ABOUT THE WEEKLY SUMMARY

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

Weekly Summary of NLRB Cases

Index of Back Issues Online

August 16, 2002 W-2856

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

OTHER CONTENTS

(GC 02-07) Utilization of Section 10(j) Proceedings

Phoenix Coca-Cola Bottling Co. (28-CA-16595, 16908; 337 NLRB No. 157) Tempe and Prescott, AZ Aug. 1, 2002. Chairman Hurtgen and Member Liebman, with Member Cowen dissenting, agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by delaying or refusing to furnish the Union with information it requested in May and November 2000, including that pertaining to part-time and seasonal employees, but excluding the social security numbers sought on May 22, 2000. [HTML] [PDF]

The majority, unlike Member Cowen, agreed with the judge that the Union demonstrated that it had a logical foundation and factual basis for requesting the alleged nonunit information. It noted that the employees whose unit status was not agreed upon (seasonal employees and part-timer merchandisers) were performing unit work; the Union filed grievances concerning, among other things, their rates of pay and performance of unit work; and accordingly, the information sought was relevant to those grievances.

The majority said Member Cowen's argument-that the Union did not satisfy its relevance burden because the parties stipulated that the unit status of the seasonal employees and part-time merchandisers would not be resolved in this proceeding-missed the mark, explaining: "The relevant inquiry . . . is whether these employees were performing unit work, not whether they are ultimately determined to be in the bargaining unit. As noted above, the employees were performing unit work; the grievances concerned that fact; and the information was relevant to those grievances."

The majority rejected the Respondent's argument in its exceptions that it was not required to provide the Union with information it requested on November 21, 2000 because the Union sought to use the information as a discovery tool for pending unfair labor practice charges. It pointed out that the charges were withdrawn prior to the hearing and the Respondent stated in its posthearing brief to the judge that based on the withdrawal it "can now reveal information requested by the Union . . . without fear that the Union is using its request as a means for discovery."

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charges filed by Industrial Service, Transportation, Professional and Government Workers, Seafarers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Phoenix on Feb. 1, 2001. Adm. Law Judge William L. Schmidt issued his decision Sept. 28, 2001.

* * *

CHS Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home (28-CA-15948, 16291; 337 NLRB No. 159) Deming, NM Aug. 1, 2002. Chairman Hurtgen and Member Cowen affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in unit employees' terms and conditions of employment and failing to provide the Union with requested information necessary and relevant to its duties as the employees' bargaining representative. They found that the judge correctly dismissed complaint allegations that the Respondent unlawfully changed its overtime policy from voluntary to mandatory and unlawfully issued a new policy manual. Agreeing with the judge that the Respondent did not withdraw recognition of the Union as its employees' bargaining representative, Chairman Hurtgen and Member Cowen decided that the judge's recommended general affirmative bargaining

order is not necessary to remedy the violations found and modified his Order accordingly. [HTML] [PDF]

Member Liebman, dissenting in part, would find the Respondent violated Section 8(a)(5) and (1) when it unilaterally changed its overtime policy in March and April 1999, and when it issued a new policy manual in March 2000.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charges filed by Steelworkers District 12, Subdistrict 2; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Deming, May 2-3, 2000. Adm. Law Judge James L. Rose issued his decision Aug. 2, 2000.

Brookville Health Care Center (22-CA-23007; 337 NLRB No. 167) Irvington, NJ Aug. 1, 2002. The Board upheld the administrative law judge's conclusion that the Respondent, a successor employer who purchased Brookville Health Care Center in November 1997, violated Section 8(a)(5) and (1) of the Act by refusing to execute the predecessor's contract with Health Care Employees District 1199J, which the Respondent had adopted by its conduct. [HTML] [PDF]

Relying on these factors, the Board found the evidence sufficient to meet the clear and convincing evidence standard that the Board has repeatedly held appropriate in adoption by conduct cases: (1) the Respondent's failure to expressly reject the contract or any of its terms; (2) the Respondent's compliance with all of the contract terms, including contractually required mid-term changes, and the union-security and dues-checkoff provisions; and (3) the Respondent's participation in several arbitration proceedings without asserting as a defense the absence of a binding contract between the parties.

The Board reasoned that a successor employer has the freedom to reject the predecessor's contract, but if it exercises that right it is obligated to bargain with the union over a new agreement. The Respondent here did nothing to indicate that it was exercising that right, and its conduct was completely inconsistent with doing so.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Hospital and Health Care District 1199J, AFSCME; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark on Oct. 6, 1999. Adm. Law Judge D. Barry Morris issued his decision March 2, 2000.

* * *

Aramark School Services, Inc. (7-RC-22114; 337 NLRB No. 166) Benton Harbor, MI Aug. 1, 2002. The Board reinstated the instant petition dismissed by the Regional Director pursuant to the successor bar doctrine enunciated in *St. Elizabeth Manor,* 329 NLRB 341 (1999), and remanded the proceeding to the Regional Director for further appropriate action consistent with *MV Transportation,* 337 NLRB No. 129, which overruled *St. Elizabeth Manor.* The Petitioner (Michigan Council 25, AFSCME) seeks to represent approximately 85 food service employees employed by the Employer in the Benton Harbor, Michigan school district. [HTML] [PDF]

Since about 1980, the Employer has contracted with the Benton Harbor school district for management of the food service operations at school cafeterias. In June 2001, the school board voted to privatize the entire food service operation effective August 6, 2001. At the time, there were approximately 215 service and maintenance employees, including approximately 85 who were food service employees, employed by the Benton Harbor school district and represented by the Benton Harbor Custodial/Maintenance, Bus Drivers, Food Services, Security Officers and Hall Monitors Service Employees Association, MEA/NEA. The employees were covered by a collective-bargaining agreement effective from October 1, 1998 to September 30, 2001.

