National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED
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George P. Bailey & Sons, Inc. (4-CA-31620; 341 NLRB No. 108) Bristol, PA April 30, 2004. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning dated August 14, 2002 to employee Thomas Ditmars, placing a disciplinary memo in Ditmars' file, and discharging Ditmars because he engaged in union activities. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Electrical Workers IBEW Local 269; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on March 6, 2003. Adm. Law Judge Eric M. Fine issued his decision July 2, 2003.

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Goer Mfg. Co., Inc. (11-CA-20013; 341 NLRB No. 105) North Charleston, SC April 30, 2004. Members Walsh and Meisburg granted the General Counsel's motion for summary judgment and held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue in effect the terms and conditions of its collective-bargaining agreement with Carpenters East Coast Industrial Council Local 2221 by refusing to pay unit employees vacation and perfect attendance pay earned prior to February 11, 2003. The Respondent, in its second amended answer, admitted the factual allegations in the complaint, including that it unilaterally discontinued vacation and perfect attendance pay, but asserted the affirmative defense that the Board's proceeding is stayed by the provisions of Section 362 of the Bankruptcy Code. [HTML] [PDF]

Member Schaumber, dissenting, would dismiss the complaint, noting that it involves essentially a mere collection action against a bankrupt employer that is financially unable to pay moneys due under the terms of a collective-bargaining agreement. He wrote: "I question whether such facts establish an unfair labor practice as a matter of law. Moreover, given the availability of alternative fora in which the Union can pursue contractual remedies, I do not believe the prosecution and adjudication of such claims is a wise or appropriate use of the Board's resources."

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by Carpenters East Coast Industrial Council Local 2221; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for summary judgment Jan. 14, 2004.

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Industrial Materials Clearance, Inc. (7-CA-46312, 7-RC-22490; 341 NLRB No. 87) Romulus, MI April 30, 2004. The Board affirmed the recommendations of the administrative law judge and found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging David Powers. The Board noted that the evidence supports an inference that the Respondent knew of Powers' union activities when it discharged him, and that those activities were a motivating factor for his discharge. It overruled the challenge to Powers' ballot and directed the Regional

Director to open and count the ballot and thereafter, prepare and serve on parties a revised tally of ballots and issue the appropriate certification. The tally of ballots for the election of July 14, 2003 showed one vote for and one against, the Petitioner (Teamsters Local 247), with one determinative challenged ballot. [HTML] [PDF]

In the absence of exceptions, the Board adopted the judge's findings that the Respondent violated Section 8(a)(1) by coercively asking employee Horton to tell the Union to withdraw its election petition, by coercively interrogating Horton, and by questioning employees Horton and Messer in preparation for the unfair labor practice hearing without complying with the safeguards established in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enfd. denied 344 F.2d 617 (8th Cir. 1965).

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by David Powers, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, Aug. 20-21, 2003. Adm. Law Judge David L. Evans issued his decision Nov. 5, 2003.

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K-Mart Corp., Debtor-In-Possession (7-CA-42873(1)(2), et al.; 341 NLRB No. 102) Clinton, MI The Board dismissed the complaint, agreeing with the administrative law judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Christopher Munsie for complaining to Respondent on behalf of himself and other employees regarding the promulgation of work rules limiting the locations where employees could take their breaks. It also found merit in the Respondent's exceptions to the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Ricky Brock because he assisted Auto Workers Local 174 in its election campaigns and to discourage other employees from engaging in such activity. [HTML] [PDF]

The Board, in agreeing with the judge that Munsie's conduct was unprotected, concluded that the General Counsel failed to show that Munsie was engaged in concerted activity. The Respondent argued in its exceptions that Brock would have been discharged for his threatening and assaultive behavior toward a fellow employee even in the absence of any protected activity. The Board found merit in the Respondent's argument and held that the Respondent rebutted the General Counsel's case.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Auto Workers Local 174; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, May 6-9, 2002. Adm. Law Judge Margaret G. Brakebusch issued her decision Aug. 8, 2002.

