National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

September 9, 2005 W-3016

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Air Line Pilots Assn. (9-CC-1660; 345 NLRB No. 51) Cincinnati, OH Aug. 27, 2005. Chairman Battista and Member Schaumber affirmed the administrative law judge's finding that the Respondent violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing a grievance in which it sought to prohibit DHL Holdings and DHL Worldwide, and its subsidiary, Airborne, Inc., from entering into and complying with an agreement for ABX to provide flying services to Airborne, Inc. because ABX does not employ Air Line Pilots Assn. (ALPA) members, and by filing a counterclaim in federal district court in which ALPA sought to compel arbitration of its grievance. [HTML] [PDF]

The threshold issue was whether the judge properly found that the Board has jurisdiction over the dispute. The majority noted that because Section 8(b)'s prohibition on secondary activity expressly extends to Section 2(5) labor organizations, it follows that the Respondent is covered by Section 8(b) dictates and agreed with the judge that the Board has jurisdiction. The Respondent and Member Liebman contend that the Board does not have jurisdiction because this dispute is in essence a Railway Labor Act (RLA) dispute.

The parties' dispute centers on whose pilots should fly the cargo handled by Airborne after its merger with DHL. Prior to the merger, ASTAR (formerly DHL Airways) pilots flew DHL cargo and ABX (formerly Airborne) pilots flew Airborne cargo. After the merger, the Respondent sought to extend its contractual status as the exclusive source of pilots for DHL to cover both DHL and Airborne.

The Respondent claimed that it was simply attempting to obtain the benefit of its bargaining with DHL that it would be DHL's exclusive source of pilots. According to the Respondent, once Airborne became a part of DHL's corporate structure, DHL's contractual obligation to use the Respondent's pilots extended to Airborne. The judge disagreed and found that the Respondent's objective to force DHL to use the Respondent's pilots for flying both DHL and Airborne freight necessarily required DHL to cease doing business with ABX. The judge concluded that this cessation of business had no work preservation objective, and found that Respondent's conduct violated the Act. The majority agreed with the judge.

Member Liebman concluded that the essence of the dispute in this case is between a RLA-covered union, concerning RLA-covered, union-represented employees. She stated: "A Federal court lawsuit to adjudicate the private parties' respective rights under the RLA is pending. The majority advances no persuasive reasons or authority for asserting jurisdiction over the dispute, and Supreme Court precedent counsels against it. We should decline to decide this case."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by ABX Air, Inc.; complaint alleged violation of Section 8(b)(4)(ii)(A) and (B). Hearing at Cincinnati, March 10-11, 2004. Adm. Law Judge Joseph Gontram issued his decision July 2, 2004.

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Aladdin Gaming, LLC (28-CA-18851, 19017; 345 NLRB No. 41) Las Vegas, NV Aug. 27, 2005. The Board adopted, absent exceptions, the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act in numerous respects, including interrogations, threats, promises of improved working conditions, issuing warnings, imposing more onerous working conditions, and discharging employee Sococretes Oberes. [HTML] [PDF]

Chairman Battista and Member Schaumber reversed the judge and found that the Respondent did not violate Section 8(a)(1) by surveilling employees engaged in Section 7 activity when Tracy Sapien, the Respondent's vice president of human resources, approached a table in the employee dining room at which employees were soliciting other employees to sign union authorization cards; and when Stacey Briand, the Respondent's director of human resources, surveilled Azucena Felix and Adelia Bueno in the employee dining room while Felix was soliciting Bueno to sign an authorization card.

The majority said Sapien's and Briand's presence in the dining room where managers and employees dined was routine and their consequent observation of employees engaged in solicitations was unaccompanied by coercive conduct. They added: "The dining room was an open area, and the union activity was in the open. The presence of Briand and Sapien in the dining room was not unusual. Of course, both persons had an 8(c) right to assert their views regarding unionization. That they did so during an employee conversation about the Union or that Sapien waited 2 minutes before speaking does not establish that the supervisors' conduct was out of the ordinary, requiring a different result."

Chairman Battista and Member Schaumber found without merit the Charging Party's exception to the judge's revocation of the Charging Party's subpoena for the names and contact information of hotel customers who submitted written complaints about employee Luis Velasquez. The Charging Party argued that the Respondent solicited the complaints as a pretext for discharging Velasquez, and that the real reason for the discharge was Velasquez' union activity.

Member Liebman found that the Respondent committed unfair labor practices when its two high-level managers separately interrupted private employee conversations on union matters and injected themselves into the discussion. She said "the majority's apparent endorsement of such conduct—which stifles employees' free speech—is wrong. Section 8(c) of the Act does not give employers a license to effectively terminate a conversation between employees." Member Liebman would also reverse the judge's revocation of the Charging Party's subpoena, finding that the Respondent put the validity of the customer complaints at issue, and the Union's need for the information clearly outweighed the minimal burden that enforcing the subpoena would have placed on the customers.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 and Bartenders Local 165, a/w Hotel and Restaurant Employees. Hearing at Las Vegas, Dec. 15-19, 2003 and Jan. 13-15, 2004. Adm. Law Judge Gregory Z. Meyerson issued his decision May 28, 2004.

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Bath Iron Works Corp. (1-CA-36658, et al.; 345 NLRB No. 33) Bath, ME Aug. 27, 2005. Chairman Battista and Member Schaumber reversed the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act. Member Liebman dissented. [HTML] [PDF]

The central issue in this case is whether the Respondent violated the Act in 1998 by merging its Bath Iron Works Pension Plan (the Plan) into the larger pension plan of its corporate parent, General Dynamics, without the consent of the three Charging Party Unions (Marchinists Locals S-6 and S-7, District 4 and Bath Marine Draftsmen's Assn.). The judge found that the merger was a mandatory subject of bargaining, that the Respondent modified the collective-bargaining agreements (CBAs) without the Unions' consent, that the Unions had not clearly and unmistakably waived their statutory right to bargain over the merger, and thus, the merger of the plans violated the Act.

The Respondent argued that, contrary to the General Counsel, the Plan documents are part of the CBAs and give the Respondent the right to merge the Plan; that section 12.2 of the Plan grants the Respondent the right to terminate the Plan; and that there was no contract modification because it acted consistent with the authority given it by the CBAs and Plan documents.

The majority agreed with the Respondent's argument that the Plan documents are a part of the CBAs and that the Respondent had the authority to implement the merger without the Unions' consent. They wrote: "[T]he plan documents are arguably a part of the CBAs, and they arguably give the Respondent the authority to effect the merger. Thus, the Respondent's interpretation of the CBAs has a sound arguable basis. The General Counsel's interpretation, that the Plan documents are not part of the CBAs and do not contain a right to merge the Plan, is reasonable, but no more so than the Respondent's." The majority concluded that the General Counsel failed to prove that the Respondent modified the contracts with the Unions.

In dissent, Member Liebman contended that the majority erred in rejecting the traditional approach, applied by the judge, which asks whether the contract language amounts to a clear and unmistakable waiver of the Unions' right to bargain. She found that none of the three collective-bargaining agreements involved here contained any language that, by its express terms, authorized the Respondent to act unilaterally with respect to the pension plan during the life of the agreements, much less to merge it out of existence.

Member Liebman further contended that even if the majority were right to focus instead on whether there was a "sound arguable basis" for the employer's contract interpretation—an approach that favor's Board deferral to another forum—a statutory violation should still be found.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Machinists Locals S-6 and S-7, District 4 and Bath Marine Draftsmen's Assn.; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Bath, Nov. 29-Dec. 1, 1999. Adm. Law Judge Arthur J. Amchan issued his decision March 15, 2000.

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Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center (25-CA-28991, et al.; 345 NLRB No. 55) Owensboro, KY Aug. 31, 2005. Chairman Battista and Member Liebman granted Counsel for the Acting General Counsel's motion to strike the Respondent's submission seeking to bring to the Board's attention the letter from the Regional Director of the Board's Milwaukee, WI Regional Office dismissing an unfair labor practice charge filed against Extendicare's Beloit Health and Rehabilitation Center. [HTML] [PDF]

Citing *Reliant Energy aka Etiwanda, LLC*, 339 NLRB 66 (2003), which permits the parties to call to the Board's attention "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, the Respondent argued in its letter that the Regional Director's dismissal letter supported the Respondent's position in this case. The Counsel for the Acting General Counsel moved to strike the submission saying "with all due respect to the Board's Regional Directors, their decisions are of no precedential value before the Board."

On Aug. 26, 2005, Chairman Battista and Members Liebman and Schaumber delegated to themselves, as a three-member group, all of the Board's powers in anticipation of the expiration of then Member Schaumber's term on Aug. 27, 2005. Pursuant to this delegation, the remaining two Board Members (Chairman Battista and Member Liebman) constituted a quorum of the three-member group with the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act.

(Chairman Battista and Member Liebman participated.)

