Transportation* and adheres to the views expressed in her dissent. She concurred in the application of *MV Transportation* to this case "for institutional reasons" in the absence of three votes to overrule that decision.

The Respondent filed a petition for review of the Board's original decision in the U.S. Court of Appeals for the Fifth Circuit, and the Board filed a cross application for enforcement of its Order. Thereafter, on May 16, 2002, the Board filed a motion with the Fifth Circuit to remand the case without prejudice for further consideration. On July 9, 2002, the Fifth Circuit granted the Board's motion.

(Chairman Battista and Members Liebman and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Albertson's Inc. (Food and Commercial Workers Local 1564 and an individual) Albuquerque, NM September 29, 2003. 28-CA-17671, et al.; JD(SF) 61-03, Judge Thomas M. Patton.

C & K Insulation, Inc. (Asbestos Workers Local 38) Binghamton, NY September 29, 2003. 3-CA-24151; JD(NY)-52-03, Judge Joel P. Biblowitz.

Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland (California Nurses Association) Oakland, CA September 30, 2003. 32-CA-17432; JD(SF)-70-03, Judge Gerald A. Wacknov.

Fiesta Hotel Corporation d/b/a Palms Hotel and Casino (Hotel and Restaurant Employees Locals 226 and 165) Las Vegas, CA September 30, 2003. 28-CA-17853; JD(SF)-67-03, Judge Burton Litvack.

GB Tech, Inc. (Auto Workers [UAW]) Houston, TX September 11, 2003. 16-CA-22799; JD(ATL)-69-03, Judge Keltner W.

Locke.

Pinkerton, Inc. (California Security Officers) Santa Clara, CA September 30, 2003. 32-CA-19852-1; JD(SF)-66-03, Judge William L Schmidt.

Puritan-Bennett Corp. A Division of Tyco Healthcare (an Individual) Plainfield, IN September 29, 2003. 25-CA-28562; JD-106-03, Judge David L. Evans.

Pepsi-Cola Bottling Co. of Fayetteville, Inc. (Food & Commercial Workers Local 204) Fayetteville, NC October 2, 2003. 11-CA-14889; JD(ATL)-68-03, Judge Pargen Robertson.

Stage Employees Local 784 (an Individual) San Francisco, CA September 26, 2003. 20-CB-11109-1; JD(SF)-68-03, Judge James M. Kennedy.

Tendercare (Michigan), Inc. d/b/a Taylor Total Living Center (Service Employees Local 79) Taylor, MI September 29, 2003. 7-CA-45810, et al.; JD-108-03, Judge Karl H. Buschmann.

Verizon and its subsidiary TeleSector Resources Group (Communications Workers Local 1108) New York, NY September 30, 2003. 2-CA-32858, et al.; JD(NY)-53-03, Judge Steven Fish.

Velocity Express, Inc., formerly known as Corporate Express Delivery Systems (Teamsters Local 886) Oklahoma City, OK September 30, 2003. 17-CA-20076-1; JD(SF)-72-03, Judge John J. McCarrick.

* * *

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.)

A.C.E. Construction, Inc. (Carpenters New Jersey Regional Council) (22-CA-25655; 340 NLRB No. 72) Hazlet, NJ September 30, 2003.

Classical Stone Works, Inc. d/b/a Gothic Stone Masonry (Bricklayers Local 1) (4- CA-31409; 340 NLRB No. 68) West Chester, PA September 30, 2003.

Clearwater Sprinkler System, Inc. (Plumbers Local 536) (5-CA-30527, et al.; 340 NLRB No. 50) Baltimore, MD September 30, 2003.

Jet-R Construction, Inc. (an Individual) (18-CA-16829; 340 NLRB No. 49) Wayzata, MN September 26, 2003.

Choctaw Manufacturing Co., Inc. (UNITE) (15-CA-16699, et al.; 340 NLRB No. 66) Silas, AL September 30, 2003.

Consolidated Work Opportunities, Inc. (Operating Engineers Local 465) (11- CA-19765; 340 NLRB No. 61) Cherry Point, NC September 29, 2003.

Phargo, LLC d/b/a Buffalo Weaving and Belting (Steelworkers) (3-CA-24104, 24177; 340 NLRB No. 80) Buffalo, NY September 30, 2003.

Rosedale Fabricators, LLC (Steelworkers Local 250) (26-CA-21187; 340 NLRB No. 67) Rosedale, MS September 30, 2003.

Trade Force, Inc. (Electrical Workers IBEW Local 429) (26-CA-20048-1; 340 NLRB No. 45) Nashville, TN September 26, 2003.

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TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in the unfair labor practice proceeding.)

Shore Club Condominium Association, Inc., a/k/a S.C. Condominium Association, Inc. (Teamsters Local 390) (12-CA-23262; 340 NLRB No. 82) Ft. Lauderdale, FL September 30, 2003.