

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

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Press Release ([R-2558](#)): Labor Board Grants Review and Invites Briefs to be Filed in Alyeska Pipeline Service Company

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Brisben Development, Inc., et al. (8-CA-33018-1, et al.; 344 NLRB No. 46) Cincinnati, OH March 31, 2005. The Board granted the General Counsel's motion for partial summary judgment as to Respondent Brisben Development, Inc. (Brisben) based on Brisben's failure to file an answer to the consolidated complaint and compliance specification. [\[HTML\]](#) [\[PDF\]](#)

The Board held that Brisben violated Section 8(a)(1) of the Act by initiating and maintaining a state court lawsuit, which was without a reasonable basis and was motivated by an intent to retaliate against the protected activity of the Carpenters Ohio and Vicinity Regional Council, Electrical Workers IBEW Local 38, Roofers, Bricklayers Local 5, Plumbers Local 42, Painters District Council No. 6 of Northern Ohio, Plasterers Local 404, and Plumbers Local 495. The Board ordered Brisben to pay to the Unions a total of \$126,064.50 as reimbursement for legal fees and other expenses incurred in defending and challenging the legal proceedings.

The Board denied the General Counsel's motion as to Respondent Brisben TL despite its failure to file an answer because there is no allegation in the consolidated complaint or compliance specification that Brisben TL is a employer engaged in commerce within the meaning of the Act and, accordingly it was unable to find that Brisben TL is a statutory employer. It remanded the matter to the Regional Director for further appropriate action.

The General Counsel did not seek summary judgment against Respondent Timber Lake Apartments Limited Partnership (Timber Lake) because Timber Lake filed an answer.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Ohio and Vicinity Regional Council, Electrical Workers IBEW Local 38, Roofers, Bricklayers Local 5, Plumbers Local 42, Painters District Council No. 6 of Northern Ohio, Plasterers Local 404, and Plumbers Local 495; complaint alleged violation of Section 8(a)(1). General Counsel filed motion for partial summary judgment Sept. 21, 2004.

The Brooklyn Hospital Center (29-CA-26044; 344 NLRB No. 48) Brooklyn, NY March 31, 2005. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally changing its malpractice insurance for unit employees from a plan obtained through a consortium of hospitals, known as "CCC," to a self-funded plan; and (2) failing to provide the New York State Nurses Association with requested malpractice insurance information. [\[HTML\]](#) [\[PDF\]](#)

Applying the Board's "clear and unmistakable" waiver standard set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the judge rejected the Respondent's contention that the Union waived its right to bargain over malpractice insurance. In contrast, the court in *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), set forth a "contract coverage" analysis, finding appropriate that analysis rather than a "clear and unmistakable" waiver analysis where the contract covers the issue in dispute. Chairman Battista and Member Schaumber deemed it unnecessary to pass on which standard is appropriate because the Respondent would not prevail under either standard. No party has excepted to the judge's application of the waiver standard.

To remedy the Respondent's unlawful unilateral change, the judge issued a restorative order conditioned on the desires of the affected employees as represented by the Union. In relevant part, the judge stated: "The Respondent should also make whole any employees who have suffered losses as a result of its unilateral action in changing the level of insurance coverage, if such is found to be the case."

While Chairman Battista and Member Schaumber have decided to adopt the judge's remedy, they wrote that the make-whole component of the remedy shall not apply if the Union chooses continuation of the Respondent's self-funded malpractice insurance plan. Unlike her colleagues, Member Liebman would adopt the judge's remedy in its entirety, providing make-whole relief to the unit employees even if the Union selects continuation of the self-funded malpractice insurance plan.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by New York State Nurses Assn.; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on April 13, 2004. Adm. Law Judge Eleanor MacDonald issued her decision Sept. 30, 2004.