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Bredero Shaw, A Div. of Shawcor Ltd. (15-RC-8356; 345 NLRB No. 48) Mobile, AL Aug. 27, 2005. The Board adopted the hearing officer's recommendation to overrule the Employer's Objection 8 and the challenges to the ballots of Ryan Noel, Sam O'Cain, and Derrick Jordan, but reversed his recommendation to overrule the challenges to the ballots of Wesley Biggs and Michael Flynn, and to sustain the challenges to the ballots of Joseph McDonald, William Wiley, and Scott Ellzey. In the absence of exceptions, the Board adopted the hearing officer's

recommendation to overrule the challenges to the ballot of Alvin White, Christopher Snyder, Ronald Robbins, and Richard Ardilla, and to sustain the challenge to the ballot of Edward Rivers. [HTML] [PDF]

The Board directed the Regional Director to open and count 11 ballots and to issue a revised tally of ballots and the appropriate certification. The tally of ballots for the election held on April 14, 2003, showed 38 ballots for and 47 against the Petitioner, Operating Engineers Local 653, with 16 challenged ballots. The parties stipulated at the hearing that the ballot of Charles McGee should be counted and that the ballots of Terrence Summers and Albert Strickland should not be counted.

The hearing officer recommended: overruling the challenges to the ballots of Biggs and Flynn on the basis that they were not supervisors; sustaining the challenges to the ballots of McDonald and Wiley on the basis that they were statutory supervisors; sustaining the challenge to the ballot of Ellzey on the basis that he lacked sufficient community of interest with unit employees; and overruling the challenge to the ballots of Jordan, finding that although Jordan occupied a position not specifically enumerated in the unit description, he shared a sufficient community of interest with unit employees to warrant his inclusion in the unit.

Chairman Battista and Member Schaumber found that the record established Biggs' and Flynn's supervisory status, that McDonald was not a supervisor because he did not use independent judgment in the assignment or direction of employees, that the record did not support a finding that Wiley was a statutory supervisor when the election was held in April 2003, and that Ellzey was a dual-function employee who maintains a substantial interest in the wages, hours, and other working conditions of unit employees.

Member Liebman wrote that while she joined her colleagues in adopting the hearing officer's report, as modified, with respect to all other issues, she disagreed with their finding that Biggs and Flynn are statutory supervisors based on their authority to discipline employees. She stated that the finding with regard to Biggs is based on a single incident in which he sent an employee home because the employee "got smart" with Biggs. Similarly, she said the finding that Flynn exercised independent judgment in sending two employees home for fighting is not supported by the evidence.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Center Construction Co., Inc. d/b/a Center Service System Div. (7-CA-46490, et al.; 345 NLRB No. 45) Burton, MI Aug. 27, 2005. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by threatening employees for honoring a picket line, surveilling picket line activity, interrogating applicant David Lawrence during a job

interview, promulgating and enforcing an unlawful rule prohibiting employees from wearing clothing displaying the Union's insignia, and interrogating employees about their union sympathies. [HTML] [PDF]

Further, the Board affirmed the judge's findings that the Respondent violated Section 8(a)(1) and (3) by refusing to consider for hire union members for available plumber positions and discharging employee Wayne Rose. It also agreed with the judge's recommendation that the Respondent be ordered to bargain with the Union (Plumbers Local 370) pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1960).

A majority of the Board (Members Liebman and Schaumber) agreed with the judge that the Respondent violated Section 8(a)(1) by soliciting grievances from Rose. A separate majority (Chairman Battista and Member Schaumber) reversed the judge's finding that the Respondent violated Section 8(a)(1) by threatening adverse employment actions, including termination, if the Union was selected to represent the plumbers.

There were no exceptions to the judge's dismissal of the complaint allegation that the Respondent, by its president and owner, Robert Eagleson, violated Section 8(a)(1) by telling employee Rose that following prior unsuccessful union organizing drives, he "eventually got rid of the [useless] sons of bitches." Chairman Battista and Member Schaumber found it unnecessary to rely on this statement as evidence of antiunion animus. Member Liebman relied on the statement as evidence of antiunion animus.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Plumbers Local 370; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Flint, May 18-20, 2004. Adm. Law Judge Joseph Gontram issued his decision Sept. 21, 2004.

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Chep USA (26-CA-20126; 345 NLRB No. 50) Sardis, MS Aug. 27, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule requiring employees to obtain company authorization to engage in protected activity in non-working areas on the employees' nonworking time. No exceptions having been filed, it approved the judge's findings that: (1) the Respondent maintained an unlawful solicitation and distribution rule from August to December 31, 2000, and (2) the new solicitation rule, implemented on January 1, 2001, was not violative of the Act. Chairman Battista and Member Schaumber, with Member Liebman concurring, further agreed with the judge that the Respondent did not violate Section 8(a)(1) by discharging employee Anthony McGlothian. [HTML] [PDF]

The Respondent rings a break bell to signal the beginning and end of each break and lunch. If the bell is rung at times other than scheduled breaks or lunch, employees know they are to leave their workstations and report to the breakroom for a meeting with management. On January 10, 2001, without management authorization, McGlothian rang the bell during

worktime, causing all 50-52 employees on the second shift to cease production and report to the breakroom. McGlothian rang the bell to discuss with employees his concerns about the Respondent's being open on the Martin Luther King Day holiday. Since late December 2000, McGlothian had held meetings with employees during scheduled breaks and lunch to discuss his concerns about the Martin Luther King Day holiday.

Chairman Battista and Member Schaumber noted, as did the judge, that McGlothian's prior meetings had been held during scheduled breaks and lunch and constituted protected activity. They agreed with the judge however that McGlothian's ringing of the bell was not protected by the Act, finding that the record established that the Respondent discharged McGlothian pursuant to the lawful solicitation rule contained in its 2001 handbook. Chairman Battista and Member Schaumber rejected the General Counsel's alternative argument that regardless of whether McGlothian's conduct was protected, the Respondent discharged him pursuant to its unlawful 2000 solicitation rule.

In her concurring opinion, Member Liebman wrote: "Contrary to the majority view, the Respondent did rely on an invalid no-solicitation rule in discharging employee Anthony McGlothian. But the Respondent nevertheless proved that it 'acted in response to an actual interference with or disruption of work.' *Trico Industries*, 283 NLRB 848, 852 (1987). On that ground, I concur in the conclusion that McGlothian's discharge was lawful."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Anthony McGlothian, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Memphis, TN, Aug. 29-30, 2001. Adm. Law Judge Margaret G. Brakebusch issued her decision Oct. 5, 2001.

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Easter Seals Connecticut, Inc. (34-CA-10401, 10469; 345 NLRB No. 52) Meriden, CT Aug. 27, 2005. The administrative law judge dismissed the complaint allegations, finding that the Respondent did not violate: (1) Section 8(a)(1) of the Act by establishing a policy requiring employees to bring their problems and complaints to the attention of management; (2) Section 8(a)(1) and (3) by disciplining employee Jennifer Carabello-Mendez pursuant to that policy; and (3) Section 8(a)(1) and (3) by constructively discharging Caraballo-Mendez. While the Board found that the policy was facially valid, it reversed the judge and found that the Respondent violated Section 8(a)(1) by its over-broad application of the policy to discipline Caraballo-Mendez for discussing terms and conditions of employment with other employees. [HTML] [PDF]

Chairman Battista and Member Schaumber agreed with the judge that there is no evidence that the discipline of Caraballo-Mendez was motivated by antiunion animus and that there was no constructive discharge. They found that the General Counsel failed to establish that Respondent's threat to discharge Caraballo-Mendez was causally related to her resignation and they disagreed with the dissent to the extent she places the burden of proof on the Respondent to show the absence of a causal relationship.

Dissenting in part, Member Liebman wrote that before her resignation, Caraballo-Mendez was presented with a classic Hobson's Choice: either give up exercising her statutorily-protected right to discuss employment conditions with her coworkers or be discharged. She observed that under established Board law, this was an unlawful constructive discharge. Member Liebman would find that the judge erred in focusing on factors that are relevant to a different category of constructive-discharge cases, which turn on whether an employer has imposed intolerable working conditions that do not directly implicate a statutory right.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Auto Workers Local 376; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford, Oct. 1-2, 2003. Adm. Law Judge Howard Edelman issued his decision Jan. 26, 2004.

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Endicott Interconnect Technologies, Inc. (3-CA-24205; 345 NLRB No. 28) Endicott, NY Aug. 27, 2005. Members Liebman and Schaumber agreed with the administrative law judge that the statements made by employee Richard White on two occasions (newspaper comments and internet-forum remarks) constituted activity protected by the Act, not disloyal conduct warranting his discharge for cause, and that the Respondent violated the Act by warning and then discharging White. The majority found that the judge's decision is in accord with *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and its progeny. [HTML] [PDF]

Contrary to his colleagues, Chairman Battista would reverse the judge and find that White's statements did not speak of a "labor dispute" within the meaning of *Jefferson Standard* and its progeny. He would find that White was discharged for cause because of his disloyal and disparaging statements against the Respondent.

