National Labor Relations Board

Weekly Summary of NLRB Cases

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

May 5, 2006 W-3050

C A S E S S U M M A R I Z E D

VISIT WWW.NLRB.GOV FULL TEXT

OTHER CONTENTS

Airport 2000 Concessions, LLC (5-CA-32092, 32185; 346 NLRB No. 86) Baltimore, MD April 24, 2006. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act in several respects during UNITE HERE Local 7's attempt to organize employees of the Respondent's concession operations at Baltimore/Washington International Airport. The employees worked on pier B of the airport, where the Respondent maintained a Charley's Steakery and a combined Caribou Coffee/Mamma Ilardo's Pizza restaurant. [HTML] [PDF]

Chairman Battista and Member Schaumber reversed the judge and dismissed the allegation that Valerie Trusty, the managing partner for Charley's Steakery and an admitted supervisor, unlawfully surveilled an employee on June 16, 2004, when she interrupted a breaktime conversation between a union organizer and a team member in the unit (the dining area adjacent to the food service counters). The Board agreed with the judge that Trusty's subsequent conduct (returning to her workstation and instructing employees not to speak with union organizers) violated Section 8(a)(1). Chairman Battista and Member Schaumber found merit in the Respondent's exception and reversed the judge's finding that the Respondent's secretary/treasurer, Stephen Olsen, acted unlawfully in soliciting grievances from employees Johns and Reaves on Aug. 24, 2005.

Member Liebman dissented from her colleagues' reversals of the judge. She would find that Trusty's interruption of the team member's breakroom conversation with a union representative constituted unlawful surveillance, noting that "Trusty immediately followed her intrusion into the team member's obviously union-related conversation with a general announcement of an overbroad no-solicitation rule that expressly (and unlawfully) prohibited the precise protected conduct that the team member was at that very moment engaged in." Turning to her agreement with the judge's conclusion that the Respondent acted unlawfully in soliciting the grievance of Johns and Reaves, Member Liebman pointed out that prior to Aug. 24, Olsen had never met, one-on-one, with Johns or Reaves, and he was not the Respondent's contact person for benefits. She found that the Respondent did not meet its burden of rebutting the inference of an implied promise.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UNITE HERE Local 7; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Baltimore, Feb. 22-24, 2005. Adm. Law Judge Eric M. Fine issued his decision June 2, 2005.

***

Mercy, Inc. d/b/a American Medical Response (28-CA-19495; 346 NLRB No. 88) Las Vegas, NV April 26, 2006. Chairman Battista and Member Schaumber found, contrary to the administrative law judge, that a 3-month extension rather than his recommended 1-year extension of Service Employees Local 1107's certification year, is appropriate. They noted that the initial 10 months of the certification year were free from unfair labor practices and there is no

explanation in the record for the lack of bargaining during those 10 months. Member Liebman, dissenting, would adopt the judge's recommended 12-month extension to the certification year based on the Respondent's unfair labor practices and bargaining behavior. [HTML] [PDF]

On May 16, 2003, the Union was certified as the exclusive representative of the Respondent's paramedics, EMT-l's, and EMT's working out of its Las Vegas, NV facility. The parties' first bargaining session, which did not occur until March 30, 2004, ended because the Union refused to agree to the Respondent's ground rules. On April 22, the Union served the Respondent with its third information request. The Respondent subsequently complied with some, but not all, of the Union's requests.

On June 22, 2004, the Union filed a charge alleging that the Respondent violated Section 8(a)(5) of the Act when it preconditioned bargaining on the Union's agreement to its ground rules which were not mandatory subjects of bargaining. On the same date, employees filed a second decertification petition, which is currently blocked by the instant unfair labor practice charge. The first decertification petition filed on May 17, 2004 was withdrawn. The Union amended its charge on July 28, 2004, to additionally allege that the Respondent violated Section 8(a)(5) and (1) by failing to comply with its third information request. On Aug. 2, 2004, the Regional Director issued a complaint alleging that the Respondent violated Section 8(a)(5) and (1) by demanding agreement on nonmandatory subjects of bargaining and refusing to comply with the Union's April 22 request for information.

The parties resumed bargaining on Nov. 16, 2004, after agreeing to modify ground rules. At the opening of the hearing on the complaint, the General Counsel noted that he had been in discussions with the Respondent about a settlement but could not obtain the Union's agreement because of the pending decertification petition. The Respondent did not enter into a formal settlement agreement, but it withdrew its answer to the complaint and the General Counsel moved for judgment on the pleadings. The parties left the remedy to the judge and the Board.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Employees Local 1107; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Las Vegas on March 16, 2005. Adm. Law Judge James L. Rose issued his decision April 19, 2005.