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Lakewood Engineering and Mfg. Co. (13-RC-20869; 341 NLRB No. 101) Chicago, IL April 30, 2004. The Board granted the Employer's request for review of the Regional Director's second supplemental decision on objections and overruled the Petitioner's (Electrical Workers UE) Objections 1 and 2, finding contrary to the Regional Director, that the objections are without merit. The Board remanded the case to the Regional Director to resolve the outstanding challenges and Petitioner's Objection 3. The tally of ballots for the runoff election held on April 24, 2003 shows 140 votes for the Petitioner, 143 votes against the Petitioner, and 8 challenged ballots. [HTML] [PDF]

Objection 1 alleges "the Board Agent failed to challenge four voters, despite having objective evidence, and thus actual knowledge, of their ineligibility to vote." Objection 2 alleges, "the day of the April 24 election, [Employer's] counsel . . . suppressed the facts regarding four voters' ineligibility to vote." Objection 3 alleges "the day of the April 24 election, [Employer's] Plant Manager . . . told at least two employees known to have been hired after the cutoff date to vote in the election."

The Regional Director sustained Objections 1 and 2 without a hearing and set aside the results of the election. She did not address Objection 3 or the eight outstanding ballot challenges based on her resolution of Objections 1 and 2. The Regional Director determined that because the Board agent knew the eight new hires were hired after the eligibility cutoff date, her failure to challenge their ballots required that the election be set aside.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Lee Builders, Inc. (10-CA-33718, et al.; 341 NLRB No. 104) Huntsville, AL April 30, 2004. The Board considered the Respondent's exceptions, agreed that the administrative law judge's decision does not provide an adequate basis for review, and remanded the proceeding to the judge for further consideration of his findings of 8(a)(1) and (3) violations, with specific instructions. The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees, by threatening them with plant closure, the futility of supporting Carpenters Alabama Regional Council-Local 1274, and implicit job loss; and violated Section 8(a)(3) by discharging three employees. The Board noted that the judge failed to set out the bases for his credibility resolutions and that his decision lacked sufficient detail about the specific evidence that he relied on in resolving the relevant factual issues in dispute and the factual basis for each of his findings of violations. [HTML] [PDF]

Member Walsh found that the judge's decision and the record provide an adequate basis for review and he would proceed to a determination of the merits.

(Chairman Battista and Members Schaumber and Walsh participated.)

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

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Manhattan Crowne Plaza Town Park Hotel Corp. (2-RC-22395; 341 NLRB No. 90) New York, NY April 28, 2004. Chairman Battista and Member Schaumber, contrary to the Regional Director, overruled the Petitioner's (Security Personnel Officers and Guards) Objections 1 and 5 and certified the results of the election. In dissent, Member Walsh concluded that the election should be set aside and a new election held. The tally of ballots for the election held on June 27, 2001 showed 5 for and 13 against the Petitioner, with no challenged ballots. [HTML] [PDF]

At issue is a memorandum that the Employer distributed to its security officers about a week prior to the election. The Petitioner's objections alleged that the memorandum threatened the employees with a loss of benefits and wages and interfered with the employees' free choice. The Regional Director found that the memorandum "clearly implied" that the loss of jobs, benefits, and wages suffered at other hotels was the Union's fault, and that it predicted similar losses were possible if the employees voted for the Union. The Regional Director concluded that this implied prediction was an objectionable threat because the Employer failed to provide an objective basis for the belief that, for reasons beyond its control, the employees' selection of the Union as their representative would lead to the same fate. The Employer excepted to the Regional Director's recommendation that the objections be sustained.

The majority determined that the memorandum did not convey a threat of reprisal if the employees selected the Petitioner as their collective-bargaining representative but rather that it came within the range of permissible campaign conduct. See *Novi American, Inc*., 309 NLRB 544 (1992); *Caradco Corp*., 267 NLRB 1356 (1983). Citing *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), the majority wrote that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"

Member Walsh held that the Regional Director correctly found that the Employer interfered with the election by threatening employees. He agreed with the Regional Director that the memorandum was a clear attempt to communicate the message that unionization at the other two hotels caused those employees to lose their jobs and benefits, and that unionization would likewise cause the Employer's employees to lose their jobs and benefits.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Mashuda Corp. (6-CA-33414; 341 NLRB No. 91) Cranberry Township, PA April 30, 2004. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by informing an applicant he was not hired because of his support for and activities on behalf of Operating Engineers Local 132 and Section 8(a)(1) and (3) by refusing to hire Gary V. Singer since on or about March 14, 2003. [HTML] [PDF]

Because the Board adopted the judge's finding that the Respondent did not make a valid job offer of a night-shift position to Singer, it found it unnecessary to pass on whether that position would be substantially equivalent to the day-shift mechanic position unlawfully denied to Singer. Chairman Battista would leave to compliance the separate issue of whether Singer's comment to Mashuda, arguably showing a disinterest in a night-shift position, was a breach of the duty to mitigate backpay. Members Liebman and Walsh disagreed, noting that because Mashuda's statement to Singer was not a valid offer of employment, Singer had no obligation to reply. They noted also that the Board does not evaluate a discriminatee's response to an offer unless the respondent has established that the offer was valid.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Gary V. Singer, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Pittsburgh on Oct. 1, 2003. Adm. Law Judge Eric M. Fine issued his decision Dec. 19, 2003.