On June 28, 2001, the Benton Harbor school district awarded a contract to the Employer to provide food services at school cafeterias. By letter dated August 3, 2001, the Employer informed the Intervenor (Michigan Education Association/National Education Association) that it would recognize it as the exclusive collective-bargaining representative of the food service employees but would not assume the existing collective-bargaining agreement and instead intended to negotiate a new collective-bargaining agreement covering food service employees.

The Regional Director dismissed the instant petition after finding that a reasonable period of time for bargaining had not occurred, and that the petition is barred. The Board, in reversing the Regional Director, denied the Intervenor's contention that *MV Transportation* should not be applied retroactivity to this case, noting that the Board's usual practice is to apply new policies and standards to all pending cases. It also denied the Intervenor's motion to reopen the record and dismissed the Petitioner's request for review of the Regional Director's decision. The Board noted that when a petition is timely filed, the subsequent execution of a collective-bargaining agreement will not serve to bar the petition. The critical inquiry is whether the petition was timely and proper at the time of filing.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

* * *

Harding Glass Co., Inc. (1-CA-31148, 31158; 337 NLRB No. 175) Worcester, MA Aug. 1, 2002. The Board granted the General Counsel's motion for partial summary judgment with respect to the amended compliance specification paragraphs 1 through 10, and 12 through 21, relating to the backpay period and the backpay calculations for all the employees except as to the amount of interim earnings and expenses of each of the employees, granted the motion to strike the Respondent's affirmative defenses, and denied summary judgment as to the status of James Tritone. In Member Liebman's view, Tritone's job classification was within the Respondent's knowledge and she found no basis to allow the Respondent to seek to prove that Tritone was physically unable to perform glazier work. She would therefore grant summary judgment as to the status of Tritone. [HTML] [PDF]

The Board in an earlier decision, 316 NLRB 985 (1995), ordered the Respondent, among other things, to restore all terms and conditions of employment to the status quo as they existed on October 23, 1993, and make whole any employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment. On March 27, 1996, the U.S. Court of Appeals for the First Circuit enforced the Board's order in part, and denied enforcement of that portion of the order that required the Respondent to offer immediate and full reinstatement to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993.

The amended compliance specification sets forth backpay formulae and calculations for glassworkers Robert Mosley, David Elworthy, Mark Zaltberg, Christopher Pelletier, Kenneth Bullock, and Christopher Carle, and glaziers James Tritone, James Gabrielle, Richard Poirer, and Richard Von Merta. The Respondent, in its first amended answer, generally denied the General Counsel's formulae for computing backpay and the application of those formulae to the claimants. The Respondent failed to provide any explanation to support its claim that Robert Mosely was properly paid, denied without elaboration that the alleged hourly rates of pay were applicable to the employees, and denied that Elworthy and Pelletier were glassworkers. Chairman Hurtgen would deny summary judgment as to the status of Elworthy and Pelletier, saying that it is sufficient to assert that they were not glassworkers.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

General Counsel filed motion to strike portions of Respondent's first amended answer to the amended compliance specification and for partial summary judgment May 19, 2000.

* * *

Kaiser Foundation Hospitals, et al. (32-UC-385; 337 NLRB No. 165) Oakland, CA Aug. 1, 2002. In denying the Petitioner's request for review of the Acting Regional Director's dismissal of the petition, the Board held that this petition was properly dismissed under the Board's unit clarification principles governing historically excluded classifications. It said the Board will not entertain a unit clarification petition seeking to accrete a historically excluded classification into the unit, unless the classification has undergone recent, substantial changes. *Bethlehem Steel Corp.,* 329 NLRB 243, 244 (1999). [HTML] [PDF]

The unit clarification petition sought to include temporary agency employees who had been employed at the Employer for over 60 days. The Petitioner (Office & Professional Employees Local 29) contended that the Board's recent decision in *M.B. Sturgis, Inc.,* 331 NLRB 1298 (2000), justified processing the petition.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

* * *

KSM Industries Inc. (30-CA-13762, et al.; 337 NLRB No. 156) Germantown, WI Aug. 1, 2002. Chairman Hurtgen and Member Bartlett, with Member Liebman concurring, granted the Respondent's motion for reconsideration of the Board's decision reported at 336 NLRB No. 7 (2001). Member Cowen dissented. In its decision, the Board found, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its health insurance proposal, after impasse. It relied on *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997) in reaching this conclusion. [HTML] [PDF]

The Respondent's motion asserted that, with respect to the unilateral implementation of the medical and dental insurance proposal, the Board made "*de novo* findings and/or conclusions with regard to material facts" that are "erroneous as either unsupported by any record evidence or contrary thereto." The majority granted the motion only insofar as to delete the last two sentences of the decision's penultimate paragraph and denied the motion in all other respects. They said that there are no "extraordinary circumstances" to warrant reversal of the conclusions of law or adoption of the argument of the dissent.

In her concurrence, Member Liebman stated: "I write separately (1) to emphasize my own view that the sentences deleted from the Board's decision are not necessary to its rationale, and (2) to disagree with Member Cowen's view that there was no violation of Section 8(a)(5) here." Chairman Hurtgen and Member Bartlett did not participate in the underlying case and they expressed no views regarding the Board's decision.

