National Labor Relations Board

Weekly Summary of NLRB Cases

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

October 8, 2004 W-2968

CASES SUMMARIZED
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Arbor Construction Personnel, Inc. (7-RC-22440; 343 NLRB No. 38) Ann Arbor, MI Sept. 30, 2004. The Board reversed the Acting Regional Director's decision in which he found appropriate the petitioned-for single-employer unit of plasterers working for the Employer at its Ann Arbor, MI facility. The Board held that the single-employer unit petitioned for by Bricklayers Local 9 is inappropriate because the Architectural Contractors Trade Association (ACT), a multiemployer association, and the Intervenor (Operative Plasterers and Cement Masons Local 67) created and maintained a multiemployer bargaining unit. [HTML] [PDF]

The Employer is a member of the Washtenaw Contractors Association (WCA), a multi-employer association formed for purposes of collective bargaining, and has been in a collective-bargaining relationship with the Petitioner, through WCA, since 1985. WCA was party to a then-current 8(f) agreement with the Petitioner effective from Aug. 1, 2000, through July 31, 2003.

The Employer is also a member of ACT and has been in a collective-bargaining relationship with the Intervenor, through ACT, since 1985. In 1995, the Employer signed a power of attorney delegating authority to ACT's predecessor, Detroit Association of Wall & Ceiling Contractors, to negotiate and sign collective-bargaining agreements and to handle all labor relations matters. ACT and the Intervenor were parties to an 8(f) agreement effective from June 1, 1997, through May 31, 1999. In 2000, ACT and the Intervenor entered into a successor agreement, effective from Aug. 1, 2000, through May 31, 2003 (2000 Agreement), and changed their relationship from one governed by Section 8(f) to one governed by Section 9(a). In Nov. 2000, ACT and the Intervenor amended the 2000 Agreement and expanded its geographic scope to include areas covered by the WCA 8(f) agreement.

The Acting Regional Director found that recognition language in the 2000 Agreement evidenced an intent to create single-employer bargaining units. Finding no evidence to rebut the presumption of a single-employer unit, he found the petitioned-for unit appropriate. The Board disagreed, holding: "Here, both the 1995 power of attorney and the 2000 Agreement evidence an unequivocal intent by the Employer to be bound by group action over at least the past 9 years. . . . The express delegation of authority to ACT and the Employer's participation in group negotiations provides sufficient evidence to overcome the single-employer presumption. That the 2000 Agreement provides for recognition under Section 9(a) only after majority status at each member employer is shown in not inconsistent with a multiemployer bargaining unit."

(Members Schaumber, Walsh, and Meisburg participated.)

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Architectural Contractors Trade Association (7-RC-22466; 343 NLRB No. 39) Farmington Hills, MI Sept. 30, 2004. The Board reversed the Regional Director's decision and order in which he found the petitioned-for multiemployer plasterers unit inappropriate and dismissed the petition filed by Bricklayers Local 9. The Petitioner is seeking to represent a multi-employer unit encompassing all plasterers employed by employers who are members of the Architectural Contractors Trade Association, a multi-employer association formed for purposes of collective bargaining. The Board found, contrary to the Regional Director, that the petitioned for unit is

appropriate because the Petitioner and the Employer created and maintained a multiemployer bargaining unit and accordingly, there is the existence of a controlling history of multiemployer bargaining. See *Arbor Construction Personnel, Inc.*, 343 NLRB No. 38 (2004), which involved the same unions and an analogous issue. [HTML] [PDF]

(Members Schaumber, Walsh, and Meisburg participated.)

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Auto Workers Local 2333 (B.F. Goodrich Co.) (8-CB-9023(E); 343 NLRB No. 42) Cleveland, OH Sept. 30, 2004. The Board reversed the administrative law judge in part and dismissed in its entirety the Union's application for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA). The judge found that this case consisted of two distinct "components" and that the General Counsel was "substantially justified" in pursuing only one of those components and awarded the Union half of its requested fees. [HTML] [PDF]

In the underlying unfair labor practice proceeding, the Board dismissed the complaint, which alleged that the Union violated Section 8(b)(1)(A) of the Act by its handling of employee David Smith's grievance. 339 NLRB No. 20 (2003). The judge, considering the Union's EAJA application, found that the Union was not entitled to recover fees to the extent that the General Counsel alleged that the Union failed and refused to process Smith's grievance for reasons that were unfair, arbitrary and invidious, because that component was substantially justified. He found that the Union was entitled to recover fees to the extent that it was forced to defend against a "phantom charge" that it had failed and refused to accept and process Smith's grievance because he refrained from engaging in union activities.

The Board wrote in deciding that the General Counsel was substantially justified in litigating the case and dismissing in its entirety the Union's application for an award of fees: "In sum, we find the judge erred by fragmenting what is, in reality, a single allegation, namely that the Union violated its duty of fair representation vis-à-vis employee Smith by its handling of his grievance. The General Counsel was substantially justified in litigating this allegations, both because: (1) it had a reasonable basis in law and fact, and (2) it involved credibility issues not subject to resolution by the General Counsel at the investigative stage of the proceeding."

(Members Liebman, Schaumber, and Meisburg participated.)

Adm. Law Judge Earl Shamwell Jr. issued his supplemental decision Nov. 26, 2003.

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Banta Catalog Group, a Div. of Banta Corp. (18-CA-16512, 16710; 342 NLRB No. 132) Maple Grove, MN Sept. 28, 2004. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by issuing Mike Blazek a documented verbal warning for leaving work early on July 13, 2002, and

telling employees that another employee had been terminated for engaging in union activities; and violated Section 8(a)(3) and (1) by discriminatorily denying Blazek access to the pre-press room, enhancing Blazek's August 29 discipline to the level of a written warning based on the unlawful July 13 warning, denying Blazek a wage increase based on the unlawfully enhanced written warning of August 29, suspending Blazek on December 13, and discharging Blazek on December 19. [HTML] [PDF]

The judge found that the Respondent disciplined Blazek for acting as a union observer and that the Respondent's asserted reasons for the discipline including, among others, an altercation with a co-worker and failing to follow a work directive, were pretextual.

In adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Blazek, Members Schaumber and Meisburg noted that this finding is not to suggest that in an appropriate case an employer is not within its right to discipline employees who commit costly production errors. Here, they found that the General Counsel has met the initial burden under *Wright Line*, and the Respondent has not demonstrated through comparatives that it has excepted like misconduct from its progressive disciplinary system.

(Members Schaumber, Walsh, and Meisburg participated.)

Charges filed by Graphic Communications Workers Local 1-M; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Minneapolis, June 24-26 and July 23-24, 2003. Adm. Law Judge William L. Schmidt issued his decision May 28, 2004.

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BFI Waste Services (10-RC-15442; 343 NLRB No. 35) Lawrenceville and Gainesville, GA Sept. 30, 2004. Chairman Battista and Member Liebman, finding no merit to the Employer's exceptions to the hearing officer's disposition of its objections, certified the Petitioner, Teamsters Local 728, as the exclusive collective-bargaining representative of the employees in the appropriate unit. Member Meisburg concurred. The tally of ballots for the election of April 2, 2004 showed 78 votes for and 61 against, the Petitioner, with no challenged ballots. [HTML] [PDF]

In exceptions, the Employer argued that the hearing officer erred in denying its petition to revoke the Petitioner's subpoena duces tecum and in allowing the Petitioner's attorney to use the subpoenaed materials in cross-examination. The disputed materials, which the Employer contended are attorney work product, are questionnaires which its counsel used to interview witnesses in preparing this case. The Employer also contended that the hearing officer erred in preventing its attorney from introducing evidence, or making an offer of proof, concerning alleged trespasses, threats, and assaults by union agents in December 2003. The Board found no merit in the Employer's contentions.

