



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED

ADB Utility Contractors, Inc.	St. Louis, MO	1
ATC of Nevada	Las Vegas, NV	1
Alyeska Pipeline Service Co.	Anchorage, AK	2
Amcast Automotive of Indiana, Inc.	Gas City, IN	3
Barstow Community Hospital	Barstow, CA	4
Bay Harbour Electric, Inc.	Erie, PA	5
Bellaire Medical Center	Houston, TX	6
Electrical Workers IBEW Local 2321 (Verizon New England)	Boston, MA	6
GFC Crane Consultants, Inc.	Ft. Lauderdale, FL	7
HQM of Bayside, LLC	Lexington Park, MD	7
Hacienda Hotel, Inc.	El Segundo, CA	8
Loyalhanna Care Center	Trafford, PA	8
RCC Fabricators, Inc.	Southampton, NJ	9

Raley's and United Wholesalers & Retailers Union (UWRU)	Sacramento, CA	9
Talmadge Park, Inc.	East Haven, CT	10
Terry Machine Co.	Waterford, MI	11
Universal Truss, Inc.	Fontana, CA	11
Wal-Mart Stores, Inc.	Fort Smith, AR	12
Weldon, Williams & Lick, Inc.	Fort Smith, AR	13

OTHER CONTENTS

List of Decisions of Administrative Law Judges	14
No Answer to Compliant Case	14
Test of Certification Case	14
List of Unpublished Board Decisions and Orders in Representation Cases	15
<ul style="list-style-type: none"> • Contested Reports of Regional Directors and Hearing Officers • Requests for Review of Regional Directors' Decisions and Directions of Elections and Decisions and Orders • Miscellaneous Board Orders 	

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ADB Utility Contractors, Inc. (14-CA-27386, et al.; 348 NLRB No. 53) St. Louis, MO Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening of the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare, Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

On Sept. 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Croft Metals*, and *Golden Crest*, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). These cases specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act.

This case involves allegations that the Respondent discharged 13 individuals because of their activities for Electrical Workers IBEW Local 2. In defense, the Respondent denied that it violated the Act and contended that 8 of the 13 discharged employees were supervisors within the meaning of *Kentucky River*.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Electrical Workers IBEW Local 2; complaint alleged violation of Section 8(a)(1) and (3). Hearing at St. Louis, on 16 days between Aug. 4, 2003 and Feb. 5, 2004. Adm. Law Judge Benjamin Schlesinger issued his decision May 10, 2005.

ATC, LLC d/b/a ATC of Nevada (28-CA-20076, 20197; 348 NLRB No. 43) Las Vegas, NV Sept. 29, 2006. 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 provide Amalgamated Transit Local 1637 with information it requested concerning nonbargaining unit persons performing bargaining work, employees who no longer worked on their bids, and forced overtime work; Section 8(a)(2) and (1) by dealing with a labor organization other than Local 1637 in processing employee grievances; and Section 8(a)(1) when it directed four employee-union officers, under a threat of suspension, to complete a written questionnaire seeking information about a potential work stoppage. [\[HTML\]](#) [\[PDF\]](#)

No exceptions were filed to the judge's finding that the Respondent did not violate Section 8(a)(5) by implementing a memorandum of understanding that was agreed to by the Union and the Respondent, but was subsequently rejected by a vote of the Union's members. The General Counsel alleged in the complaint that the Respondent violated Section 8(a)(5) by processing a grievance filed by a union that was not the exclusive collective-bargaining

representative of the unit employees, but never pursued the allegation at the hearing or in subsequent submissions. The judge did not address the allegation and no exceptions were filed to the judge's failure to address the complaint allegation.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Amalgamated Transit Local 1637; complaint alleged violation of Section 8(a)(1), (2), and (5). Hearing at Las Vegas, Nov. 7-9, 2005. Adm. Law Judge William G. Kocol issued his decision Feb. 27, 2006.