Member Cowen, dissenting, would grant the Respondent's motion and reverse the Board's finding that the Respondent's unilateral implementation of its medical/dental proposal ("health insurance proposal") violated Section 8(a)(5) of the Act. Unlike his colleagues, he believed that the Respondent's motion can reasonably be read as giving the Board grounds for reconsidering the merits of the finding that the Respondent violated Section 8(a)(5) by unilaterally implementing its health insurance proposal. In his view, the removed language cannot be separated from the violation itself.

(Chairman Hurtgen and Members Liebman, Cowen, and Bartlett participated.)

* * *

Nevada Security Innovations, Ltd. (31-RC-8025; 337 NLRB No. 173) Las Vegas, NV Aug. 1, 2002. A Board majority of Chairman Hurtgen and Member Bartlett overruled the Employer's objection and certified the Intervenor, Federation of Police, Security & Corrections Officers-AFSPA as the employees' collective-bargaining representative. The mail ballot election held Aug. 24 through Sept. 13, 2001, showed that 28 ballots were cast for the Petitioner, Safety Officers Union, 139 were for the Intervenor, and 25 against the participating labor organizations, with no challenged ballots and 1 void ballot. [HTML] [PDF]

The hearing officer, relying on *Midland National Life Insurance,* 263 NLRB 127 (1982), recommended overruling the Employer's Objection 1 which alleged, in substance, that a letter sent to employees by an affiliate of the Intervenor misrepresented that the affiliate would be appearing on the ballot. Although the majority agreed that the Employer's objection should be overruled, they did not rely on *Midland,* where the Board held that it generally will not set aside elections on the basis of campaign misrepresentations. Instead, they applied the standard set forth in *Pacific Southwest Container,* 283 NLRB 79 (1987). Chairman Hurtgen and Member Bartlett concluded that the employees knew for which union they were voting, and that their right to select their bargaining representative was not compromised.

Member Cowen, dissenting, would remand the case to the hearing officer to reopen the record and make findings resolving whether at the time of the election the Intervenor intended to represent the employees once it was certified or intended to transfer bargaining rights to some other labor organization or affiliate.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

* * *

Scapino Steel Erectors, Inc. (7-CA-43137; 337 NLRB No. 158) Edwardsburg, MI Aug. 1, 2002. The Board majority of Chairman Hurtgen and Member Liebman affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to post a bond with the Union's trusts and by failing to respond to the Union's request for certain information. In agreement with the General Counsel, but contrary to the judge, they found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to pay the wage rates set forth in the Union's collective-bargaining agreement and by refusing to make the contractually-mandated fringe benefit contributions. The judge declined to rule on this allegation, deciding that the matter was best left to future compliance proceeding, because the agreement was "ambiguous as to whether the Respondent was required to pay union scale wages and/or utilize the Union's hiring hall."[HTML] [PDF]

The Respondent signed a collective-bargaining agreement under Section 8(f) with the Union on December 10, 1999, which was binding through May 31, 2002. Disagreeing that the contract is ambiguous, the majority said a review of the contract revealed that a signatory employer, such as the Respondent, must pay specified wage rates for certain job classifications, i.e., apprentice, journeyman, and foreman, and the contract reveals no specific reference to a hiring hall.

In dissent, Member Cowen would not find that the Respondent violated Section 8(a)(5) of the Act by failing to adhere to certain provisions of its Section 8(f) contract with the Union. He wrote: "the judge stated that the only issue in this case is whether the parties' agreement is enforceable and, if so, what remedial action is warranted for the Respondent's refusal to honor its terms. Thus, the issue in this case is merely a question of contract interpretation and enforcement." Member Cowen would dismiss the complaint and, in his view, the Board should not be involved in such questions, and the parties should be left to resolve their dispute through traditional contract enforcement mechanisms. See *United Telephone Co. of the West,* 112 NLRB 779, 782 (1955).

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Iron Workers Local 292; complaint alleged violation of Section 8(a)(5) and (1). Hearing in Niles on Feb. 6, 2001. Adm. Law Judge Jerry M. Hermele issued his decision April 10, 2001.

* * *

Sumo Container Station, Inc. d/b/a Sumo Airlines and Sumo Trucking and Cargo, Personnel & Equipment Leasing Inc. and Sumo Cargo Services, Inc. and Sumo Air Cargo, Inc. (1-CA-29985, 30236; 337 NLRB No. 171) Jamaica, Queens, and Inwood, NY Aug. 1, 2002. The Board granted the General Counsel's motion to strike portions of the Respondents' answer and for partial summary judgment, except to the extent that the issues of the Respondents' alter ego, single employer, and/or successor employer status, tolling of backpay after October 20, 1993, interim earnings, and interim expenses, which issues were remanded for hearing before an administrative law judge. [HTML] [PDF]

In the proceeding decided on May 10, 1995, 317 NLRB 383, the Board ordered the original Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines, among others, to offer full and immediate reinstatement to the discriminatees and to make them whole for any loss of pay or benefits resulting from the discrimination against them; to reestablish its entire business operations at its East Boston, MA terminal; and to restore the work formerly performed at that location before bargaining unit employees were terminated.

A controversy having arisen over the amount of backpay due the discriminatees and the identity of the entities responsible for payment, the Acting Regional Director on Sept. 30, 1999, issued a compliance specification and notice of hearing alleging the amounts due under the Board's order. The specification also alleged that four additional Respondents are derivatively liable for the backpay because they are each alter egos of, single employers with, and successor employers to the original Respondent.

The General Counsel's motion moved to strike portions of the Respondents' first amended answers which fail to meet the specificity requirements of the Board's Rules and Regulations. Summary judgment was granted with respect to paragraphs 13 through 15 and was denied with respect to paragraphs 19 through 25, subsections (a) and (b) of the compliance specification insofar as they allege that backpay has not been tolled.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

General Counsel filed motion to strike portions of Respondents' answer to the compliance specification and for partial summary judgment March 28, 2000.