Member Meisburg noted that the Board has seen a number of cases with variations of the tactic used by the Petitioner in this case—the solicitation on a petition of employee signatures that are then transferred to a widely circulated flyer, mailing or poster. He wrote: "Although we have not found such conduct objectionable, I am concerned about its potential adverse impact on the laboratory conditions for an election. An employee who has merely signed a petition may feel compelled to support the union after seeing his signature or photograph reproduced on a poster." Member Meisburg believes that the Board should, in an appropriate case, consider whether photocopying or reproduction of employee signatures is subject to some sort of "fair use" rule, e.g., that we will not permit a party to take an employee's signature affixed to one medium and use it in another medium where the message is different, without the express permission of the employee.

(Chairman Battista and Members Liebman and Meisburg participated.)

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Buckhorn, Inc. (25-RC-10206; 343 NLRB No. 31) Bluffton, IN Sept. 30, 2004. The Board found, contrary to the Acting Regional Director, that the petitioned-for unit of all maintenance employees employed by Buckhorn, Inc. at its Bluffton, IN facility is not an appropriate unit for collective bargaining. The Employer contended that a separate maintenance unit is not an appropriate unit for bargaining and that the only appropriate unit must include production and maintenance employees. The Board agreed, finding that the petitioned-for maintenance employees do not constitute a distinct, homogenous group of employees that would warrant granting the Petitioner's (Industrial and Independent Workers International) request for a separate unit. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Meisburg participated.)

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Butera Finer Foods (13-CA-40246-l; 343 NLRB No. 30) Elgin, IL Sept. 30, 2004. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) of the Act by ceasing pension fund payments after the expiration of its collective-bargaining agreement with UFCW on Nov. 1, 2001, but only with respect to the payment that was due January 10, 2002. The Board concluded that the Respondent failed to demonstrate that it had a good-faith doubt of the Union's majority status in late Dec. 2001 when Paul Butera, the Respondent's chairman, made the decision not to make the Jan. 10 payment. It decided however that the Respondent's failure to make the later payments was lawful because on Jan. 16 Butera was told of and shown the decertification petition signed by 85 percent of the Respondent's grocery clerk employees and filed with the Board on Jan. 15, 2002. [HTML] [PDF]

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by UFCW and Employers Midwest Pension Fund; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Chicago on Nov. 8, 2002. Adm. Law Judge Karl H. Buschmann issued his decision April 9, 2003.

***

C. Politis & Co., Inc. (4-CA-32606; 343 NLRB No. 28) Upper Merion, Upper Providence, and Center City, PA Sept. 30, 2004. There are no exceptions to the administrative law judge's finding that the Respondent, a nonunion painting contractor, did not violate Section 8(a)(1) and (3) of the Act by discharging employee Robert Hinson because of his activities for Painters District Council 21 or because he engaged in protected concerted activities when he questioned whether the Respondent paid African-American painters less than white painters and picketed at the gates of the Respondent's jobsite. The judge found that the Respondent lawfully discharged Hinson for insubordination. [HTML] [PDF]

The Respondent moved to strike certain remarks made by the judge, arguing that they are not supported by the record and are not necessary to the resolution of the proceeding because they reflect a judgment regarding the Respondent's employment practices and the character of the Respondent's owner. Members Schaumber and Meisburg agreed with the Respondent, stating:

> Parties appearing before this Agency must be treated with respect. In addition, we must be diligent to ensure that nothing stated in our decisions gives any party cause to question whether they have been, or will be, treated with respect.
>
> We do not countenance the gratuitous remarks made by the judge in his decision. We have therefore redacted from the judge's decision those and other related remarks that are neither necessary to the resolution of this proceeding nor supported by the record.

Member Liebman, concurring in the result, agreed that the judge made gratuitously pejorative remarks in his decision, which the Board should disavow. She disagreed with the actual deletion of the remarks, citing *Victor's Café 52, Inc.*, 338 NLRB No. 90 (2002). Member Liebman stated: "What the judge wrote was, and should remain, a matter of public record (and not a mystery), whether or not it was appropriate." She found the majority's effort to distinguish *Victor's Café* is "unconvincing but ultimately irrelevant" because "what matters is whether we as a Board should be erasing a matter of public record."

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Painters District Council 21; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on March 11, 2004. Adm. Law Judge David L. Evans issued his decision June 29, 2004.

***

Communications Workers Local 13000 (Verizon Communications, Inc.) (6-CB-10992; 343 NLRB No. 21) Pittsburgh, PA Sept. 30, 2004. The Board adopted the administrative law judge's dismissal of the complaint allegations that the Respondent Union violated Section 8(b)(1)(A) of the Act by initiating internal union disciplinary proceedings against four employee/members who continued to park their company-owned vehicles at Verizon Communications' remote facilities. [HTML] [PDF]

The primary issue involved here is whether the four employees were voluntarily parking at the remote facilities or whether they were required to do so by Verizon. Verizon has a remote garaging program that allows field technicians to park their company-owned vehicles at a location other than the main garage or work center to which they are assigned. Participants generally lived closer to the remote locations than to their work center. On December 13, 2002, in response to layoffs by Verizon, the Union instituted a "non-participation policy" requiring all union members to cease participation in any of the Employer's voluntary programs, such as blood drives, charitable activities, and certain training activities. Pursuant to the Union's nonparticipation policy, those members who were parking at remote locations were to cease doing so and park at the work centers to which they were assigned.

The judge determined that the four employee/members voluntarily continued to park at the remote locations and that the Union did not violate the Act in threatening them with internal union discipline. In this regard, he noted that the Board, in interpreting Section 8(b)(1)(A), has drawn a clear distinction between instances in which a union seeks to discipline its members for complying with an employer's mandatory requirements, i.e., those which put the member at risk of discipline or discharge, and those which are voluntary.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Michael San Agustin, an Individual; complaint alleged violation of Section 8(b)(1)(A). Hearing at Pittsburgh, April 13 and 14, 2004. Adm. Law Judge Arthur J. Amchan issued his decision June 18, 2004.

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Cox Communications Gulf Coast, L.L. C. (15-CA-16904, 17145; 343 NLRB No. 26) Fort Walton Beach, FL Sept. 30, 2004. Affirming the administrative law judge's conclusion, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee William Dalton because of his activities for the Electrical Workers IBEW International. [HTML] [PDF]

Chairman Battista and Member Liebman found it unnecessary to rely on the judge's finding that the Respondent's antiunion animus is demonstrated by its communications to its employees about its commitment to remain union free and to protect itself and its employees from "the risks and costs of a union." Instead, they relied on the fact that the Respondent's stated reason for discharging Dalton, that he falsified his return to work note, was knowingly false and

thus, the reason for the discharge is pretextual and supports an inference that Dalton's discharge was motivated by his union activity. Member Walsh would rely on the Respondent's communications to its employees about its commitment to remain union. He also agreed with his colleagues that the pretextual nature of Dalton's s discharge supported an inference that the discharge was motivated by his union activity.

No exceptions were filed to the judge's dismissal of the complaint allegations that: (a) the Respondent violated Section 8(a)(1) by denying Dalton a promotion and discharging him because of his protected concerted activity, interrogating employee Troy Giehl, discharging Giehl because he engaged in protected concerted activity, and discharging James Wilson because of his protected concerted activity; (b) the Respondent violated Section 8(a)(3) by denying Dalton a promotion because of his union activity; and (c) the Respondent violated Section 8(a)(4) by denying Dalton a promotion and discharging him because he contacted the Board.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by William R. Dalton and James S. Wilson, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Mary Esther, March 15-17, 2004. Adm. Law Judge George Carson II issued his decision May 13, 2004.

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Detroit Newspaper Agency, d/b/a Detroit Newspapers (7-CA-42544; 342 NLRB No. 125) Detroit, MI Sept. 28, 2004. Members Liebman and Walsh affirmed the administrative law judge and held that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating reinstated striker Thomas Hydorn because of his union and protected activities. Member Schaumber dissented. [HTML] [PDF]

In defense, the Respondent claimed that Hydorn was discharged for his "refusal to follow the instructions and direct order given by your supervisor." The majority held that Hydorn was disciplined for misconduct he did not commit. They wrote that while Hydorn may have exhibited insubordinate behavior, they agreed with the judge that he never defied a direct order to remedy a pending paper drag because his supervisor, Leach, never gave Hydorn a direct order to clear a paper drag (paper jam).

