

ABOUT THE WEEKLY SUMMARY

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



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October 18, 2002

W-2865

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Crown Electrical Contracting, Inc. (14-RC-12252; 338 NLRB No. 36) St. Louis, MO Sept. 30, 2002. Affirming the hearing officer's recommendation, Members Cowen and Bartlett overruled the portions of Petitioner's Objection 4 alleging that during a mandatory meeting with employees on June 20, 2001, the Employer promised to increase funding to the employee benefits

plan without reducing the employees' wages on nonprevailing wage jobs; and certified the Intervenor (Congress of Independent Unions (CIU)) as the exclusive representative of certain employees working at the Employer's St. Louis, MO facility. The majority explained: [\[HTML\]](#) [\[PDF\]](#)

Contrary to our dissenting colleague, we agree with the hearing officer that the Employer's statement that he would do whatever it took to keep employees' current benefits was nothing more than a lawful promise to maintain the status quo. The hearing officer found, and we agree, that there was no context or history that would cause employees to interpret the statement as a promise to increase benefits.

Dissenting Member Liebman said the majority's view is "based on a misunderstanding of what the status quo here actually was. Because the status quo allowed for benefits to fall-which was precisely the employees' concern-a promise to maintain the current level of benefits offered employees something more than they already had. Nothing in the record suggests a reason for this promise other than a desire to influence the election." She would find the Employer's statement to be objectionable and would order a new election.

The tally of ballots for the election held June 22, 2001 shows 15 for the Petitioner (Electrical Workers IBEW Local 1), and 16 for the Intervenor, with no challenged ballots. In the absence of exceptions, the majority adopted pro forma, the hearing officer's recommendation to overrule the portions of the Petitioner's Objection 4 alleging that the Employer promised the employees a wage rate after benefits on prevailing wage jobs if the CIU was voted in, and that the Employer arranged for the election of a new employee trustee to the employee benefit plan.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

A.T. Electric Construction Corp. (2-CA-32967; 338 NLRB No. 37) New York, NY Sept. 30, 2002. Members Liebman and Bartlett upheld the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay contractually required wage rates to unit employees and by failing to remit contractually-required payments to several pension, health and welfare, and other benefit funds on behalf of unit employees. The judge specifically discredited the Respondent's claims that the Union consented to these actions because of the Respondent's poor financial condition. [\[HTML\]](#) [\[PDF\]](#)

Member Cowen, dissenting, would reverse the judge, dismiss the complaint, and leave the matter to the parties to resolve through their own bargained-for procedure or in court.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Electrical Workers IBEW Local 3; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on April 10, 2001. Adm. Law Judge Joel P. Biblowitz issued his decision May 16, 2001.

* * *

Mine Workers (Arch of West Virginia) (9-CB-10626; 338 NLRB No. 40) Fairfax, VA Oct. 8, 2002. Members Liebman and Bartlett affirmed the administrative law judge's conclusion that the Respondent Union violated Section 8(b)(3) of the Act by repudiating the collective-bargaining agreement that it executed with Arch of West Virginia on November 6, 2001. Member Cowen, in dissent, found that the agreement did not occur in the context of a lawful bargaining relationship in an existing unit and is an illegal prehire agreement, noting that the parties negotiated the collective-bargaining agreement for future employees in a future bargaining unit at a new mine. "I will not sign an Order enforcing an agreement that so clearly flouts the fundamental policies of the Act," he said. [\[HTML\]](#) [\[PDF\]](#)

For several years, the Employer has mined coal at the Ruffner mine, a surface mine in Logan County, West Virginia, that is nearing depletion and will close soon. The Employer has rights to the Guyan mine, a surface mine approximately 2 1/2 miles from the Ruffner mine. The Employer and the Union have a bargaining relationship at the Ruffner mine. This case arose from

the parties' negotiations of an agreement to cover the Guyan mine when it opened.

Members Liebman and Bartlett observed that Member Cowen's theory has not been alleged in the complaint, raised as a defense, or litigated by the parties and, therefore, they declined to sua sponte find that the Guyan agreement is an unlawful prehire agreement or contrary to public policy. Noting that the dissent is based on the view that when the Union agreed to negotiate a new contract for a new mine, it severed its connection to the Ruffner unit and entered into negotiations as a minority union, the majority said: "However, the record shows that the Employer and the Respondent embarked on negotiations at least in part to preserve job opportunities for members of the Ruffner bargaining unit, once that mine was depleted. . . . Although we need not, and do not, decide the issue, all of this suggests that the Guyan negotiations took place within the context of the Ruffner bargaining relationship, and that the agreement reached vitally affects the Ruffner employees by giving them preference in employment at Guyan and protecting them from the effects of the shutdown at Ruffner."