***

Meeker Cooperative Light and Power Association (18-CA-16924; 341 NLRB No. 89) Litchfield, MN April 27, 2004. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish Electrical Workers IBEW Local 160 with necessary and relevant information concerning contracting out bargaining unit work. It modified the judge's recommended order to make it clear that the Respondent is only required to provide the Union with subcontracting information for the period beginning September 16, 2000, as alleged in the complaint. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Electrical Workers IBEW Local 160; complaint alleged violation of Section 8(a)(1) and (5). Parties waived a hearing. Adm. Law Judge Bruce D. Rosenstein issued his decision Dec. 17, 2003.

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Friendly Cab Co., Inc. d/b/a, a.k.a. Metro Cab Co., et al. (32-RC-5060; 341 NLRB No. 103) Oakland, CA April 30, 2004. The Board affirmed, with one modification, the Regional Director's Decision and Direction of Election, in which he found that the Employer's taxi drivers are employees, not independent contractors. The petitioning union is the East Bay Taxi Drivers

Association. The Regional Director found that the evidence as a whole, including the large amount of day-to-day control exercised by the Employer over the drivers, warranted a finding that the taxicab drivers are employees. [HTML] [PDF]

Contrary to the Regional Director, the Board found that the voucher system supports a finding that the drivers are employees because the evidence shows: 1) the voucher trips are fairly common; 2) the Employer's dispatcher has complete discretion in assigning voucher work; 3) drivers must redeem vouchers through the Employer; 4) the Employer charges drivers a significant percentage of the voucher amount when it is redeemed; and 5) the drivers perform voucher work for Friendly Transportation Co. when its employee drivers are not available.

(Members Liebman, Walsh, and Meisburg participated.)

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Network Dynamics Cabling, Inc. (4-CA-27102, et al.; 341 NLRB No. 107) Westchester, PA April 30, 2004. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire job applicants William Corazo, Raymond Della Vella, Robert Poston, and John Pritchard because of their membership in Electrical Workers IBEW Local 98. [HTML] [PDF]

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by telling an employee that applicants for employment could not be affiliated with the Union, or that the Respondent violated Section 8(a)(3) by suspending employee Anthony Angelucci, sending him home early from work, issuing him warnings and discharging him, all because of his activities on behalf of the Union.

(Chairman Battista and Members Liebman and Meisburg participated.)

Charges filed by Electrical Workers IBEW Local 98; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, Nov. 6-9, 2000. Adm. Law Judge George Aleman issued his decision Sept. 17, 2001.

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North American Dismantling Corp., North American Demolition Corp. (7-CA-39923; 341 NLRB No. 95) Lapeer, MI April 30, 2004. On remand from the Sixth Circuit, Chairman Battista and Member Schaumber adhered to the original holding at 331 NLRB 1557 (2000) that Jeffrey G. Powell was discharged on May 9, 1997 for engaging in protected concerted activity. They found merit in the Respondent's affirmative defense, however, to the extent that the Respondent has established that it would have denied reemployment to Powell on May 22, 1997 because he attempted to steal company business. Accordingly, Chairman Battista and Member Schaumber determined that Powell is only entitled to back wages for the period between being

fired at the job site and requesting employment on May 22 in his call to the office of the Respondent's owner and president, Rick Marcicki. [HTML] [PDF]

Dissenting in part, Member Liebman would affirm the Board's original remedy requiring that Powell be reinstated and given full backpay. In her view, the Respondent has not met its burden of proof: it has not proven that Powell engaged in misconduct for which it would have disqualified any employee from continued or future employment. Member Liebman accepts the court's decision as the law of the case, but she disagreed as to the proper inquiry on remand. While the majority analyzes the issue under *Wright Line* as one of liability, she believes the relevant inquiry is more accurately analyzed as remedial: whether in light of after-acquired evidence (i.e., knowledge of Powell's attempt to "steal" the Respondent's business), the Respondent is required to offer reinstatement to Powell, whom it unlawfully terminated, and give him full backpay.