Dissenting, Member Schaumber would find that the Respondent carried its rebuttal burden of establishing that it would have discharged Hydorn for gross insubordination even if he had not joined his coworkers on the picket line.

In exceptions, the Respondent argued that the complaint should be dismissed because the General Counsel failed to meet his *Wright Line* burden of establishing a motivating factor in the Respondent's decision to discharge Hydorn was Hydorn's union or protected activities. The Respondent also contended that because the evidence of antiunion animus on which the judge

relied consisted of Board decisions that were denied enforcement in the court of appeals, the evidence does not support the judge's finding of antiunion animus.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Detroit Mailers Local 2040, Teamsters; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, March 14 and 15, 2000. Adm. Law Judge Paul Bogas issued his decision June 21, 2000.

***

Exxon Mobil Corp. (13-CA-40976; 343 NLRB No. 44) Lockport, IL Sept. 30, 2004. Chairman Battista and Member Schaumber reversed the administrative law judge and dismissed the complaint, finding that the Respondent lawfully terminated Teamsters Local 705 chief steward Nick Slusher for his unprotected harassment of a fellow employee because of that employee's dissident union activities and not because of Slusher's involvement in protected grievance-related conduct. [HTML] [PDF]

Dissenting Member Walsh wrote: "The majority reversed the judge's rock-solid findings, based largely on credibility, that chief steward Nick Slusher was engaged in protected activities; that he did not lose the protection of the Act; and therefore the Respondent violated Section 8(a)(1) of the Act by suspending and discharging him for engaging in that protected activity. This unwarranted rejection of the judge's findings raises serious concerns about the future protection of grievance activity in the workplace."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Nick Slusher, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Chicago, Oct. 20-21, 2003. Adm. Law Judge Joseph Gontram issued his decision Dec. 24, 2003.

***

Fisher Island Holdings, LLC, Fisher Island Club, Inc., and Fisher Island Community Association d/b/a Fisher Island (12-CA-23440, 12-RC-8941; 343 NLRB No. 29) Miami, FL Sept. 30, 2004. Affirming the administrative law judge, Members Liebman and Walsh, with Member Meisburg dissenting, held that the Respondent's chairman, John Melk, violated Section 8(a)(1) of the Act and engaged in objectionable conduct by conveying to employees the impression that unionization would be futile and by threatening employees with loss of future wage increases if employees unionized. The majority set aside the election held in Case 12-RC-8941 on July 30 and 31, 2003, which Teamsters Local 390 lost 134-137, and remanded the case to the Regional Director to conduct a third election. Member Meisburg dissented. [HTML] [PDF]

After the Union lost the election, it filed objections and unfair labor practice charges based on three captive audience speeches given by Melk on the two days before the election. The three speeches were identical in content; Melk read them from a prepared text.

Member Meisburg found that Melk's speech was neither unlawful nor objectionable, and he would not set aside this election, saying: "Melk articulated legitimate business concerns regarding financial losses, provided specific assurances that the Respondent would bargain in good faith, and did not present a position that precluded the ability of the Respondent to bargain in good faith."

(Members Liebman, Walsh, and Meisburg participated.)

Charge filed by Teamsters Local 390; complaint alleged violation of Section 8(a)(1). Hearing at Miami on April 21, 2004. Adm. Law Judge George Carson II issued his decision June 4, 2004.

***

Golden Stevedoring Co., Inc. (15-CA-13334 (E), et al.; 343 NLRB No. 18) Mobile, AL Sept. 29, 2004. The Board, while agreeing with the administrative law judge and denying the Applicant's request for fees and expenses under the Equal Access to Justice Act (EAJA), did not adopt his entire rationale. In an earlier decision reported at 335 NLRB 410 (2001), the Board found that the Applicant (Golden Stevedoring Co., Inc.) engaged in certain violations of the Act, as alleged, and dismissed certain other complaint allegations, including complaint paragraph 7(b), alleging that the Applicant threatened its employees with discharge for engaging in union activities. [HTML] [PDF]

At the unfair labor practice hearing, the Applicant moved to dismiss paragraph 7(b) for lack of proof. Counsel for the General Counsel stated that he had "no defense" to the motion to dismiss and admitted that he had no evidence to support the allegations. The judge granted the Applicant's motion to dismiss. The Board adopted the judge's dismissal of paragraph 7(b) in the absence of exceptions to his ruling.

Chairman Battista and Member Schaumber found that even if the General Counsel was not substantially justified as to paragraph 7(b), and even if that paragraph was a "discrete" substantive portion of the underlying adversary proceeding, it was not a "significant" portion of the underlying adversary proceeding. See Sections 102.143(b) and 104.44 of the Board's Rules and Regulations. They noted that paragraph 7(b) alleged a single threat of discharge and that there were 19 other allegations, which included a myriad of 8(a)(1) allegations, suspensions, warnings, reductions of hours; a refusal to reinstate unfair labor practice strikers; and a host of unilateral changes. In these circumstances, Chairman Battista and Member Schaumber concluded that paragraph 7(b), alleging a single threat of discharge, was not a "significant" part of the entire case. They also concluded that the General Counsel's overall position was substantially justified.

Member Walsh, concurring, wrote separately "to disassociate himself" from his colleagues' discussion of whether paragraph 7(b) constituted a "significant and discrete substantive portion of [the] proceeding" within the meaning of Section 102.143. Given the holding on the "substantial justification" issue as a whole, Member Walsh found it unnecessary to reach the "significant and discrete" issue and did not join his colleagues in their discussion of it.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge Keltner W. Locke issued his supplemental decision Nov. 21, 2001.

***

Harold J. Becker Co., Inc. (9-RC-17814; 343 NLRB No. 11) Dayton, OH Sept. 29, 2004. Affirming the hearing officer's recommendation, Members Liebman and Walsh sustained the Petitioner's (Sheet Metal Workers Local 24) challenges to 21 ballots cast in an election held on July 21, 2003, and certified the Petitioner as the exclusive representative of employees working for Harold J. Becker Co. engaged in sheet metal work, including architectural workers. The majority agreed with the hearing officer that the evidence failed to establish that the employees did sufficient unit work to warrant their inclusion. Chairman Battista dissented. [HTML] [PDF]

The tally of ballots for the election held July 21, 2003 shows 6 for and 4 against the Petitioner, with 26 determinative challenged ballots. In the absence of exceptions, the Board adopted pro forma the hearing officer's recommendation to sustain the challenges to the ballots of Marvin Garrett, Matthew Kempf, Dennis Singler, Anthony Devito, and Joseph Greene

The majority disagreed with the dissent's position that they have erroneously placed the burden on the Employer, rather than the Petitioner, to prove that the 21 employees are ineligible to vote. They noted that the Petitioner challenged the ballots of the 21 employees on the basis that they are employed in positions explicitly excluded from the parties' stipulated unit and that it is undisputed that the challenged employees occupy the excluded positions. "The Petitioner thus has substantiated the basis for its challenges," the majority stated.

Chairman Battista found that the Union failed to meet its burden. He noted that the record showed that 18 of the challenged employees performed sheet metal work at least 20 percent of the time during the relevant period and that their ballots should be opened and counted. And, he explained, contrary to the majority's contention, the Union's burden is not met merely by asserting that the challenged employees occupy excluded positions. The Chairman concluded that 3 of the 21 disputed employees did not perform sheet metal work during the relevant period and accordingly they are ineligible.

(Chairman Battista and Members Liebman and Walsh participated.)