Alyeska Pipeline Service Co. (19-RC-14600; 348 NLRB No. 44) Anchorage, AK Sept. 29, 2006. After consideration of the Employer's request for review, Chairman Battista and Member Kirsanow reversed the Regional Director's Supplemental Decision and Direction of Election and remanded the proceeding to the Regional Director for further appropriate action. Member Walsh dissented. [\[HTML\]](#) [\[PDF\]](#)

The Petitioner (PACE Local 8-0369) sought to represent a unit of all operations and maintenance technicians at the Employer's Valdez Marine Terminal (VMT) facility, relying on the Board's longstanding presumption that a single-facility unit is appropriate for collective bargaining. The Employer contended that an alternative presumption should apply, namely, the "public utility" presumption that a systemwide unit is optimal. In its request for review, the Employer asserted that the Regional Director should have applied the "public utility presumption" and found only a systemwide unit of technicians to be appropriate.

The Trans Alaska Pipeline System (TAPS) is owned by five companies that formed the Alyeska Pipeline Service Co. for the purpose of operating and maintaining the pipeline system. The pipeline and VMT are a functionally integrated system designed to move crude oil from one point to another. The Regional Director noted that the Board has not decided whether to extend the public utility presumption to the crude oil industry. In determining whether the presumption should be applied, he found that the public utility presumption has been applied only to traditional public utilities such as electricity, natural gas, telephone, and cable television services, where the employers provide an essential service directly to the public and are the only providers of that service.

The Regional Director found that TAPS is merely a common carrier pipeline, moving oil from one point to another. He found that TAPS is not a "public utility" under Board law, and thus the systemwide unit presumption is not applicable. The Regional Director further found that the petitioned-for technicians at the VMT constitute a presumptively appropriate single-facility unit, and that the Employer failed to rebut the presumption. He therefore directed an election in a unit limited to VMT technicians. The Regional Director noted, however, that if TAPS were found to be a public utility under Board law, he would conclude differently and find that a systemwide unit of technicians would be the only appropriate unit.

Chairman Battista and Member Kirsanow wrote that the Board has not addressed the application of the systemwide “public utility” presumption to crude oil pipelines, but it has applied the systemwide presumption to natural gas pipelines that provide a vital service to public utilities. The majority further wrote: “The Board did not specifically find the natural gas pipelines to be public utilities per se, but nonetheless found that the public utility systemwide presumption should apply because the pipelines are relied on as the source of supply for public utilities.” *Michigan Wisconsin Pipe Line Co.*, 194 NLRB 569, 470 (1971), et al. Accordingly, Chairman Battista and Member Kirsanow found that the systemwide presumption should apply here as it does in the natural gas pipeline cases, whether or not the Employer is deemed to be a “public utility.” The majority wrote:

The Board’s presumption in favor of a systemwide unit is based, at least in part, on the judgment that an increase in the number of units leads to an increase in the number of potential labor disputes and work stoppages. And, given the essential nature of the transport of crude oil by TAPS, and the potentially serious consequences of a work stoppage, either on the pipeline or at the VMT, increasing the likelihood of a disruption by finding a less than systemwide unit to be appropriate is unacceptable.

Dissenting Member Walsh concluded that the petitioned-for single-facility unit of technicians working at the Employer’s VMT facility is an appropriate unit for collective bargaining. He wrote that the Petitioner has satisfied all three prongs of the rebuttal test and has shown by compelling evidence that a less than systemwide unit is appropriate in this case. Member Walsh would, therefore, direct an election in the petitioned-for unit of VMT technicians.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Amcast Automotive of Indiana, Inc. (25-CA-29199; 348 NLRB No. 47) Gas City, IN Sept. 29, 2006. The Board affirmed the administrative law judge’s findings that the Respondent violated Section 8(a)(1) of the Act by telling John Rowe that activity for the Auto Workers played a role in his discharge. Chairman Battista and Member Schaumber, with Member Walsh dissenting, reversed the judge’s findings that the Respondent violated Section 8(a)(3) and (1) by discharging Rowe and Section 8(a)(1) by interrogating Rowe. They found that the General Counsel failed to establish that the Respondent unlawfully discharged Rowe and that Manufacturing Manager Wilbur Kline’s single question to Rowe about whether there was any truth to “the rumors,” referring to a possible union organizing drive, reasonably tended to restrain, coerce, or interfere with Rowe’s exercise of his Section 7 rights. [\[HTML\]](#) [\[PDF\]](#)

Rowe searched the Internet for information about a company called KPS on three separate occasions during working hours after hearing a rumor that KPS was purchasing the Respondent’s Gas City facility. At times, employee Gene Sage, Jr. joined Rowe at his computer

to view KPS-related websites. On one occasion, Rowe printed documents related to KPS on a printer located in his immediate Supervisor John Stambaugh's office, gave the documents to Stambaugh to read, and placed them on a table in the tool room for other employees to read. Upon being told that Rowe was accessing the Internet to get information on KPS, Human Resources Manager Larry Henn requested a report of every computer at the facility that had accessed the KPSfund.com website during the period from May 7-14. The report showed that Rowe had spent approximately 29 minutes accessing nonwork-related worksites during working hours between May 11 and 14, 2004. The Respondent discharged Rowe because his Internet usage violated employee work rules against loitering on the job, misuse of company equipment, and wasting time.

