National Labor Relations Board

Weekly Summary of NLRB Cases

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Press Release (R-2560): Margery Lieber Names Deputy Associate General Counsel in the NLRB's Division of Enforcement Litigation

Boardwalk Regency Corp. d/b/a Caesars Atlantic City (4-CA-32937; 344 NLRB No. 122) Atlantic City, NJ June 30, 2005. The Board adopted the recommended order of the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by indicating that it would be futile for employees to select union representation, threatening reprisals for engaging in union activities, and creating an impression that union activities were under surveillance by management; and violated Section 8(a)(1) and (3) by issuing employee David J. LoManto a written warning, followed by a suspension, and ultimately a discharge. [HTML] [PDF]

Chairman Battista agreed with the judge that the General Counsel failed to meet his burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating by direct or circumstantial evidence that the Respondent was aware of LoManto's union activity when it warned, suspended, and discharged him. He did not rely on the judge's *Wright Line* analysis to the extent that it suggests that circumstantial evidence of knowledge of a particular employee's union activity may be inferred by establishing other elements of the General Counsel's initial burden under *Wright Line*, such as animus and general knowledge.

In adopting the judge's credibility resolutions, Member Schaumber does not rely on the judge's citation to *Double D Construction Group*, 339 NLRB 303, 306 (2003), a case in which he dissented, or the language used by the judge to describe the proposition for which it stands. The majority in *Double D* did not hold, as the judge's language could be interpreted to suggest, that a witness' past falsehood, standing alone, is always insufficient to discredit his testimony, he explained.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by David J. LoManto, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, Dec. 6-8, 2004. Adm. Law Judge Paul Buxbaum issued his decision March 29, 2005.

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Carpenters Empire State Regional Council, Local 7 (Five Brothers, Inc.) (29-CD-575; 344 NLRB No. 116) Farmingdale, NY June 28, 2005. The Board determined that the employees of Five Brothers, Inc. represented by Carpenters Empire State Regional Council, Local 7 are entitled to perform the installation of wire mesh on the Q-deck in preparation for the spraying of fireproofing in connection with the construction of a Stop and Shop supermarket at Sills and Station Roads in Medford, New York. The Board noted that although the factor of area practice favored awarding the disputed work to employees represented by Metallic Lathers Local 46, Ironworkers, it is outweighed by the factors of the Employer's preference, past practice, and current assignment, and economy and efficiency of operations that favor awarding the work to the Carpenters-represented employees. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

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Chinese Daily News (21-RC-20280; 344 NLRB No. 132) Monterey Park, CA June 30, 2005. Chairman Battista and Member Schaumber reversed the hearing officer's recommendation to overrule the Employer's objections alleging that the prounion campaign conduct of the Employer's supervisors tainted the election, and directed a second election. Member Liebman dissented. The tally of ballots for the election held on March 19, 2001, showed 78 votes for and 63 votes against the Petitioner, Communications Workers, with 7 challenged ballots, an insufficient number to affect the results. [HTML] [PDF]

Chairman Battista and Member Schaumber agreed with the Employer's argument, based on the Board's decision in *Harborside Healthcare, Inc*., 343 NLRB No. 100 (2004), that the hearing officer erred in finding no objectionable conduct. The hearing officer found that the conduct at issue did not rise to the level of objectionable conduct under existing Board law in the absence of evidence of coercive statements, threats, or promises to employees during the prepetition signing of the cards. Chairman Battista and Member Schaumber found that Book Department Group Leader Ching Shan Lin's solicitation and collection of authorization cards from the book department employees whom he supervised was inherently coercive and that this conduct materially affected the outcome of the election. They found it unnecessary to address the Employer's remaining exceptions regarding other alleged objectionable conduct.

In dissent, Member Liebman found nothing objectionable in Lin's participation in the solicitation of cards from employees he supervised, or in any other conduct at issue in this case. She wrote: "Regrettably, this representation election has been at the Board for almost 4 years. During that time, the Board has reversed its approach to the solicitation of union authorization cards by supervisors and has decided to apply its new approach retroactively. Accordingly, the majority concludes that the election here must be set aside. I disagree in every respect. As explained in earlier dissents, the Board was wrong to change the law and wrong to apply it retroactively."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Cintas Corp. (13-CA-40821, et al., 28-CA-18488, 29-CA-25421 and 25498; 344 NLRB No. 118) Bedford Park, IL; North Las Vegas, NV; and Central Islip, NY June 30, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining the following confidentiality rule in its Cintas Corporation partner reference guide:

> We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters. [HTML] [PDF]

The Board agreed with the judge that the rule's unqualified prohibitions of the release of "any information" regarding "its partners" could be reasonably construed by employees to

restrict discussion of wages and other terms and conditions of employment with their fellow employees and with UNITE. Therefore, it found the rule is unlawful under the principles set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004).