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Joseph Chevrolet, Inc. (7-CA-45211; 343 NLRB No. 2) Millington, MI Sept. 29, 2004. Affirming the administrative law judge, Members Liebman and Walsh held that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. Among others, the majority agreed with the judge that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Tony Amend; by Owner Joseph Hood's statement to Amend that "your job got f—ked up at the bargaining table;" by selecting Larry Stevens and Michael Cooper for layoff; and by reprimanding Cooper for conducting a competitive business. [HTML] [PDF]

Member Schaumber, dissenting in part, would reverse the judge and find that the Respondent did not violate Section 8(a)(3) by discharging Amend, selecting employees Stevens and Cooper for layoff, and reprimanding Cooper for conducting a competitive business. With regard to these allegations, Member Schaumber found that the Respondent met its *Wright Line* rebuttal defense. He would also reverse the judge's finding that the statement by Respondent's owner Hood to Amend violated Section 8(a)(1) because he found the statement's meaning is ambiguous and allows for lawful interpretations. In all remaining respects, Member Schaumber agreed with his colleagues' decision to adopt the judge for the reasons stated in his decision.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Operating Engineers Local 324; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Flint, March 25-27, 2003. Adm. Law Judge Bruce D. Rosenstein issued his decision June 16, 2003.

***

Kaiser Foundation Hospitals; Kaiser Foundation Health Plan, Inc.; and The Permanente Medical Group, Inc. and Office and Professional Employees Local 29 (32-CA-19771-1, 32-CB-5477-1; 343 NLRB No. 8) Oakland, CA Sept. 30, 2004. The Board affirmed the administrative law judge's finding that the Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by extending recognition to the Respondent Union as the collective-bargaining representative of research assistants employed in its Division of Research, informing the research assistants that an existing collective-bargaining agreement with the Respondent Union covering an office and clerical unit and including a union-security clause applied to them, and applying the agreement to them. [HTML] [PDF]

The judge found, with Board approval, that the Respondent Union violated Section 8(b)(1)(A) and (2) by accepting recognition from the Respondent Employer as the representative of the research assistants, informing the research assistants that the collective-bargaining agreement's union-security clause applied to them, and applying the agreement to them. The Board agreed with the judge's finding that the addition of the research assistants into the bargaining unit was not lawful, regardless of their alleged community of interest with unit employees, because the research assistants historically had been excluded from the bargaining unit.

Further, the Board agreed with the judge in rejecting the Respondent's argument that the addition of the research assistants to the bargaining was not an accretion, but rather was a recapture of bargaining unit work, sanctioned by *Lockheed Martin Tactical Aircraft Systems*, 331 NLRB 1407 (2000).

The Board found merit in the General Counsel's exception to the judge's failure to order make-whole relief for the research assistants who were unlawfully transferred into the bargaining unit and subjected to the terms of the collective-bargaining agreement and held that the Respondent must compensate them to the extent that they suffered a loss of benefits as a result of their transfer. It modified the judge's recommended Order to make clear that the Order should not be construed as authorizing or requiring the Respondent Employer to withdraw or revoke any benefits that have been granted to the research assistants as a result of the Respondents' imposition of the contract and their unlawful grant and acceptance of recognition of the Respondent Union as the research assistants' representative.

(Chairman Battista and Members Walsh and Meisburg participated.)

Charges filed by Aikya Param, an Individual; complaint alleged violation of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2). Hearing at Oakland, April 29-30, 2003. Adm. Law Judge Clifford H. Anderson issued his decision Aug. 12, 2003.

***

Lamar Central Outdoor d/b/a Lamar Advertising of Hartford (34-CA-10254; 343 NLRB No. 40) Windsor, CT Sept. 30, 2004. The administrative law judge recommended dismissal of the complaint in its entirety. Chairman Battista and Member Schaumber affirmed the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) of the Act by threatening Charging Party Gary Crump with discharge on Oct. 2, 2002 in the course of an investigatory interview conducted by the Respondent's attorney, Clifford Nelson, for a pending separate unfair labor practice case; and that the Respondent violated Section 8(a)(1) and (4) by discharging Crump on Oct. 3, 2002 because the Respondent believed that Crump was going to file unfair labor practice charges against it. [HTML] [PDF]

Chairman Battista ad Member Schaumber reversed the judge's failure to find that the Respondent violated Section 8(a)(1) by threatening Crump with discharge on Oct. 3 in a meeting with the Respondent's Vice President Steve Hebert and Sales Manager Jeff Burton. They concluded that, based on Hebert and Burton's statements, the Respondent was linking Crump's discharge to the fates of Rachael Rychling and Ken Simmons, who had recently been discharged after filing unfair labor practice allegations against the Respondent and who were not being reinstated to their jobs under a settlement agreement. Chairman Battista and Member Schaumber also found that Crump could reasonably understand the Respondent's statements as threatening him with discharge if he filed unfair labor practice charges over the loss of the account.

Member Walsh, concurring and dissenting in part, would find that the Respondent violated the Act in all three respects, saying the record establishes the violations.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Gary Crump, an Individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Hartford, April 1-3, 2003. Adm. Law Judge Michael A. Marcionese issued his decision July 7, 2003.

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Mays Electric Co., Inc. (5-CA-31247, 31371; 343 NLRB No. 20) Lynchburg, VA Sept. 30, 2004. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of Allen Morgan because he supported Electrical Workers IBEW Local 666. In agreeing with the judge that the General Counsel met his initial burden of showing that the Respondent harbored animus towards Morgan and his union activity, the Board relied on the judge's findings that on the day Morgan placed a union insignia on his hardhat, Supervisor Parrish told employees not to talk to Morgan, and the shifting and pretextual reasons given by the Respondent for Morgan's termination, including lack of work, Morgan's record of absenteeism and poor performance, and a reduction in force. [HTML] [PDF]

There were no exceptions to the judge's recommended dismissal of the allegation that the Respondent unlawfully created the impression that its employees' union activity was under surveillance.

(Members Liebman, Schaumber, and Meisburg participated.)

Charges filed by Electrical Workers IBEW Local 666; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Richmond, Oct. 30-31, 2003. Adm. Law Judge Paul Buxbaum issued his decision Feb. 20, 2004.

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Metropolitan Taxicab Board of Trade, Inc., and its Constituent Members (2-CA-31330; 342 NLRB No. 130) New York, NY Sept. 28, 2004. Members Schaumber and Meisburg, with Member Liebman concurring in the result, adopted the recommendation of the administrative law judge and dismissed the complaint allegation that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with Service Employees SEIU Local 74 as the collective-bargaining representative of the Respondents' taxi drivers. [HTML] [PDF]

Members Schaumber and Meisburg agreed with the judge that the Respondents' fleet operators' lessee taxicab drivers are independent contractors. The judge found no violation on the grounds that the historical bargaining unit of drivers and inside workers was so changed, i.e.,

essentially destroyed, because the lessee taxicab drivers comprised the majority of the unit. Members Schaumber and Meisburg found it unnecessary to pass on the judge's rationale, explaining:

> The record evidence here compels us to find that the Respondent fleet operators' lessee taxicab drivers are independent contractors who do not belong in the historical bargaining unit. Although the parties stipulated that the inside workers constitute an appropriate unit, the complaint, strictly, construed, failed to allege that the Respondent fleet operators' inside workers constituted an appropriate unit within the meaning of Section 9(b), that the Union demanded recognition and bargaining in that unit, and that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union as the collective-bargaining representative of those unit employees. Given the limited scope of the present complaint, we find that dismissal of the complaint is warranted.

Member Liebman wrote: "There is no good reason to decide this case. The Charging Party Union has sought to withdraw its unfair labor practice charge and to discontinue all related proceedings. In the interest of administrative economy, we should grant the Union's request and dismiss the complaint, on that basis alone. See, e.g., *Wilson Tree Co*., 312 NLRB 883 (1993)." She noted that as neither the General Counsel nor the Respondents filed written response to the Union's request, the Board should have solicited such responses by issuing an order to show cause why the Union's request should not be granted.