The majority found it unnecessary to reach the remedial issue posed by the dissent because they accepted the court's decision as the law of the case and analyzed the failure to hire Power under *Wright Line*, as instructed by the court's remand order.

In the original decision, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging employees Powell, Robert W. Giltrop, and Jayson Zeitz and ordered the Respondent to offer the discharged employees reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discharges.

On cross-petitions for enforcement and review, the Sixth Circuit, on April 12, 2002, affirmed the Board's findings as to Giltrop and Zeitz. The court agreed that Giltrop, Zeitz, and Powell had engaged in protected activity on May 9, and that, based on statements made by Supervisor Daniel Borashko, they had a reasonable basis to believe they had been fired. The court denied enforcement as to Powell, holding that the "NLRB had failed to make any finding as to the Companies' affirmative defense" that "Powell would have been fired for attempting to steal company business even had he not engaged in protected concerted activity."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Northeast Iowa Telephone Co. (18-RC-17190; 341 NLRB No. 97) Monona and Decorah, IA April 30, 2004. After consideration of the Employer's request for review, Members Liebman and Walsh affirmed the Decision and Direction of Election in which the Regional Director (1) found the petitioned-for employerwide multifacility unit appropriate; (2) found the lead technician not to be a statutory supervisor; and (3) found the record inconclusive with respect to the plant and wireless managers' status and allowed them to vote under challenge. Chairman Battista dissented in part. [HTML] [PDF]

The Employer argued that the petitioned-for multifacility unit is inappropriate and that the lead technician is a statutory supervisor. With respect to the two managers, the Employer asserted that "the abundance of record evidence" showed that they are both statutory supervisors and if the Board agreed that the evidence is inconclusive it should reopen the record to permit the testimony of General Manager Arlan Quandahl, who was unavailable to testify at the hearing due to his recuperation from surgery. Members Liebman and Walsh determined that the employer failed to file a special appeal of the Regional Director's decision to schedule the hearing on October 27, 2003 and failed to request a postponement of the hearing to allow the general manager to testify.

The majority, contrary to Chairman Battista, found that the Regional Director did not err in allowing the two managers to vote under challenge. They found no merit in their colleague's contention that because the supervisory status of the two managers remained unresolved at the time of the election, the employees could not cast an informed ballot. Neither did they agree with Chairman Battista's finding that the Regional Director's decision to allow the two managers to vote under challenge somehow compromised employee free choice in the election.

In his partial dissent, Chairman Battista said that he would grant review of the Regional Director's decision to allow the plant manager and the wireless manager to vote subject to challenge. He stated: "This is a case where undue haste led to an inadequate record which, in turn, led to a situation where employees are asked to vote without knowing significant aspects of the composition of the unit." Chairman Battista was concerned about the fact that, without the general manager's testimony, the Regional Director did not have enough evidence to resolve the issues concerning the two managers. He believed that in order for employees to intelligently decide whether they wish to be represented by the Union, they may want to know whether 25 percent of the unit will be comprised of the two disputed individuals, as most of the undisputed unit employees work for one or the other of these individuals.

(Chairman Battista and Members Liebman and Walsh participated.)

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Operating Engineers Local 370 (19-CA-27935; 341 NLRB No. 114) Spokane, WA April 30, 2004. The Board adopted, absent exceptions, the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) of the Act when it discharged its paid organizer, Melvin Thoreson, because he repeatedly criticized the Local for allowing employers to cease making pension fund contributions on behalf of probationary apprentices; and the judge's finding that the Respondent violated Section 8(a)(1) by telling Thoreson that it denied his unemployment application because he filed an unfair labor practice charge. [HTML] [PDF]

The issue before the Board is whether a union may lawfully discharge a paid employee in a key position such as Thoreson's for criticizing the union's collective-bargaining policies and decisions. The questions presented are whether Thoreson's criticism of the union's contribution waiver policy is concerted activity that is protected from employer interference by Sections 7

and 8(a)(1) of the Act and whether the Respondent has a legitimate countervailing interest that outweighs the exercise of Thoreson's Section 7 rights.