Member Liebman dissented in part in *Lutheran Heritage Village-Livonia*, finding contrary to her colleagues, that certain of the employer's rules were unlawful. In the present case, she found that under either the majority or dissenting view in *Lutheran Heritage*, the Respondent's confidentiality rule is unlawfully overbroad.

The Board modified the judge's recommended Order to conform with that recently issued in *Guardsmark, LLC*, 344 NLRB No. 97, slip op. 4.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UNITE; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago, April 26-28, 2004; at Brooklyn on May 17, 2004; and at New York on May 18-19, 2004. Adm. Law Judge Joel P. Biblowitz issued his decision Sept. 16, 2004.

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Contract Flooring Systems, Inc. (32-CA-18602; 344 NLRB No. 117) Bay Point, CA June 29, 2005. Affirming the administrative law judge, the Board held, for differing reasons, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide Painters District Council 16 with the information it requested in a letter dated May 31, 2000 that was relevant to its belief that an alter ego relationship existed between the Respondent and a nonunion company, Majestic Floors, and that bargaining unit work was unlawfully being diverted to Majestic Floors. At the request of the General Counsel and the Union, the Board deleted from the Order and notice the provision that information be furnished to the Union "on request." [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Painters District Council 16; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland on Nov. 6, 2001. Adm. Law Judge Mary Miller Cracraft issued her decision Dec. 26, 2001.

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Firstline Transportation Security, Inc. (17-RC-12354; 344 NLRB No. 124) Kansas City, MO June 30, 2005. Chairman Battista and Member Schaumber, with Member Liebman dissenting, granted the Employer's request for review of the Regional Director's decision and direction of election as it raises substantial issues whether the Board has jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction. The majority found it important that the Board hear from other Federal agencies, interested amici, and further from the parties. [HTML] [PDF]

The Regional Director found it appropriate for the Board to assert jurisdiction over Firstline Transportation Security, a private company that provides security screening services primarily to the aviation industry pursuant to its contract with the Transportation Security Administration (TSA), a government entity; and directed an election in the unit petitioned for by Security, Police and Fire Professionals (SPFPA) of security screeners employed by the Employer at the Kansas City International Airport in Kansas City, Missouri.

In her dissent, Member Liebman wrote: "Given the current climate of skepticism, even hostility, toward collective bargaining, the Board's decision to grant review in this case is deeply troubling, not least because it comes from the agency charged with *protecting* the institution of collective bargaining in the private sector. I see no basis for questioning the labor-law rights of airport screeners employed by private companies, not the Federal government. And absent 'compelling reasons,' the Board should not grant review. Board's Rules and Regulations, Section 102.67(c)."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Gimrock Construction, Inc. (12-CA-20173, 20527; 344 NLRB No. 112) Hialeah Gardens, FL June 30, 2005. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide requested relevant information to Operating Engineers Local 487 and refusing to meet and bargain with the Union. The Board found it unnecessary to rule on the Respondent's motion to stay these proceedings, noting that it rejected the Respondent's defense that the Union's bargaining demands were jurisdictional in the companion case, *Gimrock Construction*, 12-CA-173385, 344 NLRB 128 (2005)), which had served as the basis for the Respondent's motion. It wrote: "To the extent that the Respondent asserts the same defense here, we again reject it. Moreover, we agree with the judge that the stipulated record in this proceeding additionally fails to establish such a defense." [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 487; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Miami on March 5, 2001. Adm. Law Judge Pargen Robertson issued his decision June 8, 2001.