***

Plumbers Local 32 (Anthony Construction Co., Inc.) (19-CB-9181; 346 NLRB No. 95) Tacoma, WA April 28, 2006. The administrative law judge found, and the Board agreed, that the Respondent denied William Stone's request for a photocopy of referral records of its exclusive hiring hall under circumstances where he had a reasonable belief that he had been unfairly treated by the hiring hall, in violation of Section 8(b)(1)(A) of the Act. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by William Stone, an individual; complaint alleged violation of Section 8(b)(1)(A). Hearing at Seattle on Oct. 18, 2005. Adm. Law Judge Jay R. Pollack issued his decision Dec. 9, 2005.

****

Caldwell Mfg. Co. (3-CA-24955; 25076; 346 NLRB No. 100) Rochester, NY April 28, 2006. In agreement with the administrative law judge, the Board decided that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide IUE-CWA Local 311 with requested information, which precluded the existence of a valid impasse between the parties in their negotiations because the information was relevant to the core issues separating the parties; and by prematurely declaring impasse, announcing the unilateral implementation of its final bargaining offer, and unilaterally implementing the terms of that offer. [HTML] [PDF]

During the parties' negotiations, the Respondent's representative made certain specific factual representations in support of its proposals. The Union's representative orally requested information to evaluate the proposals and develop counterproposals. The Union later acquired a financial consultant to assist in preparing a detailed, written request, which was sent to the Respondent. The letter requested information such as material costs, labor costs, manufacturing overhead, productivity calculations, competitor data, and data on possible new production. The Respondent denied the Union's request on the ground that it had not cited an inability to pay. The Respondent declared impasse and implemented the terms of its final bargaining offer.

The Board rejected the Respondent's argument in its exceptions that the Union was not entitled to receive the information because it was financial in nature and the Respondent had not claimed an inability to pay. It noted, as did the judge, that an employer's duty to bargain includes a general duty to provide information needed by the bargaining representative to assess claims made by the employer relevant to contract negotiations. Generally, information pertaining to employees within the bargaining unit is presumptively relevant. When the representative requests information that does not concern terms and conditions of employment for bargaining unit employees—such as data or information pertaining to nonuit employees—there is no such presumption of relevance, and the potential relevance must be shown.

The Board added that where there has been a showing of relevance, the Board has consistently found a duty to provide information such as competitor data, labor costs, production costs, restructuring studies, income statements, and wage rates for nonunit employees. *E.I. du Pont & Co*., 276 NLRB 335 (1985); *E.I. du Pont & Co*., 264 NLRB 48, 51 (1982), enfd. 744 F.2d 536 (6th Cir. 1984); see also *CalMat Co*., 331 NLRB 1084 at 1096-1097; *Litton Systems*, 283 NLRB 973, 974-975 (1987), enf. denied on other grounds 868 F.2d 854 (6th Cir. 1989).

In this case, Board found that although the information requested by the Union was not presumptively relevant, the General Counsel established that the information was relevant, because it would have assisted the Union in assessing the accuracy of the Respondent's proposals and developing its own counterproposals. The Union's requests were made directly in response to specific factual assertions made by the Respondent in the course of bargaining. The Board noted that the Respondent's argument—that an employer has no duty to disclose information that is financial in nature when the employer has not claimed an inability to pay—was rejected the Board in *E. I. du Pont*, supra.

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by IUE-CWA Local 311; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo, Jan. 25-26, 2005. Adm. Law Judge Paul Bogas issued his decision June 22, 2005.

***

Central Valley Meat Co. (32-CA-17951, et al.; 346 NLRB No. 94) Hanford, CA April 28, 2006. The Board, in agreeing with the administrative law judge that the Respondent's refusal to permit employee Jose Sandoval to wait in its parking lot violated Section 8(a)(1) of the Act, relied on the disparate treatment of Sandoval, a known union supporter, compared to other employees who were routinely permitted to wait in the Respondent's parking lot. In light of its finding that the Respondent's no-access policy was discriminatorily applied, the Board found it unnecessary to rule on the judge's finding that the policy itself violated Section 8(a)(1). [HTML] [PDF]

The United Farm Workers began organizing the Respondent's floor and boning department employees after kill floor employee Sandoval contacted the Union. In Feb. 2000, Sandoval was waiting in the Respondent's parking lot, after his shift, for another employee to give him a ride home. The Respondent's security guard told Sandoval that he had to leave because he was talking to employees as they left the plant.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed United Farm Workers; complaint alleged violation of Section 8(a)(1). Hearing at Hanford, Jan.23-26, April 2-6, and June 4-6, 2001. Adm. Law Judge John J. McCarrick issued his decision Oct. 16, 2001.