The judge found that two of Rowe's activities were protected: (1) his activity of surfing the Internet for information on KPS; and (2) his union activity in 1999 and 2002. Chairman Battista and Member Schaumber decided that neither is sufficient to support the General Counsel's case. First, although Rowe's Internet activity may have been concerted, it was not protected because there is insufficient evidence of a link between Rowe's activity and the employees' working conditions. Second, although Rowe engaged in union activity at times during his employment with the Respondent, the General Counsel failed to establish that union activity was a motivating factor in Rowe's discharge.

Member Walsh would find Kline's questioning of Rowe coercive, considering the totality of circumstances as required by *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *NLRB v. Hotel Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985). He agreed with the judge that the Respondent unlawfully discharged Rowe because of his actual or suspected union and other protected activity when he searched the Internet for information about KPS. Member Walsh said the Respondent's claim that Rowe engaged in misconduct warranting his discharge "is seriously undermined by the fact that Stambaugh effectively condoned Rowe's conduct." He noted that Stambaugh was aware of Rowe's Internet activity, yet he never told Rowe that he had violated any company rule, that he had engaged in any misconduct, or that he should stop using his computer to learn about KPS.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by John Rowe, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Marion, Nov. 15-16, 2004 and at Fort Wayne, Jan. 25-26, 2005. Adm. Law Judge Ira Sandron issued his decision June 16, 2005.

Barstow Community Hospital-Operated by Community Health Systems, Inc. (31-CA-26057; 348 NLRB No. 58) Barstow, CA Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if

warranted, reopening the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

On Sept. 29, 2006, the Board issued its decisions in *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest*, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2002). The three cases specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by the Nurses Association of California; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, June 30 and July 1, 2003. Adm. Law Judge Lana H. Parke issued her decision Aug. 29, 2003.

Bay Harbour Electric, Inc. (6-CA-32166, et al.; 348 NLRB No. 59) Erie, PA Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

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(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Chris Watkins, an Individual and Electrical Workers IBEW Local 306; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Cleveland, May 7-10 and May 29-30, 2002. Adm. Law Judge David L. Evans issued his decision Nov. 25, 2002.

Bellaire General Hospital, LP, d/b/a Bellaire Medical Center (16-CA-22556, et al.; 348 NLRB No. 57) Houston, TX Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare, Croft Metals*, and *Golden Crest*, framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

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(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Dannie Denise Coleman, Linda A. Coleman, and Iolene V. Williams, Individuals; complaint alleged violation of Section 8(a)(1). Hearing at Houston, June 30, July 1-3, and 8-9, 2003. Adm. Law Judge Margaret G. Brakebusch issued her decision Sept. 25, 2003.

Electrical Workers IBEW Local 2321 (Verizon New England) (1-CB-10559; 348 NLRB No. 50) Boston, MA Sept. 29, 2006. The Board, concluding that the complaint does not sufficiently set forth grounds for finding a violation of Section 8(b)(1)(A) of the Act, denied the General Counsel’s motion for summary judgment notwithstanding that the Respondent has admitted all of the factual allegations and legal conclusions in the complaint. It did so without prejudice to the Region amending the complaint and remanded the case to the Regional Director for further action. [\[HTML\]](#) [\[PDF\]](#)

The complaint alleges, among others, that the Respondent “charged” Gregory Burns in retaliation for his failure to participate in a concerted refusal to perform voluntary overtime work requested by Verizon New England.