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Gimrock Construction, Inc. (12-CA-17385; 344 NLRB No. 128) Hialeah Gardens, FL June 30, 2005. On remand from the U.S. Court of Appeals for the Eleventh Circuit, the Board concluded, consistent with its original decision reported at 326 NLRB 401 (1998), that the evidence in this case fails to establish that the Union's bargaining position reflected an unlawful jurisdictional

objective; consequently, it concluded that Operating Engineers Local 487 did not engage in an unlawful jurisdictional strike and ordered the Respondent to take the action set forth in its original Order. [HTML] [PDF]

In the prior decision, the Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers upon their unconditional offer to return to work and the judge's dismissal of allegations that the Respondent violated Section 8(a)(5) by refusing to execute a collective-bargaining agreement and by conditioning the attainment of an agreement on a nonmandatory subject of bargaining (specifically, a limitation on the applicability of the agreement to one project only). It adopted the judge's recommended Order, requiring that the Respondent offer reinstatement to the strikers.

The Respondent, in defense of the 8(a)(3) complaint allegation, asserted that it had no obligation to reinstate the striking employees, because they allegedly had engaged in an unprotected unlawful jurisdictional strike. It also claimed that the strike had been conducted in furtherance of the Union's demands during the parties' negotiations for a collective-bargaining agreement, and that those bargaining demands were jurisdictional in nature (i.e., that the Union, through negotiations, sought to have certain work assigned to its members, rather than to other employees).

The court denied enforcement of the Board's original order requiring reinstatement and directed the Board to explain its conclusion, contrary to that of the judge, that the Union's bargaining position—in support of which the strike was conducted—did not evidence a jurisdictional objective. After consideration of the record evidence, the Board concluded that the evidence failed to establish that the Union's bargaining position reflected an unlawful jurisdictional objective, and held that the Respondent did not satisfy its burden to establish that the Union had engaged in an unlawful jurisdictional strike.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Grange Debris Box and Wrecking Co., Inc. (20-RC-17987; 344 NLRB No. 123) San Rafael, CA June 30, 2005. The Board affirmed the administrative law judge's recommendation and remanded the proceeding to the Regional Director to open and count the ballots of J. Guadalupe, Alvaro Jiminez, and Nick Hultberg Sr. and, thereafter, serve on the parties a revised tally of ballots and the appropriate certification. The tally of ballots for the election of March 10, 2005 showed 5 votes for and 2 against the Petitioner, Teamsters Local 624, and 3 challenged ballots, a sufficient number to affect the election results. At the hearing, the Petitioner withdrew its challenges to the ballots of Guadalupe and Jimenez. The judge found Hultberg to be an eligible voter. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

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Great Northwest Builders, LLC (36-CA-8799; 344 NLRB No. 120) Vancouver, WA June 30, 2005. Members Liebman and Schaumber granted the General Counsel's motion for summary judgment and held that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire employee-applicant Jeffrey Carlson and by laying off and refusing to recall Robert Clerihew. Chairman Battista concurred in the result reached by his colleagues, but he did not fully agree with their rationale. [HTML] [PDF]

On July 10, 2001, the General Counsel, Charging Party Ironworkers Local 29, and the Respondent entered into an informal settlement agreement that was approved by the Regional Director and provided, among other things, that the Respondent would make Carlson and Clerihew whole by paying Carlson $6384 and Clerihew $6,357.58 in backpay. The Respondent's first installment payment to both Carlson and Clerihew were returned to their banks because of insufficient funds. The Respondent also failed to post the required notice.

Members Liebman and Schaumber found that, in accordance with the terms of the settlement agreement, the Respondent's answer has been withdrawn and all the allegations in the complaint are true. They ordered the Respondent to pay Carlson $7980 and Clerihew $7947, less the amounts already paid to them, with interest accruing from the date of the agreement as set forth in the noncompliance clause. Members Liebman and Schaumber included in the order the customary provisions of instatement, reinstatement, expungement, and notice posting.

Chairman Battista found that the noncompliance clause is not clear as to what, if any, remedy beyond specified backpay is to be granted if there is noncompliance with the settlement. In his view, the General Counsel should specifically spell out all of the relief that will be granted if there is noncompliance, or, at the very least, make it clear that backpay is not the only relief to be granted. Chairman Battista would grant the relief sought by the General Counsel in the circumstances of this case because the motion for summary judgment, filed after noncompliance, sought a remedy that "include[ed], but was not limited to, preferential hire and backpay" and because the Respondent did not answer the motion or the notice to show cause why the motion should not be granted.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Ironworkers Local 29; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment Nov. 14, 2001.