***

Certco Distribution Centers (30-CA-16895-1; 346 NLRB No. 102) Madison, WI April 28, 2006. The administrative law judge found that the Respondent violated Section 8(a)(5) of the Act by failing to provide Teamsters Local 695 with some of the information it requested concerning the Respondent's facility in Madison, WI on Verona Road (Verona), where the Union has

represented employees since 1962, and its facility in Madison, WI on Helgesen Drive (Helgesen) that opened in March 2004. The Board found that the Respondent was required to provide all of the requested information. [HTML] [PDF]

After the Respondent announced the opening of the Helgesen warehouse, the Union contended that it should represent the Helgesen employees as an accretion to the Verona unit and that the parties' collective-bargaining agreement should apply at Helgesen. The Respondent replied that the Helgesen facility would not have a bargaining unit and declined to recognize the Union or apply the contract at that facility. The Union filed a grievance over the opening of the Helgesen facility. The Respondent rejected the grievance as nonarbitrable. When the Helgesen warehouse opened in March 2004, no Verona employees applied for positions at Helgesen and none were hired. The Respondent transferred large quantities of product from Verona to Helgesen. In a May 10 letter, the Union requested information regarding the Verona facility and the Helgesen facility.

The judge found that the Union's requests regarding unit work at Verona and the transfer of product from Verona to Helgesen were relevant, but that the information sought regarding the establishment, management, and staffing of the Helgesen facility was not relevant. The Board found that the Respondent must provide all the requested information, explaining that many of the Union's inquiries (in addition to those that the judge found to be relevant) sought information related to the existing bargaining unit at Verona. It added that the Union has shown that the information requested about the nonunit Helgesen operations was relevant because it had legitimate concerns about the possible transfer of unit work from Verona to Helgesen and had filed a grievance related to those concerns. The Respondent, in defense of its failure to provide the requested information, only asserted lack of relevance, which the Board rejected.

The Board reversed the judge's finding that the Respondent violated Section 8(a)(1) by telling its employees that the Helgesen facility would be nonunion. The Board wrote: "The Respondent officials never told the employees explicitly that the Helgesen facility would be 'nonunion,' but instead said that it was a new facility that would not have a bargaining unit upon its opening. This was merely a statement of the Respondent's position, with which we and the judge have agreed, that the collective-bargaining agreement did not apply to the new facility."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 695; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Madison, March 14-15, 2005. Adm. Law Judge George Carson II issued his decision May 5, 2005.

****

Consolidated Biscuit Co. (8-CA-33402, et al., 8-RC-16402; 346 NLRB No. 101) McComb, OH April 28, 2006. The Board affirmed in part and reversed in part the administrative law judge's findings that the Respondent committed a number of unfair labor practices in violation of

Section 8(a)(1) and (3) of the Act during the Union's organizing campaign and after the election held on May 21, 2002, which the Bakery Workers International lost 485-286. Chairman Battista and Member Walsh, with Member Schaumber dissenting, adopted the judge's recommended broad cease-and desist order, to which no exceptions were filed. The Board set aside the election held in Case 8-RC-16402 and remanded the case to the Regional Director to conduct a second election. [HTML] [PDF]

The Respondent's misconduct included discharging the two most active union supporters, Russell Teegardin and William Lawhorn; issuing disciplinary warnings to Teegardin, Thomas Thompson, and Gary Hill; denying employee Cheri Todd a temporary lead position and telling her she was not selected because of her union activity; telling employees not to talk about the Union on company time; suggesting to employees that supporting the Union would be futile; threatening employees with loss of benefits, plant closure and stricter discipline if they supported the Union; and instructing security guards to call police at the first sign of union activity and calling the police to its facility to interfere with employees engaged in lawful activities in support of the Union.

In reversals of the judge, the Board found that the Respondent did not violate Section 8(a)(1) by erecting 10 "no trespassing" signs and 4 signs giving notice that all activities were being monitored by video camera, by allegedly assigning more onerous work to relief machine operator Tammy Medina because of her union activity, when Supervisor Kelly Frey gave employee Thompson a verbal warning for not being at his workstation on time, and when Managers Birkemeyer and Dan Kear told employees Patti Wickman to remove prounion slogans, written in magic marker, on their arms while at work. It also reversed the judge and dismissed allegations that the Respondent violated Section 8(a)(3) by discharging John Green, Gary Hill, Thomas Thompson, Tyrone Holly, and Patti Wickman because of their union activities.

