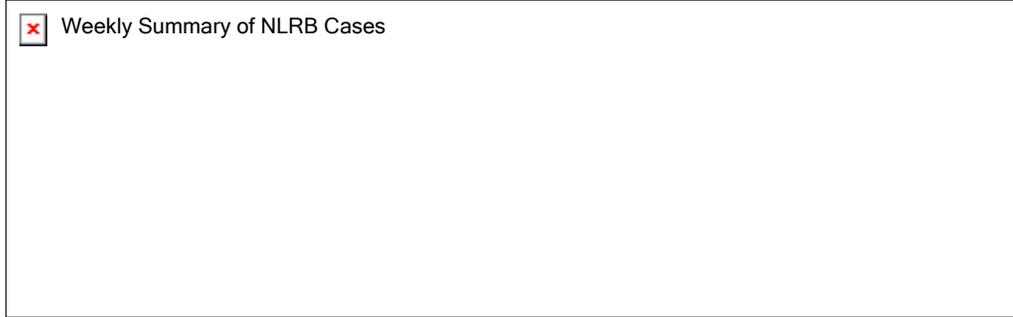


ABOUT THE WEEKLY SUMMARY

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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December 13, 2002

W-2873

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American Gardens Management Co. and Bailey Gardens Realty Corp. 2-CA-33475, 33605; 338 NLRB No. 76) Bronx, NY Nov. 22, 2002. In agreement with the General Counsel, the Board determined that a *Wright Line* analysis must be applied in these cases to determine whether the joint employer Respondents discriminatorily discharged three maintenance employees in violation of the Act. Finding that the administrative law judge, in recommending the complaint's dismissal, did not clearly undertake a *Wright Line* analysis, or address all of the relevant record evidence, the Board remanded the cases to him for further consideration and found it premature to rule on the substance of the General Counsel's exceptions. [\[HTML\]](#) [\[PDF\]](#)

The judge was directed to consider all of the evidence relevant to an analysis under *Wright Line*, making any additional findings of fact and credibility determinations which might be required; to apply the applicable *Wright Line* elements and standards to those facts; and to issue a supplemental decision setting forth his findings, analysis, and conclusions. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The complaint alleges that the Respondent discharged employees Roberts and Resales in violation of Section 8(a)(1), (3), and (4) because they testified at a representation hearing and discharged employee Frias in violation of Section 8(a)(1) and (3) because he assisted Service Employees Local 32E and engaged in concerted activities. The Respondents contended that Roberts and Rosales were discharged for lack of work and that Frias was discharged for his insubordinate and volatile attitude.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Service Employees Local 32E; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at New York City, Dec. 11-13, 2001. Adm. Law Judge Raymond P. Green issued his decision March 6, 2002.

* * *

Lancaster Care Center, L.L.C. (30-RC-6193; 338 NLRB No. 80) Lancaster, WI Nov. 22, 2002. In agreement with the hearing officer's recommendation to sustain the Petitioner's Objection D, Members Liebman and Bartlett set aside the third election held April 26, 2001 and directed a fourth election. Because Objection D warranted setting aside the election, they found no need to pass on the Petitioner's other objections (Objections C, G, H, and I) sustained by the hearing officer. While she agreed that Objection D provided sufficient grounds to set aside the election, Member Liebman would also agree with the hearing officer that the surveillance incidents in Objections G and H constituted objectionable conduct. [\[HTML\]](#) [\[PDF\]](#)

The tally of ballots for the third election resulted in 20 for and 21 against, the Petitioner (Sheet Metal Workers Local 565), with 2 determinative challenged ballots, one of which was sustained, rendering the remaining ballot no longer determinative.

Objection D involved a statement made by LPN Kris Mumm, a supervisor, who was overheard by Cindy Klinkhammer telling a certified nursing assistant (CNA) that if the Union was successful in organizing the CNAs the LPNs would no longer help the CNAs. Klinkhammer disseminated this statement to other unit members. Members Liebman and Bartlett found it significant that the threat of reprisal was made within 2 months of the election and that it would have affected the election, which was decided by one vote.

In dissent, Member Cowen would overrule Objection D. He disagreed with his colleagues that Mumm's statement was a threat of reprisal. He said "Mumm's remark, which was based on what happened at another resident care facility after its CNAs had

unionized, amounted to nothing more than an almost certainly truthful statement concerning what the Union would do at Lancaster to protect the work jurisdiction of the CNAs. Such a statement is not a threat of reprisal, but rather an unobjectionable explanation of one of the natural consequences of choosing union representation." Member Cowen would also overrule Petitioner's Objections C, G, H, and I and certify the results of the election.