The Respondent produces printed circuit boards for the computer industry. Its owners had negotiated and completed the purchase of the business from IBM between March and Nov. 2002. On Nov. 15, 2002, or two weeks after the purchase was completed, the Respondent permanently laid off 10 percent of its work force of 2000 employees. The Union requested that employee and union member White, who was not laid off, provide comments about the layoff for an article in a local newspaper. The article appeared on Nov. 16. The newspaper that had published the article maintained a public-forum website where people could read and/or submit opinions about the purchase of the business by the Respondent. On Dec. 1, White responded to an antiunion message that an individual had contributed to the forum.

The judge found that the Nov. 15 layoff constituted a labor dispute between the Respondent and the Union, and that White's comments in the newspaper article were part of the context of the dispute. He rejected the Respondent's argument that White's conduct was not protected because the article did not refer to the Union, finding it sufficient that the Union had

authorized White to speak. The judge also found that White's internet-forum message referred to, and was part of, the labor dispute arising from the Nov. 15 layoff, as well as the Union's efforts to organize Respondent's employees. He concluded that White's remarks on both occasions did not exceed the boundary of conduct protected by the Act.

The majority wrote in agreeing with the judge. "Viewed in context, the November 16 newspaper article and the December 1 internet posting each provide more than enough information for an ordinary reader to understand that a controversy involving employment is at issue. Moreover, the requisite nexus between White's statements and these labor controversies is apparent. Finally, his comments were not so egregious in the circumstances that the Act's protection should be withdrawn. Accordingly, his conduct was protected in each instance."

Chairman Battista concluded that the Respondent was fully within its right to discipline White because of the Nov. 16 article, and to discharge him for cause because of the Dec. 1 posting. He explained that White's comments reported in the Nov. 16 article did not refer to a labor dispute and instead made the different point that the layoff would be detrimental to the quality of the Respondent's product. The Chairman acknowledged that other passages in the article refer to the impact of the layoff on the laid-off employees, but he emphasized this point. "However, White was not disciplined for what the article said. He was disciplined for *his views*, as reported in the article. And those views concerned his opinion about the condition of the Company." Thus, Chairman Battista found that the Respondent was justified in warning White that he would be discharged if he disparaged the Company again in the future. He found White's internet posting also lacked a clear nexus to the labor dispute concerning the layoffs and that those comments were also insubordinate in light of the Respondent's explicit warnings to White to cease from making such disloyal statements to the public.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Alliance @IBM/Communications Local 1701; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Binghamton on June 10, 2003. Adm. Law Judge Joel P. Biblowitz issued his decision Aug. 7, 2003.

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Enloe Medical Center (20-CA-31806-1, 20-RC-17937, et al. ; 345 NLRB No. 54) Chico, CA Aug. 27, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by requiring employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU." It reversed the judge and found that the Respondent violated Section 8(a)(1) by promulgating a rule prohibiting the placement of union literature in the employee breakroom. The Board also agreed with the judge's recommendation to overrule the Respondent's election objections and certified that a majority of the valid ballots in Case 20-RC-17938 have been cast for Health Care Workers SEIU Local 250 and that it is the exclusive collective-bargaining representative of the employees in the service unit. [HTML] [PDF]

Chairman Battista and Member Schaumber agreed with the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by interrogating employees. The alleged interrogation occurred during a disciplinary interview involving nurse Beth Denham regarding Denham's telephone solicitation for the Union from a patient's home. Kerry Cannell, the Respondent's nurse manager of Home Care Services, asked Denham, who was accompanied by employees Ron Taylor and Kathy Lambert for support, why they believed that they needed a union. When Taylor listed some employee concerns, Cannell responded that she too had some problems with how the hospital was being operated. No further inquiry was made about the Union. The judge did not find that Cannell's single question constituted coercive interrogation violative of Section 8(a)(1).

Contrary to her colleagues, Member Liebman would find that the Respondent violated the Act by interrogating employees. She contended that Cannell's question was coercive, because, she argued: the questioning occurred against a background of the Respondent's unfair labor practices; there was no apparent reason for Cannell's question; Cannell failed to assure the employees that they need not answer or that their answers would not affect their jobs; and the questioning was conducted by a high level manager, in her office, during a disciplinary meeting related to Denham's union activity.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Health Care Workers SEIU Local 250; complaint alleged violation of Section 8(a)(1). Hearing at Chico, Aug. 10-12 and Nov. 2-4, 2004. Adm. Law Judge Gerald A. Wacknov issued his decision Feb. 14, 2005.

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J.P. Mascaro & Sons (4-RC-20920; 345 NLRB No. 42) Reading, PA Aug. 27, 2005. Chairman Battista and Member Schaumber, with Member Liebman concurring, overruled the Petitioner's (Machinists District Lodge 1) Objection 1 alleging that the Employer's agents stood outside the voting area, within 15 feet of the polls, and intimidated voters as they entered to vote; and certified the results of the election held on December 10, 2004. The tally of ballots shows 26 for and 41 against the Petitioner, with 9 challenged ballots, an insufficient number to affect the results. [HTML] [PDF]

The judge recommended that Objection 1 be sustained and that a new election be held. He found that the Employer's president, Pat Mascaro Sr.'s continual presence during the election "just" outside the front door of the facility was objectionable even without considering his conversations and handshaking with employees. The judge noted that there was no reason for Mascaro's presence at the Berks County facility on election day apart from making his presence known to potential voters and concluded that Mascaro's conduct amounted to a nonverbal form of "electioneering."

Chairman Battista and Member Schaumber noted that the judge combined the analyses applied in surveillance and electioneering cases in finding Mascaro's presence, without more, constituted objectionable conduct. However, regardless of whether Mascaro's conduct is analyzed under surveillance or electioneering principles, they found that it was not objectionable. Under *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983), Chairman Battista and Member Schaumber held that the evidence does not show that the Employer engaged in objectionable electioneering. They determined, contrary to the judge, that Mascaro's presence at the Berks County facility did not constitute objectionable surveillance.

In her concurring opinion, Member Liebman said that Mascaro's continual presence outside the facility where he had no office for most of the election raised troublesome questions. However, she wrote: "Nonetheless, in the circumstances here—Mascaro did not stand in any designated no-electioneering area, he had no direct view of the polling place from where he stood, the Union never objected to his presence, and there was no other objectionable conduct—I would not set aside the election."

In the absence of exceptions, the Board adopted the judge's recommendation to overrule the Petitioner's Objections 2, 3, 4, and 5.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Johnson Technology, Inc. (7-CA-43375; 345 NLRB No. 47) Muskegon, MI Aug. 27, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by removing the union meeting notice posted by employee David LaNore on August 29, 2000, by disparately prohibiting him from posting union literature on employee bulletin boards, and by threatening him with discipline for his postings. [HTML] [PDF]

Chairman Battista and Member Schaumber, with Member Liebman dissenting, agreed with the judge that the Respondent did not violate Section 8(a)(1) when Director of Marketing Jasick told LaNore that he could not use company paper for preparing union notices. The majority also found, contrary to the judge and their dissenting colleague, that the Respondent did not violate Section 8(a)(1) by soliciting grievances and impliedly promising to remedy them.

Member Liebman said: "Contrary to the majority, I do not believe that an employer's supposed property interest in a piece of scrap paper is a license to interfere with statutorily protected activity. Nor does seeking occasional feedback from employees authorize an employer to invite the belief that employee support will be bought, if necessary." She would therefore find that the Respondent committed unfair labor practices in both instances.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Electronic Workers (IUE) International; complaint alleged violation of Section 8(a)(1). Hearing at Grand Rapids, Jan. 30 and Feb. 21, 2001. Adm. Law Judge Earl E. Shamwell, Jr. issued his decision July 31, 2001.

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Lake Mary Health Care Associates, LLC, d/b/a Lake Mary Health and Rehabilitation (12-RD-978; 345 NLRB No. 37) Lake Mary, FL Aug. 27, 2005. Chairman Battista and Member Liebman agreed with the hearing officer that the Employer engaged in objectionable conduct by announcing, just prior to the election held on Sept. 17, 2004, the elimination of its practice of paying a $25 extra shift bonus to certified nursing assistants (CNAs) for each extra shift they worked after 40 hours. The majority sustained the corresponding portion of the Union's Objection 4, set aside the election (Service Employees 1199 Florida lost 40-37), and remanded the proceeding to the Regional Director to conduct a second election. [HTML] [PDF]

Member Schaumber, dissenting, found that the Union failed to carry its burden of proof, that the objection should be overruled, and that a certification of results of election should issue.

