

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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January 18, 2002

W-2826

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Benesight, Inc., f/k/a The TPA, Inc., and/or The Third Party Administrators, Inc. (27-CA-16932-1; 337 NLRB No. 40) Pueblo, CO Dec. 20, 2001. The Board agreed with the administrative law judge's finding that the Respondent unlawfully discharged employees Hayes, Mercado, and Chavez, and disciplined eight other employees for engaging in a protected work stoppage on April 10, 2000. The Board rejected the Respondent's defense that the decision in *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (1998), "imposes a 'proportionality obligation on employees engaging in the kind of unannounced work stoppage pursued in this case.'" It held: "Respondent argues that employees lose the protection of the Act if they use a disproportionate means to protest a working condition. On this view, because the Respondent contends that the work stoppage here was an over-reaction to the employees' grievance, it argues that it was free to discharge them." [\[HTML\]](#) [\[PDF\]](#)

The majority of Members Liebman and Walsh reversed the judge's finding that the Respondent independently violated Section 8(a) (1) by telling employee Mercado that she had been terminated for engaging in protected, concerted activity. The judge found that Manager Potestio told Mercado on the day after the walkout that based on her participation in it she had been insubordinate and was terminated. Although the judge determined that Potestio's statement was proof that the discharge was unlawful, he concluded that this statement was subsumed by the discharge violation.

Dissenting in part, Chairman Hurtgen, while agreeing with his colleagues that the Respondent violated Section 8(a)(1) by terminating Mercado, for engaging in a protected work stoppage, would find - as did the judge - that Potestio's statement did not independently violate Section 8(a)(1), or call for an additional remedy. He concluded that "Potestio's statement was part of the res gestae of the unlawful termination, and is subsumed by that violation. Further, the remedy for that violation adequately insures employees of their statutory rights."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Anna Marie Chavez, Laura, Hayes, and Beatriz Mercado (Individuals); complaint alleged violation of Section 8(a)(1). Hearing at Pueblo, Nov. 28, 2000. Adm. Law Judge James L. Rose issued his decision Feb. 9, 2001.

* * *

Kolin Plumbing Corp.; Kolin Environmental, Inc.; H. Kolin Plumbing Corp.; H. Kolin Environmental, Inc.; Dial-A-Water-Heater, Inc.; and MSJ Enterprises, Ltd. (29-CA-17195, 17340; 337 NLRB No. 34) Deer Park, NY Dec. 20, 2001. The Board granted the General Counsel's motion for summary judgment against Respondents Kolin Plumbing, Kolin Environmental, and its single employer, alter ego, and successor H. Kolin Environmental (collectively called Respondent Companies), and remanded for hearing the issues of interim earnings and medical expenses timely raised by Respondents H. Kolin Plumbing, Dial-A-Water-Heater, and MSJ Enterprises (collectively called additional Respondents). It held in abeyance the final backpay liability determination at this time. [\[HTML\]](#) [\[PDF\]](#)

In a 1998 unpublished Order, the Board directed the Respondents to offer full and immediate reinstatement to John J. Demscheck Jr., James Ott, and Donald C. Muller; to make them whole for loss of earnings and other benefits resulting from the discrimination against them; to make whole the Respondents' employees and the benefit funds of Plumbers' Local 200; and to make their employees whole by reimbursing them for any losses ensuing from the Respondents' failure to make the contributions.

In the motion for summary judgment, the General Counsel contended that all six Respondents failed to file an answer to the amended compliance specification. The Board noted however that the additional Respondents filed a timely answer to the original compliance specification and their failure to file an answer to the amended compliance specification does not negate their timely filed answer. Accordingly, the Board limited the hearing to the determination of derivative liability, interim earnings, and medical expenses with regard to the additional Respondents but stated that its ruling does not permit the Respondent Companies to participate in that hearing. See *Transportation by La Mar*, 281 NLRB 508, 510 fn. 6 (1986).

(Chairman Hurtgen and Members Liebman and Walsh participated.)

General Counsel filed a motion for summary judgment December 14, 1999.

* * *

The Bakersfield Californian (31-CA-23978, 23979; 337 NLRB No. 42) Bakersfield, CA Dec. 20, 2001. The Board majority of Chairman Hurtgen and Member Walsh, affirming the administrative law judge, found no violation in the Respondent's posting of its last, best, and final offers which included a wholly discretionary merit wage and bonus program. The complaint alleged that the Respondent implemented its last, best and final offers in two separate bargaining units, on or about January 12 and 13, 1999, respectively. The complaint further alleged that those offers included a wholly discretionary merit wage and bonus provision. The complaint did not allege that the Respondent violated the Act by actually granting merit wage increases.

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... [W]e agree with the judge that, under *Woodland [Clinic]*, 331 NLRB No. 91 (2000)], the Respondent's postimpasse posting of its terms and conditions of employment on January 12 and 13 is not a basis for finding a violation under *McClatchy*. Unlike in *Woodland*, of course, the Respondent here has stipulated that it unilaterally granted wage increases pursuant to its final pre- impasse contractual wage proposal. The General Counsel, however, by failing to object when the judge stated that he was not going to consider events after January 12 and 13, has clearly acquiesced in the judge's limiting of the scope of the complaint to encompass only the Respondent's January 12 and 13 posting of the proposal.

Dissenting Member Liebman would find that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its wholly discretionary merit pay plan on January 12 and 13, 1999. She asserted:

My disagreement with my colleagues and the judge stems from my belief that *Woodland*, did not establish a per se rule that a *McClatchy* violation may never accrue prior to an employer's actual granting of discretionary merit increases. In my view, the Board may find in appropriate circumstances that an employer has 'implemented' a *McClatchy*-type merit pay proposal, even if the employer has yet to actually grant any increases. I would find that this is such a case.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Bakersfield Typographical Union No. 439; complaint alleged violation of Section 8(a)(5). Hearing at Bakersfield, Jan. 31, 2000. Adm. Law Judge Frederick C. Herzog issued his decision Oct. 17, 2000.