Member Walsh, dissenting in part, agreed with the judge that the Respondent violated Section 8(a)(1) by erecting the no-trespassing signs near the entrance to the employee area where the employees had begun to congregate 1-2 days before and when Frey told Thompson, in the context of a verbal warning for not being at his workstation on time, that his Union was not around to protect him now. He also disagreed with his colleagues' failure to find that the Respondent unlawfully discharged union supporters Green, Hill, Thompson, Holly, and Wickman, saying "these discharges were part of a strategy whereby the Respondent seized upon infractions committed by suspected union supporters in order to rid itself of them and prevent the resurgence of the union campaign."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Bakery Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Bowling Green, July 29-Aug. 1 and Sept. 8-11 and 29-30, 2003. Adm. Law Judge Arthur J. Amchan issued his decision Jan. 14, 2004.

***

Ead Motors Eastern Air Devices, Inc. (1-CA-40651, et al.; 346 NLRB No. 93) Dover, NH April 28, 2006. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act when it prematurely declared impasse and implemented the terms of its final offer to IUE-CWA Local 81243, and that many of the Respondent's subsequent unilateral actions were also unlawful, but it explained its rationale. It agreed with the remainder of the judge's findings with minor exceptions. [HTML] [PDF]

The judge found that the Respondent could not lawfully declare impasse because it did not present the Union with a complete Matrix proposal, a wholesale reconfiguration of the extant job classification system and the primary concern throughout negotiations. The Board found that *I.T.T. Rayonier, Inc.*, 305 NLRB 445 (1991), relied on by the judge, did not support his finding that the Respondent's Matrix proposal was incomplete. In *I.T.T. Rayonier*, the Board held that "there is nothing improper in an employer's commencing negotiations with a broad outline of proposals that are nonspecific and attempting to obtain through negotiations the Union's cooperation in developing contract language to resolve a specific concern." Id. at 446 fn. 6. In this decision, the Board held that the Matrix proposal cannot be characterized as not fully formulated such that the parties could not effectively bargain over it.

Citing *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board found that the Respondent failed to meet its burden to establish a valid impasse. It rejected the Respondent's argument that, under the parties' bargaining history, it was entitled to conclude negotiations when the contract expired. In addition, the Board found that the Respondent's arbitrary deadline did not allow sufficient time for meaningful bargaining over the Respondent's proposed changes. As further support for finding no impasse, the Board considered the Union's stated intention to return to the bargaining table in response to the Respondent's declaration of impasse.

Turning to another alleged violation, the Board reversed the judge and found that the Respondent did not violate Section 8(a)(5) and (1) by reducing the toolroom attendant position from full time to part time and eliminating the position altogether and transferring French to the stockroom. Member Walsh, dissenting in part, would find that the Respondent violated Section 8(a)(5) when it eliminated the position altogether and transferred French to the stockroom.

The Board's remedy included an order that the Respondent, on request of the Union, immediately put into effect all terms and conditions of employment provided by the contract that expired at 7 p.m. on Sept. 17, 2002, and to maintain those terms in effect until the parties have bargained to an agreement or a valid impasse, or the Union has agreed to the changes.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by IUE-CWA Local 81243; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Boston, MA and Dover, NH on 12 days between Jan. 26 and March 10, 2004. Adm. Law Judge Martin J. Linsky issued his decision June 15, 2004.

***

Invista (11-CA-20703; 346 NLRB No. 107) Salisbury, NC April 28, 2006. The Board upheld the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Lucy Henderson on about March 11, 2005, because she joined, supported, or assisted Teamsters Local 71. [HTML] [PDF]

The Board reversed the judge's finding that the Respondent violated Section 8(a)(1) by threatening its employees by letter with unspecified reprisals in retaliation for their engaging in union activity, after concluding that that there is insufficient evidence to support finding a violation.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 71; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Salisbury on June 27, 2005. Adm. Law Judge John H. West issued his decision Sept. 13, 2005.