* * *

TVI, Inc. d/b/a Savers (28-CA-16019-2; 337 NLRB No. 163) Las Vegas, NV Aug. 1, 2002. A Board majority of Chairman Hurtgen and Members Cowen and Bartlett affirmed the administrative law judge's dismissal of the complaint, agreeing that Supervisor Terri Foster's statement to employees at the Respondent's Rancho store did not violate Section 8(a)(1) of the Act, but rather was a lawful prediction of potential consequences of unionization under the standard set forth in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). Member Liebman dissented in part. [HTML] [PDF]

The majority noted under *Gissel,* when an employer makes a prediction as to what effects unionization may have on its company, such a prediction is lawful where it is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." They found that Foster's statement was both "carefully phrased" and based upon "objective fact." In response to employee questions, Foster, who knew that the store was losing money at the time, stated that "if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job."

Unlike her colleagues, Member Liebman would reverse the judge and find that Foster threatened job loss in violation of Section 8(a)(1). She asserted there is no evidence that Foster, a low-level supervisor who had been working at the Rancho store for only a month, had any firsthand knowledge of the store's finances. Member Liebman takes issue with the judge's suggestion that a "single incident . . . by a minor supervisor" cannot be the basis for finding a violation under *Gissel.* By dismissing a threat of job loss on the basis that it was merely a "single incident," she said the majority ignored *Gissel's* admonition that employees are "particularly sensitive" to such hints of plant closing.

(Chairman Hurtgen and Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Teamsters Local 14; complaint alleged violation of Section 8(a)(1). Hearing in Las Vegas on June 13, 2000. Adm. Law Judge Albert A. Metz issued his decision Sept. 18, 2000.

* * *

Desert Palace, Inc., d/b/a Caesars Tahoe (32-RC-4878; 337 NLRB No. 170) Stateline, NV Aug. 1, 2002. Chairman Hurtgen and Member Liebman overruled the challenge to the ballot of Kimbrough Maier, and directed that the Regional Director open and count Maier's ballot and issue a revised tally of ballots and the appropriate certification. Member Cowen concurred in the result. [HTML] [PDF]

The Petitioner (Operating Engineers, Stationary Local 39) is seeking to represent certain employees employed in the Employer's engineering department. The election of June 1, 2001 resulted in 19 for and 18 against, the Petitioner, with one determinative challenged ballot, that of Maier, who is the engineering coordinator. The Petitioner challenged Maier's ballot, alleging that he should be excluded from the unit because: the engineering coordinator position is not included in the bargaining unit; Maier performs clerical work, not engineering work, and does not share a community of interest with other bargaining unit employees; and Maier is a supervisor.

The hearing officer recommended that the challenge to Maier's ballot be sustained and that a certification of representation be issued. The Employer excepted to the hearing officer's findings, arguing that: Maier was hired to perform facility maintenance work; upon transferring to the engineering coordinator position, he was assigned clerical responsibilities which comprise about 2 hours of his average workday; and he is available to perform, and does perform, facility maintenance work the remainder of the time.

Finding merit in the Employer's exceptions, the Board noted that when resolving determinative challenged ballots in cases involving stipulated bargaining units, its function is to ascertain the parties' intent and then to determine whether that intent is

contrary to any statutory provision or established Board policy. *Northwest Community Hospital,* 331 NLRB 307 (2000). The Board noted that the D.C. Circuit has recently followed this governing principle in applying a three-prong approach to resolving stipulated unit cases in *Associated Milk Producers, Inc. v. NLRB,* 193 F.3d 539 (D.C. Cir. 1999), which essentially embodied the approach generally taken, but that the Board did not always expressly articulate in prior cases. It wrote:

Under the D.C.Circuit's three-prong test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Applying the D.C. Circuit's analysis to this case, and expressly adopting the three-prong test as a clear statement of the analytical approach to be followed prospectively in stipulated unit cases, the Board concluded that the stipulation is facially ambiguous; that there is insufficient extrinsic evidence from which to discern the parties' intent; and that, applying community-of-interest principles, the engineering coordinator position should be included in the bargaining unit. Thus, Maier is eligible to vote.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

* * *

Flambeau Airmold Corp. (11-CA-17172, et al.; 337 NLRB No. 161) Roanoke Rapids, NC Aug. 1, 2002. Granting the General Counsel's motion to modify order to include a make whole remedy, the Board modified the underlying order at 334 NLRB No. 16 (2001) to provide a make-whole provision for the Respondent's violation of Section 8(a)(5) and (1) of the Act by making unilateral changes in employees' terms and conditions of employment. The Board denied the Respondent's request, saying it will not permit the Respondent to relitigate in compliance the issue of whether unit employees, in fact, had worked in the job classifications so that the Respondent's elimination of them constituted an unlawful unilateral change. The Respondent may challenge the identities of the employees who held the jobs because the Board has made no finding on that issue. [HTML] [PDF]

The Board found in the earlier decision that the Respondent also violated Section 8(a)(5) and (1) by unilaterally increasing the amount of employee contributions for health insurance premiums effective February 2, 1997. In its motion to clarify and modify decision, the Union (UNITE) asserted that the Respondent had again unilaterally increased employee health insurance payments in 1998 and 1999 and requested the Board to amend the earlier decision to permit litigation of the alleged 1998 and 1999 increases during the compliance stage. The Union filed the motion with the Board after the compliance officer denied its request to include the 1998 and 1999 increases in the backpay calculations to remedy the Respondent's unfair labor practices.