* * *

Grinnell Fire Protection Systems Co. (5-CA-24521, et al.; 337 NLRB No. 22) Exeter, NH Dec. 20, 2001. In denying the Charging Parties' motion for clarification of its Decision and Order reported at 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 122 S. Ct. 49 (2001), the Board noted that the motion, though styled as one for clarification, may more accurately be described as one seeking additional substantive relief by asking the Board to change the Order that has already been enforced by the Fourth Circuit. It further noted that [\[HTML\]](#) [\[PDF\]](#)

The Board, however, is without authority to change such an order, as Section 10(e) of the Act provides that upon the filing of the record in a United States court of appeals, 'jurisdiction of the court shall be exclusive and its

judgment and decree shall be final,' subject, of course, to review by the Supreme Court. . . . we no longer possess jurisdiction to modify that Order. *Haddon House Food Products*, 260 NLRB 1060 (1982); *Royal Typewriter Co.*, 239 NLRB 1, (1978). See also *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir. 1958); cf. *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 361 (6th Cir. 1976).

In addition to the procedural reasons relied on by his colleagues, Chairman Hurtgen would deny the Charging Parties motion on the merits.

The Charging Parties requested that the Board hold that the term "unit employees" in its Order to include not only "crossover" employees who continued to work during the nationwide unfair labor practice strike that was called on the night of April 12, 1994, but also strike replacements hired by the Respondent after the strike began. In its opposition, the Respondent contended that the strike replacements should not be included among the "unit employees" for purposes of the Board's Order.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Bricklayers Local #5-New Jersey and Bricklayers Local #2-New Jersey (4-CD-1021, et al.; 337 NLRB No. 28) Vineland, NJ Dec. 20, 2001. Chairman Hurtgen and Member Liebman concluded that employees of Jersey Panel Corp. represented by Plasterers Local 8, not Bricklayers Local #5 or Local #2, are entitled to perform the exterior plastering and insulation, and the installation of an exterior finishing system at the Sands Hotel and Casino and the Atlantic City Hilton Resort garage in Atlantic City, NJ. They limited the determination to the particular controversies that gave rise to this proceeding. The Employer and the Plasterers had contended that, based on the actions of the Bricklayers, a broad order with respect to plastering work in various New Jersey Counties is necessary to avoid similar jurisdictional disputes. Member Walsh did not participate in the decision on the merits. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Washoe Medical Center, Inc. (32-CA-17934-1, 18179-1; 337 NLRB No. 32) Reno, NV Dec. 20, 2001. Members Liebman and Walsh affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by continuing to unilaterally set starting wage rates for newly hired employees after the union election, without providing Operating Engineers Local 3 with advance notice and an opportunity to bargain about the wages. The majority agreed with the judge's application of *Oneita Knitting Mills*, 205 NLRB 500 (1973), finding the issue is whether the Respondent failed to provide the Union with advance notice and an opportunity to bargain about the implementation of discretionary wages rates, as required by *Oneita*. Like the judge, it found *News Journal Co.*, 331 NLRB No. 177 (2000), where the Respondent unilaterally discontinued its practice of establishing discretionary starting wage rates for newly hired employees based on numerous criteria, is distinguishable. [\[HTML\]](#) [\[PDF\]](#)

Chairman Hurtgen, in dissent, would not affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the starting wage rates for newly hired employees. He noted that the Respondent's policy was to place a new employee into a particular quartile, *based on objective criteria*: professional qualifications, prior experience, and specialty certifications. The Respondent also determined the precise wage rate within the quartile, again *based on objective criteria*, i.e., comparing her to other employees of the Respondent in terms of skills, qualification and experience. "In my view, the Respondent was privileged, indeed required, to continue the status quo, pending bargaining with the Union. That is what the Respondent did."

The majority said, in agreeing with the judge that the Respondent's policy to place new employees in a quartile within the wage range for the relevant position is in no sense automatic: "Rather, it entails the application of a large measure of discretion. It is this substantial degree of discretion, as well as the unavoidable exercise of such discretion each time the Respondent establishes a wage rate for a new employee, that requires the Respondent to bargain with the Union, pursuant to the Board's holding in *Oneita*."

The Board affirmed the judge's recommended dismissal of the allegation that the Respondent unlawfully failed to bargain before-the-fact, i.e., before the planned imposition of specific discipline on particular employees. There were no exceptions to her recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its policy governing shift schedule changes in its labor and delivery department.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Operating Engineers Local 3; complaint alleged violation of Section 8(a)(5) and (1). Hearing at Reno, Oct. 3-4, 2000. Adm. Law Judge Lana H. Parke issued her decision Dec. 14, 2000.

* * *

TransMontaigne, Inc. (4-CA-27610; 337 NLRB No. 38) Philadelphia, PA Dec. 20, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with Teamsters Local 929, but it relied on a different rationale. [\[HTML\]](#) [\[PDF\]](#)

Louis Dreyfus Energy Corp. (LDEC) and the Union were parties to a collective-bargaining agreement from Dec. 1, 1995 to Nov. 30, 1998. On Oct. 30, 1998, the Respondent, through its wholly-owned subsidiary TransMontaigne Product Services, Inc. (TPSI), acquired all of LDEC's issued and outstanding capital stock. LDEC was renamed TransMontaigne Product Services East, Inc. (TPSE). Subsequently, TPSE was merged into TPSI and TPSE ceased to exist. The Respondent argued that it had no obligation to recognize and bargain with the Union, relying on article 2 of the agreement between LDEC and the Union, which states:

In the event of a bona fide sale of the assets or change in ownership, or in the event COMPANY ceases operation of the facility any successor COMPANY which purchases, acquires or becomes the EMPLOYER of EMPLOYEES presently covered by the Recognition clause [of the agreement] shall not be bound by this Recognition clause.

The judge, noting the stock transfer, found LDEC (TPSE) remained the same legal and employing entity, that successorship principles do not apply and thus the Respondent was not a "successor Company" within the meaning of article 2. Members Liebman and Walsh found, however, that the distinction between a stock purchaser and a successor is irrelevant because the issue is whether the Respondent was required to recognize and bargain with the Union, not whether the Respondent was obligated to abide by the terms of the collective-bargaining agreement (the General Counsel does not make this contention). They explained: "[T]he Union's right to recognition, as well as the Respondent's corresponding duties, are statutory, not contractual, in nature, regardless of whether the Respondent is regarded as a successor or the continuation of the same legal entity." Article 2 does not constitute a clear and unmistakable waiver of the Union's statutory right to recognition, Members Liebman and Walsh concluded.