***

Yeshiva Ohr Torah Community School, Inc. d/b/a Manhattan Day School (2-CA-32420; 346 NLRB No. 89) New York, NY April 25, 2006. The administrative law judge dismissed the complaint in its entirety concerning the Respondent's actions in subcontracting bargaining unit work in the summer of 1999. The Board adopted the judge's dismissals in all respects except it found that the Respondent violated Section 8(a)(1) of the Act by informing unit employees of its plan to subcontract work because of their support for Teamsters Local 808. Member Walsh, concurring and dissenting in part, would find that the Respondent also unlawfully terminated the unit employees and subcontracted their work in violation of Section 8(a)(3) and (5). [HTML] [PDF]

The complaint alleged that the Respondent violated Section 8(a)(5) by negotiating the subcontracting clause in bad faith; Section 8(a)(1) by its supervisors' statements about subcontracting; Section 8(a)(3) and (5) by terminating unit employees' employment and subcontracting their work; Section 8(a)(5) by failing to provide information about the subcontracting; and Section 8(a)(3) by constructively discharging two employees.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 808; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, May 3-5 and 8-9, 2000. Adm. Law Judge D. Barry Morris issued his decision Dec. 28, 2000.

***

Journal Register East d/b/a New Haven Register (34-CA-11070, 11085; 346 NLRB No. 98) New Haven, CT April 28, 2006. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Robert Camposano on Aug. 18, 2004, and suspending him on Jan. 7. 2005, because of his activities for Laborers Local 455 and other protected concerted activities; and violated Section 8(a)(1) by issuing a memorandum asking employees to report to management the union activities of other employees. [HTML] [PDF]

In affirming the judge's finding that the Respondent's memorandum violated Section 8(a)(1), Members Schaumber and Kirsanow found it unnecessary to rely on *Tawas Industries*, 336 NLRB 318 (2001), cited by the judge. Member Schaumber would overrule *Tawas* to the extent that it held an employer violates Section 8(a)(1) when, in response to reports of threats and coercion of employees, the employer issues a facially neutral prohibition against such conduct and/or requests that employees report such conduct to management and/or the Board. He believes the term "coercion" as it appears in the statute is not so inherently ambiguous that employees would reasonably construe it to apply to Sec. 7 activities and suggests that the Board reconcile its divergent precedent in this area. Member Kirsanow, having decided *Tawas* is inapposite, found it unnecessary to comment on the future vitality of that decision.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Laborers Local 455; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford on June 15-17, 2005. Adm. Law Judge Wallace H. Nations issued his decision Aug. 31, 2005.

***

L.B.&B. Associates, Inc. and Olgoonik Logistics, LLC, a joint venture d/b/a North Fork Services (29-CA-25511, et al.; 346 NLRB No. 92) Columbia, MD and Plum Island, NY April 28, 2006. The unit employees in this case commenced an economic strike on Aug. 14, 2002 and on March 21, 2003, Operating Engineers Local 30 made an unconditional offer to return to work on their behalf. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging longtime union member James McKoy on June 20, 2003 because of his union activity and failing to reinstate nine former economic strikers after the Union made the unconditional offer to return to work. [HTML] [PDF]

The Board explained its rationale in adopting the judge's findings regarding McKoy, former strikers Bumble, Siemerling, Patenaude, and Soullas, and the Respondent's refusal to reinstate former striker Kerr to a vacant ordinary seaman position. It adopted, without further comment, the judge's findings regarding former strikers Letavec, Weinmiller, and Borrusso.

The Board reversed the judge's findings that the Respondent unlawfully refused to reinstate former striker Occhiogrosso to a vacant laborer/escort position and unlawfully refused to reinstate Kerr to the position of full-time master. It found that the laborer/escort position was not substantially equivalent to Occhiogrosso's prestrike position of trades helper/laborer. It also concluded that Kerr's occasional part-time work as a master did not establish that he held the position of full-time master, and his pre-strike position was not substantially equivalent to the full-time master position available after the strike. Member Walsh, dissenting in part, agreed with the judge that the Respondent unlawfully failed to offer Occhiogrosso reinstatement to the labor/escort position, for which he was fully qualified, and which was substantially similar to his former job.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Operating Engineers Local 30; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn on 6 days from Oct. 28, 2003 to Jan. 22, 2004. Adm. Law Judge Eleanor MacDonald issued her decision Aug. 9. 2004.