Chairman Hurtgen and Member Cowen denied the Union's motion, finding no reason to make an exception to the Board's established policy that "[o]nce the Board has found a violation of the Act, it usually does not permit subsequent unfair labor practice allegations to be litigated in compliance proceedings." *Burgess Construction,* 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

Member Liebman, dissenting on this issue, found that it is not necessary for the Board to clarify its original decision because the Order implicitly permits litigation in the compliance stage, as sought by the Union. She wrote: "The Board's original remedy cannot be fully effectuated without permitting the litigation of the 1998 and 1999 increases in the compliance phase. That is because the pre-February 1997 status quo ante cannot be restored without determining the legality of the intervening increases. This necessarily must be done in the compliance phase." Contrary to the Respondent's argument, Member Liebman held that the Union's allegations of posthearing increases are not time-barred under Section 10(b). She explained that the alleged posthearing violations are not merely closely related to the violations found by the Board; they are essentially identical. 11

(Chairman Hurtgen and Members Liebman and Cowen participated.)

* * *

Ready Mix, Inc. (28-CA-14984; 337 NLRB No. 181) North Las Vegas, NV Aug. 1, 2002. Chairman Hurtgen and Member Liebman adopted the administrative law judge's dismissal of four Section 8(a)(1) allegations. In dismissing these allegations, the judge relied solely on the ground that the General Counsel failed to establish that Dave Hampton was a supervisor under Section 2(11) of the Act. The majority reversed the judge and held that the Respondent violated Section 8(a)(1) by interrogating an employee and creating the impression of surveillance, finding that in August 1997, the Respondent, through Operations Manager Michael Ramsey, coercively interrogated employee Richard Edwards about his union organizational activity. [HTML] [PDF]

Concurring in part and dissenting in part, Member Bartlett would affirm the judge's dismissal of allegations that the Respondent, through Ramsey, violated Section 8(a)(1). Member Bartlett stated Ramsey had initiated a conversation with employee Edwards and went on to say he'd heard that Edwards had been passing out union cards. Member Bartlett held that Ramsey made clear that his sole reason for raising the subject of card solicitation was to make sure that Edwards did not solicit cards on worktime. He also agreed with the judge that Ramsey did not make threats of retaliation against legitimate or protected card solicitation activities and his conversation with Edwards was noncoercive.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by Teamsters Local 631; complaint alleged violation of Section 8(a)(1), (3) and (4). Hearing in Las Vegas, Nov. 3-4, 1998 and Feb. 18, 1999. Adm. Law Judge Frederick C. Herzog issued his decision Sept. 27, 1999.

* * *

Made 4 Film, Inc. (12-CA-21148; 337 NLRB No. 179) North Miami, FL Aug. 1, 2002. The administrative law judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to make benefit fund contributions as required in its collective-bargaining agreement with Stage Employees Local 477 and by delaying the furnishing of certain information requested by the Union. The Respondent filed no exceptions to these findings. [HTML] [PDF]

The judge, in her remedial order, directed the Respondent to make the benefit fund contributions owed under the contract up to April 14, 2001, the contract expiration date. The General Counsel excepted, arguing that the Respondent's obligation to pay benefit fund contributions continues beyond the expiration date of the contract until a successor agreement or lawful impasse is reached. Chairman Hurtgen and Member Liebman, with Member Cowen dissenting, agreed and modified the judge's Order accordingly. See *R.E.C. Corp.,* 296 NLRB 1293 (1989).

The judge found a unilateral modification of the contract and ordered Respondent to adhere to the contract for its term. Chairman Hurtgen and Member Liebman found however that the General Counsel's complaint alleged, and the evidence established, that the Respondent's action was also a unilateral change in terms and conditions of employment and that the remedy should also include a provision that, after expiration of the contract, Respondent must continue the status quo unless and until an impasse or agreement is reached.

Chairman Hurtgen and Member Liebman noted that Member Cowen raised an issue not raised by the Respondent. They wrote: "[h]e argued that the Respondent cannot be required to make payments beyond the expiration of the contract because such payments would be prohibited by Sec. 302(c)(5), which requires that employer payments into union trust funds be detailed in a 'written agreement.' In *Hinson v. NLRB,* 428 F.2d 133, 138-139 (8th Cir. 1970), however, the court held that the terms of an expired contract, together with the underlying trust agreements, are sufficient to satisfy the requirements of Sec. 302(c)(5)." The Chairman and Member Liebman concluded, although they did not need to reach the issue, that the "written agreement" requirement of Section 302(c)(5) is met.

Member Cowen pointed out that no trust agreement was made a part of this record. He said that in the absence of such, the latitude allowed by Section 302(c)(5)(B) cannot come into play, and based on the state of the present record, would not grant the remedy that the General Counsel sought.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Stage Employees Local 477; complaint alleged violation of Section 8(a)(1) and (5). Hearing in Miami on Nov. 29, 2001. Adm. Law Judge Margaret G. Brakebusch issued her decision Jan. 31, 2002.