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Service Employees SEIU Local 74; complaint alleged violation of Section 8(a)(1) and (5). Hearing held June 3-4 and July 28, 1999. Adm. Law Judge Raymond P. Green issued his decision Nov. 15, 1999.

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Midwest Generation, EME, LLC (13-CA-39643-1; 343 NLRB No. 12) Chicago, IL Sept. 30, 2004. On a stipulated record, Chairman Battista and Member Meisburg dismissed the complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by its partial lockout of only full-term strikers, but excluding nonstrikers and crossover employees. The majority held that the Respondent presented a legitimate and substantial business justification for its lockout and that the record showed that the lockout was for the purpose of applying economic pressure in support of its legitimate bargaining proposals. Member Walsh, dissenting, concluded that the Respondent failed to provide any substantiation for its asserted business justification. [HTML] [PDF]

The parties stipulated that "the only issue for resolution before the Board" is:

> Whether the [Respondent] violated Sections 8(a)(1) and (3) of the Act by locking out and/or refusing to reinstate those employees who were on [an economic] strike at the time of the union's unconditional offer to return to work, while not

> locking out and/or reinstating those individuals employed by the [Respondent] who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the [Respondent]?

The Respondent claimed that its lockout was in furtherance of securing its lawful bargaining proposals, which constitutes a settled business justification under *American Ship Building Co. v. NLRB*, 380 U.S. 300, 312 (1965). It explained that the lockout applied only to employees who were actively participating in the strike in support of the Union's bargaining demands, in order to pressure them to abandon those demands.

Member Walsh pointed out that the Respondent failed to present any evidence establishing that the nonstrikers and the crossover employees in fact abandoned the Union's bargaining position, and that the Board and the courts have long recognized that employees may cross their union's picket line for numerous reasons, including economic concerns, an unwillingness to gamble on the success of the strike, and a philosophical objection to strikes in general. He wrote: "A partial lockout distinguishing between strikers and nonstrikers has a powerful negative effect on Section 7 rights. The effect of the lockout's disparate treatment of employees is to undermine adherence to the Union by demonstrating to employees the advantages from the standpoint of job security of refraining from concerted activity. . . . For this reason, the law requires that a partial lockout be justified by substantial business considerations."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 15; complaint alleged violation of Section 8(a)(1) and (3). Parties waived their right to a hearing before an administrative law judge.

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Neaton Auto Products Mfg., Inc. (9-CA-37579; 343 NLRB No. 37) Eaton, OH Sept. 30, 2004. The Board decided to publish a previously unpublished Order dated Sept. 14, 2004 in the bound volumes of its decisions. In the unpublished Order, Chairman Battista and Member Meisburg granted the General Counsel's request to remand the case to the Regional Director for further appropriate action consistent with the Board's decision in *IBM Corp*., 341 NLRB No. 148 (2004). [HTML] [PDF]

Dissenting, Member Liebman wrote: "[R]ather than applying *IBM* to dismiss the complaint on the merits—a simple matter—my colleagues grant the General Counsel's motion to remand the case to permit his own dismissal of the complaint." She contended that this step threatens to foreclose Charging Party Robert E. Parker from seeking judicial review on the merits and thus from challenging the correctness of the *IBM* decision.

(Chairman Battista and Members Liebman and Meisburg participated.)

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Northwest Graphics, Inc. (14-CA-25998, et al.; 342 NLRB No.127) St. Charles, MO Sept. 28, 2004. The Board affirmed the administrative law judge's findings that the Respondent committed unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. Based on the bargaining behavior of the Respondent in the 6 months immediately following certification of Graphic Communications Local 505-M as exclusive representative and the Respondent's unfair labor practices in the 6 months thereafter, Members Liebman and Walsh affirmed the judge's 12-month extension of the certification year. Chairman Battista said that the record failed to support a 12-month extension. [HTML] [PDF]

Applying *Mar-Jac Poultry Co*., 136 NLRB 785 (1962), the judge granted the extension based in part, on the fact that the Union was never given an honest opportunity to reach an accord with the Respondent. The judge rejected the Respondent's defense that the Union was at fault, finding that the Respondent acted in derogation of its bargaining obligations and was dismissive of the Union.

Chairman Battista wrote: "The Respondent's unlawful conduct was confined to the last 6 months of the certification year. Thus, the bargaining in the first 6 months of that year was untainted by any unlawful conduct. By extending the certification for 12 full months, my colleagues give the union 18 months of certification protection. There is no basis for doing so."

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Graphic Communications Workers Local 505-M; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis, Dec. 10 and 11, 2001. Adm. Law Judge Robert A. Pulcini issued his decision June 4, 2002.

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Northwest Graphics, Inc. (14-CA-27011; 343 NLRB No. 16) St. Charles, MO Sept. 30, 2004. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with Graphic Communications Local 6-505M; and by unilaterally implementing and then discontinuing the evening shift and unilaterally paying and then ceasing to pay a shift differential to employees. [HTML] [PDF]

Members Liebman and Walsh affirmed the judge's finding that the Respondent also violated Section 8(a)(5) by directly dealing with employee Shayne Shelburne about working a newly created shift schedule with a 50-cent wage differential. In view of this finding, they found it unnecessary to pass on the judge's additional finding that the Respondent violated Section 8(a)(5) by similarly engaging in direct dealing with employee Joe Jones because it would be cumulative and would not affect the remedy.

Chairman Battista would not find that the Respondent's alleged direct dealing with either Shelburne or Jones separately violated Section 8(a)(5). He noted that the Respondent's

implementation of the shift change and wage differential involved, inter alia, telling two employees of the shift change and wage differential. In his view, it is not two violations, viz., unilateral change and direct dealing, but rather simply an implementation of a unilateral change.

The General Counsel excepted to the judge's failure to require the Respondent's highest-ranking official to read the notice to the employees. The Board found that the unfair labor practices found do not warrant this extraordinary remedy.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Graphic Communications Local 6-505-M; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis on Oct. 18, 2002. Adm. Law Judge Margaret M. Kern issued her decision July 10, 2003.

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Onyx Waste Services, Inc. (12-CA-22996, et al.; 343 NLRB No. 3) Port Orange, FL Sept. 29, 2004. The Board adopted the administrative law judge's numerous findings that the Respondent violated Section 8(a)(3) and (1) of the Act. Among others, it adopted the judge's finding that the Respondent discharged employee James Payne in violation of Section 8(a)(3) and (1). The Board did not adopt the judge's alternative finding that the Respondent discriminatorily refused to hire Payne because that theory of a violation was not alleged in the complaint or litigated at the hearing. [HTML] [PDF]

The Respondent argued that Payne resigned and that it accepted his resignation. Payne admitted stating that, if he did not receive a transfer to the Respondent's Apopka facility "we will make Friday my last day." The judge found that Payne did so only after assuring that there were positions available at Apopka and that Route Supervisor Charles Eduardo was offering him a job at that facility. He concluded that the Respondent, by failing to approve Payne's transfer, effectively discharged him.

Member Meisburg agreed that Payne was unlawfully terminated because of his union activities and noted the special circumstances presented. He wrote: "Ordinarily an employer would not violate the Act by deciding to terminate an employee who had presented it with an ultimatum such as the one put forward by Payne. Here, however, the evidence establishes that Respondent's decision to terminate Payne was not based on his ultimatum, but rather on the Respondent's antiunion animus. Specifically, the Respondent's actions, including Site Manager J. D. Smith's misrepresentations to Payne and uppermanagement's edict that Apopka Supervisor Charles Eduardo should not hire Payne, demonstrate that the Respondent was determined to block Payne's transfer efforts and thereby force his termination."

(Members Liebman, Walsh, and Meisburg participated.)

Charges filed by Teamsters Local 385; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New Smyrna Beach, Oct. 27 and 28, 2003. Adm. Law Judge George Carson II issued his decision Jan. 7, 2004.