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Highgate LTC Management, LLC d/b/a Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens (3-CA-23616, 23730; 344 NLRB No. 129) Rennselaer, NY June 30, 2005. The Board agreed with the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union and protected concerted activities and informing its employees that they were prohibited from engaging in union and other protected activities while on the Respondent's property; violated Section 8(a)(1)

and (3) by discharging Denise King; and violated Section 8(a)(1) and (5) by failing and refusing to meet with New York's Health & Human Service Union 1199/SEIU in a timely manner for the purpose of negotiating a collective-bargaining agreement. [HTML] [PDF]

Noting that the allegation was not included in the complaint, the Board reversed the judge's finding that the Respondent violated Section 8(a)(1) by promulgating an overbroad restriction on off-duty employee access to the Respondent's facility.

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) when (a) Manager Catherine Donato told employees that they could not engage in protected activities during nonworking time in nonworking areas of the Respondent's property; (b) Supervisor Nancy Nopper told employee Denise King that she could not talk about the Union while at work; (c) Supervisor Nopper told employee Ronnie Currie to remove a Union pin from his uniform; and (d) the Respondent promulgated a rule prohibiting employees from wearing tags, buttons, or stickers while on duty. In addition, no exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(5) by denying the Union's request for access to its facility to observe employees' working conditions and by failing to provide the Union with certain requested information.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by New York's Health & Human Service Union 1199/SEIU; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Albany on Nov. 12, 2002. Adm. Law Judge Joel P. Biblowitz issued his decision Jan. 24, 2003.

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HMY Roomstore, Inc. (5-CA-30809; 344 NLRB No. 119) Jessup, MD June 30, 2005. The Board affirmed the administrative law judge's decision that the Respondent violated Section 8(a)(1) of the Act by suspending and discharging 13 employees for engaging in a protected, concerted in-plant work stoppage. In the absence of exceptions, the Board adopted the judge's conclusions that the Respondent also violated Section 8(a)(1) by questioning employee witnesses Bessie Beltran and Ana Mejia in preparation for an unfair labor practice proceeding without providing the safeguards required by *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Elmer Pastora, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Baltimore, May 1-2 and 6, 2003. Adm. Law Judge John T. Clark issued his decision May 7, 2004.

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Independent Steel Products, LLC (29-CA-26283; 344 NLRB No. 114) Farmingdale, NY June 28, 2005. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing in an untimely manner from multiemployer bargaining through the Hollow Metal Door and Buck Association (the Association), insisting on bargaining individually with Carpenters Local 2947, and thereafter unilaterally changing unit employees' health care benefits. [HTML] [PDF]

In exceptions the General Counsel and the Charging Party requested modification of the judge's recommended remedial order to require that the Respondent abide by the Association agreement, which they claim is one of the standard remedies for an employer's untimely withdrawal from multi-employer bargaining. As the Respondent failed to file a response to the Board's April 21, 2005 notice to show cause why the remedy should not be modified in the manner proposed by the exceptions, the Board granted the requested modification. It ordered the Respondent, among others, to abide by the terms of the Association agreement in all respects, including resuming contributions to the Union's Welfare Fund as ordered by the judge, to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to abide by the agreement, and to make whole all benefit funds provided by the Association agreement for any failure to make the contractually required contributions.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Carpenters Local 2947; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on Nov. 9, 2004. Adm. Law Judge Raymond P. Green issued his decision Dec. 2, 2004.

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Industria Lechera de Puerto Rico, Inc. (Indulac, Inc.) (24-CA-9591; 344 NLRB No. 133) Hato Rey, PR June 30, 2005. The Board, in agreement with the administrative law judge, found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring Jose del Valle from the second shift to the first shift without providing Congreso de Uniones Industriales de Puerto Rico with notice and an opportunity to bargain. In the absence of exceptions, the Board adopted the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by refusing to provide the Union with medical documentation regarding employee del Valle's disability. [HTML] [PDF]

The Respondent argued that it was privileged to act unilaterally because it was required to provide del Valle a "reasonable accommodation" under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. Even though the Respondent maintains a seniority system governing shift assignments, and there was another second shift employee who was more senior than del Valle, it unilaterally transferred del Valle to the first shift—the shift most desired

by the Respondent's employees—after receiving a letter from del Valle's physician that del Valle should be transferred to that shift because he was taking medication at night that might cause him to endanger his coworkers.