***

North Hills Office Services, Inc. (29-CA-25930; 346 NLRB No. 96) Woodbury, NY April 28, 2006. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning to Ana Joya, Sandra Hernandez, and Maria Mendoza for distributing union literature on "company time," and discharging Joya and Hernandez; and violated Section 8(a)(1) by, among others, directing night-shift employees to remove their union t-shirts on July 1, 2003, and implementing a new policy on July 2, 2003, requiring night-shift employees to wear a uniform; and directing off-duty employees to stop distributing union leaflets in a nonworking area in August and on October 14, 2003. [HTML] [PDF]

Chairman Battista and Member Schaumber (Member Liebman dissenting) reversed the judge's finding that the Respondent violated Section 8(a)(1) by distributing the Sept. 22, 2003 edition of its "Plain Talk" newsletter to employees that included this statement about the Union:

> Many of you must have read newspapers regarding the bigotry and the bias crimes committed against Hispanic workers in Farmingville. 32BJ has shown their true colors when they went to the Federal Labor Board with a group of employees and told the Federal Labor Board that North Hills many of the hardworking Hispanic people we employ are undocumented. 32BJ is creating problems for hardworking Hispanic people! 32BJ is trying to get the INS to threaten North Hills employees. You have to ask yourself why did the Union engage in such gutter tactics. When you see a 32BJ representative or a sympathizer, ask them why they told the Labor Board that the people working at North Hills are undocumented. To verify that they told this to the Labor

> Board, you need only call the attorney at the Board . . . . This is the most unprincipled tactic that any union can use and only a union as unscrupulous as 32BJ would engaged [sic] in this kind of activity.

Chairman Battista and Member Schaumber noted that, contrary to the judge's statement, the Board did not find the Sept. 22 newsletter was unlawful in *North Hills Office Services*, 344 NLRB No. 134, slip op at 15 (2005) *(North Hills I)*. They acknowledged that threats involving immigration or deportation can be particularly coercive because they place in jeopardy employees' jobs and working conditions along with their ability to remain in the U.S. In finding that this Respondent did not make a threat, Chairman Battista and Member Schaumber noted that the Respondent explained to employees its view of what the Union had done and what the Union allegedly planned on doing, that the newsletter did not say that the Respondent would take any action regarding employees' immigration status, and that employees would reasonably understand that the newsletter did not refer to any action within the control of the Respondent.

Member Liebman would find that the newsletter violated Section 8(a)(1), particularly in the context of the Respondent's other, unlawful antiunion conduct. She wrote "the newsletter's repeated references to the 'Federal Labor Board' in connection with the Union's asserted efforts to create immigration-law difficulties for employees, would discourage employees from bringing claims to the Board and from cooperating with the Board, for fear of being reported to immigration authorities." Member Liebman added that the newsletter was attached to employees' paychecks and included a large picture of a rat, saying: "Employees who both faced the real possibility of employer reprisals and who were discouraged from turning to the Board for protection would reasonably tend to be chilled in their exercise of Sec. 7 rights."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Employees Local 32B-J; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn on various days in June and Aug. 2004. Adm. Law Judge Raymond P. Green issued his decision Jan.14, 2005.

***

Oasis Mechanical, Inc. (17-CA-23050; 346 NLRB No. 91) Princeton, TX April 27, 2006. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Tommy O'Donnell, Mike Franklin, and Larry Mason because of their activities for Plumbers Local 344. [HTML] [PDF]

The Board modified the judge's recommended Order in various respects. Among others, it noted that the Respondent is free to argue at compliance that instatement is not appropriate because it allegedly made the discriminatees unconditional offers of employment in March 2005 and that the backpay period was tolled at the time of those offers. The Board modified the judge's Order to reflect that, under *FES*, 331 NLRB 9, 14 (2000), the Respondent's conduct

constitutes not only a refusal to hire the two applicants who would have been hired (as determined at compliance), but also a refusal to consider the remaining applicant, for whom no position would have been available. Because the Respondent cannot meet an obligation to offer instatement within 14 days of the Board's decision to applicants whose identities are yet to be determined, the Board removed the 14-day time limit in this provision.

Although the complaint did not allege, and the Board did not find, a refusal to consider violation, and the cease-and-desist order does not contain the phrase, the Board explained that the absence of the violation did not preclude it from entering a complete remedy for the "refusal to hire" violation as to all three discriminatees, which includes an order that the Respondent consider for hire the applicant for whom no position existed.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Plumbers Local 344; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Oklahoma City, July 7-8, 2005. Adm. Law Judge Thomas M. Patton issued his decision Sept. 14, 2005.