The Employer argued that its conduct was not a purposeful act designed to influence the election and that its conduct was de minimis. The majority noted that, in determining whether conduct is objectionable, the test is not a subjective one, but instead an objective determination of whether the conduct of a party to an election has the tendency to interfere with the employees' free choice. They found that the test is met here and noted the seriousness of the Employer's conduct, the timing of the announcement of the elimination of the bonus 2 days before the election, the wide dissemination of the announcement, the closeness of the vote and the Employer's failure to effectively inform employees that the bonus had been restored.

In his dissent, Member Schaumber said he disagreed that the underlying election, a decertification vote, should be set aside because an apparent miscommunication between a frontline supervisor and clerk resulted in the announcement, shortly before the election, of the discontinuation of a popular benefit, an extra shift bonus. He noted that the announcement was immediately rescinded when brought to the attention of management the next day, the bonus was never discontinued, and good-faith efforts were made to communicate the correction to employees. Member Schaumber found that employees would not reasonably view the announcement of the rescission of a benefit prior to a vote to decertify the union as an effort to discourage their support for the union. He noted that while not relied upon for purposes of this dissent, no evidence exists that the miscommunication affected the vote of any eligible voter much less that it was intended to achieve such a result.

In the absence of exceptions, the Board adopted, pro forma, the hearing officer's recommendation to overrule Union's Objections 1, 2, 3, 5, and 6, and the portion of Objection 4 that alleged the refusal to process a grievance.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Lee Builders, Inc. (10-CA-33718, et al.; 345 NLRB No. 32) Huntsville, AL Aug. 26, 2005. In affirming the administrative law judge's finding, the Board held that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating and threatening its employees. Chairman Battista and Member Liebman reversed the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employee Daniel Manuele on May 28, 2002. Member Schaumber disagreed with his colleagues on this latter issue. [HTML] [PDF]

The Respondent argued that it discharged Manuele pursuant to its then-existing policy that required termination of employees who tested positive for drugs after a workplace accident. The majority agreed with the judge that the General Counsel established by a preponderance of the evidence that Manuele's protected activity was a motivating factor in the Respondent's decision to discharge him. However, the judge in his supplemental decision found that the Respondent's policy that called for termination of an employee who tested positive did not come into effect until 2002, and therefore the Respondent's earlier failure to discharge employee Curtis Brown for positive test results could not form the basis of a finding of disparate treatment. The judge therefore rejected the General Counsel's disparate treatment argument, and found that the Respondent had established that it would have discharged Manuele pursuant to its 2002 policy even in the absence of his protected activities.

Chairman Battista and Member Liebman noted that notwithstanding changes in the Respondent's drug policy in 2000, the evidence showed that the Respondent conducted postworkplace injury drug testing on Brown, who, despite having tested positive for drugs, was not terminated for his transgression. They wrote: "The Respondent's failure to terminate Brown, an employee (1) who tested positive for marijuana; (2) following a workplace accident; and (3) subsequent to changes in the Respondent's policy that purportedly required the termination who test positive for drugs after a workplace injury, constitutes unexplained and unrebutted evidence of disparate treatment.

Member Schaumber would affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) by discharging Manuele. He concluded that the Respondent has met its rebuttal burden of proving that it would have discharged Manuele even in the absence of his protected activity.

In his original decision, the judge found that the Respondent violated Section 8(a)(3) by discharging employees Christopher Hughes, Bradley Walls, and Daniel Manuele for their union activity. On remand, the judge again found each of the Section 8(a)(1) violations alleged, but reversed his findings on each of the Section 8(a)(3) discharge allegations and recommended dismissal of those allegations. The Board found no basis for reversing the judge's findings that the Respondent would have terminated employees Hughes and Walls for the absences and/or tardiness even in the absence of their union activity.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Alabama Regional Council Local-1274; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Huntsville on Oct. 21-22, 2002. Adm. Law Judge Lawrence W. Cullen issued his decision Feb. 12, 2003 and his supplemental decision Aug. 9, 2004.

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M&M Backhoe Service, Inc. (12-CA-22384; 345 NLRB No. 29) Homestead, FL Aug. 27, 2005. Affirming the administrative law judge's conclusions, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and withdrawing recognition from Operating Engineers Local 487, failing to provide the Union with relevant information, and changing unit employees' terms and conditions of employment without notice to and bargaining with the Union; violated Section 8(a)(3) and (1) by reprimanding and suspending employees for engaging in lawful strike activity; and violated Section 8(a)(1) by, among others, promising benefits conditioned upon disavowal of the Union and threatening termination for continuing to support the Union. [HTML] [PDF]

The Board, in agreeing with the judge that the 8(f) bargaining relationship between the Respondent and the Union validly converted to a 9(a) relationship, noted that the record clearly demonstrated that the Union enjoyed majority support at the time that the recognition agreement was executed. The judge applied *Staunton Fuel & Material*, 335 NLRB 717 (2001), pursuant to which an agreement that meets certain requirements is independently sufficient to establish a union's 9(a) status. This approach was challenged by the D.C. Circuit in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). The Board found it unnecessary to reassess the rule of *Staunton Fuel & Material* because the result in this case would be the same under *Nova Plumbing*.

Chairman Battista and Member Schaumber declined to grant the General Counsel's exceptions to the judge's recommended Order. The General Counsel asserted that in ordering a make-whole remedy for the Respondent's unilateral cessation of payments into the Union's health and welfare fund, the judge failed also to order a like remedy for the Respondent's cessation of payments into the Union's pension, apprenticeship, and vacation funds. The General Counsel noted that the Respondent stipulated that it ceased making payments into all four of these funds after June 2002. Chairman Battista and Member Schaumber pointed out that the complaint did not allege that the Respondent unlawfully ceased payment into the pension, apprenticeship, or vacation funds and that the General Counsel never sought to amend the complaint to include these allegations, nor were the issues raised at the hearing.

Member Liebman would grant the General Counsel's exception, finding that the Respondent's cessation of payments into the Union's pension, apprenticeship, and vacation funds was both closely related to its refusal to pay into the health and welfare fund and, contrary to the majority's view, fully and fairly litigated by the parties.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 487; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, April 8-10, 2003. Adm. Law Judge George Carson II issued his decision June 10, 2003.

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Macerich Management Co. and Macerich Property Management Co. (20-CA-29636-1, 29918-1; 345 NLRB No. 34) Sacramento and Capitola, CA Aug. 27, 2005. The Board, applying California law which permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner, agreed with the administrative law judge that the Respondents violated Section 8(a)(1) of the Act by unlawfully restricting the content of picket signs, handbills, and other written material. It also agreed that Respondent Macerich Management Co. unlawfully threatened union handbillers with arrest at Arden Fair Mall on December 16, 1999. The Board reversed the judge and found that Respondent Macerich Property Management Co. unlawfully threatened union picketers with arrest at Capitola Mall on March 7, 2000, and had union picketers unlawfully arrested on March 21 and May 3, 2000. [HTML] [PDF]

Contrary to the judge, Chairman Battista and Member Schaumber found that the Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activities occur in "designated areas," and their ban on all expressive activity during peak traffic times are reasonable time, place, and manner restrictions that do not violate the Act.

Dissenting in part, Member Liebman would find that the Respondents' ban on the carrying or wearing of signs, their requirement that all expressive activity occur only in "designated areas" located inside the malls, and their ban on all expressive activity during peak traffic times ('peak traffic ban") on the malls' exteriors, are unlawful because they are not narrowly tailored. While she addressed each of the three rules, she concluded that the Respondents have offered no evidence that expressive activity interfered with normal business operations or could be reasonably expected to do so.

The issue presented here is whether six rules maintained and enforced by the two California shopping malls constituted reasonable time, place, and manner restrictions under State law. The rules alleged to be impermissible include: (1) a ban on activities that identify by name the mall owner, manager, or mall tenants; (2) a ban on signage and written materials that interfere with the "commercial purpose" of the mall; (3) a ban on the carrying or wearing of signs; (4) an application process that requires the pre-submission of written materials; (5) the exclusion of exterior areas, including mall sidewalks, from designated areas where activities may occur; and (6) the prohibition of activities during "peak traffic days" on the exterior areas of the mall, including sidewalks.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Locals 586 and 505; complaint alleged violation of Section 8(a)(1). Hearing at San Francisco, March 20-29, 2001. Adm. Law Judge Jay R. Pollack issued his decision Dec. 26, 2001.