Relying on the Supreme Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Board found no merit in the Respondent's argument. It noted that in *Barnett*, the Supreme Court concluded that, absent special circumstances, the ADA does not require an employer to assign a disabled employee to a particular position when the assignment would violate the employer's "established seniority system."

The Board noted also that in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002), the Court stated that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." Unlike the employer in *Hoffman*, the Respondent's compliance with the Board's Order will not require it to violate another Federal statute—the ADA. The Board wrote: "The NLRA requires only that the Respondent bargain with the Union before making the change of the seniority system to accommodate del Valle. After bargaining to a good-faith impasse or agreement on the change, the Respondent is free to make the change. Concededly, . . . the Respondent must restore the status quo ante, pending such bargaining. However, . . . such compliance will not result in a violation of the ADA."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed Congreso de Uniones Industriales de Puerto Rico; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Juan on Dec. 10, 2003. Adm. Law Judge William N. Cates issued his decision Feb. 18, 2004.

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J. S. Troup Electric, Inc. (3-CA-24587; 344 NLRB No. 125) Buffalo, NY June 30, 2005. The Board adopted the administrative law judge's recommendations and held that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Avi Israel because of his activities for Electrical Workers IBEW Local 41. In reaching this conclusion, the judge relied in part on Israel's testimony, which he broadly credited. [HTML] [PDF]

While the Respondent did not except to the judge's unlawful discharge finding, it excepted to the judge's exclusion of evidence purportedly showing that Israel was working while receiving unemployment or worker's compensation benefits, allegedly in violation of State law, and that he was untruthful with the relevant State agencies concerning those matters. The Respondent contended that, under Federal Rules of Evidence, Section 608(b), the judge should have admitted the proffered evidence, because it would have undermined Israel's credibility.

In finding that the judge did not abuse his discretion in disallowing introduction of the evidence the Respondent proferred, the Board first determined that because the proffered

evidence did not involve a criminal conviction, it was inadmissible under Rule 608(b). Secondly, it found that the judge did not act summarily as he deferred ruling on the General Counsel's objection to cross-examination into Israel's alleged interim employment until he had heard all the evidence bearing on Israel's credibility.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Avi Israel, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Buffalo, Aug. 11-12, 2004. Adm. Law Judge William C. Kocol issued his decision Nov. 3, 2004.

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Machinists IAM District 190, Lodge 1414 (SSA Terminal, LLC) (32-CD-163-1; 344 NLRB No. 126) Oakland, CA June 30, 2005. The Board quashed the notice of hearing after concluding that the dispute is a work preservation dispute and not a jurisdictional dispute subject to Section 10(k) proceedings. The work in dispute is the monitoring, plugging and unplugging of refrigerated cargo containers (reefer work) for SSA Terminal, LLC at its Howard Terminal at the Port of Oakland, Oakland, California. [HTML] [PDF]

ILWU Locals 10 and 75 moved to quash the notice of hearing, arguing that the dispute involves a work preservation claim on behalf of the longshoremen and watchmen whom it represents rather than the kind of jurisdictional dispute contemplated by Section 8(b)(4)(D) and 10(k) of the Act. ILWU contended that SSA created this dispute by assigning the reefer work at the Howard Terminal, which historically and consistently had been performed by ILWU-represented machinists and watchmen, to IAM-represented machinists in violation of the SSA/ILWU collective-bargaining agreements. ILWU further contended that SSA now seeks to obtain a Board award confirming its right to assign the work to machinists while releasing SSA from its contractual obligations to ILWU. SSA and IAM argued that a bona fide jurisdictional dispute is properly before the Board for resolution and that the Board should award the work to IAM-represented machinists on the basis of employer preference and economy and efficiency of operations.