Chairman Hurtgen, concurring in the result, applied the normal rules of contract interpretation rather than principles of waiver, finding it is appropriate, where, as here, the contract covers an issue. He wrote: "As I read the clause in question here, a 'successor COMPANY' is not bound to recognize the Union. Clearly, 'successor COMPANY' is not the same company as the original one, i.e., the one that entered into the collective-bargaining agreement with the Union. And it is equally clear, in the instant case, that the Respondent is the same company. The shareholders have changed, but the company has not. Thus, the clause does not defeat the bargaining obligation."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 929; complaint alleged violation of Section 8(a)(1) and (5). Adm. Law Judge Richard A. Scully issued his decision June 23, 2000.

* * *

Walmart Foods d/b/a Winco Foods (20-CA-29332; 337 NLRB No. 41) Chico and Redding, CA Dec. 20, 2001. The Board

upheld the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by prohibiting nonemployee union representatives from engaging in consumer handbilling at the Respondent's Chico, CA store. The judge concluded that under California property law, the Respondent did not have a right to exclude union representatives from its property. *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 25 Cal. 3d 317 (1979). The Board rejected the Respondent's arguments that California law itself is invalid because it (1) is preempted by the Act, (2) constitutes a denial of equal protection of the laws, in violation of the Fourteenth Amendment, and (3) constitutes a taking of property without just compensation, in violation of the Fifth Amendment. [\[HTML\]](#) [\[PDF\]](#)

There were no exceptions to the judge's recommended dismissal of the complaint's allegations involving union activity at the Respondent's Redding, CA store.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Food and Commercial Workers Local 588; complaint alleged violation of Section 8(a)(1). Adm. Law Judge William L. Schmidt issued his decision Sept. 25, 2000.

* * *

Service Employees Local 32B-32J (Pratt Towers, Inc.) (29-CC-1285; 337 NLRB No. 44) Bronx, NY Dec. 20, 2001. The Board held that the Respondent Union's contract proposal contained a picket line clause prohibited by Section 8(e) of the Act, that the Union engaged in a strike in order to force or require Pratt Towers, Inc. to enter into an agreement containing the picket line clause, and that therefore the strike violated Section 8(b)(4) (ii)(A). [\[HTML\]](#) [\[PDF\]](#)

This case arose in the context of the parties' unsuccessful negotiations for an initial contract and an ensuing strike. The administrative law judge found that the picket line clause was prohibited by Section 8(e), but that the General Counsel failed to prove a violation of Section 8(b)(4)(ii)(A), citing *Longshoremen ILA Local 1418 (New Orleans Steamship Assn.)*, 235 NLRB 161, 169 (1978), and *ABC Outdoor Advertising, Inc.*, 169 NLRB 113, 116 (1968). The Board agreed with the Charging Party's argument raised in exceptions that the cases the judge cited are not apposite and that Board precedent actually supports its position that the Union violated Section 8(b)(4)(ii)(A). See, e.g., *Teamsters Local 559 (Anopolsky & Son)*, 145 NLRB 722 (1963); *Teamsters Local 294 (Rexford Sand & Gravel Co.)*, 195 NLRB 378, 382 (1972); and *Teamsters Local 445 (Edward L. Nezelek, Inc.)*, 194 NLRB 579, 585 (1971), enfd. 473 F.2d 249 (2d Cir. 1973).

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Pratt Towers, Inc.; complaint alleged violation of Section 8(b)(4)(ii)(A). Hearing at Brooklyn on Aug. 16, 1999. Adm. Law Judge Jesse Kleiman issued his decision May 16, 2000.

* * *

1849 Sedgwick Realty LLC and R & S Management a/k/a Arandess Management Co. (2-CA-30569, 31011; 337 NLRB No. 37) Bronx, NY Dec. 20, 2001. The Board ordered the Respondents to pay 12 individuals backpay totaling \$220,400 and to make contributions to Service Employees Local 32E's Pension Fund and Health and Welfare Fund totaling \$286,428.40 on behalf of five discriminatees. [\[HTML\]](#) [\[PDF\]](#)

By unpublished dated September 23, 1999, the Board adopted, absent exceptions, the initial administrative law judge's decision that the Respondents violated Section 8(a)(1), (2), (3), and (5) of the Act by among others, ordering an employee to sign an authorization card for Factory and Building Employees Local 187; providing unlawful assistance to Local 187, thereby tainting the Respondents' recognition of, and execution of a collective- bargaining agreement, with Local 187; refusing to hire their predecessor's employees because of their Local 32E membership; and unilaterally implementing salaries below the Local 32E scale. On Dec. 17, 1999, the Second Circuit issued its judgment (unpublished) enforcing the Board's Order.

The violations found occurred when Respondent 1849 Sedgwick Realty (Sedgwick Realty) purchased an apartment building in the Bronx from Morris Heights Apartments. Morris Heights and Local 32E were parties to a collective-bargaining agreement

(CBA) that included a sale-and-transfer clause, but Morris Heights did not require Sedgwick Realty to assume and adopt the CBA. Local 32's subsequent grievance against Morris Heights for breach of the sale-and-transfer clause went to arbitration, resulting in awards for discriminatees Carmelo Delgado, Daniel Diaz, Juan Maria, and Jose Reyes. Sedgwick Realty engaged R & S Management, also known as Arandess Management Co., to manage the apartment building. Sedgwick Realty refused Local 32E's demands for recognition and bargaining. Instead, the Respondents recognized and quickly agreed to terms with Local 187. Under those terms, newly hired service employees (the replacements) were paid below the wage scale in the Local 32E CBA and the Respondents made no contributions to any union fringe-benefit funds.