The Board wrote: “Assuming that the charges referred to in the complaint were internal union fines, we note that such fines, within certain limitations, are permissible. See *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (‘Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.’).” The Board explained that while Unions are not permitted to discipline members who refuse to engage in unprotected activity which would subject them to

lawful discipline by their employer, a concerted refusal to work voluntary overtime is protected activity and a union does not violate Section 8(b)(1)(A) by imposing a reasonable fine on one of its members for refusing to participate in such protected concerted activity.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Gregory S. Burns, an individual; complaint alleged violation of Section 8(b)(1)(A). General Counsel filed motion for summary judgment June 22, 2006.

GFC Crane Consultants, Inc. (12-CA-21302, et al.; 348 NLRB No. 51) Ft. Lauderdale, FL Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening of the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. [\[HTML\]](#) [\[PDF\]](#)

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(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by District 1-Pacific Coast District, Marine Engineers Beneficial Association; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Tampa, Dec. 10-14, 2001. Adm. Law Judge Pargen Robertson issued his decision April 4, 2002.

HQM of Bayside, LLC (5-CA-30964; 348 NLRB No. 42) Lexington Park, MD Sept. 29, 2006. In affirming the administrative law judge's finding, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Food & Commercial Workers Local 400 as the employees' collective-bargaining representative because the evidence on which the Respondent relied did not demonstrate the Union's actual loss of majority status. In addition, it agreed with the judge's recommendation that an affirmative bargaining order is warranted to remedy the Respondent's unlawful withdrawal of recognition. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Food & Commercial Workers Local 400; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Washington, D.C. on Oct. 14, 2003. Adm. Law Judge Karl H. Buschmann issued his decision Feb. 25, 2004.

Hacienda Hotel, Inc. (31-CA-26945; 348 NLRB No. 49) El Segundo, CA Sept. 29, 2006. The Board affirmed the administrative law judge's finding and held that the Respondent violated Section 8(a)(5) and (1) of the Act by bypassing UNITE HERE Local 11 and engaging in direct dealing with its bargaining unit employees by involving itself in an unauthorized ratification vote on its own contract proposal; violated Section 8(a)(3) and (1) by issuing warning notices to its employees because they engaged in protected concerted activities that it believed were authorized by the Union; and violated Section 8(a)(1) by threatening its employees with reprisals or negative consequences because they engaged in activities in support of the Union, and with disciplinary hearings for engaging in protected concerted activities that it believed were authorized by the Union and thereby impliedly threatening its employees with reprisals if they engaged in activities in support of the Union. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by UNITE HERE, Local 11; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Los Angeles, Nov. 14-18, 2005. Adm. Law Judge Burton Litvack issued his decision May 31, 2006.

Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center, a Pennsylvania Limited Partnership (6-CA-28609, et al.; 348 NLRB No. 54) Trafford, PA Sept. 30, 2006. The Board to remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening the record to obtain relevant evidence to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

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In an earlier decision reported at 332 NLRB 933 (2000), the Board overruled the judge's finding that registered nurses Cynthia Clark, Erica Lewis, and Melanie Fritz are statutory supervisors. It concluded that the nurses do not exercise independent judgment with regard to any of the indicia of supervisory authority set forth in Section 2(11) of the Act. The Respondent subsequently appealed the Board's decision in the United States Court of Appeals for the Third Circuit and the Board filed a cross-application for enforcement. In January 2001, the Board filed in the Third Circuit an unopposed motion to hold the case in abeyance, pending a decision by the Supreme Court in *Kentucky River*.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge Irwin H. Socoloff issued his decision April 7, 1998.

RCC Fabricators, Inc. (4-CA-31757, 4-RC-20569, 20572; 348 NLRB No. 56) Southampton, NJ Sept. 30, 2006. The Board remanded the case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening of the record to obtain relevant evidence to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

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(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Carpenters Metropolitan Regional Council of Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland; complaint alleged violation of Section 8(a)(1). Hearing at Philadelphia, April 8 and 10 and May 15, 2003. Adm. Law Judge Paul Buxbaum issued his decision Oct. 23, 2003.