No exceptions were filed to the hearing officer's recommendation to overrule Petitioner's Objections A, B, and J.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Offshore Mariners United (Trico Marine Operators, Inc.) (15-CC-832, 833; 338 NLRB No. 88) Houma, LA Nov. 22, 2002. Members Liebman and Bartlett denied a Petition to Revoke Subpoena Ad Testificandum filed by David Eckstein, a former field director for Offshore Mariners United (OMU). The General Counsel served the subpoena on Eckstein because the Region was unsuccessful in gaining his voluntary cooperation during its investigation of charges filed against OMU by Trico. The charges allege, among others, that OMU violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing or encouraging employees of Trico's customers to refuse to perform any work related to Trico, and by threatening Trico's customers, all with an object of forcing or requiring the customers to cease doing business with Trico. [\[HTML\]](#) [\[PDF\]](#)

The Region's investigation of the charges disclosed that Eckstein had written letters during his tenure as the OMU field director to two of the Employer's largest customers concerning the Employer's alleged antiunion/antiworker activities, and sought to meet with the customers and discuss those issues. In a followup letter to one of the customers, Eckstein stated that the OMU was contacting the customer in an attempt to highlight the inherent problems of doing business with such a company.

Eckstein's arguments for revocation of the subpoena are numerous. The majority, in denying the petition to revoke the General Counsel's investigatory subpoena, wrote:

Section 102.31(b) of the Board's Rules and Regulations provides that the Board shall revoke a subpoena if the evidence sought does not relate to any matter under investigation, if the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. None of these criteria are met here.

Member Cowen, dissenting, would grant the petition because the prehearing discovery sought by the General Counsel is not provided for under the Board's rules. He also believes that it is important for the Board to reexamine the appropriateness of the Board's rules governing prehearing discovery and recommended that his colleagues consider providing full pretrial discovery to all parties involved in Board proceedings.

In response to the dissent, Members Liebman and Cowen said that "[t]he Board's policy is well established and has been sustained by the circuit courts. Further, Congress has long recognized the Board's policy and never changed it."

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Time Auto Transportation, Inc. and Time Auto Transport, L.S. (7-CA-43641-1, -2; 338 NLRB No. 75) Troy, MI Nov. 22, 2002. Members Liebman and Cowen adopted the administrative law judge's finding that the Respondent committed several unfair labor practices against Randy Hill and Ernest Blake because they engaged in union activities, culminating in their unlawful discharge. The judge concluded that Hill and Blake, who haul vehicles for the Respondent using tractor-trailers that they lease from the Respondent, are statutory employees, not independent contractors as the Respondent claimed. [\[HTML\]](#) [\[PDF\]](#)

Member Cowen joined in affirming the judge's finding that Hill and Blake are statutory employees. In his view, the structure of their work relationship with the Respondent, tips the balance in favor of finding independent contractor status. However,

noting that the terms of both Hill's and Blake's truck-lease contract give the Respondent the right to terminate the lease at will on 5 days' notice, and that the Respondent used that right to control the manner of Hill's performance of his work, Member Cowen said that the Respondent sought to exercise a degree of control over the manner of work performance that is inconsistent with independent contractor status. Member Liebman, based on all of the factors set forth in the judge decision, including the factors relied on by Member Cowen, also agreed that Hill and Blake are statutory employees.

In dissent, Member Bartlett would find that lease drivers Hill and Blake were independent contractors, not employees, and would therefore dismiss the complaint. He relied on numerous factors: the lease agreements signed by Hill and Blake identified them as independent contractors; the Respondent did not withhold social security taxes, issued 1099 forms to the drivers' companies, and did not provide the drivers with any benefits; the drivers formed their own corporations and paid their own expenses to maintain the vehicles, including repairs, inspections, permits and fees; the Respondent's payments were made to the drivers' corporation, which in turn hired additional drivers and filed federal corporate income tax returns; the lease drivers, such as Hill and Blake, were responsible for paying the additional drivers (whom they could terminate) and for providing with insurance coverage; and, except for deliveries in Canada, the drivers would choose their own routes.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Randy Hill and Ernest L Blake, individuals; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, Nov. 13-15, 2001. Adm. Law Judge Eric M. Fine issued his decision April 10, 2002.