In this supplemental decision, the Board affirmed the administrative law judge's findings concerning backpay amounts due Delgado, Maria, Minaya, and Reyes; that the backpay owing to the discriminatees includes unpaid bonus payments; that the Respondents' backpay obligation is not to be reduced by Sedgwick Realty's payments to satisfy Morris Heights' liability for breaching the CBA's sale-and-transfer clause; and that the Respondents must make contributions to the pension and health fund on behalf of the discriminatees. It disagreed with the judge's finding that the Respondents must contribute to the funds on behalf of the seven replacements, concluding that the replacements' interest in the pension fund is speculative at best. Chairman Hurtgen, dissenting in part, found that the severance payments made by the Respondents to Delgado, Maria, Minaya, and Reyes should offset the backpay owed to them. Member Walsh, dissenting in part, would order the Respondents to contribute to Local 32E's pension fund on behalf of the replacement employees.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Hearing at New York, July 10 and 12, 2000. Adm. Law Judge Steven David issued his supplemental decision Dec. 29, 2000.

* * *

Verkler, Inc. (7-RC-21936; 337 NLRB No. 18) South Bend, IN Dec. 20, 2001. Agreeing with the Acting Regional Director, the Board majority of Members Liebman and Walsh dismissed the petition by the Petitioner (Plasterers) after determining the Employer and the Intervenor (Bricklayers Local 9) entered into a 9(a) bargaining relationship barring the petition. In a concurring opinion, Chairman Hurtgen agreed the collective-bargaining agreement to which the Intervenor was party contained language establishing a 9(a) relationship, but that the agreement and language were binding only on the parties. He stated: [\[HTML\]](#) [\[PDF\]](#)

The Petitioner is not a party thereto. Accordingly, if the petition had been filed within 6 months of the recognition, the Petitioner would have been free to assert that such recognition was not majority-based. However, inasmuch as the petition was filed more than 6 months after the recognition, such an assertion is untimely.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Tim Foley Plumbing Service (25-CA-26181; 337 NLRB No. 45) Muncie, IN Dec. 20, 2001. In a Supplemental Decision and Order, the Board reversed the administrative law judge's finding that the Respondent is entitled to an award of \$16,164.93 in fees and other expenses under the Equal Access to Justice Act. In the underlying case, the judge concluded the Respondent did not commit any of the 8(a)(1) and (3) violations based on four findings: [\[HTML\]](#) [\[PDF\]](#)

(1) the 8(a)(1) allegation that Respondent solicited an employee to induce other employees to oppose the Union did not state a violation of the Act; (2) the General Counsel failed to establish that Leadman Larry Bisel was a supervisor within the meaning of Section 2(11) of the Act, which was necessary to prove the 8(a)(1) allegation that Bisel threatened Ronald Duke with more onerous working conditions; (3) the General Counsel failed to present any evidence of employer knowledge or animus to prove the 8(a)(3) allegations that Respondent unlawfully reassigned and constructively discharged Ronald Duke and refused to hire his son, Thomas Duke; and (4) the General Counsel had further failed to prove that Respondent had reassigned Duke against his will.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge David L. Evans issued his supplemental decision Sept. 22, 2000.

* * *

Jonbruni, Inc., d/b/a Temptations (20-CA-28393, 28525; 337 NLRB No. 35) San Francisco, CA Dec. 20, 2001. Chairman Hurtgen and Member Liebman affirmed the administrative law judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by terminating dancer Hima Narumanchi and refusing to reinstate dancer Tracy Buel because of their activities on behalf of the Exotic Dancers Alliance and other protected, concerted activity. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The majority found it unnecessary to consider the judge's finding that the Respondent's dancers are employees within the meaning of Section 2(3) rather than independent contractors. Assuming for purposes of disposition of this case that the dancers are statutory employees, it held, in agreement with the judge, that the Respondent's annual gross volume of business did not meet the Board's retail standard for discretionary jurisdiction.

The jurisdictional issue decided by the judge was whether compensation paid by the Respondent's customers directly to employees-in this case the dancers' tips and fees-should be included in calculating the Respondent's gross volume of business. Relying on *Love's Wood Pit Barbecue Restaurant*, 209 NLRB 220 (1974), the judge found it inappropriate to include these funds. The majority, finding that the Board in *Love's* explicitly considered the central issue presented in this case, said "[t]he relevant holding in *Love's* is that employer deductions from employees' pay for tips . . . do not count in the calculation of the employer's gross business volume because the tips themselves-a part of employees' compensation paid by customers-do not count in these calculations."

Dissenting, Member Walsh, contrary to the judge and his colleagues, found that the Respondent's gross annual income satisfies the Board's discretionary jurisdictional standard and that the Board should assert jurisdiction. Citing *Supreme, Victory, & Deluxe Cab Co.*, 160 NLRB 140 (1996) and *Major Cab Co.*, 255 NLRB 1383 (1986), he stated that the dancers' tips and fees should be included in the Respondent's gross annual income. Member Walsh would reverse the judge's dismissal of the consolidated complaint and remand the case to the judge for resolution of the unfair practice violations alleged.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Hima Narumanchi and Tracy Buel, Individuals; complaint alleged violation of Section 8(a)(1). Hearing at San Francisco, June 22-25 and July 12-13, 1999. Adm. Law Judge Mary Miller Cracraft issued her decision Nov. 2, 1999.

* * *

Waxie Sanitary Supply (21-CA-32812, et al.; 337 NLRB No. 43) San Diego, CA Dec. 20, 2001. The Board, in agreement with the administrative law judge, found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by delaying execution of the agreed-upon collective-bargaining agreement for one day from August 13, 1998 until August 14, 1998, for review by the Respondent's attorney and signature by the Respondent's president. It also agreed with the judge's finding that by delaying execution of the agreement an additional 33 days from August 14 until September 16, the Respondent violated Section 8(a)(5) and (1). [\[HTML\]](#) [\[PDF\]](#)

Turning to another issue, the General Counsel excepted to the judge's finding that the Respondent's holiday bonus was not a term of employment. The Board agreed, stating that the Respondent violated its statutory bargaining obligation by discontinuing the holiday bonus without first providing the Union notice and an opportunity to engage in meaningful bargaining regarding the decision.