The judge held that Thoreson's purpose was not the mutual aid or protection of employees within Section 7 and that his activity, therefore was neither concerted nor protected. He found that Thoreson's rhetoric was more in the nature of an individual seeking to position himself for a run at union office, and that he was seeking "to challenge the integrity of the service which the Union provides to its membership." The judge concluded that a union employee (as opposed to a union member) who disparages the way the union represents its members is no more protected than any other employee who disparages his employer's product or service.

Unlike the judge, the Board assumed, without deciding, that Thoreson's conduct was for "mutual aid or protection" within the meaning of Section 7 and that it was therefore both protected and concerted. It concluded, however, that "any arguable Section 7 interest belonging to Thoreson was outweighed by the strong legitimate interest of Local 370 in ensuring loyalty, by its key paid employees to its policies" and accordingly, Thoreson's discharge did not violate Section 8(a)(1). Member Schaumber would adopt the judge's analysis on this issue, but he would not rely on fn. 6 of the judge's decision.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Melvin E. Thoreson, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Spokane, June 25-26, 2002. Adm. Law Judge James M. Kennedy issued his decision Sept. 24, 2002.

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Palm Court Nursing Home N.H., L.L.C. and Hidden Palm ALF, L.L.C., Joint Employers (12-CA-22564, 23071; 341 NLRB No. 113) Fort Lauderdale, FL April 30, 2004. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' working conditions by instituting a 401(k) plan, increasing employee contributions for prescription drugs and the cost of using other than "preferred providers," reducing employees' paid holidays, jury duty days, and sick days, increasing the time required for advance notification for absences or tardiness, and ceasing to provide employees with overtime pay for hours over 8 required to be worked in a single day. [HTML] [PDF]

In the absence of exceptions, the Board affirmed the judge's finding that the Respondent violated the Act by refusing to meet with Service Employees Local 1199 because of the composition of its bargaining committee, and his recommended dismissal of the allegation that the Respondent violated the Act by unilaterally changing the employees' dress code.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Service Employees Local 1199; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Miami, Sept. 2-3, 2003. Adm. Law Judge George Carson II issued his decision Nov. 7, 2003.

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Ryder Truck Rental, Inc. d/b/a Ryder Transportation Services (25-CA-27551, 27705-1; 341 NLRB No. 109) Indianapolis, IN April 30, 2004. Members Liebman and Walsh held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by requesting that employees report to management employees who, in advocating Machinists District Lodge 90, "harass" other employees. They wrote: "Here, in response to nothing more than a vague claim of 'harassment' in connection with an employee's union solicitation, [Respondent's service team leader] Woehlke directed employees to document in writing the specifics of that employee's union activity. Clearly, employees who learned of this directive, and of the circumstances upon which it was given, could reasonably believe that the Respondent was seeking written documentation of its employees' lawful Section 7 activity." [HTML] [PDF]

Chairman Battista, dissenting, found no violation because Woehlke did not invite the employees' complaints. The Chairman explained: "Obviously, it would be imprudent to ignore such employee complaints. On the other hand, a series of pointed questions could intrude into conduct that might turn out to be protected. A reasonable middle ground is to simply ask the employees to state what had happened to them. And, by asking that this be done in writing, the employer can minimize the possibility of misunderstanding."

On other alleged violations, the judge found, with Board approval, that the Respondent violated Section 8(a)(3) and (1) by discharging employees Tim Bullman and Allen Fedlscher because of their union activities; and Section 8(a)(1) by, among others, soliciting employee grievances and directly or impliedly promising to remedy them if employees rejected the Union as their collective-bargaining representative, threatening employees with loss of vacation benefits, and informing them that bargaining will start at ground zero like a blank sheet of paper if they voted for the Union.

Chairman Battista, concurring in part, explained his reasoning in finding that the Respondent's vice president of operations violated Section 8(a)(1) by soliciting employee grievances and promising to remedy them. Inasmuch as he adopted the judge's finding that the Respondent violated Section 8(a)(1) when its director of employee relations, William Herlihy, threatened employees with loss of benefits if the Union was brought in, he found it unnecessary to pass on the judge's other findings of unlawful threats of loss of benefits because such findings are cumulative and do not affect the remedy.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Machinists District Lodge 90; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Indianapolis, Dec. 10-13, 2001. Adm. Law Judge Eric M. Fine issued his decision Aug. 2, 2002.