* * *

Community Action Commission of Fayette County, Inc. (9-RC-17367; 338 NLRB No. 79) Fayette County, OH Nov. 22, 2002. Members Cowen and Bartlett, contrary to the hearing officer, sustained the challenge to the ballot of Head Start Program employee Debra Tyree. Agreeing with the hearing officer, Members Liebman and Cowen sustained the Petitioner's objection alleging that the Employer threatened employees that they would lose their jobs if the Union won the election and found it unnecessary to pass on his recommendation to sustain the objection alleging that the Employer selectively videotaped employees on days that they were wearing Union tee shirts at work. [\[HTML\]](#) [\[PDF\]](#)

Members Liebman and Cowen set aside the election held May 2, 2000 and directed a second election since the Petitioner (Ohio Association of Public School Employees (OAPSE/AFSCME Local 4) did not receive a majority of the valid ballots cast. The tally showed 20 for and 20 against, the Petitioner, with 2 determinative challenged ballots. In the absence of exceptions, the Board adopted, pro forma, the hearing officer's recommendation that the unresolved challenged ballot of Heather Michael be neither opened nor counted because the parties stipulated that she was not an eligible voter.

Member Liebman, concurring in part and dissenting in part, would adopt the hearing officer's findings that Tyree was employed on both the voting eligibility cutoff date and the date of the election, overrule the challenge to her ballot, and open and count it. Given the majority's sustaining the challenge to Tyree's ballot, she joined Member Cowen in setting aside the election on the basis of the Employer's objectionable threats of job loss if the Union won.

Member Bartlett, dissenting in part, would overrule the Petitioner's objection based on supervisor Jodie Baker's threat of job loss and found it unnecessary to reach the Petitioner's remaining objection based on the alleged videotaping of protected activity, and contrary to the hearing officer, would overrule that objection as well and certify the results of the election.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Amber Foods, Inc. (32-CA-18139-1, et al.; 338 NLRB No. 84) Dinuba, CA Nov. 22, 2002. This case involves allegations that the Respondent committed numerous violations of the Act in response to the Union's 1999-2000 organizational campaign. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by granting a wage increase effective April 7, 2000 shortly after it learned of the employees' union activities, and by withholding the employees' midyear bonus; and that the Respondent did not violate Section 8(a)(3) and (1) by warning employee

Concepcion Sandoval and refusing to permit her to return to work. [\[HTML\]](#) [\[PDF\]](#)

The Board held, contrary to the judge, that the Respondent violated the Act by issuing warnings to Maria Chavez on May 31 and June 20, 2000 and issuing a series of disciplinary warnings and suspensions to Carmen Munoz; and that the Respondent did not violate the Act by suspending and discharging Maria Alvarez and issuing disciplinary warnings to and discharging Genoveva Alvarez because of their union activities.

Member Liebman, concurring in part and dissenting in part, would adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by repeatedly warning and ultimately discharging G. Alvarez, and by suspending and discharging M. Alvarez.

Member Cowen, dissenting in part, found that the General Counsel failed to establish that the disciplinary warnings issued to C. Munoz, and the May 31 and June 20, 2000 warnings given to M. Chavez, were unlawful and disagreed with his colleagues' finding of violations in these respects.

No exceptions were filed to the judge's findings, among others, that the Respondent violated Section 8(a)(1) by telling employees not to speak with other employees who were involved in union activities, soliciting grievances, and threatening employees with stricter application of rules, discharge, and plant closure; and violated Section 8(a)(3) and (1) by increasing the number of sick days to which its employees were entitled and by taking disciplinary action against certain employees.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by United Farm Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Visalia on various dates between Dec. 11, 2000 and Jan. 23, 2001. Adm. Law Judge James L. Rose issued his decision April 23, 2001.