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Manufacturers Woodworking Assn. of Greater New York Inc. (2-CA-35702; 345 NLRB No. 36) Valhalla, NY Aug. 27, 2005. Affirming the administrative law judge's recommendation, the Board dismissed the complaint, which alleged that the Respondent violated Section 8(a)(1) of the Act by filing a Demand for Arbitration to compel the New York City District Council of Carpenters (the Union) to enforce article I, section 7 of the parties' collective-bargaining agreement, which reads:

> The Union shall monitor all woodwork installed within its jurisdiction and confirm that said woodwork was manufactured by a shop, which either is a signatory to this agreement or in the alternative manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement. The Union shall not allow the installation by any of its members of any woodwork, which is identified as not being furnished and/or manufactured by a signatory to this agreement or in the alternative which is not furnished and/or manufactured by a shop that is paying equal to or better than the wages and fringe benefits provided for in this agreement subject to applicable law.
> [HTML] [PDF]

The Respondent, Manufacturers Woodworking Association (MWA), is a multiemployer bargaining group whose companies manufacture and install woodwork. The Charging Parties are woodwork manufacturers who have collective-bargaining agreements with Carpenters Local 42 and subcontract their installation work to Installation Contactors that have a collective-bargaining relationship with the Union and are signatory to an agreement similar to the MWA-District Council contract. Because the agreement between Local 42 and the Charging Parties provides for lower wages than the MWA-District Council contract, the Union could not, under the clause, allow its members employed by any Installation Contractor to install the woodwork manufactured by the Charging Parties.

By letter dated Dec. 9, 2002, the Respondent notified the Union that MWA members had lost work on 21 projects to shops outside the Union's jurisdiction. The Respondent reminded the Union of its contractual responsibility to prohibit the installation of woodwork that does not meet the contract's requirements. It stated that the Union would be in breach of the parties' contract if it did not meet its obligations, and that any action other than prohibiting the installation of unsanctioned woodwork would constitute a breach of the agreement. On April 25, 2003, the Respondent filed the Demand for Arbitration, alleging that the Union breached article I, section 7. The Respondent withdrew its request for arbitration on July 31, 2003.

The Board assumed arguendo that the Respondent's arbitration demand had the unlawful objective of requiring the Union and its members to engage in a work stoppage that would

violate Section 8(b)(1)(A) and therefore, the arbitration demand lost its special protections. It concluded however that the General Counsel failed to show that the mere filing of the arbitration demand had a reasonable tendency to interfere with employees' Section 7 rights.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Peterson Geller Spurge, Inc. and Patella Mfg., Inc.; complaint alleged violation of Section 8(a)(1). Hearing at New York on Sept. 27, 2004. Adm. Law Judge D. Barry Morris issued his decision Jan. 12, 2005.

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Nott Co., Equipment Div. (18-CA-15056; 345 NLRB No. 23) Bloomington, MN Aug. 27, 2005. On a stipulated record, Chairman Battista and Member Schaumber, with Member Liebman dissenting, dismissed the complaint in its entirety. [HTML] [PDF]

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by prohibiting union discussion among employees during worktime and violated Section 8(a)(5) and (1) by: failing to comply with the collective-bargaining agreement and to recognize and bargain with Operating Engineers Local 49; withdrawing recognition from the Union and repudiating the collective-bargaining agreement; prohibiting union business agents from gaining access to the Respondent's facility or speaking to employees during worktime; and announcing employee restrictions on talking.

The Respondent is engaged in the sale, rental, and service of forklifts. It has had a 40-year collective-bargaining relationship with the Union. The parties' most recent contract was effective from Aug. 1, 1996 through July 31, 2000. The bargaining unit consists of forklift employees working at the Respondent's Bloomington facility and at other permanent shops and field-mechanic resident locations in Minnesota. In Oct. 1998, the Respondent purchased the assets of Metro Forklifts in Maple Grove, Minnesota, a nonunion business, and hired the 14 Metro employees. The Respondent closed the Maple Grove facility in Nov. 1998 and consolidated the entire operation at Bloomington. Subsequently, the Respondent repudiated its contract with the Union and withdrew recognition, claiming that, because of the addition of the Metro mechanics, the Union no longer represented a majority of the bargaining unit employees.

The parties stipulated that the issue is whether Respondent's withdrawal of recognition of the Union is permissible because the Union lost majority status once the former Metro employees were employed at the Bloomington location.

The majority held that an accretion analysis is appropriate. They noted that the unrepresented group sought to be accreted is equal in number to the existing represented group (14 former Metro employees and 14 existing Nott employees). Applying accretion principles, the majority concluded that the Respondent lawfully withdraw recognition from the Union because the Union lost majority status once the former Metro employees were employed at the

Bloomington location. Given that the previously represented employees are no longer a majority of the new overall unit, the majority decided there is no bargaining obligation in the unit and accordingly, as the General Counsel and the Charging Party acknowledge, the unilateral changes that occurred on Nov. 13 were not unlawful because the Union no longer had Section 9(a) status.

Member Liebman, dissenting, found that as a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract, citing *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996), where a unanimous Supreme Court endorsed the Board's policy affording unions a conclusive presumption of majority status during the term of a collective-bargaining agreement. She observed that under the applicable contract-bar principles, the increase in the size of the bargaining unit was not substantial enough to create an exception to the conclusive presumption. Also, there was no change in the nature of the Respondent's operations or in the functions of the employees in the overall unit. Accordingly, Member Liebman would find that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) and therefore, the Respondent further violated Section 8(a)(5) and (1) as alleged in the complaint.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Operating Engineers Local 49; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing.

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Service Corp. International d/b/a Oak Hill Funeral Home and Memorial Park (32-RC-5325; 345 NLRB No. 35) San Jose, CA Aug. 27, 2005. Member Liebman and Schaumber affirmed the hearing officer's recommendation, but not his entire rationale, and overruled the Employer's Objection 2, alleging that a marked sample ballot flyer sent by the Petitioner (Laborers Local 270) to the Employer's maintenance employees had the tendency to mislead employees into believing that the Board favored the Petitioner in the election. They certified the Petitioner as the exclusive collective-bargaining representative of cemetery grounds and maintenance employees working for the Employer at its San Jose, CA facility. Chairman Battista, dissenting, would sustain Objection 2, set aside the election, and direct a new election. [HTML] [PDF]

The revised tally of ballots shows 23 for the Petitioner, 0 for the Intervenor (Cemetery Workers and Greens Attendants Local 265, SEIU), 20 against the participating labor organizations, and one challenged ballot, which was insufficient to affect the results of the election. The Union sent between 20-30 flyers containing union propaganda, in both Spanish and English to the homes of the Employer's maintenance employees in the months leading up to the election. The subject flyer, in both Spanish and English, is two-sided and includes a marked sample ballot, with a handwritten "X" in the box for the Petitioner.

The hearing officer concluded that the employees would have understood that the marked sample ballot emanated from the Petitioner and was merely propaganda. Members Liebman and

Schaumber found that employees would not have been misled by the sample ballot flyer based on the physical appearance of the document itself, and the totality of the circumstances surrounding its source and distribution. Chairman Battista concluded that the nature of the contents of the marked ballot had the tendency to mislead the employees into believing that the Board favored a vote for the Petitioner.

The Board adopted the hearing officer's recommendation to overrule Employer's Objection 1, which alleged that Superintendent of Construction Pat Kintzley engaged in objectionable prounion supervisory conduct. It relied solely on the hearing officer's credibility determinations, which establish that the supervisory conduct alleged to be objectionable did not occur. In the absence of exceptions, the Board adopted pro forma, the hearing officer's recommendation that the remaining portions of Objection 1 be overruled.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Sterling Fluid Systems (USA), Inc. d/b/a Peerless Pump Co. (25-CA-26448; 345 NLRB No. 20) Indianapolis, IN Aug. 27, 2005. Members Liebman and Schaumber agreed with the administrative law judge that the Respondent violated Section 8(a)(3) of the Act by failing to reinstate or place on a nondiscrinnatory recall list, former strikers on whose behalf Machinists District 90 made an unconditional offer to return, and failing to maintain and use a nondiscriminatory recall procedure by giving preference for recall to (a) employees who abandoned the strike prior to its conclusion and (b) former striking employees encompassed by the Union's unconditional offer to return who complied with the Respondent's unlawful signup requirement. [HTML] [PDF]

Chairman Battista, dissenting in part, would not find that the Respondent violated the *Laidlaw* rights of strikers by implementing a recall list which placed these employees beneath those who had sought reinstatement earlier. *Laidlaw Corp*., 171 NLRB 1366 (1968). He agreed with Member Schaumber that there is no violation as to non-*Laidlaw* positions, i.e., jobs that are not the same as the prestrike job or substantial equivalent.

Chairman Battista and Member Schaumber reversed the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing discriminatory procedures which adversely affected the recall rights of former striking employees, bypassing the Union and dealing directly with former strikers about the terms and conditions of reinstatement; (2) violated Section 8(a)(3) and (1) by failing to provide notice and an opportunity for former striking employees to apply for nonequivalent positions posted in the plant; and (3) violated Section 8(a)(1) by threatening former strikers with loss of their reinstatement rights. They found that the 8(a)(5) allegations are time-barred under Section 10(b).