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U.S. Postal Service (16-CA-22781; 341 NLRB No. 94) Coppell, TX April 30, 2004. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to timely and expeditiously furnish the Union (Postal Workers Dallas Area Local) with its requested information regarding a sexual harassment investigation. In the absence of exceptions, the Board held that the Respondent violated the Act by failing to timely furnish the Union with information in its request #3, including a list of employees who took the 725 exam on April 18, 2003. [HTML] [PDF]

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Postal Workers Dallas Area Local; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Ft. Worth, Sept. 22-23, 2003. Adm. Law Judge Michael A. Marcionese issued his decision Oct. 31, 2003.

***

U.S. Postal Service (16-CA-22766, et al.; 341 NLRB No. 100) Spring and Houston, TX April 30, 2004. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act by threatening an employee and changing his working conditions in retaliation for his union activity; and violated Section 8(a)(5) by unilaterally changing its established policy of automatically granting the requests of Spring Area postal employees represented by the Letter Carriers Branch 283 to take leave without pay for their choice vacation period and failing to provide information requested the Letter Carriers Branch 283. [HTML] [PDF]

Chairman Battista and Member Schaumber modified the judge's recommended Order by limiting its provisions to the postal facilities involved in this case. They saw no need for the judge's recommended special remedies of districtwide notice posting and a broad order, noting three Houston districtwide Board orders recently enforced by the Fifth Circuit. Member Liebman agreed that a broad order is unnecessary in light of multiple Board orders containing broad cease-and-desist language that have been enforced against this employer, but she does not agree that the outstanding districtwide notice posting in two of those previous cases render a districtwide posting in this case similarly unnecessary. She would adopt the judge's order for a districtwide posting.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Letter Carriers Branch 283; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Houston, Nov. 3-5, 2003. Adm. Law Judge George Carson II issued his decision Jan. 21, 2004.

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Volair Contractors, Inc. (4-CA-27432, 27028; 341 NLRB No. 98) Wilmington, DE April 30, 2004. The administrative law judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Melvin Baldwin because of his activities for Plumbers Local 74 and that it did not violate Section 8(a)(3) and (1) by laying off Louis Oliver or Section 8(a)(1) by interrogating and making certain coercive statements to Baldwin, Oliver, and other employees concerning those activities. The judge also refused to find that the Respondent's failure to recall Oliver was unlawful because it was not alleged in the complaint to violate the Act. [HTML] [PDF]

The Board, in adopting the judge's conclusions, found it necessary to more fully explain its rationale on several issues, including its finding that Baldwin was a statutory employee and not a supervisor at the time of his discharge, that the Respondent did not unlawfully interrogate employee John Cabral pursuant to an unfair labor practice charge arising from Oliver's layoff, and that the judge did not abuse his discretion by declining to find that the Respondent unlawfully refused to recall Oliver.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Plumbers Local 74; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, May 24-25, 1999. Adm. Law Judge Arthru J. Amchan issued his decision July 29, 1999.

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Wal-Mart Stores, Inc. (12-CA-20882, 22441; 341 NLRB No. 111) Port Orange, FL April 30, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by discharging employee Edward Eagen. It found it unnecessary to pass on the judge's finding that the discharge violated Section 8(a)(3) because this additional finding would be cumulative with no material effect on the remedy. No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent unlawfully interrogated Eagen and unlawfully discharged employee Dennis Demint. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

Charges filed by Food & Commercial Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Deland, Aug. 18-22, 2003. Adm. Law Judge Margaret G. Brakebusch issued her decision Nov. 4, 2003.

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Orchard Park Health Care Center, Inc. d/b/a Waters of Orchard Park (3-CA-23704; 341 NLRB No. 93) Orchard Park, NY April 30, 2004. Chairman Battista and Member Schaumber reversed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act when it suspended employee Carol Gunnersen and discharged employee Kathleen Reed for calling the New York State Department of Health Patient Care Hotline to report excessive heat in

the Respondent's nursing home. They agreed with the judge that the employees were engaged in concerted activity but contrary to the judge, found that the employees' activity was not protected under the Act because it did not relate to a term or condition of their employment. Member Meisburg concurred with the determination that the employees' discipline did not violate the Act. Members Liebman and Walsh dissented. [HTML] [PDF]

Chairman Battista and Member Schaumber wrote in dismissing the complaint:

> The Act protects employees' interests as employees. The interests of the nursing home residents are not protected by the Act. Reed and Gunnersen may be entitled to relief under a State whistleblower statute or under the public policy exceptions to the employment-at-will doctrine. We find, however, that they are not entitled to relief under the Act, and accordingly, we dismiss the complaint.