The Board concluded that the evidence failed to establish a traditional jurisdictional dispute between two rival groups of employees claiming the same work, with an innocent employer caught in the middle. It wrote: "[W]e conclude that SSA by its own unilateral actions—assigning to IAM-represented machinists work historically performed by ILWU-represented longshoremen—has created a work preservation dispute. As such, it is not appropriate for resolution under Section 10(k)."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Meijer, Inc. (9-CA-40631, 40778; 344 NLRB No. 115) Tipp City, OH June 29, 2005. In adopting the administrative law judge's finding, the Board held that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a policy prohibiting employees from engaging, during nonworking time, in solicitation and the distribution of literature in the parking lots and other exterior areas of its retail stores and distribution facilities; and promulgating, maintaining, and enforcing a policy permitting solicitation for one union but prohibiting solicitation for other unions. [HTML] [PDF]

The Board reversed the judge and found that the Respondent violated Section 8(a)(1) by prohibiting employee Robert Caldwell from distributing union literature and soliciting union membership at the entry gates to its distribution facility at a time when he was not scheduled to work. Caldwell distributed membership applications for a labor organization, Real Union, as part of a campaign to replace Food and Commercial Workers Local 1099 as the representative of employees at the distribution center. The judge found that Respondent manager Jack Evans did not interfere with Caldwell's protected activity because Evans did not know that Caldwell was engaged in union distribution when he directed Caldwell to leave the parking lot.

In support of its reversal, the Board found that the judge erred in imposing a burden upon the General Counsel to show that Evans had knowledge of Caldwell's protected activity when he directed Caldwell to leave. They wrote "[I]t is well established that evidence of employer knowledge is not a necessary element of an 8(a)(1) violation. Rather, the test is whether the Respondent's conduct would reasonably tend to interfere with, threaten, or coerce employees in their exercise of their Section 7 rights." *Alliance Steel Products*, 340 NLRB No. 65, slip op. at 1 (2003).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Robert Lee Caldwell, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Cincinnati on May 24, 2004. Adm. Law Judge Michael A. Rosas issued his decision Aug. 31, 2004.

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National Steel Supply, Inc. (2-CA-36457, 36464; 344 NLRB No. 121) Bronx, NY June 30, 2005. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Eric Atalaya about his union activities and violated Section 8(a)(3) and (1) by discharging Atalya, refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work, and subsequently discharging the strikers. It also agreed with the judge that a bargaining order is warranted under *NLRB v. Gissel Packing Co*., 395 U.S. 575, 613-614 (1969), and affirmed his related finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Trade Unions Local 713. [HTML] [PDF]

The Board found merit in the General Counsel's exception and held that the Respondent also violated Section 8(a)(3) and (1) by issuing a written warning to Atalya the day before his discharge. It modified the judge's recommended to provide that the Respondent post the notice to employees in both Spanish and English because most of the Respondent's employees are Spanish-speaking.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Trade Unions Local 713; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, Oct. 20-25, 2004. Adm. Law Judge Raymond P. Green issued his decision Dec. 23, 2004.

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Operating Engineers Local 12 (Nevada Contractors Assn.) (28-CB-6173; 344 NLRB No. 131) Las Vegas, NV June 30, 2005. In affirming the administrative law judge, the Board found that the Respondent violated Section 8(b)(1)(A) of the Act by failing to timely furnish Charging Party John L. Scott, a registrant on the out of work list, with job referral information requested in his May 31, 2004 letter to determine whether he was being fairly treated under the Respondent's exclusive hiring hall procedure. The Board modified the judge's recommended order to more closely reflect the violation found and the Board's usual remedial provisions. It did not require the Respondent to afford the Charging Party access to other registrants' social security numbers and stated that the Respondent may redact those numbers from the documents provided pursuant to the Board's order. [HTML] [PDF]

Member Schaumber would require the Respondent to produce the requested information found relevant by the judge, absent social security numbers, for the period between the Charging Party's May 31, 2004 request and May 5, 2004, the date he filed the charge in Case 28-CB-6114. The charge, which was dismissed by the Regional Director on June 18, 2004, alleged that the Respondent unlawfully failed to refer Scott to available jobs. The dismissal was not appealed. Member Schaumber concluded that the General Counsel has not demonstrated a basis for requiring the Respondent to furnish the information for the period covered by the dismissed charge or for periods of time subsequent to the date of his request.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by John L. Scott, an Individual; complaint alleged violation of Section 8(b)(1)(A). Hearing at Las Vegas on March 1, 2005. Adm. Law Judge Gerald A. Wacknov issued his decision April 14, 2005.