Raley's and United Wholesalers & Retailers Union (20-CA-24973, et al., 20-CB-9623, et al.; 348 NLRB No. 25) Sacramento, CA Sept. 29, 2006. The Board affirmed the administrative law judge's findings that (1) specific actions by the Respondent Employer (Raley's) at some of its individual stores in Sept. 1993 did not unlawfully assist the Respondent Union (United

Wholesalers & Retailers Union (UWRU)), an independent union then named United Drug Center Employees Association (UDCEA); (2) Raley's did not unlawfully assist UDCEA in September 1993 in obtaining a unit majority of signatures from Raley's drug clerks authorizing UDCEA to represent them, and did not unlawfully recognize UDCEA; and (3) Raley's and UDCEA lawfully entered into a collective-bargaining relationship and enforced UDCEA's dues-paying requirements. It also affirmed the judge's findings that the Respondents are not entitled to attorney fees from the General Counsel. [\[HTML\]](#) [\[PDF\]](#)

This case involves the competition between Food and Commercial Workers Local 58 and UDCEA to replace the Independent Drug Clerks Association (IDCA) as the representative of the drug clerks who worked in the pharmacy departments of Raley's California stores, after IDCA disclaimed interest in representing them. The judge found that when Raley's recognized UDCEA, 355 out of 673 drug clerks had objectively manifested their wish to be represented by UDCEA. Raley's did not except to the judge's findings that in Sept. 1993 Raley's violated Section 8(a)(1) in a few isolated instances at its stores in Fair Oaks and Placerville, and violated Section 8(a)(3) by giving IDCA's president Gilbert Eidam an unlawful disciplinary warning. The Board adopted, among others, the judge's finding that Raley's actions in violation of Section 8(a)(1) at its Fair Oaks and Placerville stores, from which UDCEA did not obtain any employee signatures, did not violate Section 8(a)(2) or taint UDCEA's majority showing.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by Independent Drug Clerks Association, Food and Commercial Workers Local 588, and Individuals; complaint alleged violation of Section 8(a)(1), (2), (3), and (5), and Section 8(b)(1)(A) and (2). Hearing at Sacramento for 63 days between Aug. 19, 1996 and Aug. 25, 1997. Adm. Law Judge Timothy D. Nelson issued his decision Nov. 29, 2000.

Talmadge Park, Inc. (34-CA-11295, 34-RC-2136; 348 NLRB No. 52) East Haven, CT Sept. 30, 2006. The Board remanded this case to the administrative law judge for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening of the record to obtain relevant evidence to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. The Board ordered the judge to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate on remand. [\[HTML\]](#) [\[PDF\]](#)

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(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by New England Health Care Employees District 1199, SEIU; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford, April 3-5, 2006. Adm. Law Judge Richard A. Scully issued his decision July 17, 2006.

Terry Machine Co., A Div. of S.P.S. Technologies, Inc. (7-RC-21581; 348 NLRB No. 55) Waterford, MI Sept. 30, 2006. The Board remanded this case to the Regional Director for further consideration in light of its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39. It allowed the parties to file briefs on the issue, and, if warranted, reopening of the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework. [\[HTML\]](#) [\[PDF\]](#)

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In a refusal-to-bargain case, the Respondent contested the Board’s certification of Auto Workers Local 15 as the exclusive representative of its employees. On May 24, 2005, the Board remanded and reopened the record in this underlying representation case.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Universal Truss, Inc., a Div. of Universal Forest Products, Inc. (31-CA-25477, et al.; 348 NLRB No. 41) Fontana, CA Sept. 29, 2006. The Board affirmed the administrative law judge’s findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging economic strikers Jose Ramon Flores and Rodolfo Navidad for alleged strike-related misconduct, but they reversed his finding that the discharges of eight others—Jose Becerril, Fidel Burciaga, Juan Lopez, Enrique Luqueno, Eduardo Martinez Mejia, Miguel Angel Padilla, Alfredo Raya, and Juan Carlos Vazquez—were unlawful. Member Walsh, dissenting in part, agreed with the judge that the Respondent unlawfully discharged Luqueno, Padilla, Raya, Mejia, and Burciaga. [\[HTML\]](#) [\[PDF\]](#)

Four days into the strike, several strikers and an associate followed a car carrying three nonstriking employees to an offsite parking lot, where the strikers assaulted the employees, and beat one of them, Luis Samayoa, so severely that he was knocked unconscious and required overnight hospitalization. The strikers also vandalized the nonstrikers’ vehicle, flattening two tires, denting a door, and breaking the tail lights. The next day, other strikers endorsed the assault against Samayoa, asking employees as they arrived in vans to work, “[D]o you want what

happened to [Samayoa] to happen to you?” One striker made this threat while aiming and shooting an imaginary gun at employees. During the remainder of the strike, strikers engaged in other misconduct, including threatening workers and their families with various acts of violence, and to follow workers home and rape female employees and the wives of male workers.