Contrary to her colleagues, Member Liebman would not reverse and dismiss any portion of the 8(a)(3) allegations or the 8(a)(1) threat allegation. She found that the Respondent's job

posting system also discriminatorily denied unreinstated former strikers the opportunity to apply for other positions for which they were entitled to be fairly considered. Member Liebman found it unnecessary to pass on the 8(a)(5) allegations because a remedy for such violations would be cumulative to other relief granted.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Machinists District 90; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Indianapolis, Nov. 1-2, 1999. Adm. Law Judge John H. West issued his decision Feb. 1, 2000.

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Hillard Development Corp. d/b/a Provident Nursing Home (1-CA-42263; 345 NLRB No. 40) Boston, MA Aug. 27, 2005. Chairman Battista and Member Liebman adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to execute, upon request of Service Employees Local 2020, a collective-bargaining agreement after the parties reached complete agreement on terms and conditions of employment. [HTML] [PDF]

Member Schaumber concurred in the majority's finding that the Respondent violated Section 8(a)(5) by refusing to execute the collective-bargaining agreement reached by the parties' chief negotiators. He wrote separately to clarify a point of fact and to express concern regarding the manner in which the judge questioned Respondent's lead negotiator, Charlene Kaye. Member Schaumber said that questioning Ms. Kay under oath during the hearing certainly would have been an appropriate, and perhaps necessary, step in furtherance of judge's duty to inquire fully into the facts. He wrote: "Here, however, the judge questioned Ms. Kaye on the record, before the General Counsel had opened his case, and before the witness was even sworn. He then relied on Ms. Kaye's unsworn responses in his decision, which mischaracterized what she actually said. Further, the judge did not develop a full record."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Employees Local 2020; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Boston on April 18, 2005. Adm. Law Judge Bruce D. Rosenstein issued his decision June 2, 2005.

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Regency Service Carts, Inc. (29-CA-24174; 345 NLRB No. 44) Brooklyn, NY Aug. 27, 2005. Chairman Battista and Member Liebman affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with Iron Workers Local 455 and by failing to timely supply to the Union the information that it requested on June 1, 2000, August 9, 2000, and January 23, 2001. Member Schaumber dissented in part. [HTML] [PDF]

Chairman Battista and Member Liebman concluded that the totality of the Respondent's conduct, considering all the facts viewed as an integrated whole, clearly demonstrates that it intended to frustrate negotiations and prevent the successful negotiation of a bargaining agreement. Accordingly, they found that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining.

In their view, the Respondent's bad faith in negotiations establishes beyond doubt that the Board's traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole for the financial losses it incurred in bargaining with Respondent. Chairman Battista and Member Liebman stated: "Reimbursement of negotiation expenses is therefore warranted to make the Union whole for the costs of its negotiations with the Respondent and to restore the status quo ante." Accordingly, the Respondent was ordered to reimburse the Union its negotiation expenses.

With the exception of the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to timely respond to the Union's August 9, 2000 information request, Member Schaumber agreed with his colleagues in all respects. He said that the requested information—the dollar amount of the Respondent's government contracts—was not presumptively relevant nor was its relevance demonstrated by the Union. Thus, he wrote, the Respondent was under no obligation to provide it.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Iron Workers Local 455; complaint alleged violation of Section 8(a)(1) and (5). Hearing held Dec. 10-14 and 18, 2001. Adm. Law Judge Steven Fish issued his decision Dec. 27, 2002.

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Ryan Iron Works, Inc. (1-CA-33353, et al.; 345 NLRB No. 56) Raynham, MA Aug. 27, 2005. The Board affirmed the administrative law judge's recommendations and ordered that the Respondent make payments to the Union's Pension Fund for the strike replacement employees for the period December 8, 1995 (end of strike) to October 1, 2001, and for the employees whose entitlement under the Pension Fund had not vested as of the time they left the Respondent's employ prior to October 2001, and to pay interest on those payment. It reversed the judge's finding that the Respondent was not obligated to pay liquidated damages on the Pension Fund contributions that were delinquent. [HTML] [PDF]

The judge found that the Respondent is obligated to make the contributions to the Fund and to pay interest on these contributions, as set forth in the amended compliance specification. However, he found no evidence that payment of the 20-percent liquidated damages was necessary to make the Fund whole. Citing *G. T. Knight Co.*, 268 NLRB 468 (1983), the judge by implication suggested that some unproven lower percentage of liquidated damages may have been sufficient to make the Fund whole. He cited well-settled precedent that remedies for

violations of the Act are to be remedial not punitive, and found that the Respondent was not obligated to pay these liquidated damages because they were not shown to be remedial.

Chairman Battista and Member Liebman affirmed the judge in all respects, except his finding that the liquidated damages set forth in the compliance specification are not remedial, finding that the payments are necessary to make the Fund whole and, therefore, the Respondent is obligation to pay them. Accordingly, they ordered the Respondent to pay liquidated damages in the amount of 20 percent of the delinquent contributions but not less than the interest on such delinquency, and, in addition, pay interest on the delinquent contributions.

Member Schaumber agreed with the majority in all respects except he would not order the Respondent to pay liquidated damages in the amount of 20 percent of its delinquent contributions. In his view, such an award is not an appropriate make-whole remedy in the circumstances of this case. He would limit any award of liquidated damages to 5 percent, the minimum amount stated in the plan documents.

The Board's decision and order in the prior proceeding is reported at 332 NLRB 506 (2000). On July 16, 2001, the United States Court of Appeals for the First Circuit granted in part and denied in part, the Board's order. Following the court's decision, the Respondent, on October 1, 2001, began making contributions to the fund for all employees employed by the Respondent on that date, including its strike replacement employees. However, the Respondent did not make contributions for employees who had worked for less than 5 years (the vesting period under the Pension Fund), and whose employment had terminated before that date. Further, the Respondent did not make any contributions for replacement employees for hours worked before October 2001.

(Chairman Battista and Members Liebman and Schaumber participated.)

Hearing held April 23-24 and July 15, 2003. Adm. Law Judge Martin J. Linsky issued his supplemental decision October 29, 2003 and second supplemental decision March 30, 2004.

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BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station (20-CA-30455-1, et al.; 345 NLRB No. 39) Sacramento, CA Aug. 27, 2005. The administrative law judge found, and the Board agreed in the absence of exceptions, that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities or the union activities of other employees; threatening employees with subcontracting, loss of work assignments, and loss of employment; announcing and granting wage increases and a bonus program; and imposing restrictions on the rights of employees to discuss unions or other protected concerted activities. [HTML] [PDF]

The Board found merit in the General Counsel's exception and concluded that the Respondent further violated Section 8(a)(1) by telling employees that it could not increase wages

or other benefits, because of union activity, and soliciting grievances and implicitly promising to remedy them. Chairman Battista found that the Respondent's statements that it could not increase wages because the Union had filed a petition, to be truthful and lawful expression of the Respondent's concern about the potential consequences of granting a raise. In view of the Board's finding that the Respondent's grant of the wage increase was unlawful, Chairman Battista would not find that the Respondent's expressed and correct concern that this would be so was unlawful.

Chairman Battista and Member Liebman affirmed the judge's finding, in the absence of exceptions, that the Respondent denied an employee the right to representation at an interview which the employee reasonably believed might result in disciplinary action. They wrote: "Had there been timely exceptions, we would have reversed the judge and dismissed the allegation, retroactively applying *IBM Corp*., 341 NLRB No. 148 (2004), where a Board majority reversed *Epilepsy Foundation*, 331 NLRB 676 (2000), enfd. in part 268 F.3d 1095 (D.C. Cir. 2001), and held that employees in a nonunionized workplace do *not* have a right to representation at a disciplinary interview. While we affirm the finding of a violation pro forma, we decline to order a remedy." In the circumstances here, Member Schaumber would not adopt the judge's finding of a violation.

Chairman Battista and Member Schaumber affirmed the judge's conclusion that the General Counsel did not establish Section 8(a)(3) violations with respect to the five employees discharged on Nov. 7. In agreement with the judge, they found that the General Counsel failed to establish the requisite knowledge on the Respondent's part.

Contrary to the judge and her colleagues, Member Liebman would find that the General Counsel established the Respondent's knowledge, as well as the other elements of his initial burden of proof under *Wright Line*, that the Respondent knew about the union activities of the five employees it discharged—promptly after employees distributed and signed union authorization cards at work. Because the judge failed to make findings with respect to the Respondent's assertedly lawful reasons for the discharges, its *Wright Line* defense, she would remand the proceeding to the judge for consideration of the Respondent's defenses.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 150; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Sacramento, Sept. 16-20 and 23-25, 2002. Adm. Law Judge Jay R. Pollack issued his decision Jan. 31, 2003.