In adopting the judge's recommendation that the Union be ordered to give full force and effect to the agreement if the Company opens the Guyan mine, the majority modified the Order to reflect that, the Union must give full force and effect to the memorandum of understanding only upon a proper demonstration of majority support among the Guyan employees.

(Members Liebman, Bartlett, and Cowen participated.)

Charge filed by Apogee Coal Co. d/b/a Arch of West Virginia; complaint alleged violation of Section 8(b)(3). Hearing at Charleston on June 6, 2002. Adm. Law Judge George Carson II issued his decision July 23, 2002.

* * *

Norton Audubon Hospital (9-CA-37404, 37933; 338 NLRB No. 34) Louisville, KY Sept. 30, 2002. Members Liebman and Bartlett affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ Wilma McCombs in a certified nursing assistant type position; and that the Respondent violated Section 8(a)(1) by coercively interrogating registered nurse Maryann King, an open union supporter, about her union sentiments and those of other employees. Member Cowen, concurring in part and dissenting in part, set forth his rationale for finding that the Respondent unlawfully failed to employ McCombs in a certified nursing assistant type position. He would reverse the judge and dismiss the allegation involving the alleged interrogation of King. [\[HTML\]](#) [\[PDF\]](#)

In adopting the judge's finding that the Respondent unlawfully refused to employ McCombs, Member Bartlett does not rely on the Respondent's general statements expressing its opposition to the Union as evidence of animus or on the unfair labor practices of the Respondent's predecessor as evidence of the Respondent's union animus. On the former point, Member Bartlett said "that Board precedent, which by practice remains controlling absent a three-Member Board majority to overrule it, permits reliance on such statements as evidence of animus." However, in agreement with several circuit courts of appeals, he would find that Sec. 8(c) of the Act prohibits the Board from relying on such lawful statements as evidence of either an unfair labor practice or animus. Member Cowen agrees with Member Bartlett in both respects. Member Liebman, in finding antiunion animus, found it unnecessary to rely on the unfair labor practices of the Respondent's predecessor or on the Respondent's statements opposing the Union, but she observed that, as a general matter, such statements may properly be considered as background of animus.

The Board modified the judge's recommended Order to omit a requirement that the Respondent offer McCombs a 1.0 (full-time) patient support associate position (also referred to as patient care associate (PCA) position) or, if one does not exist, a substantially equivalent position, noting it is undisputed that the Respondent offered McCombs a 1.0 PCA position on Sept. 15, 2000, an issue that was fully litigated at the hearing.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Nurses Professional Organization, a/w United Nurses of America, AFSCME; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Louisville, April 4-5, 2001. Adm. Law Judge Irwin H. Socoloff issued his decision Oct. 31, 2001.

* * *

Aldworth Co., Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers (4-CA-27274, et al., 4-RC-19492; 338 NLRB No. 22) Swedesboro, NJ Sept. 30, 2002. The Board held that an order requiring Respondent Aldworth to bargain with Food and Commercial Workers Local 1360 is necessary to remedy the effects of the Respondent's misconduct, which began almost immediately upon learning of the Union's 1998 organizational campaign and extended well beyond the date of the election and which included several "hallmark" violations and numerous other serious and pervasive unfair labor practices that directly involved high-level management representatives. The Board wrote: [\[HTML\]](#) [\[PDF\]](#)

[W]e find the nature and extent of Respondent's antiunion conduct were so pervasive as to have created a corporate culture of lawlessness. The after-effects of this rampant unlawful activity created a legacy of hostility that will pervade the atmosphere for some time to come. And while some employees may have voluntarily departed their jobs, those who remain will doubtless share this history with newcomers. The impact of these events will thus live on in the lore of the shop, where stories, often embellished over time, may grow to legendary proportions. In these circumstances, despite the departure of a significant number of employees who were employed at the time of the unlawful conduct, we conclude that those who remain not only will recall those events, but will continue to be effected by them, and will relate their experience to those newly hired.

Respondent Dunkin' Donuts owns a warehouse in Swedesboro, NJ from which food products are transported to retail outlets in a several-state area. It leases truck drivers, helpers, and warehouse personnel from Respondent Aldworth to carry out these duties. The events of this case began in the spring of 1998 when employees began union organizational efforts. Upon learning of employees' activities, Respondent Aldworth reacted with counter-organizational efforts directed at the entire work force.