Chairman Battista and Member Schaumber observed that it is appropriate to consider all of the circumstances in which the alleged strike misconduct occurred, including other instances of vandalism, threats and violence occurring during the course of the strike because threats to inflict similar harm in the future are likely to have a greater coercive impact. Here, they noted that there were a large number of relevant circumstances, including: the ambush and violent assault on Samayoa, and the strikers’ endorsement of that beating and threats to repeat it; “the threats of rape and beatings”; the following of employees home and harassment of employees while driving; the rock throwing; the vandalism and other attempts at vandalism; and the repeated incidents of sexual harassment. “This pattern of coercive misconduct directed at nonstrikers can, and does, color the subsequent similar threats directed at other employees,” Chairman Battista and Member Schaumber wrote.

Member Walsh noted that the Respondent’s belief that Burciaga engaged in serious strike misconduct was mistaken. Regarding Luqueno, Padilla, Raya, and Mejia, he concluded that their alleged acts do not meet the test for serious strike misconduct established by *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), adding: “In finding to the contrary, the majority misapplies the *Clear Pine Mouldings* standard, ignores the balancing of interests the Board must undertake in strike-misconduct cases, and condones the principle of collective punishment.”

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Cabinet Makers, Millmen and Industrial Carpenters Local 721; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles for 17 days between Nov. 4, 2002 and Feb. 19, 2003. Adm. Law Judge James J. Kennedy issued his decision Aug. 28, 2003.

Wal-Mart Stores, Inc. (28-CA-16832, et al.; 348 NLRB No. 46) Fort Smith, AR Sept. 29, 2006. The Board held that any attorney-client privilege with respect to the Respondent’s production of certain documents and files has been waived and that the Respondent must now produce them to the extent they are relevant to the complaint allegations. It remanded the proceeding to the judge to reopen the record to receive relevant evidence, to make findings, and to take further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

During the underlying unfair labor practice hearing, the General Counsel served the Respondent with a subpoena duces tecum requiring it to produce, among other things, documents and electronic files from the Respondent’s “Remedy System” for the years 2000 through 2004. The Respondent moved to quash those portions of the subpoena on the basis that the documents

and files in the Remedy System were protected from disclosure by the attorney-client privilege and as attorney work product. The administrative law judge agreed and granted the motion to quash.

While the case was pending at the Board, the Respondent filed a motion to supplement the record, advising that in January 2004, pursuant to a court order in an unrelated State court proceeding, the Respondent had produced the Remedy System documents subpoenaed by the General Counsel. Thereafter, the Board issued a notice to show cause why the asserted privilege should not be deemed waived.

In this Order, the Board wrote in reversing the judge's ruling quashing the subpoena: "Once waived, the attorney-client privilege is lost in all forums for proceedings running concurrent with or after the waiver occurs." See, e.g., *Genentech, Inc. v. U.S. International Trade Commission*, 122 F.3d 1409, 1416-1417 (Fed. Cir. 1997). It found that the Respondent's disclosure took place while the case was pending before the Board on exceptions and because litigation of this unfair labor practice case is an ongoing matter, the Respondent's waiver of the privilege in the State court proceeding precludes the Respondent from asserting it in this case.

(Chairman Battista and Members Liebman and Schaumber participated.)

Weldon, Williams & Lick, Inc. (26-CA-21926; 348 NLRB No. 45) Fort Smith, AR Sept. 29, 2006. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Dale Morfey. It decided that the Respondent's stated reason for discharging Morley was pretextual, and that the facts of this case warrant an inference that the Respondent's true motive was an unlawful one that it wished to conceal. *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115 fn. 17 (1999). [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber, with Member Walsh dissenting, reversed the judge's finding that the Respondent violated Section 8(a)(1) by Supervisor Todd Friday threatening that the Respondent would not let the Union, Graphic Communications Conference/IBT, in. The judge viewed Supervisor Todd Friday's statement that "They are not going to happen. No way" as a threat that efforts at unionization would be futile. Chairman Battista and Member Schaumber disagreed, finding that Friday's statement did not unlawfully threaten that union representation would be futile. Rather, they reasoned that Friday was offering the prediction that management would vigorously resist a union and would prevail. In reversing the judge, they found that Friday's comparatively ambiguous remarks were made in response to a question posed by Morfey during a casual conversation over coffee in the context of a long-term working relationship.