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Southern Mail, Inc. (16-CA-20779, et al.; 345 NLRB No. 43) Dallas, TX Aug. 27, 2005. The administrative law judge found, and the Board agreed, as set forth in its decision, that the Respondent committed numerous violations of Section 8(a)(1), Section 8(a)(3) and (1), and Section 8(a)(5) and (1) of the Act. Among others, it affirmed the judge's finding that the

Respondent violated: Section 8(a)(5) and (1) by transferring bargaining unit work to Leeway Transportation; Section 8(a)(5), (3) and (1) by changing its Department of Transportation (DOT) log disciplinary policy and, therefore, violated Section 8(a)(3) and (1) by discharging drivers Howard Cranford and Clyde Evans for DOT log violations; and Section 8(a)(5) and (1) by failing to bargain over changes to the Dallas to Denver run. [HTML] [PDF]

Contrary to the judge, the Board did not find that the Respondent unlawfully threatened employee Ron Dakin. While Dakin was in the office picking up timecards, Supervisor John Pool asked Dakin how the Union was coming along and told Dakin that the Respondent's owner, Tish Farrell, was considering cutting the drivers' runs to 40 hours a week. Dakin asked why and Pool replied that Farrell told him that if the Union got a contract that called for time-and-a-half pay over 40 hours she was not going to want to pay the extra money. The judge found that Pool's statement was a threat of loss of pay in violation of Section 8(a)(1). The Board disagreed, finding that viewed in context, the statement was not a threat of reprisal for employees' support of the Union, but was instead, a lawful discussion of possible contract proposals.

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by reducing employee Julio Gomez's work schedule by one day. They found that the General Counsel failed to show that Gomez's union activity was a motivating factor in the decision to reduce his hours. Member Liebman would adopt the judge's finding. In her view, the Respondent waived all arguments with respect to the independent Section 8(a)(3) finding concerning Gomez—and also with respect to the independent Section 8(a)(1) finding, which the majority also dismisses—except its contention that Gomez should not have been credited.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Postal Workers; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Fort Worth, on various days from Sept. 5-Nov. 6, 2001. Adm. Law Judge Pargen Robertson issued his decision March 6, 2002.

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St. Joseph News-Press (17-CA-20534, et al.; 345 NLRB No. 31) Saint Joseph, MO Aug. 27, 2005. Chairman Battista and Member Schaumber, with Member Liebman dissenting, found, contrary to the administrative law judge, that the Respondent's newspaper carriers and haulers are not employees under Section 2(3) of the Act, but are independent contractors excluded from the Act's protection under the standards of *Roadway Package Systems*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998). The majority dismissed the complaint alleging that the Respondent committed numerous violations against the independent contractors, including discharging carriers because of their activities for Teamsters Local 460. [HTML] [PDF]

The Respondent publishes a daily newspaper in Saint Joseph, Missouri. Haulers pick up the bundled papers at the plant and bring them to common drop points, where carriers pick them up. Carriers deliver papers to the Respondent's customers. They also place papers in newspaper racks, deliver to dealers, and drop newspapers at the post office to be mailed to subscribers.

The majority found that a comparison of the common law factors in this case with those factors in *Roadway* and *Dial-A-Mattress* demonstrated, on balance, that the carriers are independent contractors. The majority noted these factors in finding that the carriers here are independent contractors. The carriers provide their own "tools" of work, their vehicles and supplies; they receive little training from the Respondent; they are not supervised by the Respondent while performing the work; they may hire their own employees; they may work for more than one party; they can solicit new business; and they can subcontract their routes to others. Addressing the argument of the Union and its amicus that the carriers should be found to be employees because of their asserted lack of bargaining power, the majority explained that the status of persons as employees and independent contractors does not turn on differences in their relative bargaining power.

Contrary to the majority's view, Member Liebman found that the Respondent's substantial economic advantage over the carriers results in a relationship of economic dependence on the newspapers and is persuasive evidence that the carriers are employees, who are substantially dependent on the Respondent for their livelihood, not independent contractors who are economically independent business people. She said:

> The majority concedes that there is considerable evidence otherwise demonstrating that the carriers are employees, rather than independent contractors. The carriers' delivery work is an integral part of the newspapers business. They are relatively unskilled laborers. They are hired for an indefinite period rather than for a specific project. The newspaper retains other, undisputed employees who perform work similar to the carriers'. Moreover, as the judge found, the newspaper dictates the carriers' days of work and delivery times, and maintains the financial records that support the carriers' work.
>
> When these factors are matched with the evidence establishing the carriers' economic dependence on the newspaper, the result is clear under the common-law agency test: the carriers are employees under Section 2(3).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 460; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park, KS, Jan. 23-25, March 20-23, and April 10-13, 2001. Adm. Law Judge Albert A. Metz issued his decision Sept. 6, 2001.

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Steelworkers Local 14693 (9-CB-10982, 11007; 345 NLRB No. 46) Randolph, NY Aug. 27, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(b)(3) of the Act by disclaiming interest in representing certain employees in an

existing bargaining employees. Chairman Battista and Member Schaumber did not resolve the issue of whether the Respondent's conduct also violated Section 8(b)(1)(A), noting that such a violation would not add materially to the remedy. [HTML] [PDF]

Dissenting in part, Member Liebman would dismiss the allegation that the disclaimer also violated Section 8(b)(1)(A) because it somehow tended to restrain or coerce employees. In her view, even though the Union's disclaimer of interest violated Section 8(b)(3), that violation cannot support a finding that Section 8(b)(1)(A) was also violated.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Skibeck, P.L.C., Inc.; complaint alleged violation of Section 8(b)(1)(A) and (3). Hearing waived. Adm. Law Judge John T. Clark issued his decision Sept. 13, 2004.

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The Salvation Army (13-CA-39080; 345 NLRB No. 38) Chicago, IL Aug. 27, 2005. The Board upheld the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Kalaveeta Dean because she engaged in protected concerted activity. [HTML] [PDF]

The Board denied the Respondent's motion to reopen the record to adduce evidence relating to the contention that the Board lacks jurisdiction pursuant to the test for religiously affiliated educational institutions established by the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (2002). In that case, the Board, in asserting jurisdiction over faculty members at a university owned by a Roman Catholic religious order, applied the "substantial religious character test" set forth in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and found that the university's purpose and function to be primarily secular. The Court decided that the Board applied the wrong test and should decline to assert jurisdiction over an educational institution if it (1) "holds itself out to students, faculty and community as providing a religious educational environment"; (2) "is organized as a nonprofit"; and (3) "is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious institution, or with an entity, membership of which is determined at least in part, with reference to religion . . . ." *University of Great Falls*, 278 F.3d 1343.

Chairman Battista and Member Liebman found it appropriate to assert jurisdiction here, noting that while the Respondent is a religious institution, the function involved, unlike those found in *University of Great Falls*, is not one of religious education, and the employee at issue is not a teacher. They concluded that the Board's decision in *Hanna Boys Center*, 284 NLRB 1080, 1083 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992), is applicable. *Hanna* involved a Catholic residential facility for boys and a unit of child-care workers, recreation assistants, cooks, cooks-helpers, and maintenance employees. The Board asserted jurisdiction, saying that "[t]he sensitive first amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case."

Chairman Battista and Member Liebman observed that the Salvation Army is an international not-for-profit organization engaged in many charitable and social service programs. The program involved in this case is the Community Correctional Center that the Salvation Army maintains within the City of Chicago under contracts with the Federal Bureau of Prisons to provide pre-release services for persons released from prison and for persons serving probationary sentences. The residents are assigned a case manager or resident advisor (RA), like the employee at issue here. The RA description lists 22 enumerated job responsibilities and four qualifications for the job, including one that refers to the "Salvation Army's vision of human service and social justice."

Chairman Battista and Member Liebman, noted that the Board, with court approval has previously asserted jurisdiction over Salvation Army facilities similarly devoted to its "vision of human and social justice," including over teachers, a janitor, a cook, and a social worker at a Salvation Army child care center after finding that the day care center was primarily concerned with custodial care of young children. They decided that the Salvation Army here is also primarily concerned with rehabilitative care, albeit of adults. Accordingly, Chairman Battista and Member Liebman were satisfied that the sensitive issues raised by the Board's assertion of jurisdiction over religiously affiliated educational institutions are not present in this case and denied the Respondent's motion to reopen the record.

In his concurring opinion, Member Schaumber said he agreed with his colleagues in denying the Respondent's motion to reopen the record. He wrote separately to provide a fuller discussion of the applicable case law.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Kalaveeta Dean, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Chicago, Aug. 6-7, 2001. Adm. Law Judge C. Richard Miserendino issued his decision Feb. 12, 2002.