Harco Trucking, LLC (32-CA-20621-1; 344 NLRB No. 56) Sparks, NV March 31, 2005. In agreement with the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by refusing to hire Scott Wood because he engaged in the protected concerted activity of filing and maintaining a class action lawsuit against his former employer, Harco Company, alleging that it had failed to pay the prevailing wages on certain of its jobsites. [\[HTML\]](#) [\[PDF\]](#)

Harco Company entered into bankruptcy proceedings after the lawsuit was filed and the assets of Harco Company were sold at a bankruptcy auction and a new entity, Harco Trucking, LLC was created. The Respondent contended that it cannot be found to have unlawfully refused to hire Wood because the refusal to hire occurred before the date that the Respondent was officially incorporated, and that any unfair labor practice was committed by Harco Company, an unrelated entity, not by Respondent.

The Board rejected the Respondent's "corporate non-existence" defense, noting that the Respondent admitted corporate status in its answer to the complaint, failed to seek to amend its answer, and failed to argue its "corporate non-existence" defense at the hearing; and that the record supports a finding that the unfair labor practices occurred on or after the date of incorporation.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Scott Wood, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Reno on Dec. 11, 2003. Adm. Law Judge Jay R. Pollack issued his decision Jan. 26, 2004.

Mt. Clemens General Hospital (7-CA-46087; 344 NLRB No. 54) Mt. Clemens, MI March 31, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish to the RN Staff Council, Office and Professional Employees Local 40, upon request, the following relevant and necessary information: Joy Johnson's personnel file, the names and positions of interns and externs, and the number of general beds that were added to specialized hospital units. [\[HTML\]](#) [\[PDF\]](#)

The judge also found that the Respondent violated Section 8(a)(3) and (1) by refusing to rehire Union President Kasper-Monczk because of her union activities. However, the General Counsel notified the Board that the parties wished to settle this allegation and moved to sever and remand the allegation to the Regional Director. Subsequently, the Respondent withdrew its exception to the judge's finding. The Board granted the General Counsel's motion on March 17, 2005 and accordingly, modified the judge's recommended Order and Notice to delete the provisions regarding the Respondent's refusal to rehire Kasper-Monczk because that issue is no longer before it.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by RN Staff Council, Office and Professional Employees Local 40; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Detroit, May 10 and July 7-8, 2004. Adm. Law Judge C. Richard Miserendino issued his decision Jan. 7, 2005.

Progressive Electric, Inc. (17-CA-18766; 344 NLRB No. 52) Lincoln, NE March 31, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider applicants for employment and by failing and refusing to hire them because of their union affiliation; and violated Section 8(a)(1) by threatening the loss of employment if employees engaged in union activities and to close its facility if employees selected Electrical Workers IBEW Local 265 as their bargaining agent. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber reversed the judge's findings that the Respondent violated Section 8(a)(1) by soliciting employees to distribute a letter in opposition to the organizing or "salting" efforts of the Union; by instructing employees to reject solicitations by Union representatives at or near the jobsite; and by Neeman's remarks regarding the subject of wage increases where he emphasized that wage increases "are supposed to happen" and would happen as "we typically always do once a year."

The judge also found that the Respondent violated Section 8(a)(3) and (1) by changing its hiring practices when Respondent president Randy Neeman falsely told applicants they would be called in the future should a vacancy occur and by the placement of notices in its window indicating that applications were not being accepted. Chairman Battista and Member Schaumber found that these acts were not discrete changes violative under Section 8(a)(3) and (1), and that each of the acts, together with the placing of blind ads in the newspaper, were part and parcel of the Respondent's overall scheme to refuse to consider and hire union applicants. In their view, the cease and desist order, entered to remedy that overall violation, is sufficient to deter the repetition of all such conduct.

Member Liebman, contrary to her colleagues, would adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by placing "blind" advertisements for the discriminatory purpose of screening out Union applicants and violated Section 8(a)(1) by soliciting a letter in opposition to the Union's organizing activities, coercively instructing employees to reject union solicitations, and telling employees that wage increases were delayed because of the Union.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Electrical Workers IBEW Local 265; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Lincoln, June 30-July 3, 1997. Adm. Law Judge Mary Miller Cracraft issued her decision Nov. 18, 1997 and supplemental decision Aug. 23, 2000.

Road & Rail Services, Inc. (4-RC-20881; 344 NLRB No. 43) Indianapolis, IN March 31, 2005. The Board found, contrary to the Regional Director, that the evidence failed to establish that, as of the date on which the representation petition was filed by Petitioner Teamsters Local 326, the Employer and the Intervenor (Iron Workers Local 502) had a signed collective-bargaining agreement which operates as a bar to the petition. Accordingly, the Board reversed the Regional Director's dismissal of the petition and remanded the case for further appropriate action.