Member Walsh would adopt the judge's finding that Friday's statement to Morfey violated the Act. He found Friday's unqualified "no way" statement conveyed the unlawful message that Morfey's organizing efforts would be futile because the Respondent would not

allow a union to represent its employees. See *D & F Industries*, 339 NLRB 618, fn. 2 (2003); *International Door*, 303 NLRB 582, 590, 599 (1991), enf. 985 F.2d 560 (5th Cir. 1993). Member Walsh also believed that the coercive tendency of Friday's statement was not dispelled by virtue of Friday's status as a front-line supervisor, the fact that he may have been expressing his own opinion, or the fact that he committed no additional unfair labor practices.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Graphic Communications Conference/IBT; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Fort Smith, Aug. 1-2, 2005. Adm. Law Judge Mary Miller Cracraft issued her decision Oct. 5, 2005.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Horizon Contract Glazing, Inc. (Painters Locals 16 and Glassworkers Local 767)
West Sacramento, CA Oct. 4, 2006. 20-CA-32880; JD(SF)-52-06, Judge Jay R. Pollack.

Mickey's Linen & Towel Supply, Inc. (Chicago and Midwest Regional Joint Board, UNITE-HERE) Hammond, IN Oct. 2, 2006. 13-CA-43153; JD-75-06, Judge Bruce D. Rosenstein.

NO ANSWER TO COMPLAINT

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

Atlantic Express of L.A., Inc. (Teamsters Local 572) (21-CA-37038, et al.; 348 NLRB No. 40)
Los Angeles, CA Sept. 29, 2006. [\[HTML\]](#) [\[PDF\]](#)

TEST OF CERTIFICATION

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

Sprain Brook Manor Nursing Home (New York Health and Human Services Union 1199/SEIU)
(2-CA-37787; 348 NLRB No. 48) Scarsdale, NY Sept. 29, 2006. [\[HTML\]](#) [\[PDF\]](#)

**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 CERTIFICATION OF REPRESENTATIVE

Omnisleep LLP, Albuquerque, NM, 28-RC-6451, Oct. 2, 2006 (Chairman Battista and
Members Kirsanow and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Waste Management of Washington, Inc., Ellensburg and Cle Elum, WA, 19-RC-14854,
Oct. 3, 2006 (Chairman Battista and Members Kirsanow and Walsh)

Dunn Lumber Northwest, Inc., Renton, WA, 19-RC-14857, Oct. 3, 2006 (Chairman Battista
and Members Kirsanow and Walsh)

Bus & Truck of Chicago, Inc., Chicago, IL, 13-RD-2539, Oct. 3, 2006 (Chairman Battista and
Members Kirsanow and Walsh)

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

Community Physicians Services Corp. (CPSC), Norton, VA, 11-RC-6621, Sept. 29, 2006
(Chairman Battista and Members Liebman and Walsh) [remanding to Regional Director]

Miscellaneous Board Orders

**ORDER [remanding to Regional Director for appropriate action
consistent with *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006),
Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), and
Croft Metals, Inc., 348 NLRB No. 38 (2006)]**

Age Institute of Florida, Inc., d/b/a Boca Ciega Center, Gulf Port, FL, 27-RC-8184,
Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)

Brusco Tub and Barge Co., Longview, WA, 19-RC-13872, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)