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Quietflex Mfg. Co., L.P. (16-CA-20257; 344 NLRB No. 130) Houston, TX June 30, 2005. Chairman Battista and Member Schaumber affirmed the administrative law judge's recommendation and dismissed the complaint alleging that the Respondent violated Section 8(a)(1) of the Act by discharging 83 employees for refusing to vacate its parking lot where those employees had engaged in a peaceful 12-hour work stoppage to protest their terms and conditions of employment. Member Liebman dissented. [HTML] [PDF]

The majority agreed with the judge's finding that the employees' continued refusal to vacate the Respondent's premises, after they were told to return to work or leave, served no protected employee interest and unduly interfered with the Respondent's use of its property. In striking an appropriate balance between the Respondent's and the employees' competing interests, Chairman Battista and Member Schaumber concluded that the factors favoring the Respondent's property interests outweighed the employees' rights. The majority explained:

> In this case, certain factors applied by the Board weigh in favor of the employees' rights. The 83 employees at all times engaged in a peaceful work stoppage. There is no allegation or evidence that they blocked ingress or egress to the Respondent's facility, disrupted operations at the loading dock, prevented other employees from performing their duties, or sought to deprive the Respondent of the use of its property. They were on the outside, rather than the inside, of the Respondent's facility. The employees congregated together to present their work-related complaints to the Respondent in a concerted fashion. In addition, the employees were unrepresented and did not have access to any formalized grievance procedure.
>
> We find, however, that the factors favoring the Respondent's property interests outweigh the above considerations. The 12-hour work stoppage by employees, both on- and off-duty, far exceeded the limited duration of work stoppages found protected by the Board.

In her dissenting opinion, Member Liebman wrote:

> Vindicating an employer's property rights cannot justify punishing employees who exercise their statutory rights. Here, the majority deprives immigrant workers of a peaceful means of protest and self-organization, which did no real harm to their employer's legitimate interests. Because the balance struck by the majority seems unreasonable, and because I fear a continuing erosion of the Section 7 rights of unorganized workers, I dissent.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Sheet Metal Workers Local 54; complaint alleged violation of Section 8(a)(1). Hearing at Houston on Oct. 23, 2000. Adm. Law Judge Keltner W. Locke issued his decision Nov. 16, 2000.

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Starcon, Inc. (13-CA-32719; 344 NLRB No. 127) Manhattan, IL June 30, 2005. On remand from the Seventh Circuit, Chairman Battista and Member Schaumber agreed with the administrative law judge that Eugene Forkin and Robert Behrends were entitled to instatement and backpay, and that the failure of the General Counsel to prove that the remaining 105 alleged discriminatees were available for and willing to accept a job offer from the Respondent when vacancies occurred precluded an affirmative remedy for them. They also agreed that, in compliance, Forkin and Behrends must establish that they were capable of passing the same test that the Respondent had given to other applicants, in order to merit instatement as welders. [HTML] [PDF]

Chairman Battista and Member Schaumber disagreed with the judge that a cease-and-desist order for a refusal-to-consider violation under *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), was appropriate in this case. They noted that the judge incorrectly concluded that the Board in its initial decision and order (323 NLRB 977 (1997)), had found, as an independent matter, that the Respondent had unlawfully refused to consider prounion applicants for employment, and that the court had affirmed the Board's finding.

Member Liebman agreed with the majority's decision except for two matters. First, she would not condition the instatement of discriminatees Forkin and Behrends as welders on their passing the Respondent's pipe-welding test, noting that under *FES*, it was the Respondent's burden to prove that the two could not pass the test, and the Respondent never attempted to do so. Second, she saw no obstacle in the court's opinion to finding that the Respondent violated Section 8(a)(3) by refusing to consider for employment the remaining 105 alleged discriminatees identified by the judge.

In its underlying decision, the Board found that the Respondent committed several violations of Section 8(a)(1), including unlawfully refusing to hire 111 prounion applicants. It left to compliance the question of the number of job vacancies that were actually available to the discriminatees. The court enforced most of the Board's order, but denied enforcement of the instatement remedy as the Board failed to identify the number of vacancies that were available during the relevant period and, thus to establish the number of alleged discriminates actually entitled to instatement and backpay.