* * *

McClatchy Newspapers, Inc. d/b/a The Fresno Bee (32-CA-17791-1, 17986-1; 337 NLRB No. 180) Fresno, CA Aug. 1, 2002. The Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging David Otero. It found merit in the Respondent's exceptions and agreed that Otero would have been suspended and discharged even absent his union activity. However, the Board affirmed the judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(5), (3) and (1) by suspending and discharging employees Robert Barrientez and Allan Washington, and by issuing a final warning to and discharging Glenn Evans. The Board also agreed that the Respondent affirmatively showed that Evans, Washington, and Aguirre would have been discharged for misconduct even if they had not been associated with the Union and that union animus was not shown to be involved in the suspension and discharge of Barrientez. [HTML] [PDF]

In adopting the judge's dismissal of the complaint allegations, Member Cowen would find that the General Counsel failed to establish a prima facie case that union animus played a role in the Respondent's suspensions and discharges of Evans, Otero, Washington, and Aguirre.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charges filed by Graphic Communications Workers Local 404; complaint alleged violation of Section 8(a)(5), (3), and (1). Hearing at Fresno on various dates in October and November 2000 and January through April 2001. Adm. Law Judge Lana H. Parke issued her decision Aug. 27, 2001.

* * *

Newspaper and Mail Deliverers' Union of New York and Vicinity (Jalt Corp. d/b/a U.N.D.S.) (3-CB-7687; 337 NLRB No. 172) Long Island City, NY Aug. 1, 2002. The administrative law judge held, with Board approval, that the Respondent violated Section 8(b)(1)(A) of the Act by threatening employees with discharge if they refused to join or support the Union and demanding and obtaining recognition from the Employer at a time when it did not represent a majority of the Albany, NY facility employees; and Section 8(b)(1)(A) and (2) by demanding and receiving agency fees and dues deducted from the wages of the Albany facility employees. [HTML] [PDF]

The judge applied a presumption that a single-facility unit is appropriate in finding that the Employer's Albany facility was a separate appropriate unit and that its employees were not an accretion to the preexisting bargaining unit. The Board found it unnecessary to pass on the applicability of the presumption because: (1) the Respondent does not contest the judge's use of the presumption in this case; and (2) even without the benefit of the presumption, it found that the Albany employees constitute a separate appropriate unit based on the traditional community of interest factors. The Albany employees also do not satisfy the Board's test for accretion because they do not share a sufficient community of interest with the preexisting unit.

The judge recommended ordering that the Respondent reimburse the Albany employees "jointly and severally with U.N.D.S." The Board said it lacked jurisdiction over the Employer to do so because in settling a separate unfair labor practice charge arising out of the same events at issue here, the Employer agreed to reimburse the Albany employees "jointly and severally" with the Respondent for fees and dues paid by or withheld from them and the complaint thus does not allege any violations by the Employer. Instead, it ordered the Respondent to make whole the Albany employees with interest "for all initiation fees, dues, and other moneys, if any, paid by or withheld from them." The Board left to the compliance stage the determinations of (1) the amounts of any payments made by U.N.D.S. pursuant to the settlement, (2) the drivers to whom those payments were made, and (3) the effects of any amounts received from the settlement on the drivers' remedial awards in this case.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

Charge filed Leslie Kilian, an individual; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Albany, Jan. 10-11, 2001. Adm. Law Judge Bruce D. Rosenstein issued his decision April 27, 2001.

* * *

National Propane Partners, L.P. (14-CA-25471; 337 NLRB No. 160) Moro, IL Aug. 1, 2002. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge and plant closure if they selected the Union as their bargaining representative, and advising employees that other employees who supported a union in the past were discharged; that the Respondent violated Section 8(a)(3) and (1) by discharging Michael Beckham for his union activity; and that an order requiring the Respondent to bargain with Teamsters Local 525 is warranted pursuant to *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). Member Bartlett would find that a *Gissel* bargaining order is unwarranted and that traditional remedies would suffice to erase the effects of the Respondent's unfair labor practices. [HTML] [PDF]

Members Liebman and Bartlett found, contrary to the judge, that Beckham is entitled to reinstatement and full backpay. There were no exceptions to the judge's conclusion that the Respondent violated Section 8(a)(1) when its manager threatened Beckham with discharge and plant closure. The judge found, and Chairman Hurtgen agreed, that Beckham attempted to suborn perjury by asking employee Jack Stice to falsely state in a Board affidavit that Beckham had never brought a gun onto the Respondent's property. Like the judge, the Chairman would toll Beckham's backpay as of the date of the attempted subornation (leaving the precise date to be determined in the compliance proceeding). Agreeing with the General Counsel's cross-exceptions, Members Liebman and Bartlett decided that the evidence is too ambiguous to show that Beckham's intent to induce Stice to lie, rather than truthfully to deny that Beckham had threatened Stice with a gun and that Beckham thus is entitled to full reinstatement and backpay.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by Teamsters Local 525; complaint alleged violation of Section 8(a)(1) and (3). Hearing at St. Louis on June 22, 1999. Adm. Law Judge John H. West issued his decision Sept. 30, 1999.

* * *

Carpenters Central Pennsylvania Regional Council (Novinger's, Inc.) (4-CE-118; 337 NLRB No. 162) Harrisburg, PA Aug. 1, 2002. The Board affirmed the administrative law judge's finding that the Respondent Union violated Section 8(e) of the Act by its maintenance of an antidual-shop clause with a secondary objective, i.e., article V, section 6 of its collective-bargaining agreement with Charging Party Novinger's, Inc. [HTML] [PDF]

The Board found that the judge properly relied on several instances within the 10(b) period where the Respondent took steps to pursue its grievance alleging a violation of the 15 contract provision in finding that the complaint was not barred by Section 10 (b). It reasoned that the grievance was filed before the 10(b) period, but these instances constitute "reaffirmation," "maintenance," and "giving effect" to the disputed provision, and thus "entering into" an 8(e) agreement, within the 10(b) period. *Dan McKinney Co.,* 137 NLRB 649, 653-657 (1962). See, e.g., *Iron Workers (Southwestern Materials),* 328 NLRB 934, 935 (1999). The Board did not rely on the judge's discussion of the Respondent's single-employer defense.