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The Palm Beach Pops (12-CA-21890-1; 343 NLRB No. 27) Miami, FL Sept. 30, 2004. Affirming the administrative law judge's decision, the Board dismissed the complaint which alleged that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by refusing to meet and bargain with Stage Employees Local 623; failing to honor the terms and conditions of the parties' collective-bargaining agreement; refusing to use the Local 623 hiring hall; withdrawing recognition; and failing and refusing to use the Local 623 hiring hall for discriminatory reasons. [HTML] [PDF]

The Respondent operates a symphony pops orchestra located in Palm Beach, FL. To obtain the necessary stagehands for its performances from 1992-1997 at the Raymond F. Kravis Center for the Performing Arts (Kravis), the Respondent contacted Kravis, which in turn contacted Local 623 for referrals under the Kravis-Local 623 collective-bargaining agreement. When the Kravis agreement expired in Aug. 1997, Kravis and Local 623 signed a standard agreement, effective from March 4, 1998 through June 30, 2000. The standard agreement provided that, in order for it to be effective, Kravis and outside presenters, like the Respondent, must execute adoption agreements by March 11, 1998. The Respondent refused and only agreed to pay prevailing wages and benefits. Kravis and Local 623 executed a second addendum to the standard agreement. The following fall, Local 623 contacted the Respondent, requesting that it sign an adoption agreement. The Respondent again refused to sign the agreement and only agreed to pay prevailing wages and benefits.

The judge found that while Local 623 repeatedly offered the standard agreement, the Respondent never accepted it and only agreed to pay prevailing wages and benefits. Because the Respondent had consistently taken the same position throughout its oral and written correspondence with Local 623, there was no meeting of the minds, and therefore no agreement, the judge reasoned. He found that there was no other evidence establishing a bargaining relationship between the Respondent and Local 623.

The Board agreed, finding the General Counsel failed to prove that the Respondent ever voluntarily recognized Local 623 as the collective-bargaining representative of the unit employees through its oral and written communications with the Union. It pointed out that the credited testimony reflected only the Respondent's consistent position that it had no relationship with Local 623 beyond paying prevailing wages and benefits to employees referred by the Local. In adopting the judge's finding that the Respondent did not violate Section 8(a)(3) and (1), the Board found that the General Counsel failed to show that antiunion animus motivated its decision to cease utilizing referrals from the Local 623 hiring hall.

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Stage Employees IATSE Local 623; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, Oct. 28-30, 2002. Adm. Law Judge Lawrence W. Cullen issued his decision June 30, 2003.

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Pan American Grain Co., Inc. and Pan American Grain Mfg. Co. (24-CA-8570, et al.; 343 NLRB No. 32) Guaynabo, PR Sept. 30, 2004. The Board held, contrary to the administrative law judge, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by barring the Union's (Congreso de Uniones Industriales de Puerto Rico) chosen representative José Figueroa from its facilities and by refusing to bargain with him, allegedly because of his misconduct. This is the only violation found to which the Respondent excepted. [HTML] [PDF]

On May 9, 2000, during a phone conversation with the Respondent's human resources director, Luis Juarbe, Figueroa became furious over Juarbe's position concerning an information request. Figueroa told Juarbe that if he would not change his position, they would have to resolve their pending issues by "exchanging blows." On May 12, 2000, an anonymous recorded message was left on Juarbe's answering machine. The message began with an unidentified voice stating, "One has to be killed. One has to be taken away, whichever, I will start the trunk. I will watch him go through." The next voice on the tape subsequently identified as Figueroa's replied, "That's the son of a bitch, Jose Gonzalez. That's the trunk." Juarbe reported the message to Gonzalez, the Respondent's president, who instructed Juarbe that the Respondent should have no further contact or communications with Figueroa. The Respondent also filed a criminal complaint regarding the threatening message.

The judge found that Figueroa's misconduct was not so serious that his presence would render good faith bargaining impossible or futile. The Board disagreed, noting that Figueroa's misconduct in 2000 occurred against the background of his already troubled history with the Respondent (the Respondent had barred Figueroa in May 1998 from all or most of its facilities based on an allegedly similar incident). It observed that the Respondent could reasonably consider the 1998 bar in conjunction with the 2000 incidents in deciding that a complete bar was warranted and that the 1998 bar against Figueroa was still in effect 2000 when the events at issue occurred. The Board also found it significant that Figueroa actively participated in making an apparent death threat against Gonzalez.

(Chairman Battista and Members Schaumber and Meisburg participated.)

Charges filed by Congreso de Uniones Industriales de Puerto Rico; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Juan, July 29-Aug. 2 and Aug. 26-30, 2002. Adm. Law Judge George Alemán issued his decision May 23, 2003.

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Parkview Hospital, Inc. (25-CA-28821; 343 NLRB No. 13) Fort Wayne, IN Sept. 30, 2004. Affirming the administrative law judge's findings, Members Walsh and Meisburg held that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities and threatening employees with reprisal if they continued to engage in those activities; and violated Section 8(a)(3) and (1) by disciplining employees and issuing a lower evaluation to staff nurse Sheri Mulligan, because she had engaged in union activities. [HTML] [PDF]

In partial dissent, Member Schaumber found that the General Counsel failed to establish any inextricable connection between the evaluation criteria and the written confidentiality policy Mulligan was disciplined for violating. He would find, contrary to his colleagues, that the General Counsel failed to prove that the Respondent violated Section 8(a)(3) and (1) by issuing Mulligan a lower score in one subcategory of her 2003 performance evaluation and failed to satisfy his burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 415 U.S. 989 (1982) of proving that Section 7 animus was a substantial or motivating factor in what was effectively a de minimis change in a single subcategory of an otherwise positive performance appraisal.

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by Ohio Nurses Association; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Columbia City on Feb. 2, 2004. Adm. Law Judge William G. Kocol issued his decision April 9, 2004.

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Suburban Journals of Greater St. Louis, L.L.C. (14-RD-1796; 343 NLRB No. 24) Warrenton and Wentzville, MO Sept. 30, 2004. Adopting the hearing officer's recommendations, Members Schaumber and Meisburg overruled the Union's Objections 1 and 2, which essentially alleged that the Employer engaged in objectionable conduct by promising benefits to employees if the Union (St. Louis Newspaper Guild-CWA Local 36047) were decertified and by withholding benefits and blaming the Union for their being withheld. The Aug. 3, 2003 election resulted in 7 for and 7 against the Union, with no challenged ballots. The majority certified that a majority of the valid ballots were not cast for the Union and that it is not the exclusive representative of the editorial and advertising department employees working at the Employer's Warrenton and Wentzville, MO facilities. [HTML] [PDF]

Member Walsh, dissenting in part, would sustain the Union's Objection 1 and set aside the election. In Objection 1, the Union alleged that the Employer promised benefits to employees, including but not limited to health insurance plan improvements, pay raises, and participation in insurance and other benefit plans, if the Union were decertified, thereby unlawfully inducing employees to vote to decertify the Union. Member Walsh held: "The totality of circumstances demonstrates that in the last few days before the election the Employer clearly implied to virtually all of the unit employees that they would receive improved benefits if they voted to decertify the Union."

(Members Schaumber, Walsh, and Meisburg participated.)

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Trailmobile Trailer, LLC (26-CA-19343, et al.; 26-RC-8135; 343 NLRB No. 17) Jonesboro, AR Sept. 30, 2004. Members Liebman and Walsh, with Chairman Battista dissenting in part, agreed with the administrative law judge that the Respondent violated Section 8(a)(1), (3), (4), and (5) of the Act by in numerous respects by, among others, threatening, harassing, denigrating, and disparaging union employees and officials; installing two surveillance cameras, one facing the parking lot and one facing the entrance to its facility, during the Union's organizing campaign in Oct. 1999; suspending and thereafter discharging employees; and refusing to attend and conduct contractually-required grievance meetings concerning the suspension of eight union officials, and failing to notify and bargain with Electrical Workers IUE District 11 about the installation of surveillance cameras. [HTML] [PDF]

Members Liebman and Walsh affirmed the judge's recommendation to set aside the Dec. 16, 1999 election, which the Union lost, and remanded Case 26-RC-8135 to the Regional Director to conduct a new election. They relied on the Respondent's post-petition unfair labor practice conduct, most notably, the discharge of employee Amy Nichols for engaging in union activity, the transfer of several employees to more onerous positions because of their union activity, and the failure to honor the terms of the collective-bargaining agreement prior to its expiration date. Members Liebman and Walsh found it was unnecessary to pass on the judge's additional reliance on the Respondent's prepetition unfair labor practices as a basis for setting aside the election.