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On August 11, 2004, the Petitioner filed a petition seeking to represent the Employer's maintenance, repair, rail car prepping, and mechanical railcar prepping employees (preppers). The Employer claimed that it had a signed contract with the Intervenor covering the prepper employees, which bars the processing of the representation petition. The Petitioner contended that the existence of three signed contracts between the Employer and the Intervenor raises doubts as to whether there is a single contract which can operate as a bar to the petition. The contracts in question are: (1) a contract signed by the Employer and the Intervenor on July 8, 2004; (2) a contract signed by the Employer on July 8 and by the Intervenor on August 16; and (3) a contract signed by the Employer on July 15 but not signed by the Intervenor.

The Regional Director determined that the Employer and the Intervenor met their burden of proving that the July 8 contract is a bar to the petition, noting that the document contained substantial terms and conditions of employment and—on its face—was signed and dated by representatives of both the Employer and the Intervenor. The Board wrote:

[F]or contract-bar purposes, an agreement must meet certain formal and substantive requirements, including the requirement that the document proposed as a bar be signed by both parties prior to the filing of the petition that it would bar. . . . the party asserting that a contract operates as a bar bears the burden of proving that the contract was signed by both parties before a petition was filed.

The Board found that the Petitioner has raised sufficient uncertainty as to the date on which a contract worthy of bar purposes was signed. It held that the Regional Director “has misallocated the burden of proof” and that “neither of the parties asserting contract bar has met its burden of presenting evidence sufficient to overcome and resolve the myriad uncertainties in this case.” The Board accordingly found that there is no bar to the instant petition.

(Chairman Battista and Members Liebman and Schaumber participated.)

Roger D. Hughes d/b/a Roger D. Hughes Drywall (20-CA-30729, et al.; 344 NLRB No. 49) Santa Rosa, CA March 31, 2005. The Board reversed the administrative law judge’s dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by: (a) physically assaulting picket Aaron Hadzess; (b) threatening to cause the arrest of picket Sean Yellig; and (c) subsequently causing the arrest of Yellig. The Board held that, because the Union was engaged in lawful area standards picketing on public property, the Respondent interfered with employees’ Section 7 rights, thus violating Section 8(a)(1). [\[HTML\]](#) [\[PDF\]](#)

The Board adopted the judge’s recommended dismissal of the complaint allegation that the Respondent’s owner Roger D. Hughes physically assaulted a second picket, Eric Torguson, in violation of Section 8(a)(1). The General Counsel did not except to the judge’s finding that this act did not occur as alleged.

The Board ordered the Respondent to post a notice in the Respondent’s place of business and to provide the Union with signed and dated copies of the notice for posting. It also ordered the Respondent to make the Union whole with respect to the litigation costs arising out of Yellig’s arrest, and to notify the appropriate law enforcement and court authorities of the illegality of the arrest and to seek the expungement of associated records.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Local 751; complaint alleged violation of Section 8(a)(1). Hearing at Santa Rosa, February 18-19, 2003. Adm. Law Judge Burton Litvak issued his decision June 13, 2003.

St. John's Mercy Health System d/b/a St. John's Mercy Medical Center (14-CA-27851; 344 NLRB No. 44) St. Louis, MO March 31, 2005. In affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act since December 19, 2003, by refusing to give effect to the provision in its collective-bargaining agreement with Food & Commercial Workers Local 655 that requires the Respondent, upon written notice from the Union, to discharge unit members who have not met the contractual requirement of paying dues or fees to the Union. Chairman Battista noted that the Respondent failed to show that adherence to the contract's union-security provision would have caused it to violate public policy by failing to meet state-mandated staffing levels for nurses. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Food & Commercial Workers Local 655; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis on Sept. 14, 2004. Adm. Law Judge Paul Bogas issued his decision Dec. 6, 2004.