The Board agreed with the administrative law judge that the Union had secured support from a majority of unit employees as evidenced through signed authorization cards by the time it requested recognition and bargaining, and that the Respondent's unlawful conduct, both before and after the July 28, 1998 election, clearly demonstrates that employees' wishes are better gauged by an old-card majority than by a new election. The Board differed with the judge's Section 10(b) analysis, and found that certain complaint allegations are time-barred while others are timely but related to charges other than those cited by the judge. It addressed the joint-employer issue, finding that Respondent Dunkin' Donuts is properly named as a joint employer in this proceeding with respect to the Section 8(a)(1) and (3) complaint allegations and that it will be jointly and severally liable, with Respondent Aldworth for remedying those violations.

The Board modified the judge's threats of plant closure analysis and revised the rationale as to violations relating to new performance standards for warehouse employees (the Selection Accuracy Program) implemented by the Respondent shortly after the representation election. The Board reversed the judge's recommended order reinstating one unlawfully discharged employee, remanded for further hearing his dismissal of allegations relating to four other alleged discriminatees, and limited the bargaining order to Respondent Aldworth and explained why a bargaining order is appropriate.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Food and Commercial Workers Local 1360; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Philadelphia in June, July, and Aug. 1999. Adm. Law Judge William G. Kocol issued his decision April 20, 2000.

* * *

Alamo Rent-A-Car, Inc. (12-CA-16972, et al.; 338 NLRB No. 31) Orlando, FL Sept. 30, 2002. The Board found that the administrative law judge reasonably denied the Respondent's motion to defer to the parties' non-Board settlement agreement in lieu of further proceedings, citing *Independent Stave*, 287 NLRB 740 (1987). Although there is no fraud or duress alleged and no evidence of previous misconduct by the Respondent, the Board noted that only one of the four individual discriminatees approved the agreement and the General Counsel strongly opposes it and that the settlement fails to address substantial portions of the case, fails to remedy any of the alleged 8(a)(1) violations, and only partially remedies two of the alleged 8(a)(3) and (1) violations. [\[HTML\]](#) [\[PDF\]](#)

Turning to the alleged violations, Members Cowen and Bartlett found merit in the Respondent's exceptions and dismissed two 8(a)(1) findings and one 8(a)(3) finding by the judge. Member Liebman would affirm the judge's findings. Specifically, the judge found that the Respondent's Manager Soyk threatened the futurity of bargaining when she indicated to employees at a January 1995 meeting that the Union would negotiate the same benefits package that employees already had and that the Respondent engaged in surveillance of the election activities when a policy deputy, employed by the Respondent as a guard, entered the polling area in violation of Section 8(a)(1); and discriminatorily disciplined employees Altimirano and Edwards for taking an extended dinner break on May 15, 1996 in violation of Section 8(a)(3).

Contrary to Member Cowen, Members Liebman and Bartlett found, in agreement with the judge, that the Respondent's supervisor, Lovejoy-Flairty, unlawfully warned Edwards on July 13, 1996, about 2 months after the Union had lost the second of three elections. Members Liebman and Bartlett found that the alleged customer complaint underlying the warning was a mere pretext for retaliation against Edwards for supporting the Union. Member Cowen would find that the General Counsel failed to establish the requisite elements of a prima facie case that Edwards' warning violated Section 8(a)(3) and would dismiss the allegation.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Teamsters Local 385; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Orlando, March 8-10, 1999. Adm. Law Judge Lawrence W. Cullen issued his decision Sept. 14, 1999.

* * *

Saylor's, Inc. (7-RC-22037; 338 NLRB No. 35) Ottawa Lake, MI, Sept. 30, 2002. The Board majority of Members Liebman and Bartlett denied the Petitioner's (Plasterers Local 67) request for review of the Regional Director's decision that (1) a 9(a) relationship was established by the contractual language in the collective-bargaining agreement between the Employer and the Intervenor (Bricklayers Local 9), and (2) the Petitioner's challenge to the Intervenor's 9(a) status, occurring more than 6 months after the Employer's grant of 9(a) status to the Intervenor, was untimely. The majority concluded the Regional Director's findings were correct under existing Board precedent, citing *Central Illinois Construction*, 335 NLRB No. 59 (2001). [\[HTML\]](#) [\[PDF\]](#)

In a footnote, Member Bartlett said in the absence of a three-Member Board majority to reverse that precedent, he joined in denying review inasmuch as the petition was not filed within 6 months after 9(a) recognition was granted and thus any claim that the Intervenor lacked majority status at the time of recognition would be untimely. He further noted that the Petitioner would have the opportunity to file a new petition during the upcoming 30-day window period between 60 to 90 days prior to expiration of the current agreement on August 1, 2003.