Chairman Battista would not adopt the judge's findings that the Respondent violated the Act by installing surveillance cameras, by failing to give the Union an opportunity to bargain about the installation of the cameras, and by failing to attend grievance meetings. He agreed with his colleagues' other findings, except that he found it unnecessary to pass on (a) the judge's finding that the Respondent violated Section 8(a)(1) by removing prounion employees from its facility on Sept. 9, 1999, as this finding would be cumulative of other violations found and would not affect the remedy, and (b) the judge's finding that the Respondent violated Section 8(a)(4) by discharging employee Lisa Fry, as this finding would not materially affect the remedy in view of the finding—in which he joined—that her discharge violated Section 8(a)(3).

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IUE District 11; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at Jonesboro, May 22-26, May 30-June 2, Aug. 28 and 31, 2000. Adm. Law Judge Howard I. Grossman issued his decision July 31, 2001.

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Valley Slurry Seal Co. (20-CA-30721-1, et al.; 343 NLRB No. 34) Sacramento, CA Sept. 30, 2004. The administrative law judge found, and the Board agreed, that the Respondent, by its numerous unfair labor practices, violated Section 8(a)(1) and (3) of the Act. [HTML] [PDF]

Members Schaumber and Meisburg disagreed with the judge's finding that the Respondent violated Section 8(a)(1) when, after finding a union handbill on his truck, Foreman Anson Jones "said that if that asshole puts any more shit on my windshield, I'm going to kick his ass." They dismissed this allegation of the complaint, contending that Jones' remark would reasonably have been understood by employees as a personal, subjective reaction, and not as a communication by the Respondent. Member Walsh would adopt the judge's finding of a violation for the reasons stated in the judge's decision.

(Members Schaumber, Walsh, and Meisburg participated.)

Charges filed by Laborers Local 185, et al.; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Sacramento, April 1 and 2 and June 10, 2003. Adm. Law Judge Burton Litvak issued his decision Dec. 12, 2003.

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Wilshire at Lakewood (17-CA-21564; 343 NLRB No. 23) Lee's Summit, MO Sept. 30, 2004. Members Liebman and Walsh held, contrary to the administrative law judge, that Registered Nurse (RN) Lisa Jochims was a statutory employee engaged in protected activity when circulating a petition protesting a proposed change in working conditions, and accordingly the Respondent's conduct towards Jochims, including her termination, violated Section 8(a)(1) of the Act, as alleged. Chairman Battista, dissenting, agreed with the judge that Jochims, the Respondent's weekend supervisor, possessed supervisory authority, and, thus, Jochims' activity was not protected under Section 7. [HTML] [PDF]

The Board affirmed the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by telling employees, at a Feb. 22, 2002 meeting, that Jochims had been terminated for circulating the petition, and that the Respondent "did not ever want to see them do anything like that again." It relied solely on the judge's determination that the testimony of Angela McLain, the only witness to testify in support of this allegation, was not credible.

Chairman Battista and Member Liebman affirmed the judge's finding that the Respondent did not violate Section 8(a)(1) by maintaining a rule in its employee handbook prohibiting rumors and gossip in the facility and a rule prohibiting employees from walking off their shift without permission of the employees' supervisor or administrator. Member Walsh, dissenting in part, found that the Respondent violated Section 8(a)(1) by maintaining the handbook rule prohibiting employees from walking off their shift without permission of the employees' supervisor or administrator.

There were no exceptions to the judge's findings that the Respondent violated Section 8(a)(1) by maintaining handbook rules that prohibit employees from misrepresenting a fact to obtain a benefit, that prohibit making false or malicious statements about a resident, employee, supervisor, or the Company, that prohibit paycheck disclosure, and that prohibit soliciting and distribution written material during working time or in any work area or residential

care area. There were also no exceptions to the judge's finding that the Respondent violated Section 8(a)(1) by interrogating employee Christine Brackenbury about her protected concerted activity. The Board found it unnecessary to pass on the judge's finding that the Respondent did not violate Section 8(a)(1) by interrogating employee, Nancy Slackard, about her protected activity, because a finding of an additional interrogation violation would be cumulative and would not affect the remedy.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Lisa Jochims, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Overland Park on May 7, 2002. Adm. Law Judge Gregory Z. Meyerson issued his decision July 18, 2002.

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Wonder Bread, a Div. of Interstate Brands Corp. (30-CA-16456-1; 343 NLRB No. 14) Hodgkins, IL Sept. 29, 2004. The Board, finding that deferral to the parties' contractual grievance-arbitration procedures was appropriate, granted the Respondent's motion to dismiss the complaint. The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with Teamsters Local 334 before unilaterally requiring its Route Sales Representatives (RSRs) to submit to physical examinations, including possible drug testing, pursuant to regulations of the U.S. Department of Transportation (DOT). [HTML] [PDF]

The Board retained jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of its decision, either been resolved by an amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

The Board noted these factors in agreeing with the Respondent that deferral is appropriate. The parties have had a bargaining relationship dating back several decades, the Respondent has expressed a willingness to utilize the grievance-arbitration process to resolve the instant dispute, and the Union, by filing a grievance, has indicated that the subject of the grievance is amenable to the grievance-arbitration process. There is no contention that the Respondent has been hostile to the exercise of its employees' protected statutory rights.

(Chairman Battista and Members Schaumber and Meisburg participated.)

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Worldwide Flight Services, Inc. (29-RC-10028; 343 NLRB No. 4) Jamaica, NY Sept. 28, 2004. The Board found that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the National Mediation Board (NMB) pursuant to Section 201 of Title II of the Railway Labor Act (RLA). Accordingly, it dismissed the petition filed by

Petitioner Teamsters Local 851 seeking to represent all full-time and regular part-time freight agents and acceptance agents employed by the Employer at Building 9 of John F. Kennedy International Airport in Jamaica, New York. [HTML] [PDF]

At the Board's request, the NMB considered the record in this case and issued an opinion stating that in its view the Employer is a carrier subject to the RLA.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Ybarra Construction Co. and D&P Drywall, Inc., a Single Employer (7-CA-44842; 343 NLRB No. 5) Detroit, MI Sept. 29, 2004. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against Allen Kirk because he engaged in protected, concerted activity. The Board relied exclusively on Kirk's enlisting Painters District Council 22 for assistance with his claims for overtime and benefits—both of which were provided for the collective-bargaining agreement in effect between the Respondent and the Union—and the Respondent's actions in response thereto, including demoting Kirk and reducing his hourly wage. The Respondent did not except to the judge's findings that it violated Section 8(a)(1) by telling Kirk that there was no work available; and that it constructively discharged Kirk on or about Jan. 29, 2002. [HTML] [PDF]

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by Painters District Council 22; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, Jan. 20-21, 2004. Adm. Law Judge Michael A. Rosas issued his decision June 16, 2004.

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Yellow Transportation, Inc. (17-CA-22549; 343 NLRB No. 9) Kansas City, MO Sept. 29, 2004. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging casual employee Tony Laning because he engaged in protected concerted activity by filing a grievance over the Respondent's decision not to convert him to a position as a regular employee under the terms of the Respondent's collective-bargaining agreement with Teamsters Local 41. The Board found it unnecessary to pass on the judge's finding that Laning's discharge also violated Section 8(a)(3) because the additional finding would be cumulative with no material effect on the remedy. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Tony Laning, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park, KS on June 2, 2004. Adm. Law Judge Gregory Z. Meyerson issued his decision July 19, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Auto Workers Local 174 (an Individual) Belleville, MI Sept. 17, 2004. 7-CB-14320; JD-95-04, Judge C. Richard Miserendino.