****

QSI, Inc. and Smithfield Packing Co., Inc., Tar Heel Div. (11-CA-20240, et al.; 346 NLRB No. 97) Tar Heel, NC April 28, 2006. The Board upheld the administrative law judge's finding that a Nov. 15, 2005 walkout by QSI employees to protest, among others, QSI's discharge that day of certain managers and supervisors, including Supervisor Antonio Cruz, was protected by Section 7 of the Act. It also agreed that QSI, which provides cleaning services at Respondent Smithfield's pork-processing plant in Tar Heel, NC, and Smithfield each committed numerous violations of Section 8(a)(1) in response to the walkout. In so doing, the Board clarified certain parts of the judge's rationale. [HTML] [PDF]

The judge found that Respondent QSI violated Section 8(a)(1) by discharging 14 employees, physically assaulting employees, threatening employees with arrest by immigration officials, threatening employees with bodily harm, causing employees to be falsely arrested, and informing employees that they were discharged because they engaged in protected concerted activity. Respondent Smithfield violated Section 8(a)(1) by assaulting QSI employees, threatening QSI employees with arrest by immigration authorities, causing QSI employees to be falsely arrested, and telling a Smithfield employee that he would not be considered for a promotion or for a promotion or job change to the maintenance department because of his union activities.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by the Food and Commercial Workers; complaint alleged violation of Section 8(a)(1). Hearing at Lumberton, Nov. 1-5 and 9-12, 2004. Adm. Law Judge Lawrence W. Cullen issued his decision April 11, 2005.

****

Starcraft Aerospace, Inc. (11-CA-20209; 346 NLRB No. 104) Greenville, SC April 28, 2006. The Board reversed the administrative law judge and found that the Respondent did not violate Section 8(a)(5), (3), and (1) of the Act by laying off employees without first giving the Machinists notice and an opportunity to bargain. It found, unlike the judge, that the Respondent made its decision to lay off employees based on the exigent circumstances of the Company owner's terminal medical condition and the increasingly poor financial condition of the business, not antiunion animus. [HTML] [PDF]

The Respondent employed approximately 20 people and was engaged in the repair and rebuilding of aircraft parts. The Board noted the "unique" facts of this case, which involve a small, family-owned business run by a "hands-on" owner, Larry Riggs. In the months leading to the events at issue, the Respondent was experiencing a dire financial crisis and the health of Riggs, who had amyotrophic lateral sclerosis (also called ALS or Lou Gehrig's disease), was deteriorating such that he went home early on Oct. 6, 2003 and never returned. In his absence, Robert Heuschel became the Respondent's general manager.

On Nov. 7, 2003, the Union filed a petition with the Board, seeking to represent a group of eight technicians. A majority of the technicians voted for the Union in the election held on Dec. 11, 2003.

The judge found that the Respondent's decision to lay off employees was made after the election in retaliation for the employees having selected the Union as their exclusive representative, and not as a result of economic necessity. The Board disagreed, finding that by Dec. 8, following several meetings with the Respondent's management team at which the Company's declining fortunes were discussed, Riggs and his wife, Patricia, made a firm decision to cease operations, to stop financing the failing business, and to lay off employees. Finding that the unrebutted testimony of Heuschel, of Maintenance Manager Harvey Cash, and of Business manager Janine Fiorito (the management team) supported this conclusion, the Board wrote:

> The judge's contrary finding that the decision to conduct a layoff was not made until December 12 is based on a flawed analysis of the testimony. The judge failed to acknowledge the uncontradicted testimony that the decision to lay off was made *prior* to the meeting of December 8, and was announced on that date. Because the judge's decision makes no reference to this crucial testimony, his credibility resolutions do not reach this specific testimony.
>
> To the extent the judge's credibility resolutions could be construed to discredit the testimony that the Riggses reached their decision prior to the December 8 meeting, such a construction is likewise based on a misapprehension of the relevant testimony. None of the reasons the judge articulates for discrediting Heuschel and Cash is based upon their demeanor as witnesses. Our policy, as enunciated in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 288 F.2d 362 (3d Cir. 1951), is to attach great

> weight to a judge's credibility findings insofar as they are based on demeanor. However, to the extent that credibility findings are based upon factors other than demeanor, as in the instant case, the Board itself may proceed with an independent evaluation. *Canteen Corp*., 202 NLRB 767, 769 (1973) (citing *Valley Steel Products Co*., 111 NLRB 1338 (1955)). Further, even if the policy of *Standard Dry Wall* extends to credibility resolutions based on factors other than demeanor, we find that the clear preponderance is contrary to the judge's credibility resolutions discussed herein.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by the Machinists; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Greenville, April 26-27, 1004. Adm. Law Judge John H. West issued his decision July 7, 2004.