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The Wackenhut Corp. (12-CA-23294, et al.; 345 NLRB No. 53) Turkey Point, FL Aug. 27, 2005. In agreement with the administrative law judge, Members Liebman and Schaumber held that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by eliminating job classifications because the employees occupying those jobs have chosen to be represented by Security, Police and Fire Professionals; unilaterally altering the scope of any certified or recognized bargaining unit without the consent of the collective-bargaining representative of employees in the unit; and failing to timely furnish information requested by the Union that is relevant to and necessary for the Union's performance of its statutory functions as employees' exclusive collective bargaining representative. Chairman Battista concurred in part and dissented in part. [HTML] [PDF]

The Respondent provides guard and security services to Florida Power & Light (FPL). At issue is whether the Respondent's unilateral elimination of bargaining unit positions and

transfer of bargaining unit work outside the unit were lawful because they were allegedly mandated by the contract bid specification of a third party. Prior to Sept. 1, 2003, the Respondent employed four categories of employees at Turkey Point: captains, lieutenants, sergeants, and security officers. The category "security officer" included CAS/SAS (Central Alarm Station/Secondary Alarm Station) operators, unarmed security officers/watchmen, and part-time security officers.

When FPL issued a request for proposals with bid specifications for a new security contract to replace the 1998 agreement between FPL and the Respondent, the bid specification contained the following "staffing" provision:

> Contractor will provide security force personnel in accordance with the organization structure defined by the company in Attachment A to this Nuclear Site Security Specification. (Attachment A identified the positions and the number of persons in each position that FPL expected its security to provide.)
>
> Contractor supervisors will be defined as non-bargaining personnel. Additionally, all personnel assigned to operate CAS/SAS functions shall be supervisors. . . .

In accord with the bid specification, all CAS/SAS operations were performed by lieutenants, and those former CAS/SAS operators who had not become lieutenants were reassigned by the Respondent to field duties, with no reduction in pay or benefits. Five former sergeants who did not seek one of the new supervisory positions were demoted to security officers with a reduction in pay.

The judge found, among others, that the Respondent violated Section 8(a)(5) and (1) by eliminating the sergeant position and transferring the sergeants' duties to lieutenants, altering the scope of the sergeants bargaining unit. He rejected the Respondent's assertion that the elimination of the sergeant position was mandated by the FPL bid specification. The judge concluded that the Respondent did not violate Section 8(a)(5) and (1) by eliminating the bargaining-unit CAS/SAS operator positions because its actions were mandated by the FPL bid specification.

The majority found that the Respondent has failed to establish that the bid specification, which does not mention the sergeants, mandated its elimination of the sergeant positions. They further found that the Respondent failed to prove that the new CAS/SAS-operating lieutenants were statutory supervisors. Accordingly, they reversed the judge and found that the Respondent violated Section 8(a)(5) and (1).

Chairman Battista said that while he agreed with the result reached by his colleagues as to the sergeants, he does not agree with all of their rationale. He also disagreed with the result as to the CAS/SAS employees. The Chairman believes that, with respect to the CAS/SAS function,

the FPL required that the CAS/SAS function be performed by non-unit personnel and accordingly, there was no decision about which the Respondent was required to bargain and no violation of Section 8(a)(5).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Security, Police and Fire Professionals; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, March 15-18, 2004. Adm. Law Judge Michael A. Marcionese issued his decision Sep. 7, 2004.

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United States Postal Service (28-CA-19148(P), et al.; 345 NLRB No. 26) Albuquerque, NM Aug. 27, 2005. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with Postal Workers Local 380 by failing to provide requested information that was relevant and necessary to the Union as exclusive representative; and violated Section 8(a)(1) by refusing to permit union steward John Orlovsky to speak with his union representative and failing to notify Orlovsky and his union representative of charges prior to an investigatory interview. [HTML] [PDF]

There were no exceptions to the judge's findings that the Respondent violated Section 8(a)(3) by taking adverse actions, culminating in discharge, against Orlovsky because of his union activities and violated Section 8(a)(1) by threatening employees with reprisals because of their union activities and telling employees that the Respondent discharged Orlovsky because of his union activities.

Chairman Battista and Member Liebman affirmed the judge's broad injunctive language, enjoining the Respondent from "in any other manner" violating the employees' Section 7 rights. Relying on *Postal Service*, 345 NLRB No. 25, they disagreed with dissenting Member Schaumber's contention that a broad order in this case is inappropriate under *Hickmott Foods*, 242 NLRB 1357 (1979) or *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). The majority pointed out that shortly before the Respondent's refusals to provide information in this case, the Tenth Circuit had issued a broad order against the Respondent based upon a settlement agreement resolving information request violations occurring at the Respondent's Albuquerque facilities. (*NLRB v. USPS*, Case No. 02-9587 (unpub. consent judgment entered Jan. 8, 2003)).

Chairman Battista and Member Liebman also noted that the Respondent unlawfully threatened, disciplined, and discharged a union steward in retaliation for his union activity, including his filing of information requests, saying the latter conduct is the very conduct which the previous order sought to remedy. They disagreed with the dissent's assertion that the Respondent's unlawful actions were directed "almost exclusively towards a single employee," noting that after the Respondent unlawfully disciplined and discharged Orlovsky, it unlawfully warned assembled employees that a similar fate awaited those who encouraged zealous action.

Member Schaumber, dissenting from the issuance of a broad cease-and-desist order, noted that the Supreme Court has made clear that broad orders must be reserved for egregious cases in which the violations are so severe or so numerous and varied as to truly manifest a general disregard for employees' fundamental employees rights" and that is not the case here.

The Board limited the posting of the notice to the Respondent's Vehicle Maintenance Facility, the Auxiliary Service Facility, and the main plant where the Respondent's misconduct occurred rather than at all Respondent facilities in Albuquerque as recommended by the judge.

(Chairman Battista and Member Liebman and Schaumber participated.)

Charges filed by Postal Workers Local 380; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Albuquerque, June 21-24, 2004. Adm. Law Judge Margaret G. Brakebusch issued her decision Sept. 8, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Shakespeare's Inc. (Individuals) Cedar Rapids, IA August 29, 2005. 18-CA-17457, 17458; JD(ATL)-36-05, Judge William N. Cates.

Better Comfort Systems, Inc. (Sheet Metal Workers Local 17) Malden, MA August 29, 2005. 1-CA-41409, 41694; JD(NY)-39-05, Judge Joel P. Biblowitz.

T-West Sales & Service, Inc. d/b/a Desert Toyota (Machinists Local 845) Las Vegas, NV August 24, 2005. 28-CA-20207; JD(SF)-60-05, Judge William G. Kocol.

Gerber Poultry, Inc. (Food & Commercial Workers Local 880) Kidron, OH August 29, 2005. 8-CA-35368, et al.; JD(ATL)-40-05, Judge George Carson II.

Marcor Remediation Inc. (Operating Engineers Local 400, Laborers Local 1334, and Carpenters Local 28) Libby, MT August 24, 2005. 19-CA-29398, 29414; JD(SF)-58-05, Judge William L. Schmidt.

University Moving & Storage Co. (Teamsters Local 243) Farmington Hills, MI August 29, 2005. 7-CA-47352, 47750; JD-70-05, Judge Paul Bogas.

Ocean State Jobbers, Inc., d/b/a Ocean State Job Lot (Food & Commercial Workers Local 328) North Kingston, RI August 30, 2005. 1-CA-42065; JD-68-05, Judge David L. Evans.

Journal Register East d/b/a New Haven Register (Laborers Local 455) New Haven, CT August 31, 2005. 34-CA-11070, 11085; JD-69-05, Judge Wallace H. Nations.

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TEST OF CERTIFICATION

(In the following case, 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.)

Gruma Corp. d/b/a Mission Foods (Food & Commercial Workers Local 99) (28-CA-20161; 345 NLRB No. 49) Tempe, AZ August 27, 2005. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

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

SK USA Cleaners, Inc., Garfield, NJ, 22-RC-12619, Aug. 30, 2005 (Chairman Battista and Member Liebman)

DECISION AND CERTIFICATION OF REPRESENTATIVE

American Concrete Products, Inc., Morgan Hill, CA, 32-RC-5343, Sept. 2, 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)

ESS Support Services Worldwide, a Subsidiary of Compass Group USA, Inc., St Croix, VI, 24-RC-8471, Aug. 30, 2005 (Chairman Battista and Member Liebman)
SUD-Chemie, Inc., Louisville, KY, 9-RC-18011, Aug. 30, 2005 (Chairman Battista and Member Liebman)

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Miscellaneous Decisions and Orders

ORDER REMANDING [to Regional Director for further consideration in light of *St. Joseph News-Press,* 345 NLRB No. 31]

The Arizona Republic, a Div. of Phoenix Newspapers, Inc., Phoenix, AZ, 28-RC-6304, Aug. 27, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)
Courier Journal, a Div. of Gannett Kentucky Limited Partnership, Louisville, KY, 9-RC-17809, Aug. 27, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)
Courier Journal, a Div. of Gannett Kentucky Limited Partnership, McLean, VA, 9-RC-17754, Aug. 27, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)
Courier Journal, a Div. of Gannett Kentucky Limited Partnership, Louisville, KY, 9-RC-17807 Aug. 27, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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