The Brooklyn Hospital Center (New York State Nurses Association) Brooklyn, NY Sept. 30, 2004. 29-CA-26044; JD(NY)-44-04, Judge Eleanor MacDonald.

Cleveland Coca-Cola Bottling Company, Inc. (Teamsters Local 293) Bedford Heights, OH Oct. 1, 2004. 8-CA-34657; JD-99-04, Judge Bruce D. Rosenstein.

*Duane Reade, Inc. (*Allied Trades Council Division of Local 338, UFCW and Individuals) New York, NY Sept. 29, 2004. 2-CA-35441, et al.; JD(NY)-41-04, Judge Raymond P. Green.

Duer Construction Company, Inc. (Individuals) Akron, OH Sept. 30, 2004. 8-CA-34227, 34388; JD-96-04, Judge C. Richard Miserendino.

Independence Residences, Inc. (Needletrades Employees [UNITE!]) Queens, NY Sept.30, 2004. 29-CA-25657, et al.; JD(NY)-43-04, Judge Steven Fish.

Lancaster Nissan, Inc. (Machinists District Lodge 98) East Petersburg, PA Sept. 30, 2004. 4-CA-32498, 32862; JD-100-04, Judge Jane Vandeventer.

METFAB, Inc. (Sheet Metal Workers Local 54) Houston, TX Sept. 30, 2004. 16-CA-23533, et al., 16-RM-763; JD(ATL)-52-04, Judge Michael A. Marcionese.

Pacific Bell Telephone Company d/b/a SBC California (Communications Workers Local 9509) San Diego, CA Sept. 23, 2004. 21-CA-36096; JD(SF)-71-04, Judge Lana H. Parke.

Pontiac Care and Rehabilitation Center (1199 NY Upstate Division [SEIU]) Oswego, NY Sept. 28, 2004. 3-CA-24724; JD-97-04, Judge Arthur J. Amchan.

Richmond Electrical Services, Inc. (Electrical Workers [IBEW] Local 666) Richmond, VA Sept. 27, 2004. 5-CA-31680; JD-87-04, Judge David L. Evans.

Salmon Run Shopping Center, LLC (Carpenters' Empire State Regional Council Local 747) Watertown, NY Sept. 28, 2004. 3-CA-24578; JD(NY)-42-04, Judge Joel P. Biblowitz .

Teamsters Local 443 (an Individual) Orange, CT Sept. 28, 2004. 34-CB-2723; JD-98-04, Judge Arthur J. Amchan.

Vanguard Fire & Supply Co., Inc. d/b/a Vanguard Fire & Security Systems (Plumbers Local 669) Grand Rapids, MI Sept. 30, 2004. 7-CA-45823, et al.; JD(ATL)-51-04, Judge Keltner W. Locke.

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NO ANSWER TO COMPLAINT CASES

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

Colonial Rubber Co. (Steelworkers) (8-CA-35002-1; 343 NLRB No. 10) Ravenna, OH Sept. 29, 2004. [HTML] [PDF]

Energy Services International, Inc. and Arkansas Wiring Systems, Inc., alter egos (Electrical Workers [IBEW] Local 700) (26-CA-21570; 343 NLRB No. 6) Fayetteville, AR Sept. 30, 2004. [HTML] [PDF]

Exhibit Dynamics, Inc. (Ohio and Vicinity Regional Council of Carpenters) (8-CA-34859-1; 343 NLRB No. 33) Strongsville, OH Sept. 30, 2004. [HTML] [PDF]

Mary Cannon t/a Enviro-Tech (Laborers Local 332) (4-CA-33146, 33227; 343 NLRB No. 15) Philadelphia, PA Sept. 30, 2004. [HTML] [PDF]

Paint America Services, Inc. (Painters District Council 22) (7-CA-47564; 343 NLRB No. 41) Saline, MI Sept. 30, 2004. [HTML] [PDF]

Rhonda Lynn Shirey d/b/a Frontline Ultra Care (Food & Commercial Workers Local 1059) (9-CA-40590; 343 NLRB No. 7) Columbus, OH Sept. 29, 2004. [HTML] [PDF]

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TEST OF CERTIFICATION

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

Air 2 LLC (Electrical Workers [IBEW] Local 222) (12-CA-23898; 343 NLRB No. 19) Miami, FL Sept. 30, 2004. [HTML] [PDF]

Fred's Inc. (Southern Regional Joint Board [UNITE]) (26-CA-21528; 343 NLRB No. 22) Memphis, TN Sept. 30, 2004. [HTML] [PDF]

Lisbon Cleaning, Inc. (Retail, Wholesale and Department Store Local 108) (22-CA-26432; 343 NLRB No. 43) Newark, NJ Sept. 30, 2004. [HTML] [PDF]

Manhattan Center Studios, Inc. (Stage Employees Local 1) (2-CA-35394; 342 NLRB No. 131) New York, NY Sept. 24, 2004. [HTML] [PDF]

United Cerebral Palsy of New York City, Inc. (United Federation of Teachers Local 2, AFT) (29-CA-24569; 343 NLRB No. 1) New York, NY Sept. 28, 2004. [HTML] [PDF]

Valcourt Building Services, Inc. (Painters District Council 711) (22-CA-26491; 343 NLRB No. 25) Elizabeth, NJ Sept. 30, 2004. [HTML] [PDF]

Vistar (General Drivers, Warehousemen and Helpers Local 745) (16-CA-23808; 343 NLRB No. 36) Dallas, TX Sept. 30, 2004. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

U.S.A. Healthcare Center Newton, LLC, Newton, IA, 18-RC-17242, Sept. 27, 2004 (Chairman Battista and Members Walsh and Meisburg)
AKAL Security, Inc., Florence, AZ, 28-RC-6141, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)
Crowne Plaza LaGuardia Airport, Brooklyn, NY, 29-RC-10192, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)

DECISION AND DIRECTION[that Regional Director open and count ballots]

World Journal, Millbrae, CA, San Jose, CA, 20-RD-2371, Sept. 27, 2004 (Chairman Battista and Members Walsh and Meisburg)

DECISION AND ORDER[overruling objections]

Renaissance Senior Living Management, Inc., Santa Cruz, CA, 32-RC-5262 Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

K&C Erectors, LLC, Prairie Grove, IL, 33-RC-4845, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)

DECISION AND ORDER[remanding to Regional Director]

Citrus Motors Ontario, Inc., Ontario, CA, 31-RC-8320, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)
Hayward Nissan, Hayward, CA, 32-RC-5270, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)
Georgia-Pacific Corporation, Indianapolis, IN, 25-RC-10238, Oct. 1, 2004 (Chairman Battista and Members Liebman and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

The Woods Quality Cabinetry Company, Eighty Four, PA, 6-RC-12194, Sept. 30, 2004 (Chairman Battista and Members Walsh and Meisburg)

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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)

Brundage-Bone Concrete Pumping, Inc., Exeter, CA, 32-RM-788, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)
Reichhold, Inc., Morris, IL, 33-RC-4878, Sept. 29, 2004 (Chairman Battista and Members Liebman and Walsh)
Serco Management, Inc., Tallahassee, FL, 12-RD-973, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)
Steppenwolf Theatre Company, Chicago, IL, 13-RC-20942, Sep. 29, 2004 (Chairman Battista and Members Liebman and Walsh)

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Miscellaneous Board Orders

ORDER[denying Union's request for special permission to appeal the Regional Director's direction of an expedited election]

MacDonald Machinery Company, Inc., South Bend, IN, 25-RM-604, Sept. 29, 2004 (Chairman Battista and Members Walsh and Meisburg)

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