In the absence of exceptions, the Board adopted the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its driver safety bonus program, and that the Respondent did not violate Section 8(a)(5) and (1) by discontinuing a practice of allowing employees to use the Respondent's vehicles to train for a commercial driver's license, and refusing to execute a collective-bargaining agreement from July 21 through August 13, 1998 was adopted by the Board.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 36; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Diego, Aug. 23-24, 1999. Adm. Law Judge Burton Litvack issued his decision Feb. 9, 2000.

* * *

Supreme Hauling Enterprises, Inc., d/b/a Supreme Trucking Co., et al. (29-CA-18950; 337 NLRB No. 21) Staten Island, NY Dec. 20, 2001. In a Second Supplemental Decision and Order, the Board ordered the Respondent, Supreme Hauling Enterprises, Inc., d/b/a Supreme Trucking Co., and its alter egos and successors, D.T.J. Trucking, Inc. and D.L.M. Trucking Corp., and their alter egos and successors D.L.M. Truck Rentals, Inc. and Infinity Trucking, and Lynn Maschietto, (an individual) to pay \$150,921.55 in backpay, \$47,915.35 as a pension fund contribution, and \$67,765.52 as an annuity fund contribution—for a total of \$266,602.42, exclusive of interest. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

General Counsel filed a motion for summary judgment September 27, 2001.

* * *

The Boeing Co. (11-RC-6424; 337 NLRB No. 24) Charleston, SC Dec. 20, 2001. The Board majority of Chairman Hurtgen and Member Liebman reversed the Regional Director's finding that the petitioned-for unit (recovery and modification group or RAM) is appropriate, and held that the smallest appropriate unit must include all production and maintenance employees at the Charleston, SC Air Force Base. The majority concluded the distinctions in the RAM employees from other employees (such as separate supervision, meetings and work areas) are offset by the highly integrated workforce, the similarity in training and job functions between RAM and other employees, among other factors. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

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Pontiac Ceiling & Partition Co. (7-RC-21933; 337 NLRB No. 16) Pontiac, MI Dec. 20, 2001. The Board affirmed the Acting Regional Director's decision dismissing the Bricklayers Union's petition to represent 46 plasterers employed by the Employer, having found a Section 9(a) relationship. Chairman Hurtgen concurred with Members Liebman and Walsh that the collective-bargaining agreement here contains language that establishes a 9(a) relationship, but noted that "quite apart from the language showing majority status, there is extrinsic evidence of majority status." He said the extrinsic evidence consisted of majority authorization cards that the Plasterers' Union presented to the Employer at the time of recognition. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Temple Security, Inc. (13-CA-33078, 33382; 337 NLRB No. 26) Chicago, IL Dec. 20, 2001. In a Supplemental Decision and Order, the Board found that the Respondent was not privileged to withdraw recognition from the Charging Party (SEIU Local 773) upon the December 31, 1994 expiration of the parties' labor agreement simply because the Charging Party was a mixed guard union. Accordingly, the Board held: [\[HTML\]](#) [\[PDF\]](#)

[T]he Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from and refusing to bargain with the Charging Party on and after that date. Further, because the Respondent's withdrawal of recognition was unlawful, we find that the Respondent violated Section 8(a)(3), (2), and (1) by recognizing the Party in Interest [Independent Courier Guard Union], executing a collective-bargaining agreement with the Party in Interest, and giving effect to a union-security clause and a dues-checkoff clause contained in that agreement.

In the underlying case (328 NLRB 663 (1999)), the Board found that the Respondent, an employer of guards, did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Charging Party, a mixed guard union, upon the December 31, 1994 expiration of the parties' collective-bargaining agreement. The Board further found that the Respondent did not violate Section 8(a)(3), (2), and (1) by thereafter recognizing the Party in Interest, executing a collective-bargaining agreement with the Party in Interest, and giving effect to a union-security clause and a dues-checkoff clause contained in that agreement. On appeal, the U.S. Court of Appeals for the Second Circuit reversed, holding that the Board erred in construing Section 9(b)(3)'s prohibition against certifying mixed guard unions as depriving such unions of the protection of Section 8.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Auto Workers International and various of its Local Unions (Electric Boat Division, General Dynamics Corp.) (31-CB-7841, et al.; 337 NLRB No. 36) Los Angeles, CA Dec. 20, 2001. On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Board held provisionally that George Gally is entitled to a make whole order to remedy the violation found by the court, i.e., that the Autoworkers International and its Local 376 (Respondents) violated Section 8(b)(1)(A) and (2) of the Act by causing Employer Colt Industries to discharge nonmember employee Gally for nonpayment of dues without first informing him of the amount by which his union fees would be reduced if he became a *Beck* objector. *Communications Workers v. Beck*, 487 U.S. 735 (1988). The Board's decision and order dismissing the complaint in its entirety is reported at 328 NLRB 1215 (1999). [\[HTML\]](#) [\[PDF\]](#)

The Board, in its supplemental decision, accepted the court's findings as the law of the case. Having found that the Respondents engaged in unfair labor practices, it required them to notify the Employer in writing, with a copy to Gally, that they have no objection to his employment and that they affirmatively request his reinstatement. The Board also required the Respondents to notify Gally of his rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Beck* and to inform him that he is not subject to discharge for nonpayment of union dues in the absence of such notification. The notice must include the amount by which Gally's fees would be reduced were he to become a *Beck* objector. The Respondents, jointly and severally, shall make Gally whole for any loss of wages and benefits he may have suffered as a result of its unlawful conduct, from the date of his discharge until the date of his reinstatement by the Employer.

The Board afforded the Respondents the opportunity to litigate, at the compliance stage of this proceeding, that Gally was a "free rider," who willfully and deliberately sought to evade his union-security obligations. If the Respondents make this showing, Gally will not be entitled to backpay. In the prior decision, the Board did not address the issue of whether Gally was a free rider in light of its finding, on other grounds, that the Respondents' actions in causing Gally's discharge were not unlawful. Since the Respondents did not explicitly raise the free rider issue as a defense, they are now foreclosed from doing so. But, because the free rider issue is also relevant to the portion of the remedy which requires the payment of backpay, if the Respondents can show in compliance that Gally would have paid dues and fees even if he had been given a full *Beck* notice, that showing will relieve the Respondents from backpay liability.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Dutchess Overhead Doors, Inc. (3-CA-21892; 337 NLRB No. 27) Poughkeepsie, NY Dec. 20, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by failing to apply the terms of the Master Agreement regarding the wages and fringe benefits of its employees. It ordered the Respondent to comply with the terms of the agreement and to make whole its employees for any loss of earnings or other benefits that resulted from the Respondent's failure to comply with the agreement since October 19, 1998. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Upstate New York Regional Council of Carpenters; complaint alleged violation of Section 8(a)(5). Hearing at

Albany, Dec. 14-15, 1999. Adm. Law Judge Joel P. Biblowitz issued his decision June 6, 2000.