****

WGE Federal Credit Union (25-CA-29101; 346 NLRB. 87) Muncie, IN April 25, 2006. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing a rule prohibiting employees from participating in their capacity as employees, in the election of individuals to the Respondent's board of directors, and discharging employee Diane Hartman pursuant to the unilaterally implemented rule. [HTML] [PDF]

In a reversal of the judge, the Board found that the Respondent did not violate Section 8(a)(1) by threatening employees with job loss and other adverse consequences if Office and Professional Employees Local 1 became the employees' bargaining representative. Contrary to the judge, the Board concluded that this untimely 8(a)(1) threat allegation in the Union's amended charge was not closely-related to the timely 8(a)(3) discharge allegation and accordingly, the 8(a)(1) complaint allegation based on that charge is time barred under Section 10(b).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Office and Professional Employees Local 1; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Muncie on March 29, 2005. Adm. Law Judge Lawrence W. Cullen issued his decision Aug. 10, 2005.

****

Windward Teachers Association, NYSUT, AFT (2-CB-19578; 346 NLRB No. 99) White Plains, NY April 28, 2006. The Board reversed the administrative law judge and found that the Respondent violated Section 8(b)(3) of the Act by refusing to sign a successor collective-bargaining agreement submitted to it by the Charging Party Windwood School, a private independent school in White Plains, NY. [HTML] [PDF]

The judge dismissed the allegation, finding that there was no meeting of the minds between the parties on the terms of a clause in the collective-bargaining agreement about the payment of bonuses and, therefore, the contract was not a complete agreement between the parties regarding terms and conditions of employment. In reversing the judge, the Board wrote: "In sum, it is clear that the parties agreed on the terms of the successor collective-bargaining agreement submitted by the School for the Respondent's signature. The Respondent's disagreement with the School over the scope of the bonus clause contained in that agreement is a dispute over interpretation, which does not justify the Respondent's refusal to execute the agreement."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Windward School; complaint alleged violation of Section 8(b)(3). Hearing at New York, Feb. 28 and March 2-3, 2005. Adm. Law Judge Martin J. Linsky issued his decision May 13, 2005.

***

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

United States Postal Service (Postal Workers Local 32) Duluth, GA April 26, 2006. 10-CA-35999; JD(ATL)-18-06, Judge Keltner W. Locke.

3-V, Inc. (Steelworkers) Georgetown, SC April 27, 2006. 11-CA-20894-1, 20895-1; JD(ATL)-17-06, Judge George Carson II.

Plumbers Local 420 (Individuals) Philadelphia, PA April 27, 2006. 4-CB-9413, 9421; JD-33-06, Judge Richard A. Scully.

***

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.)

Labor Source 2000 d/b/a LS2000 Integrated Outsourcing Solutions (Auto Workers Local 106) (7-CA-48935; 346 NLRB No. 106) Southfield, MI April 28, 2006. [HTML] [PDF]

***

TEST OF CERTIFICATION

(In the following cases, 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.)

Service Corp. International d/b/a Oak Hill Funeral Home and Memorial Park (Laborers Local 270) (32-CA-22449; 346 NLRB No. 90) San Jose, CA April 28, 2006. [HTML] [PDF]

Lake Mary Health Care Association, LLC d/b/a Lake Mary Health (Service Employees Local 1999) (12-CA-24810; 346 NLRB No. 103) Lake Mary, FL April 28, 2006. [HTML] [PDF]

***

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

The Wackenhut Corp., St. Louis, 14-RC-12578, April 27, 2006 (Members Liebman, Schaumber, and Kirsanow)

Mangieri Electric, Inc., d/b/a Mangieri Plumbing and Heating, Galesburg, IL, 33-RC-4897, April 25, 2006 (Members Schaumber, Kirsanow, and Walsh)

DECISION AND DIRECTION OF SECOND ELECTION

R&J Drywall Finishers, Inc., New York, NY, 29-RC-11239, April 28, 2006 (Chairman Battista and Members Liebman and Kirsanow)

***

(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)

H.J. Heinz Co., Stockton, CA, 32-UC-412, April 25, 2006 (Members Schaumber, Kirsanow, and Walsh)

Staff Source, LLC and The Levy Co., Hammond, IN, 13-RC-21456, April 25, 2006 (Members Schaumber, Kirsanow, and Walsh)

Crittenton Hospital Medical Center, Rochester, MI, 7-RD-3300, April 26, 2006 (Members Schaumber, Kirsanow, and Walsh)

***