Member Cowen, dissenting, concluded that existing precedent in *Central Illinois Construction* does not support dismissal of the instant petition. Accordingly, he would reverse the Regional Director and process this petition.

Contrary to the Regional Director's analysis under *Central Illinois*, Member Cowen concluded that there are only two valid means for creating 9(a) status in the construction industry and they are identical to the requirements for unions to attain that status outside the construction industry. He stated: "In order for unions to become 9(a) bargaining representatives, I would require that they demonstrate their majority status either (1) through certification following a Board-conducted election or (2) through voluntary recognition based on the employer's card check showing that the union holds majority status in the bargaining unit."

(Members Liebman, Cowen, and Bartlett participated.)

* * *

King Soopers, Inc. (27-CA-16818-1; 338 NLRB No. 30) Denver, CO Sept. 30, 2002. The Board majority of Members Cowen and Bartlett, affirming the administrative law judge, found that the Respondent did not violate Section 8(a)(5) of the Act by refusing to deal with Union business agent George Gonzales, who it had discharged 4 years earlier over an incident in which

"Gonzales engaged in volatile and disruptive workplace misconduct." The Union hired Gonzales as a business agent in 2000. He was assigned to service several stores. [\[HTML\]](#) [\[PDF\]](#)

During a 1996 confrontation with his supervisor, as described in the majority opinion:

Gonzales confronted his supervisor about the Respondent's decision to assign him to work on a Saturday. During this confrontation, Gonzales angrily threw his meat hook over his shoulder, narrowly missing an employee. He also threw a 40 pound piece of meat into a saw (breaking its blade); threw his knife into a box; threatened his supervisor; and refused to follow to the store manager's order to leave the store.

The majority stated further:

In short, Gonzales' propensity to react violently during a confrontation would cast a lingering and threatening shadow over collective bargaining, which must, of course, occur in an atmosphere devoid of violence and threats if it is to succeed. Based on these circumstances, then, we agree with the judge that the Respondent should not be required to deal with Gonzales as a union business agent because his presence would create ill will and would make good-faith bargaining impossible.

In dissent, Member Liebman would reverse the judge's dismissal of the complaint, asserting she could see no basis for the Respondent's refusal to deal with Gonzales:

The incident relied on by the Respondent occurred some 4 years earlier, involved no actual or intended physical contact, and was purely personal in nature. The supervisor whose actions triggered Gonzales' misconduct is now working at a store not included within Gonzales' jurisdiction as business representative, so there is no prospect of any lingering personal ill will between the two affecting the bargaining process. As demonstrated, Gonzales' most recent visits to the Respondent's facilities in his role as business agent were professional and productive. The objective evidence here, then, falls far short of the strict standard established by the Board.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by United Food and Commercial Workers Local 7; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Denver on Oct. 5, 2000. Adm. Law Judge James L. Rose issued his decision Dec. 7, 2000.

* * *

Triangle Bldg. Products Corp. (29-RC-9662; 338 NLRB No. 29) Medford, NY Sept. 30, 2002. The Board majority of Members Liebman and Bartlett, reversing the Regional Director, found that the Employer's voluntary recognition of the Intervenor (Carpenters Local 2682) as the collective-bargaining representative of the employees in a wall-to-wall unit is a bar to the petition filed by Teamsters Local 1205. [\[HTML\]](#) [\[PDF\]](#)

On March 21, 2001, the Employer executed a recognition agreement with the Intervenor. In this agreement, the Employer recognized the Intervenor as the majority bargaining representative of employees in a wall-to-wall unit including all production and maintenance employees, carpenters, material handlers, warehousemen, assemblers, forklift operators, truck drivers, and checkers. On March 26, an independent arbitrator conducted an election in this unit; of the approximately 55 eligible voters, 36 voted to have the Intervenor represent them for purposes of collective bargaining. On April 26, the Petitioner filed a petition seeking to represent a portion of the recognized unit. In its petition, the Petitioner also stated that it was prepared to represent an alternative unit found appropriate by the Board.

Applying *Smith's Food & Drug Centers*, 320 NLRB No. 844 (1996) and *American National Can, Inc.*, 321 NLRB 1164 (1996), the Regional Director found that the recognition agreement between the Intervenor and the Employer did not bar the Petitioner's petition because the Petitioner had obtained the support of, inter alia, 30 percent of the drivers at the time the Intervenor and the Employer entered into the recognition agreement.