* * *

Douglas Electrical Contracting, Inc. and its alter ego and/or successor Nationwide Electrical Contracting, Inc. and Franklin Douglas Black Jr. and Mary Frances Black (11-CA-17176, 17471; 337 NLRB No. 47) Statesville, NC Dec. 20, 2001. The Board granted the General Counsel's motion for partial summary judgment with respect to the allegations in the compliance specification's paragraphs 17 through 62, insofar as they relate to the backpay period and the gross backpay calculations for all the discriminatees and remanded the case to the Regional Director to schedule a hearing on the remaining paragraphs where summary judgment was not granted. [\[HTML\]](#) [\[PDF\]](#)

In an unpublished order issued February 4, 1998, the Board directed Respondent Douglas to make whole the discriminatees for loss of earnings and other benefits resulting from the Respondent's discrimination against them. On August 3, 1998, the U.S. Court of Appeals for the Fourth Circuit in an unpublished opinion enforced the Board's order.

The compliance specification alleged that Respondents Nationwide, Franklin Douglas Black Jr., and Mary Frances Black are liable, jointly and severally, for backpay, interest and other relief as required under the Board's order as enforced by the court. The General Counsel contended that the Respondents' answer and amended answer to the compliance specification did not comply with the requirements of Section 102.56 of the Board's Rules and Regulations. The Board said, "[a] general denial is not sufficient to refute allegations pertaining to the backpay period and the gross backpay calculations." *United States Service Industries*, 325 NLRB 485 (1998). It found that the gross backpay amounts are as alleged in the compliance specification, but that the net backpay calculations regarding the discriminatees' interim earnings and expenses are subject to a hearing.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

General Counsel filed motion for partial summary judgment August 13, 2001.

* * *

Webco Industries, Inc. (17-CA-20143, 337 NLRB No. 48) Sand Springs, OK Dec. 20, 2001. The Board held that the Respondent violated Section 8(a)(1) and (4) of the Act by filing and pursuing preempted State court lawsuits against two former employees, Eric Martin and Charley Casey, in retaliation for their participation in protected concerted activities. The administrative law judge found that the suits were preempted at the time they were filed, and consequently that Martin and Casey were entitled to recover any reasonable legal expenses they had incurred in defending against the suits. The judge ordered the Respondent to move to dismiss both lawsuits. While the Board agreed with the judge that the suits were preempted and unlawful at their inception, it found that the suit against Casey was no longer preempted because "[a]fter the judge issued her decision in this case, the Board in *Webco II* found that Casey's layoff was not unlawful." [\[HTML\]](#) [\[PDF\]](#)

The case arose out of events that were the subject of an earlier case, *Webco Industries*, 334 NLRB No. 77 (2001) (*Webco II*). There, the Board found that the Respondent violated the Act by, among other things, selecting a number of employees for layoff in October 1998, because of their support for the Union.

Martin and Casey were two of the alleged discriminatees in *Webco II*. The Respondent argued that they were barred from seeking relief under the Act because, when they were laid off, they were given severance pay in return for signing agreements purportedly releasing the Respondent from all existing claims or liabilities, including those arising under the Act. The judge in *Webco II* rejected that argument and found that the layoffs of Martin and Casey were unlawful. He recommended that the issue of the effect of their severance pay on their backpay awards be left to compliance proceedings.

On July 19, 2001, the Board issued its decision in *Webco II*. The Board agreed with the judge that the severance agreements did not bar recovery and that Martin was unlawfully laid off. However, the Board reversed the judge and found that Casey's layoff was not unlawful because the Respondent was unaware of his union activities.

Meanwhile, shortly after the complaint in *Webco II* issued, the Respondent filed suits in State court against Martin and Casey.

Both suits alleged breach of contract, specifically, that the employees had breached the terms of the severance agreements by participating as alleged discriminatees in *Webco II*. The Respondent asked the court to award damages including the amounts of severance pay received, \$1500 paid on each employee's behalf to MBC Associates, Inc. (apparently for that firm's assisting the employees in making the transition to new employment), plus interest, costs, and attorney's fees. In the alternative, the Respondent asked the court to order Martin and Casey to request the General Counsel to withdraw their names from the charges and complaints.

On May 5, 1999, the Union filed the original charge in this case. The complaint issued on August 25, 1999, alleging that the Respondent's suits were preempted and unlawful. On September 30, 1999, the Respondent amended the suits by adding two causes of action, for unjust enrichment and for money had and received. On October 21, 1999, the Respondent moved the court to hold its contract claims in abeyance.

On December 14, 1999, the U.S. District Court for the Northern District of Oklahoma issued an order granting the General Counsel's request for a temporary injunction under Section 10(j) and directing the Respondent to stay its suits against Martin and Casey pending the Board's decision in this case.

In the instant cast (*Webco II*), the Board agreed with the judge that the suits were unlawful and retaliatory against Martin and Casey for exercising their Section 7 right to bring their unfair labor practice claims to the Board. "As the judge pointed out, the suits explicitly alleged that the employees breached the settlement agreements by allowing the Union to file charges and allowing the General Counsel to name them in the complaint," the Board stated.

As for the Respondent's suit against Casey, the Board said the Respondent now was free to reinstate the suit insofar as it alleges equitable claims.

Chairman Hurtgen, concurring and dissenting in part with Members Liebman and Walsh, said with respect to Casey, he would permit the Respondent to pursue a legal claim of breach of contract in seeking to recoup the money that it paid to him. The position of the majority on this point was that Respondent can only pursue an equitable claim of "unjust enrichment/money had and received, he noted."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by United Steelworkers; complaint alleged violation of Section 8(a)(1) and (4). Hearing at Tulsa, on Oct. 22, 1999. Adm. Law Judge Jane Vandeventer issued her decision March 20, 2000.