* * *

Elevator Constructors Local 10 (Thyssen General Elevator Co.) (5-CB-8986; 338 NLRB No. 83) Wilkes-Barre, PA Nov. 22, 2002. Members Cowen and Bartlett affirmed the administrative law judge's finding that the Respondent violated Section 8(b)(1)(B) of the Act by fining member Horace Stillman Jr., for characterizing another member as "nothing but trouble" and recommending that the member be removed from a jobsite supervised by Stillman. The majority rejected the Respondent's argument that Stillman is not entitled to the judge's award of expenses because he is a third-party witness. It agreed with the judge that an award to Stillman for expenses incurred in defending against the Respondent's disciplinary charge is proper, saying "this award places Stillman in the place he would have been absent the Respondent's 8(b)(1)(B) violation." [\[HTML\]](#) [\[PDF\]](#)

Dissenting Member Liebman wrote: "In my view, while the supervisor's conduct amounted to the exercise of supervisory authority under Section 2(11) of the Act, it fell outside the much narrower scope of Section 8(b)(1)(B). The majority's decision, which finds a violation, represents the sort of expansive application of Section 8(b)(1)(B) that the courts have rightly criticized. See, e.g., *NLRB v. Sheet Metal Workers Local 104*, 64 F.3d 465, 467-470 (9th Cir. 1995)."

From January to July 1999, Stillman served as the foreman at the Employer's construction site in Wilkes-Barre, Pennsylvania, where Elevator Constructors Local 84 had jurisdiction. Gibson, who transferred from a Connecticut jobsite, arrived at the Wilkes-Barre project in February or March 1999, contending that he had been promised a higher rate than the regular Local 84 contractual rate. Stillman recommended to project superintendent Gough that the Employer pay Gibson the Local 84 wage rate, and his recommendation was followed.

Stillman noticed that Gibson continued to complain about his pay and that his complaints significantly slowed and hampered his work. Stillman spoke to Gibson about his pace of work, but it did not improve. Stillman discussed the matter with Gough, telling him that Gibson was "nothing but trouble" and recommending Gibson's removal from the project. Gough followed this recommendation, and Gibson was laid off after being at the Wilkes-Barre project for 2 weeks. Local 84 brought internal union charges against Stillman, which ultimately were considered by the Respondent.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by National Elevator Industry, Inc.; complaint alleged violation of Section 8(b)(1)(B). Hearing at Washington, D.C. on Aug. 22, 2000. Adm. Law Judge Richard A. Scully issued his decision Nov. 20, 2000.

* * *

Nynex Corp. (34-CA-7953 (formerly 2-CA-30651), 8130; 338 NLRB No. 78) New York and Harrison, NY Nov. 22, 2002. The Board dismissed complaint allegations that the Respondent violated Section 8(a)(1) of the Act by taking action against Communications Workers Local 1105 and its representatives after they attempted to meet and arrange grievance meetings with the staff director of the Respondent's Absence Benefit Center (ABC or the Center), including suspending employees and calling the police regarding the union representatives' refusal to leave. Unlike the administrative law judge who found that the conduct was protected, the Board found no violation, given the 2-hour cessation of work at the Center caused by the union representatives and their persistent refusal of the Respondent's demands that they leave. [\[HTML\]](#) [\[PDF\]](#)

Members Cowen and Bartlett also reversed the judge's findings that the Respondent violated Section 8(a)(5) and (1) by refusing to accept the employees' grievances and to make appointments to discuss grievances, and by unilaterally canceling Union Representative Shannon and DeBiase's magnetic cards for gaining access to the Harrison facility.

In finding the access card violation, the judge held that the breach of past practice was a "material, substantial, and significant" change. Members Cowen and Bartlett disagreed, noting that the Respondent beefed up security at the facility after the disruption at ABC, canceling the magnetic cards held by any person who did not have regular business there at least once a week. After the cancellation, union representatives and others who visited the facility less than once a week were required to stop and present identification to gain access. Members Cowen and Bartlett concluded that the new security procedures "did not limit the Union's movement within its facility or result in the Union's being denied access to any unit employees at the workplace."

Members Cowen, concurring in the dismissal of the complaint, wrote separately "to express the additional reasons why certain allegations of the complaint lack merit."

Member Liebman, dissenting in part, would affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally canceling Shannon and DeBiase's magnetic access cards to the Harrison facility, explaining: "In effect the Respondent's new policy forced the Union to identify those employees involved in union activities or those seeking assistance from the Union with workplace issues. This aspect of the Respondent's policy necessarily impacted the unit employees' ability to meet with or submit complaints to the Union in confidence."

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Communications Workers Local 1105; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on five days between Jan. 27 and Feb. 23, 1999. Adm. Law Judge Eleanor MacDonald issued her decision June 13, 2000.