State, County and Municipal Employees (AFSCME) Local 1640 (7-CB-13986; 344 NLRB No. 53) Grosse Pointe Woods, MI March 31, 2005. The administrative law judge found, and the Board agreed, that by arbitrarily and in bad faith failing to process Remonia Murphy's grievance, the Respondent violated Section 8(b)(1)(A) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Remonia Murphy, an Individual; complaint alleged violation of Section 8(b)(1)(A). Hearing at Detroit, June 14-15, 2004. Adm. Law Judge Joseph Gontram issued his decision Jan. 5, 2005.

United Scrap Metal, Inc. (13-CA-41743, 41842; 344 NLRB No. 55) Cicero, IL March 31, 2005. The Board, in the absence of exceptions, adopted the administrative law judge's findings that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act in response to its employees' organizing efforts including threats, coercive interrogation, discharge of the entire bargaining unit, and the subcontracting of all the bargaining unit work. Agreeing with the judge,

the Board found that an order requiring the Respondent to bargain with Teamsters Local 731 is necessary to remedy the unfair labor practices. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). [\[HTML\]](#) [\[PDF\]](#)

The Respondent did not except to the propriety of the *Gissel* bargaining order. The single issue before the Board is whether the judge correctly concluded that Teamsters Local 731 had achieved majority status among the bargaining unit employees employed by the Respondent.

The judge found that the Union achieved majority status among the unit of 18 drivers based upon the General Counsel's presentation into evidence of 14 signed and dated authorization cards. While the Respondent did not contest the authenticity of the cards, it argued that the General Counsel failed to establish (1) that the 14 card signers are in fact unit employees and (2) that the unit is comprised of 18 employees. The Board concluded that the record fully supports the judge's findings regarding the bargaining unit size and composition and that the Union attained majority status.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 731; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago, May 25-26, 2004. Adm. Law Judge Karl H. Buschmann issued his decision Oct. 12, 2004.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Quantum Electric, Inc. (Electrical Workers [IBEW] Local 11) Los Alamitos, CA March 28, 2005. 21-CA-31670, 31729; JD(SF)-20-05, Judge William L. Schmidt.

Communications Workers Local 3372 (an Individual) Lexington, KY March 28, 2005. 9-CB-11065; JD-22-05, Judge Jane Vandeventer.

T-West Sales & Service, Inc. d/b/a Desert Toyota (Machinists Local 845) Las Vegas, NV March 25, 2005. 28-CA-19447, 19524; JD(SF)-24-05, Judge Albert A. Metz.

Boardwalk Regency Corp. d/b/a Caesars Atlantic City (an Individual) Philadelphia, PA March 29, 2005. 4-CA-32937; JD-7-05, Judge Paul Buxbaum.

North American Pipe Corporation (UNITE HERE) Van Buren, AR March 29, 2005. 26-CA-21773, 21833; JD(ATL)-14-05, Judge Margaret G. Brakebusch.

North Hills Office Services, Inc. (Service Employees Local 32BJ) Port Jefferson, NY March 31, 2005. 29-CA-26546; JD(NY)-17-05, Judge Raymond P. Green.

Teamsters Local 917 (Peerless Importers, Inc.) Brooklyn, NY March 30, 2005. 29-CE-128; JD(NY)-15-05, Judge Raymond P. Green.

Land Air Express, Inc. (an Individual) Springfield, MA March 31, 2005. 1-CA-41871, JD(NY)-18-05, Judge Joel P. Biblowitz.

U.S. Steel Corporation, Minnesota Ore Operations (Steelworkers Local 1938, District 11) Mountain Iron, MN March 31, 2005. 18-CA-17397; JD(ATL)-6-05, Judge William N. Cates.

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 file an answer to the complaint.)