The Board granted the General Counsel's request in his cross-exceptions that the Board modify the "cease and desist" paragraph in the judge's recommended order by broadening its language, consistent with the corresponding paragraph in his recommended notice, and with the Board's remedy and Order in *Southwestern Materials,* supra, at 937. It modified the Order accordingly. The cease and desist remedy also prohibits the Respondent from relying on the unlawful contract provision in its pursuit of the grievances. The Board denied the Charging Party's cross-exception requesting that the Board order the Respondent to withdraw its grievances and the Charging Party's cross-exception seeking the addition of a "narrow order" paragraph-i.e., language requiring the Respondent to cease violating Section 8(e) in any like or related manner.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Novinger's, Inc.; complaint alleged violation of Section 8(e). Parties waived their right to a hearing before an administrative law judge. Adm. Law Judge Earl E. Shamwell Jr. issued his decision March 15, 2001.

* * *

Kathleen's Bakeshop, LLC (29-CA-22254, et al.; 337 NLRB No. 169) Southampton, NY Aug. 1, 2002. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by: threatening to kill its employees because they supported Workers & Grain Millers Local 3l; discharging Maria Campero because she complained to management about wages, hours, and working conditions; constructively discharging George Panagiotopoulos because he supported the Union; unilaterally increasing the hours of employment of its salaried unit employees without giving the Union notice and an opportunity to bargain; and failing to supply relevant information requested by the Union relating to unit employees' working conditions and relating to the effects of the Respondent's decisions to relocate production to Richmond, VA and subcontract delivery operations. [HTML] [PDF]

Chairman Hurtgen and Member Bartlett, with Member Liebman dissenting, reversed the judge's findings that the Respondent violated Section 8(a)(1) by creating the impression that Panagiotopoulos' union activities were under surveillance, and violated Section 8(a)(5) by failing to provide information requested by the Union concerning the Respondent's last date of operation in Southampton, NY.

To remedy the Respondent's unlawful refusal to bargain over the effects of its decision to relocate production and subcontract delivery operations, the Board adopted the judge's recommended bargaining order and recommended Order of limited backpay to the affected employees pursuant to *Transmarine Corp.,* 170 NLRB 389 (1968), and conformed the *Transmarine* remedial language to the requirements of *Melody Toyota,* 325 NLRB 846 (1998). It granted the General Counsel's exception to the judge's failure to include this violation in her conclusions of law and to include a backpay provision in the notice to employees.

In adopting the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally increasing the hours of employment of salaried unit employee Karl Stork and, thereby, effectively reducing Stork's hourly rate of pay, the Board ordered the Respondent to bargain over the change in Stork's hours. The Board conditionally remedied the judge's inadvertent failure to provide a make whole remedy for Stork because it is not clear whether Stork did, in fact, lose pay as a result of the increase in his hours and left the issue of backpay to compliance.

In a separate concurring opinion, Chairman Hurtgen set forth his view as to the 8(a)(5) violation concerning the unilateral increase in Stork's hours.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charges filed by Workers & Grain Millers Local 3; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, Oct. 15 and Dec. 9-10, 1999. Adm. Law Judge Eleanor MacDonald issued her decision Aug. 9, 2000.

* * *

Joseph Stallone Electrical Contractors, Inc. (4-CA-30370; 337 NLRB No. 178) Bristol, PA ug. 1, 2002. The Board majority of Chairman Hurtgen and Member Liebman agreed with the administrative law judge's finding that Respondent owner Joseph Stallone violated Section 8(a)(1) of the Act when he made statements indicating that employee Andrew McIlvaine's layoff and recall were connected to the union activity of other employees. The majority also agreed that the Respondent violated Section 8(a)(3) by laying off McIlvaine on May 15, 2001. As a remedy, the majority agreed with the judge that a *Gissel* bargaining order is appropriate. [HTML] [PDF]

Dissenting Member Cowen, while agreeing with other unfair labor practices the judge had found, would reverse his finding that the Respondent told McIlvaine that his layoff and recall were connected to the union activity of other employees and that McIlvaine's May 15, 2001 layoff violated the Act. Member Cowen pointed out that Stallone was unaware of any union activity by McIlvaine on May 15, 2001, when he called him into his office and, in essence, told him that he was having some financial problems and that there were some things going on that he had to get taken care of with the Union and when things

straightened out that maybe he could hire McIlvaine back. Member Cowen thought Stallone's statement was "too slender a reed on which to hang an 8(a)(1) violation." On this point, the majority stated in a footnote that "Stallone's angry reaction to McIlvaine's union activity is relevant to the issue of whether Stallone laid off McIlvaine because of the union activity of other employees." Member Cowen also would not issue a Gissel bargaining order because the General Counsel did not demonstrate why traditional remedies are inadequate in this case.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Electrical Workers Local IBEW 269; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, Oct. 2 and 4, 2001. Adm. Law Judge William G. Kocol issued his decision Nov. 26, 2001.

* * *

The American Coal Co. (14-CA-25400; 337 NLRB No. 164) Galatia, IL Aug. 1, 2002. The Board majority of Chairman Hurtgen and Member Bartlett affirmed the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) and (3) of the Act in June 1998 by selecting 33 employees for inclusion in a June 1998 layoff of 88 hourly employees because they supported the union during the organizing campaign conducted a few months earlier when the mine was owned by another employer. The majority agreed with the judge's finding that the complaint should be dismissed, because the Respondent proved that it "applied neutral objective criteria in selecting employees for lay off." [HTML] [PDF]

Dissenting Member Liebman would find the layoff to be discriminatorily motivated. "Entirely apart from the troubling destruction and disappearance of some documents, the documentary record contains ample evidence of antiunion animus on the part of the Respondent's supervisory personnel," she stated, adding: "The judge himself found that CEO Murray had made statements consistent with a strong desire to avoid unionization of the Respondent's work force."