The majority disagreed with the Regional Director's analysis, offering the following rationale:

The Board in *Rollins*, as modified by *Smith's Food*, created a narrow exception to the recognition bar rule. Thus, voluntary recognition bars all petitions except those filed by a petitioner that can demonstrate that it had support of 30 percent of the employees in the petitioned-for unit at the time of recognition. While the Board in *American National Can* applied this exception in a situation where the petitioned-for unit was smaller than the recognized unit, critical to the Board's analysis was the finding that the petitioned-for unit was an appropriate unit.

Contrary to the Regional Director, we are unwilling to extend this narrow exception of the recognition bar rule to permit petitions for units that are not appropriate. To do so would create instability and uncertainty regarding voluntarily recognized units. This is particularly true in the present case where the recognized unit is a presumptively appropriate overall unit, a neutral arbitrator conducted an election in this unit, and the Petitioner waited 30 days after the recognition to file its petition. In sum, we find that if a rival union fails to petition for an appropriate unit, the employer's voluntary recognition of the other union constitutes a bar to the petition.

Dissenting Member Cowen contended the majority failed to explain "why they have created this 'exception' to the recognition bar exception beyond their vague and speculative assertion that it will prevent instability and uncertainty regarding voluntarily recognized units." He added:

"My colleagues also ignore the fact that the Regional Director, *consistent with well-established Board law and policy*, considered an alternative unit (derived from the petitioned-for unit), and found such a unit to be appropriate. See *Overnite Transportation Co.*, 331 NLRB at 663."

Member Cowen would adopt the Regional Director's Decision, process the Petitioner's petition, and direct and election.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Tejas Electrical Services (16-CA-20937; 338 NLRB No. 39) Houston, TX Oct. 11, 2002. Members Cowen and Bartlett affirmed the administrative law judge's dismissal of the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicants Jack Smith and Jack Bornsheuer, who identified themselves as union organizers on applications submitted to the Respondent's receptionist. Two other applicants, Gordon Casey and Ray Rath, concealed their union affiliation and were hired after being interviewed by the Respondent's field superintendent, Keith Carter. The judge found that the General Counsel failed to establish the required element of union animus in the decision not to hire Smith and Bornsheuer. [\[HTML\]](#) [\[PDF\]](#)

Member Liebman, dissenting in part, concluded that the judge's finding that the General Counsel had not met his burden of showing antiunion animus tainted the hiring process, is premised on these errors and related matters that require a remand. 1) The judge's failure to infer animus from the timing and sequence of events although he found it suspicious that the two covert union applicants were hired instead of Smith and Bornsheuer; 2) the judge's refusal to rely on the statements made by alleged agent Robinson to establish animus because in his view (a) the record fails to establish Robinson's supervisory or agency status, and (b) the statements themselves are insufficient to establish animus; and 3) the judge's denial of the Respondent's requests for production of affidavits given by the General Counsel's witnesses during the investigation of other unrelated cases in which the witnesses acted as union salts.

The majority explained why a remand is not necessary:

Even assuming, *arguendo*, that Smith and Bornsheuer applied for jobs before Casey and Rath did, we find that there is an insufficient basis for inferring union animus merely from the chronological order of applications, in the absence of evidence that the Respondent had a practice of hiring on a first-come, first-hired basis. Moreover, there is no basis for finding that the job credentials of Smith and Bornsheuer were so superior to those of applicants hired after them that they should have been hired absent a discriminatory motive. We also agree with the judge

that even assuming, without deciding, that Robinson acted as an agent of the Respondent when speaking to Smith and Bornsheuer, his statements did not constitute sufficient evidence to meet the General Counsel's initial burden of proving that union animus tainted the hiring process. We recognize, as our dissenting colleague points out, that statements like this *permit* the inference of union animus. But the Board is not *required* to make that inference, and we decline to do so here.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Electrical Workers IBEW Local 716; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge Keltner W. Locke issued his decision Nov. 21, 2001.