Holmberg Roofing, Inc. (Roofers Local 81) (20-CA-32142-1, 344 NLRB No. 50) Petaluma, CA March 31, 2005. [\[HTML\]](#) [\[PDF\]](#)

Apex Electric Services, Inc. (Electrical Workers [IBEW] Local 177) (12-CA-24199, 344 NLRB No. 47) Jacksonville, FL March 31, 2005. [\[HTML\]](#) [\[PDF\]](#)

Washington Sprinkler, Inc. (Road Sprinkler Fitters Local 669) (5-CA-31925, 32016; 344 NLRB No. 45) Washington, DC March 31, 2005. [\[HTML\]](#) [\[PDF\]](#)

TEST OF CERTIFICATION

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

Covenant Care of Ohio, Inc. d/b/a Wright Nursing and Rehabilitation Center (Machinists District Lodge 34) (9-CA-41696, 344 NLRB No. 57) Fairborn, OH March 31, 2005. [\[HTML\]](#) [\[PDF\]](#)

Cincinnati Air Conditioning Co. (Sheet Metal Workers Local 24) (9-CA-41683, 344 NLRB No. 51) Cincinnati, OH March 31, 2005. [\[HTML\]](#) [\[PDF\]](#)

**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS
IN REPRESENTATION CASES**

*(In the following cases, the Board considered exceptions to and
adopted Reports of Regional Directors or Hearing Officers)*

DECISION AND CERTIFICATION OF REPRESENTATIVE

*Domestic Linen and Uniform, Kankakee, IL, 33-RC-4849, March 29, 2005 (Chairman
Battista and Members Liebman and Schaumber)*
*Material Handling Services, Inc., Des Plaines, IL, 13-RC-21272, March 30, 2005
(Chairman Battista and Members Liebman and Schaumber)*
*St. John's Community Services – New Jersey, Lawrenceville, NJ, et al., 22-RC-12552
March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)*

DECISION AND DIRECTION OF SECOND ELECTION

*Union-Tribune Publishing Co., A Division of Copley Press, Inc., San Diego, CA
21-RC-20762, March 30, 2005 (Chairman Battista and Members Liebman
and Schaumber)*
*Sears, Roebuck & Co., Sterling Heights, MI, 7-RC-22296, March 31, 2005
(Chairman Battista and Members Liebman and Schaumber)*

DECISION AND ORDER [dismissing petition]

*Milepost Industries, San Francisco, CA, 20-RC-17484, March 29, 2005 (Chairman
Battista and Member Schaumber; Member Liebman dissenting)*

*(In the following cases, the Board adopted Reports of
Regional Directors or Hearing Officers in the absence of exceptions)*

DECISION AND CERTIFICATION OF REPRESENTATIVE

*AOC, Collierville, TN, 26-RD-1110, March 31, 2005 (Chairman Battista and Members
Liebman and Schaumber)*
*Duane Reade, Inc., New York, NY, 2-RC-29903, March 31, 2005 (Chairman Battista and
Members Liebman and Schaumber)*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

*Modern Concrete, LLC, Ft. Lauderdale, FL, 12-RC-9094, March 30, 2005 (Chairman
Battista and Members Liebman and Schaumber)*

Semco Energy Gas Co., Port Huron, MI, 7-RC-22787, March 31, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND ORDER [remanding to Regional Director]

Klingberg Family Centers, Inc., New Britain, CT, 34-RC-2038, March 31, 2005 (Chairman Battista and Members Liebman and Schaumber)

(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Atlantic Paratrans of New York City, Queens, NY, 29-RC-10316, March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

Sears, Roebuck & Co., Brooklyn, NY, 29-RC-10296, March 30, 2005 (Chairman Battista and Members Liebman and Schaumber)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

V.L.P. Lighting Services, Moonachie, NJ, 22-RC-12557, March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

Miscellaneous Board Orders

ORDER DENYING MOTION FOR RECONSIDERATION

All Metals Supply, Inc., Oroville, CA, 20-RC-17973, March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

Delta Brands, Inc., Modesto, CA, 32-RC-5055, March 28, 2005 (Chairman Battista and Members Liebman and Schaumber)

Heartland Home Health Care and Hospice, Plymouth Meeting, PA, 22-RC-12498, March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

V.L.P. Lighting Services, Moonachie, NJ, 22-RC-12557, March 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

**ORDER [granting Employer's request for special permission to appeal
Regional Director's refusal to determine applicable critical period and motion
seeking stay of evidence submission deadline and Board
determination of applicable critical period]**

Saint-Gobain Abrasives, Inc., Worcester, MA, 1-RD-2003, et al., March 28, 2005
(Chairman Battista and Member Schaumber; Member Liebman dissenting)