The Board in 2000 remanded the proceeding to the judge with instructions that his findings be consistent with the law of the case as established by the court and with *FES*, which issued after the court's opinion. The judge determined that there were 107 alleged discriminates entitled to consideration for instatement and backpay and that there were 76 job vacancies during the relevant period. Pursuant to *FES*, he considered the qualifications of the alleged discriminatees with respect to the Respondent's vacancies in three positions. He noted that the Respondent conceded that Forkin and Behrends were entitled to an affirmative remedy. The judge found that the General Counsel failed to show that the remaining 105 alleged discriminates were available for and willing to accept employment at the times the vacancies occurred and, accordingly, an unlawful refusal to hire had not been proven regarding any of them and they should be denied instatement and backpay.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge William G. Kocol issued his supplemental decision June 27, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Imperial Cabinet Mfg Co., Inc. (Interior Systems Local 1045, Michigan Council of Carpenters) Macomb, MI June 6, 2005. 7-CA-46750; JD-50-05, Judge Ira Sandron.

Shaw's Supermarkets, Inc. d/b/a Shaw's Supermarkets and Star Markets (Food & Commercial Workers and its Local 791 and Electrical Workers [IBEW] Local 103) West Bridgewater, MA June 27, 2005. 1-CA-39256, et al.; JD-30-05, Judge Wallace H. Nations.

Field Family Associates, LLC d/b/a Hampton Inn NY – JFK Airport (New York Hotel and Motel Trades Council) Queens, NY June 28, 2005. 29-CA-26729; JD(NY)-27-05, Judge Raymond P. Green.

C.P Associates, Inc. (Bricklayers Local 1) Storrs, CT June 28, 2005. 34-CA-8123; JD(NY)-26-05, Judge Raymond P. Green.

Quaker Painting Corp. (Painters District Counsel No. 4) Blasdell, NY June 29, 2005. 3-CA-25070; JD-52-05, Judge Eric M. Fine.

Extendicare Health Services, Inc. d/b/a River's Bend Health and Rehabilitation Service AFSCME Local 913) Manitowoc, WI June 29, 2005. 30-CA-16746-1; JD-54-05, Judge Arthur J. Amchan.

Grosvenor Orlando Associates, Ltd., d/b/a The Grosvenor Resort (Hotel and Restaurant Employees Local 55) Lake Buena Vista, FL June 29, 2005. 12-CA-18190, et al.; JD-43-05, Judge Benjamin Schlesinger.

Harding Glass Co., Inc. (Painters Local 1044) Worcester, MA June 29, 2005. 1-CA-31148, 31158; JD(NY)-25-05, Judge Joel P. Biblowitz.

Ironwood Plastics, Inc. (Auto Workers) Ironwood, MI June 30, 2005. 30-CA-16852-1; JD-53-05, Judge Michael A. Rosas.

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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

Laurel Baye Healthcare of Lake Lanier, LLC, Buford, GA, 10-RC-15475, June 27, 2005
(Chairman Battista and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Comcast of Illinois, XIII, L.T., Park Forest and Orland Park, IL, 13-RD-2491, June 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND ORDER REMANDING [to Regional Director for further appropriate action]

Farris Electric, Inc., San Jose, CA, 32-RC-5327, June 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

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

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

American Fiber Resources, Fairmont, WV, 6-RC-12452, June 28, 2005 (Chairman Battista and Members Liebman and Schaumber)
Tyson Fresh Meats, Inc., Storm Lake, IA, 18-RC-17284, June 28, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(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)

Marcal Paper Mills, Inc., Elmwood Park, NJ, 22-RC-12618, June 29, 2005 (Chairman Battista and Members Liebman and Schaumber)
Costco Wholesale, San Diego, CA, 21-RM-2667, 21-UC-415, June 29, 2005 (Chairman Battista and Members Liebman and Schaumber)

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Miscellaneous Board Orders

ORDER DENYING MOTION FOR RECONSIDERATION

Safety-Kleen Systems, Inc., South Plainfield, NJ, 22-RC-12532, June 25, 2005 (Chairman Battista and Members Liebman and Schaumber)

ORDER [remanding to Regional Director for further appropriate action]

Dipizio Construction Co., Inc., Cheektowaga, NY, 3-RC-11560, June 28, 2005

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ORDER [denying motion to submit a reply brief]

Columbia College, Chicago, IL, 13-RC-21249, June 30, 2005 (Chairman Battista and Member Liebman; Member Schaumber dissenting)

ORDER [granting request to file amicus brief]

Carroll College, Waukesha, WI, 30-RC-6594, June 30, 2005 (Chairman Battista and Members Liebman and Schaumber)

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