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by Bill Bishop, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at West Frankfort, Aug. 31 - Sept. 3, 1999 and at Harrisburg, Nov. 1-5, 1999. Adm. Law Judge Martin J. Linsky issued his decision July 26, 2000.

* * *

Odyssey Capitol Group, L.P., III (6-CA-30010; 337 NLRB No. 174) Pittsburgh, PA Aug. 1, 2002. The Board agreed with the administrative law judge that the refusal of three non-union maintenance employees to enter and perform work at an apartment because of their respective and collective concern about an unsafe working condition (exposure to airborne asbestos in the unit) was protected concerted activity. Thus, the Board held that the Respondent violated Section 8(a)(1) of the Act for discharging the employees, noting their refusal to perform the work was based upon an "honest and reasonable belief" that the work presented a safety hazard. [HTML] [PDF]

In a concurring opinion, Member Cowen stated his view that "the Board should examine the reasonableness of a claimed belief that an unsafe working condition exists in determining whether the employees in fact were motivated by such alleged conditions in taking the actions at issue in a particular case."

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Phillip D. Demas, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Pittsburgh on Nov. 6, 1999. Adm. Law Judge Jerry M. Hermele issued his decision Feb. 8, 2000.

* * *

La Gloria Oil and Gas Co. (16-CA-20461, 20585, 16-RC-10269; 337 NLRB No. 177) Tyler, TX Aug. 1, 2002. In this decision and direction, the Board majority of Chairman Hurtgen and Member Liebman agreed with the administrative law

judge's finding that the Respondent discriminatorily discharged employees Saylor and Lampe in violation of Section 8(a)(3) of the Act. Accordingly, the majority adopted the judge's recommendation that the Respondent's challenges to Saylor and Lampe's ballots be overruled and that their ballots be opened and counted. [HTML] [PDF]

The majority also concluded that the Respondent interrogated its employees regarding their union activities and threatened the employees with job loss in violation of Section 8(a)(1).

In dissent, Member Cowen would find that the Respondent has shown that it would have discharged these two employees because of their serious driving misconduct, regardless of their union activity.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charges filed by PACE Local 4-202; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tyler on June 13-15, 2001. Adm. Law Judge Margaret Brakebusch issued her decision Sept. 19, 2001.

* * *

American Commercial Barge Line Co. and Hines American Line (26-CA-18659, 18664; 337 NLRB No. 168) Jeffersonville, IN Aug. 1, 2002. The Board, affirming the administrative law judge's supplemental decision, found that five river boat pilots were supervisors at the time of their discharge in 1998 for participating in a strike. Accordingly, the Board concluded their strike activity was not protected by the Act and the Respondent did not violate Section 8(a)(1) and (3) by discharging them. [HTML] [PDF]

In determining that the pilots were supervisors, as consistent with the Supreme Court's decision in *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001), the Board stated:

We find, consistent with the judge's supplemental decision, that the pilots have authority to responsibly direct the towboat crew in their work and to assign work. They use independent judgment in exercising that authority, and they do so in the interest of the employer.

The Board further noted that the pilots were paid by salary whereas the deck crew were paid by the day; the pilots also had better benefits, such as paid vacation, and occupied better quarters.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

Charges filed by Pilots Agree Association, Masters, Mates & Pilots,ILA; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Memphis, TN, Sept. 1-3, 1999. Adm. Law Judge Lawrence W. Cullen issued his decision Sept. 27, 1999.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Allina Health System d/b/a Abbott Northwestern Hospital, et al. (Minnesota Nurses Association) Minneapolis, MN August 2, 2002. 18-CA-16051-1, et al.; JD-82-02, Judge William J. Pannier.

A & A Insulation Services, Inc. (Asbestos Workers Local 32) Hazlet, NJ August 2, 2002. 22-CA-24669; JD(NY)-45-02, Judge Steven Davis.

United States Postal Service (Letter Carriers Branch 283) Houston, TX August 2, 2002. 16-CA-21199(P), et al.; JD(ATL)-39-02, Judge Keltner W. Locke.

1300 Ocean Avenue Realty Corp./Sudano, Inc. (Building Service Employees & Factory Workers Local 2) Brooklyn, NY

August 6, 2002. 29-CA-24798; JD(NY)-47-02, Judge Eleanor MacDonald.

1300 Ocean Avenue Realty Corp./Sudano, Inc. (Building Service Employees & Factory Workers Local 2) Brooklyn, NY August 6, 2002. 29-CA-24803; JD(NY)-48-02, Judge Eleanor MacDonald.

Wal-Mart Stores, Inc. (Food & Commercial Workers Local 880) Alliance, OH August 6, 2002. 8-CA-32441, et al.; JD-83-02, Judge Martin J. Linsky.

K-Mart Corp. (Individuals and UAW International and its Local 174) Canton, MI August 8, 2002. 7-CA-43820(1), et al.; JD (ATL)-42-02, Judge Margaret G. Brakebusch.

Active Transportation Co., LLC (Teamsters Local 71) Mt. Holly, NC August 8, 2002. 11-CA-19328; JD(ATL)-44-02, Judge Keltner W. Locke.

Tri-Tech Services, Inc. (Steelworkers) Selma, AL August 8, 2002. 15-CA-16177-1, et al.; JD(ATL)-40-02, Judge Jane Vandeventer.