* * *

Baptist Medical Center/Health Midwest, et al. (17-CA-20415-3, et al.; 338 NLRB No. 38) Kansas City, MO et al. Sept. 30, 2002. The Board reversed the administrative law judge's finding that the distribution of letters on April 7, 2000 and April 20, 2000 to employees advising them of their rights and obligations related to government investigations, violated Section 8(a)(1) of the Act by impeding employees' access to the Board and obstructing Board processes. Among the rights identified in the April 7 letter was the right to talk to or to decline to talk to a government investigator and the right to "seek the advice of a lawyer before doing so." [\[HTML\]](#) [\[PDF\]](#)

When the Respondents distributed the April 7 memorandum, both a Board complaint against the Respondents and union objections to an election conducted a week earlier at Respondent Health Midwest and Visiting Nurse Association/Visiting Nurse Services of Health Midwest (VNA/VNS) were pending. The Union filed an unfair labor practice charge alleging that the April 7 memorandum violated employees' Section 7 rights to file charges or to give testimony to the Board. Seeking to refute this charge, the Respondents distributed a second memorandum to employees on April 20. This memorandum specifically referred to the Union's charge, denied that the April 7 memorandum had the alleged unlawful effect, and "clarif[ied] the record" regarding NLRB investigations.

The Board noted that no mention is made in the April 7 memorandum of the Board or its proceedings in connection with the Respondents' offer of legal counsel and its request for notification in the event that employees were contacted by government investigators. It added: The April 7 memorandum made explicit reference to investigations by the Justice Department and was clearly directed at investigations that had nothing to do with the Board, unfair labor practices, or obligations."

The Board also rejected the judge's finding that Respondent Research violated Section 8(a)(1) by ejecting two non-employee union organizers from the outside entrances of its facility and by threatening to have them arrested. In finding this violation, the judge stated that the allegation was included in the complaint. In fact, however, as the Board pointed out, "the General Counsel concedes in his answering brief to Respondent Research's exceptions that the complaint alleged only the unlawful threat to arrest employees."

The Board affirmed the judge's finding that Respondent Overland Park violated Section 8(a)(3) by disciplining employees Carr and Johnson for soliciting union support and distributing union literature during their off-duty hours at various nurses stations pursuant to a no-solicitation/no-distribution policy that was unlawful under the access rules applicable to off-duty employees set forth in *Tri County Medical Center*, 222 NLRB 1089 (1976).

In a footnote, Member Cowen indicated he would dismiss the 8(a)(3) allegations regarding the discipline of Carr and Johnson. Contrary to his colleagues, he would find that "the record establishes that the Overland Park nurses stations at issue were patient care areas, and that Respondent Overland Park excepted to the judge's findings to the contrary." Accordingly, because Carr and Johnson were disciplined for soliciting in those areas, Member Cowen found that the discipline imposed was lawful, regardless of the overbreadth of the on-solicitation rule relied on. Member Bartlett added that he agreed with former Chairman Hurtgen's view on this issue that a disciplinary action that is imposed pursuant to an overbroad no-solicitation rule is not unlawful if the application of the rule in the circumstances presented was lawful (e.g., if the employer made clear that the discipline was being imposed because the employee was soliciting during working time or in patient care areas). However, here Respondent Overland Park did not except to the judge's finding that the discipline violated the Act because it was

imposed pursuant to an over-board no-solicitation rule. Thus, in the absence of exceptions, Member Bartlett adopts the judge's finding.

The Board sustained the Respondents' exception to the cease-and-desist provision of the judge's recommended Orders and notices that direct them to refrain from prohibiting employees' nonworktime distribution of union literature in nonpatient care areas. It asserted:

As in any other industry, health care industry employers may lawfully prohibit distribution of union literature in working areas, even if they are non-patient care areas. See *Brockton Hospital*, 333 NLRB No. 165, slip op. at 2 (2001); *Hale Nani Rehabilitation & Nursing Center*, 326 NLRB 335 (1998). Accordingly, we shall modify the relevant cease-and-desist paragraphs to preclude the Respondents from applying their no-distribution rules only in nonworking, non-patient care areas during employees' nonworktime.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Nurses United for Improved Patient Care; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing held on various dates between May 23 and July 20, 2000. Adm. Law Judge George Aleman issued his decision July 25, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Quality Painting of Wisconsin, Inc. (Painters Local 781) Milwaukee, WI October 8, 2002. 30-CA-15453, 15994; JD-108-02, Judge Robert A. Giannasi.

Media General Operations, Inc. d/b/a Winston-Salem Journal (an Individual) Winston-Salem, NC October 9, 2002. 11-CA-19339; JD(ATL)-59-02, Judge George Carson II.

Neese Contracting, Inc. (Laborers Local 561) Newburgh, IN October 9, 2002. 25-CA-28060-1, 25-RC-10081; JD-109-02, Judge William G. Kocol.