* * *

Exterior Systems, Inc. (4-CA-29852; 338 NLRB No. 82) Mount Laurel, NJ Nov. 22, 2002. The Board upheld the administrative law judge's finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by failing to hire or consider for hire James Kilkenny, a union organizer for Operative Plasters and Cement Masons Local 8, after he applied for work on August 16, 2000, and again on October 3, 2000. In a reversal of the judge, the Board found that the Respondent violated Section 8(a)(1) when owner Sun Sanders told Kilkenny on October 3 that she could not hire him because he worked for the Union office. [\[HTML\]](#) [\[PDF\]](#)

The judge found that the General Counsel failed to meet his initial evidentiary burden under *FES* of proving that union animus was a motivating factor in the Respondent's decision not to consider or to hire Kilkenny. *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). He also credited Manager Mark Sanders' testimony that Kilkenny and the other applicants with him

were "disruptive" and "disrespectful." Based on the judge's crediting of the testimony of Mark and Sun Sanders as to their reaction to this conduct, the Board affirmed the judge's finding that the Respondent would not have hired or considered Kilkenny for hire regardless of his union activity.

Members Liebman, Cowen, and Bartlett each wrote a separate concurrence.

Member Liebman noted that her colleagues separately argue that the Board must supplement or modify the FES framework to address "what each apparently believes" should be an element of a refusal-to-hire and a refusal-to-consider violation under Section 8(a)(3). She wrote:

In their view, the General Counsel has the burden of proving that the employee alleged to have been discriminated against also had a genuine interest in employment-however that may be defined and demonstrated (my colleagues do not articulate a clear and common test). Member Cowen would require this showing as part of the General Counsel's initial burden: Member Bartlett would not, but he would still place the burden of persuasion on the General Counsel, once the employer produced evidence on the issue (as opposed to treating the matter as an affirmative defense, on which the employer bears the burden of persuasion).

Needless to say, these arguments would be better addressed in a case where they had some bearing on the outcome and where the Board had the benefit of briefing. But because my colleagues have put their views forward, because those views strike me as seriously flawed, and because I am the sole remaining member of the Board that decided FES, I feel compelled to speak to the issue as well.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Operative Plasterers and Cement Masons Local 8; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, May 15-16, 2001. Adm. Law Judge Paul Bogas issued his decision July 18, 2001.

* * *

Jet Electric Co. (11-CA-18395; 338 NLRB No. 77) Winston-Salem, NC Nov. 22, 2002. Members Liebman and Bartlett declined, contrary to Member Cowen, to reexamine sua sponte the Board's prior summary judgment decision, finding that the Respondent failed to submit a sufficient answer to the complaint and violated Section 8(a)(3) and (1) of the Act by, among others, refusing to consider for hire and failing and refusing to hire eight named employees. 334 NLRB No. 133 (2001). There, the Board held in abeyance a final determination of the appropriate remedy pending a remand of this case for a hearing before an administrative law judge limited to the number of openings that were available to the applicant-discriminatees under *FES*, 331 NLRB 9 (2000). [\[HTML\]](#) [\[PDF\]](#)

In his supplemental decision on remand, the judge found that the Respondent had eight job openings within the 4 months after the first refusal to hire, and recommended that the Board order reinstatement and backpay, with interest, for the eight named employees. No exceptions were filed to these findings. The majority wrote: "We view our difference with our dissenting colleague as essentially procedural in nature. In the posture of this case, particularly the Respondent's failure to file exceptions, we simply would not revisit this matter."

Member Cowen, dissenting, would not adopt the judge's decision on remand, saying: "The Board cannot remedy its error of granting summary judgment without sufficient allegations or record evidence by ordering a post-decision hearing to fill in the missing facts."

(Members Liebman, Cowen, and Bartlett participated.)

Hearing at Winston-Salem on Feb. 27, 2002. Adm. Law Judge James M. Kennedy issued his decision Aug. 10, 2001.

* * *

Victor's Café 52, Inc. (2-CA-25886; 338 NLRB No. 90) New York, NY Nov. 22, 2002. In this Supplemental Decision and Order, the Board agreed with the administrative law judge's finding that discriminatee Baute's gross backpay should not reflect work as a bus boy. Member Cowen and Bartlett rejected the judge's credibility-based rationale for this conclusion and, instead, found that the denial of backpay at the busboy rate is appropriate as a sanction in view of Baute's offer of \$1,000 to witnesses who would testify that he was a busboy, citing *Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1992). In a concurring opinion, Member Liebman said she would rely on some, if not all, aspects of the judge's valid credibility findings in affirming his award of backpay to Baute at the lower expediter rate. [\[HTML\]](#) [\[PDF\]](#)

On another issue, the Board declined to remand the decision to another judge based on this judge's sharp criticisms of counsel for the General Counsel and her trial strategy. However, it did state that the judge's intemperate language in his decision against Baute and the counsel "could raise doubt as to the integrity of the Board's decisionmaking process." In a concurring opinion, Member Cowen would find that the judge's critical comments should be excised from the record. He said "the judge exceeded his authority under the Board's Rules and Regulations, which do not contemplate a judge's use of an administrative decision to deliver a stinging criticism of any attorney or party representative."