* * *

Precision Concrete (28-CA-14982, et al.; 337 NLRB No. 33) North Las Vegas, NV Dec. 20, 2001. The Board agreed with the administrative law judge that the Respondent failed to prove its affirmative defense that the 6-month limitations period in Section 10(b) bars litigation of an unfair labor practice allegation that Foreman Juan Pulido unlawfully prohibited employee Valentin Mendez from wearing a new prounion T-shirt while working in Pulido's crew. The General Counsel first raised the Pulido/Mendez allegation in a prehearing complaint amendment made 8 months after the event at issue. [\[HTML\]](#) [\[PDF\]](#)

The Board said the merits of the Respondent's 10(b) defense turned on whether the otherwise untimely amended complaint allegation is closely related to a timely filed unfair labor practice charge.

In finding that the Pulido/Mendez allegation was closely related to an allegation contained in a timely filed charge, the Board used the three-factor test in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988): (1) the Board assesses whether the otherwise untimely allegation involves the same legal theory as the allegation in the timely charge; (2) the Board examines whether the allegations arise from the same factual situation or sequence of events; and (3) the Board may look to whether the Respondent would raise similar defenses to both allegations.

The judge's analysis of the second Redd-I factor relied on the rationale that the conduct at issue in the amendment was "part of a pattern of conduct by Respondent aimed at impeding the Union's organizing activities." The Board, however pointed out that

in *Ross Stores v. NLRB*, 235 F.3d 669, 672-675 (D.C. Cir. 2001), the D.C. Circuit Court of Appeals held that proof of a pattern of conduct cannot be satisfied solely on the basis that separate alleged acts arise out of the same antiunion campaign.

In the instant case, the Board found that all three Redd-I factors, including the second factual factor as interpreted by the D.C. Circuit, established the requisite close relationship between timely and otherwise untimely allegations. It stated:

As to the first factor, we find that all allegations involve the same section of the Act and theories of threatening conduct that interfered with employees' Section 7 rights to select the Union as their bargaining representative. As to the second factor, we find that all allegations involve types of threatening conduct by the Respondent's unnamed officers and agents occurring within a common sequence of events in a half-year time span. Finally, as to the third factor, we find that the defenses to these allegations are essentially the same: that perpetrators of the threats were not Respondent's agents or supervisors, that the testimony of the General Counsel's witnesses was not credible, or that the alleged conduct did not reasonably tend to threaten, coerce, or interfere with employees in the exercise of their Section 7 rights.

The Board affirmed the judge's finding that a strike begun by the Respondent's employees on July 28, 1998, was an unfair labor practice strike.

Chairman Hurtgen concurred in part and dissented in part with Members Liebman and Walsh. He would not adopt the majority's reliance on *Cooper Hand Tools*, 328 NLRB 145 (1999) and *Ross Stores* (he agrees with the D.C. Circuit's analysis in that case).

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Building Trades Organizing Project; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Las Vegas, March 9-12 and 23-25, 1999. Adm. Law Judge Michael D. Stevenson issued his decision and supplemental decision Aug. 23 and Oct. 20, 1999, respectively.

* * *

Ishikawa Gasket America, Inc. subsidiary of Ishikawa Gasket of Japan (8-CA-31264, 31291; 337 NLRB No. 29) Bowling Green, OH Dec. 20, 2001. The Board announced new standard language for the beginning of its Notices to Employees and Notices to Members that states the Board has found the respondent violated the Act and recites employees' Section 7 rights, and new standard language for the end of notices that sets forth the Board's functions and revises the previously customary language on contacting the regional office to include the hours of operation and the Board's website address. The General Counsel had requested the changes in the standard notice to employees so that it is "written in laypersons' language and without legal jargon" and inserts the additional information in English and Spanish at the end of the notice along with a statement that a Spanish-speaking Board agent can be made available if necessary. [\[HTML\]](#) [\[PDF\]](#)

The Board granted in part and denied in part the General Counsel's request, saying, "we support the notion that notices to employees should be drafted in plain, straightforward, laypersons' language and that clearly informs employees of their rights and the violations found. In our view, the General Counsel's proposed language at the beginning of Board notices clearly and effectively informs employees of their rights and under the Act." Accordingly, for the purposes of this case, and all future Board cases where Notices are required, the Board replaced the first two paragraphs currently used in Board notices with the following text:

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

The Board also agreed with the General Counsel that the following text should be inserted at the end of the notice to employees in this case and in all subsequent Board cases where notices are required, but with the applicable Regional Office information:

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1240 East 9th Street -- Telephone: (216)522-3715

AJC Federal Bldg., Rm. 1695, Cleveland, OH 44199-2086 -- Hours of Operation: 8:15 am to 4:45 pm

The Board said, "this descriptive, yet neutral information, serves the beneficial functions of apprising affected employees of their rights under the Act as well as providing useful information about the Board and its processes."

The Board denied, however, the General Counsel's request to the extent that it seeks the insertion of the final Spanish paragraph in the notice, noting there has been no claim or showing in this case that such a provision is needed to address the needs of the affected employees. It will consider whether to provide the information set forth in the last proposed paragraph in Spanish or other relevant foreign language upon the request of a party in a particular case.

As for the General Counsel's request that the style of the standard notice to employees be changed so that it is "written in laypersons' language," the Board said it supported plain language for the remedial portions of notices. But, it declined to revise those portions of the notice in this case because neither the General Counsel nor the Charging Party had proposed precise plain language as to the violations found. The Board invited the General Counsel and other parties in future cases to suggest precise language as to the particular violations involved.

Regarding the alleged violations in this matter, the Board held that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by discriminatorily issuing warnings to, suspending, and discharging Julie A. Wilson because of her union or other protected concerted activities and because she filed charges with the Board; violated Section 8(a)(3) and (1) by discriminatorily decreasing the rate at which its annual bonus was calculated because of employees' union activity; and violated Section 8(a)(1) in various respects, including soliciting and promising to pay an employee to surveil employees' union activities and based on language in a separation agreement it required a former employee to sign.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Julie A. Wilson, an individual and Machinists District Lodge 57; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Bowling Green, Feb. 6-9, 2001. Adm. Law Judge Richard H. Beddow Jr. issued his decision May 18, 2001.