- National Healthcare Corp. d/b/a Charlevoix Healthcare and Rehabilitation Center*, St. Louis, MO, 14-UC-190, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- The Children's Museum, Seattle*, Seattle, WA, 19-RC-14504, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Coastal Lumber Company*, Bruceton Mills, WV, 6-RC-11850, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Community Health Center La Clinica*, Pasco and Kennewick, WA, 19-RC-14551, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Detroit Medical Center*, Detroit, MI, 7-RC-22286, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Entergy Operations, Inc.*, St. Francisville, LA, 15-UC-149, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Flint Hills Resources LP and Kurtz Paramedic Service, Inc.*, St. Paul, MN, 18-RC-17418, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Falley's Inc. d/a/b Food-4-Less Store Number 8*, Topeka, KS, Topeka, KS, 17-RC-12117, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Gorham Health Care, Inc., d/b/a Gorham House*, Gorham, ME, 1-RC-20984, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Haven Health Center of Windham, LLC*, Willimantic, CT, 34-RC-2134, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Beverly Enterprises d/b/a the Hermitage*, Fort Smith, AR, 1-RC-21704, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Kroger Limited Partnership, d/b/a Highlander Foods*, Roscoe, IL, 33-RC-4715, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Hash Plastics, U.S.A., Inc.*, Lincoln Park, NJ, 22-RC-12310, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- HMR of Maryland, LLC*, Charlotte Hall, MD, 5-RC-15444, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- IHS of Lester, Inc. d/b/a IHS of Shreveport*, Shreveport, LA, 15-UC-146, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Emmys Communications, Inc. d/b/a KOIN-TV*, Portland, OR, 36-RC-6310, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Leisure Chateau Care Center*, Lakewood, NJ, 4-RC-19722 and 6-RC-11759, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Madison Center Genesis Eldercare, Inc.*, Matawan, NJ, 22-RC-11729, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Margaretville Memorial Hospital*, New York, NY, 3-RM-768, 3-UC-485, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- MidMichigan Gladwin Pines*, Gladwin, MI, 7-RC-22625, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Multimedia KSDK, Inc.*, St. Louis, MO, 14-RC-12419, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)

- M. Pavia Fernandez, Inc. d/b/a Pavia Hospital*, San Juan, PR, 26-RC-8289, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Regional Transportation Program, Inc.*, Portland, ME, 1-RC-22002, Sept. 30, 2006,
(Chairman Battista and Members Schaumber and Kirsanow)
- Renex Dialysis Clinic of Bloomfield, Inc.*, Bloomfield, NJ, 22-RC-12162, Sept. 30, 2006,
(Chairman Battista and Members Schaumber and Kirsanow)
- Gordon Health Ventures, d/b/a Rolling Hills Manor*, Pittsburgh, PA, 6-RC-12195, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- St. Lukes Memorial Hospital, Inc.*, Ponce, PR, 24-RC-8281, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Salt Lake Regional Medical Center, Inc.*, Salt Lake City, UT, 27-RC-8157, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Seven-Up/RC Bottling Co. of Southern California, Inc.*, Vernon, CA, 21-RC-20434, Sept. 30,
2006 (Chairman Battista and Members Schaumber and Kirsanow)
- So. Cal Ship Services, Inc.*, Terminal Island, CA, 32-RC-5130, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Solartec, Inc.*, Salem, OH, 8-RC-16070, Sept. 30, 2006 (Chairman Battista and
Members Schaumber and Kirsanow)
- Southwestern Public Service Co.*, Amarillo, TX and Denver, CO, 16-UC-201, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- St. Joseph Healthcare Center*, Hamtramck, MI, 7-UC-586, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- St. Mary Home*, West Hartford, CT, 34-RC-2119, Sept. 30, 2006 (Chairman Battista and
Members Schaumber and Kirsanow)
- Starrett City Associates*, Brooklyn, NY, 29-UC-518, Sept. 30, 2006 (Chairman Battista and
Members Schaumber and Kirsanow)
- Sunbridge Rehabilitation of West Toledo*, Toledo, OH, 8-RC-16487, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Richmond Health Care d/b/a Sunrise Health and Rehabilitation Center*, Sunrise, FL,
12-RC-8064, Sept. 30, 2006 (Chairman Battista and Members Schaumber and Kirsanow)
- Sweet Memorial Nursing Home, Inc.*, Chinook, MT, 27-UC-211, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- The Toledo Blade Co.*, Toledo, OH, 8-UC-365, Sep. 30, 2006 (Chairman Battista and
Members Schaumber and Kirsanow)
- Towers of America Management, LLC*, Jersey City, NJ, 22-RC-12219, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- United Water New York*, W. Nyack, NY, 2-RC-22963, Sept. 30, 2006 (Chairman Battista and
Members Schaumber and Kirsanow)
- University Park Living Center*, Muskegon, MI, 7-RC-21477, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Walker Methodist Health Center*, Minneapolis, MN, 18-RC-17157, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)
- Walker Methodist Health Center*, Minneapolis, MN, 18-RC-17146, Sept. 30, 2006
(Chairman Battista and Members Schaumber and Kirsanow)