(Members Liebman, Cowen, and Bartlett participated.)

Hearing held on June 22-23, 1999. Adm. Law Judge Howard Edelman issued his supplemental decision Nov. 15, 1999.

* * *

Robert Orr-Sysco Food Services (26-RC-8160; 338 NLRB No. 74) Nashville, TN Nov. 22, 2002. In this Decision and Direction of Third Election, the Board majority of Members Cowen and Bartlett set aside an election, sustaining the Employer's Objection 3 alleging that pro-union employees had threatened other employees and made attempts to coerce employee sentiment. The tally of ballots showed 84 for and 80 against the Petitioner (Teamsters Local 480). The hearing officer found that during the 1-to 2-week period immediately preceding the election, threats of physical violence, property damage, and deportation were made to several employees and disseminated among several more. Applying the Board's third-party conduct standard to the evaluation of these threats, the hearing officer concluded that they did not create a general atmosphere of fear and reprisal, and therefore recommended that the Employer's Objection 3 be overruled. [\[HTML\]](#) [\[PDF\]](#)

Dissenting Member Liebman would find that the statements relied on by the majority did not create a general atmosphere of fear and reprisal that made a free election impossible under the Board's standard in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). She also said the majority applied the standard as if it was no different from the less rigorous standard the Board applies to threats made by agents of the employer or the union. See *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). She also said the majority erred in its heavy reliance on the closeness of the election in justifying its decision.

In response, the majority stated:

The Board has repeatedly found, however, that voting-related threats of substantial harm directed at a determinative number of voters create an atmosphere of fear and reprisal sufficient to set aside an election. See *Steak House Meat Co.*, 206 NLRB at 29; *Buedel Food Products*, 300 NLRB at 638; *Smithers Tire*, 308 NLRB at 73; accord: *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242 (6th Cir. 1988). In this case, aside from the several "picket line" threats, two additional threats remain: Reyes was threatened with deportation, and Becker with physical violence, for voting against the Union. The character of these threats was grave, as they were intended to influence votes and intimidated substantial harm; and again, a single changed vote could have altered the outcome of the election. Thus, consistent with the precedent cited above, we disagree with our colleague's view that threats of this character are insufficient to set the election aside.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Airborne Freight Co. (1-CA-32742, et al.; 338 NLRB No. 72) Cranston, RI Nov. 22, 2002. The Board majority of Members

Cowen and Bartlett affirmed the administrative law judge's finding that the Respondent is not a joint employer with the local contractors. Member Liebman, in a concurring opinion, said this case "illustrates the sharp limits of the Board's joint-employer doctrine, which may prevent employees from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment." She said the Board has a duty to adapt its rules and policies to changing circumstances in the workplace and industries. For example, Member Liebman observed: [\[HTML\]](#) [\[PDF\]](#)

Today, increased competition drives businesses to become more flexible, adopting strategies that seek to maintain leaner product inventories and shorter product life-cycles, relying on "just in time" delivery of goods and materials. As a result, national and international "expedited-transportation" carriers like Airborne, which move an increasing share of the nation's freight, are required to guarantee deliveries on a much shorter time frame than was formerly acceptable. This requirement impels them to exert control at every stage, including the local pickup and delivery components that are contracted out. They consequently exercise much more control over their local contractors' operations, and more effective control over the contractors' terms of employment, than their trucking predecessors did. They do not always exercise this control through direct "hiring, firing, discipline, supervision and direction" of the local contractor's employees--the focus of the Board's inquiry--but rather through their pervasive domination of the local carrier's operations.