* * *

Action Temporary Employment, a/k/a Action Multi-Craft (4-CA-23898, et al.; 337 NLRB No. 39) Wilmington, Newark, and Dover, DE Dec. 20, 2001. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by refusing to consider and refer for employment members of two local unions of the Electrical IBEW Workers International, and that both the question on the Respondent's application form and the inquiry over the telephone to an applicant regarding his union activity constituted unlawful interrogation in violation of Section 8(a)(1). Members Liebman and Walsh, with Chairman Hurtgen dissenting, rejected the judge's recommended dismissal of the complaint allegation that the Respondent unlawfully refused to reinstate employees Robert Matsinger and James Conroy, upon their unconditional offer to

return to work from their unfair labor practice strike, and held that the Respondent's actions violated Section 8(a)(3) and (1). [\[HTML\]](#) [\[PDF\]](#)

The Respondent is an employment agency that recruits and hires temporary workers on behalf of its clients. Union members Matsinger and Conroy, who had been hired by the Respondent and referred for employment at A-Bell Electric, went on strike for 3 days to protest the Respondent's unlawful refusal to refer union applicants for employment. The judge found, and the Board agreed, that the Respondent and A-Bell are joint employers.

Members Liebman and Walsh held the Respondent is jointly liable for A-Bell's failure to reinstate Conroy and Matsinger. In so concluding, they found the General Counsel met his burden by establishing that A-Bell had engaged in inherently destructive conduct and that the Respondent failed to show that it neither knew nor should have known of A-Bell's unlawful action. *Capitol EMI Music*, 311 NLRB 997 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994). Chairman Hurtgen did not find the facts sufficient to impose an obligation on the Respondent to inquire into the conduct of A-Bell toward Conroy and Matsinger, let alone bear liability for A-Bell's conduct.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IBEW Locals 313 and 654; complaint alleged violation of Section (a)(3) and (1). Hearing at Philadelphia, Oct. 9-11 and Nov. 6, 1996. Adm. Law Judge Karl H. Buschmann issued his decision June 30, 1997.

* * *

Mar-Jam Supply Co. (4-CA-27831, 27867; 337 NLRB No. 46) Pleasantville, NJ Dec. 20, 2001. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(3), (2), and (1) of the Act by, among others, discharging employee Arthur English because he supported Teamsters Local 331 instead of Carpenters Local 623, granting employee Charles Doerr a wage increase because he signed an authorization card for Carpenters Local 623 and discriminatorily discouraging his support for the Teamsters, and granting recognition to the Carpenters as the exclusive collective- bargaining representative of the unit at a time when the Carpenters did not represent an uncoerced majority of the unit employees and notwithstanding that Teamsters Local 331 had filed a valid representation petition seeking an election. Chairman Hurtgen concurring and dissenting in part [\[HTML\]](#) [\[PDF\]](#).

In concluding that the Respondent violated Section 8(a)(1) when Howard Motter promised wage increases to employees in order to encourage them to support the Carpenters and informed them that they could not maintain or distribute Teamsters paraphernalia or literature at the Respondent's facility, Members Liebman and Walsh found it unnecessary to pass on the judge's finding that Motter is a supervisor within the meaning of Section 2(11). Applying *Cooper Industries*, 328 NLRB 145 (1999), they agreed with the judge's alternative finding that Motter acted as an agent of the Respondent within the meaning of Section 2(13) and that Motter's misconduct is attributable to the Respondent on that basis.

Chairman Hurtgen found, in agreement with the judge, that Motter is a statutory supervisor. In his concurring and dissenting opinion, Chairman Hurtgen addressed the composition of the unit and the number of employees in the unit. He explained that a determination as to whether the Carpenters was a minority union, and therefore whether the Respondent unlawfully recognized the Union requires a finding as to the number of employees in the bargaining unit at issue; the judge did not clearly address the composition of the unit. The Chairman concurred in the several 8(a)(1) violations found by the judge and his colleagues. He disagreed however with their further conclusion that, in some instances, the same conduct violated Section 8(a)(2) and set forth the differences.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 331 and Carpenters Local 623; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Philadelphia, Sept. 27-28 and Nov. 10, 1999. Adm. Law Judge Earl E. Shamwell Jr. issued his decision March 17, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Americorp (SEIU Local 32B-32J) Parsippany, NJ January 4, 2001. 22-CA-24532; JD(NY)-66-01, Judge D. Barry Morris.

Pacific Design Center (Individual) Los Angeles, CA January 4, 2002. 31-CA-25082; JD(SF)-002-02, Judge Lana Parke.

Shisler Electrical Contractors, Inc. (Electrical Workers [IBEW] Local 241) Ithaca, NY January 7, 2002. 3-CA-22768; JD-151-01, Judge Paul Buxbaum.

Indian River Memorial Hospital, Inc. (Teamsters Local 769) Vero Beach, FL January 8, 2002. 12-CA-21201; JD(ATL)-02-02, Judge Lawrence W. Cullen.

Hotel & Restaurant Employees Local 54 (an Individual) Atlantic City, NJ January 10, 2002. 4-CB-8664; JD-04-02, Judge Richard A. Scully.

Trumack Assembly, L.L.C. (an Individual) Detroit, MI January 10, 2002. 7-CA-43640; JD-03-02, Judge Robert M. Schwarzbart.

Smith Contracting, Inc. (Laborers) Butte, MT January 10, 2002. 19-CA-27317; JD(SF)-04-02, Judge James L. Rose.

Washoe Medical Center, Inc. (Operating Engineers Local 3) Reno, NV January 9, 2002. 32-CA-18511-1, et al.; JD(SF)-06-02, Judge Jay R. Pollack.

SKC Electric, Inc. and Cra-Mar Electric, a Single Employer (Electrical Workers [IBEW] Local 124) January 4, 2002. 17- CA-20209, et al.; JD(SF)-03-92, Judge John J. McCarrick.