The majority, rejecting Member Liebman's suggestion that the Board should revisit its standard for determining joint employer status, said:

Simply put, the Board's test for determining whether two separate entities should be considered to be joint employers with respect to a specific group of employees has been a matter of settled law for approximately twenty years. In determining whether a joint employer relationship exists under this test, the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment. *See e.g., Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991); *NLRB v. Browning-Ferris Industry*, 691 F.2d 1117, 1124 (3d Cir. 1982); *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985). The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate. *TLI, Inc.*, 271 NLRB at 798-799.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Teamsters Locals 251 and 344; complaint alleged violation of Section 8(a)(1),(3), and (5). Hearing at Boston, MA and Milwaukee, WI on various dates Jan., Feb., March, and April 1999. Adm. Law Judge Raymond P. Green issued his decision Sept. 13, 1999.

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Suburban Electrical Engineers/ Contractors, Inc. (Electrical Workers [IBEW] Local 577) Appleton, WI December 2, 2002. 30-CA-15473, et al.; JD-131-02, Judge Bruce D. Rosenstein.

O.S.G. Technologies, Inc. (Auto Workers [UAW] Local 376) Hartford, CT November 29, 2002. 34-CA-9336, 3458; JD(NY)-73-02, Judge Howard Edelman.

Local 500 (Acme Markets, Inc.) Denver, PA December 2, 2002. 4-CB-8863; JD-133-02, Judge Paul Bogas.

Aljoma Lumber, Inc. (Congreso de Uniones Industriales de Puerto Rico) Ponce, PR November 29, 2002. 24-CA-8750, et al.; JD-128-02, Judge George Alemán.

Teamsters Local 346 (Miles Differding d/b/a Central Trucking) December 3, 2002. 18-CC-1435-1, et al.; JD-134-02, Judge William J. Pannier III.

KSL Recreation Corp. d/b/a Claremont SPA and Resort (Hotel & Restaurant Employees) Berkeley, CA November 25, 2002. 32-CA-19277-1, et al.; JD(SF)-93-02, Judge Clifford H. Anderson.

Sam's Club, a Division of Wal-Mart Stores, Inc. (Food & Commercial Workers International) Las Vegas, NV November 29, 2002. 28-CA-17057, et al.; JD(SF)-91-02, Judge James L. Rose.

Connecticut State Conference Board Amalgamated Transit Union, et al. (H.N.S. Management Co., Inc.) Hartford, CT December 3, 2002. 34-CB-2506; JD(NY)-75-02, Judge Joel P. Biblowitz.

Commercial Cabinets, Inc., Creative Casework, Inc., Single Employer and/or Alter Ego (Interior Systems Local 1045, Carpenters) Fair Haven, MI December 4, 2002. 7-CA-45023; JD-132-02, Judge Ira Sandron.

Solutia Inc. (Electrical Workers [IBEW] Local 676) Pensacola, FL December 4, 2002. 15-CA-16604; JD(ATL)-74-02, Judge George Carson II.

Brite Electric Company (Electrical Workers [IBEW] Local 20) Fort Worth, TX December 3, 2002. 16-CA-21760; JD(ATL)-70-02, Judge Keltner W. Locke.

Island Knitting Corp. and Additional Respondent Advanced Design and Knits, Inc. (Knitgoods Workers Local 155) Copiague, NY December 3, 2002. 29-CA-23484; JD(NY)-74-02, Judge D. Barry Morris.

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NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to answer the complaint.)

Coulter's Carpet Service, Inc. (Painters Local 567) (32-CA-19305-1; 338 NLRB No. 85) Sparks, NV November 22, 2002.

Tom Cat Development Corp. (Ironworkers Local 46) (2-CA-34267, 34600; 338 NLRB No. 89) New York, NY November 22, 2002.

Astro Color Laboratories, Inc. (Stage Employees) (13-CA-39518; 338 NLRB No. 60) Chicago, IL November 20, 2002.

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NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

Admiral Manufacturing & Sales, Inc. d/b/a Baird Manufacturing Co. (Electrical Workers [IBEW] Local 295) (26-CA-20155; 338 NLRB No. 71) Clarendon, AR November 22, 2002.

Judd Contracting, Inc. (Lee W. Straughter) (7-CA-43054; 338 NLRB No. 81) Detroit, MI November 22, 2002.

Bristol Nursing Home (Michelle Gagnon) (1-CA-39195; 338 NLRB No. 86) Attleboro, MA November 22, 2002.

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WITHDRAWAL OF ANSWER

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the withdrawal of the Respondent's answer to the complaint.)

Biomedical Service, Inc. (Harold Crawford) (13-CA-39344; 338 NLRB No. 87) Merrillville, IN November 22, 2002.