In his concurrence, Member Meisburg wrote:

> It is undoubtedly a good thing that the employees in this case complied with the State law requiring them to report the conditions they found. It is even more of a good thing when the State law at issue protects an interest as important as patient care. But the National Labor Relations Act is not a general whistleblowers' statute. Absent an intent to improve wages, hours, or working conditions, concerted action of the type in this case cannot be deemed 'mutual aid or protection.' Because the employees here testified that their *sole* motive was to act in the interest of their patients, we cannot find that their conduct was protected by the Act.

Dissenting Members Liebman and Walsh wrote that they believed Reed and Gunnersen's concerns over patient care necessarily involved their working conditions and that Board law supports this conclusion. They agreed with the judge that the requirement to protect patients by reporting an unsafe condition was an important part of the employees' working conditions in caring for the patients.

(Full Board participated.)

Charge filed by Carol A. Gunnersen, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Buffalo, Nov. 12-13, 2002. Adm. Law Judge Marion C. Ladwig issued his decision Feb. 13, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Saint-Gobain Abrasives, Inc. (Auto Workers [UAW] Local 9A) Worchester, MA April 27, 2004. 1-CA-39789, 40476; JD-33-04, Judge David L. Evans.

Yale University (Yale Police Benevolent Association) New Haven, CT April 28, 2004. 34-CA-10550; JD(NY)-15-04, Judge Joel P. Biblowitz.

PSCH, Inc. (UNITE) College Point, NY April 28, 2004. 29-CA-25881; JD(NY)-17-04, Judge Joel P. Biblowitz.

Postal Workers Long Island NY Area Local (an Individual) Lynbrook, NY April 28, 2004. 29-CB-12398; JD(NY)-16-04, Judge Steven Davis.

Service Spring Corp. (an Individual) Toledo, OH April 29, 2004. 8-CA-33022; JD-37-04, Judge Eric M. Fine.

Lana Blackwell Trucking, LLC (an Individual) Norman, IL April 30, 2004. 25-CA-28702; JD-39-04, Judge Karl H. Buschmann.

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NO ANSWER TO COMPLAINT

(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.)

American Alpha Construction, Inc. (Bricklayers Local 21) (13-CA-40937-1; 341 NLRB No. 88) West Chicago, IL April 28, 2004. [HTML] [PDF]

CCP Printing, L.L.C., d/b/a Craftlink Printing (Communications Workers St. Louis Typographical Union 8/CWA 14616) (14-CA-27642; 341 NLRB No. 92) Creve Coeur and St. Louis, MO April 30, 2004. [HTML] [PDF]

Rollins Container Corp. (Food & Commercial Workers Local 1) (3-CA-24527; 341 NLRB No. 99) Rochester, NY April 30, 2004. [HTML] [PDF]

Prime Envelope & Graphics, Inc. (Printing Specialties [GCIU] Local 47) (22-CA-26086; 341 NLRB No. 110) Carlstadt, NJ April 30, 2004. [HTML] [PDF]

Advanced Fire Technology, *LLC* (Plumbers Local 669) (7-CA-46847; 341 NLRB No. 112) Kalamazoo, MI April 30, 2004. [HTML] [PDF]

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NO ANSWER TO COMPLIANCE SPECIFICATION

(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 compliance specification.)

Falcon Wheel Division L.L.C. (Teamsters Local 692) (21-CA- 34692, 34772; 341 NLRB No. 107) Gardena, CA April 30, 2004. [HTML] [PDF]

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TEST OF CERTIFICATION

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

The Lamar Co., LLC d/b/a Lamar Advertising of Janesville (Painters District Council No. 7) (30-CA-16706-1; 341 NLRB No. 96) Janesville, WI April 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 Reports of Regional Directors or Hearing Officers)*

DECISION AND CERTIFICATION OF REPRESENTATIVE

King Electric, Inc., Toledo, OH, 8-RC-16240, April 29, 2004
Ameripride Services, Phoenix, AZ, 28-RC-6178, April 29, 2004
GKN Sinter Metals, Inc., Romulus, MI, 7-RC-22411, April 30, 2004

SUPPLEMENTAL DECISION AND DIRECTION [that Regional Director open and count 2 ballots]

Sutter Health Pacific d/b/a Kahi Mohala, Ewa Beach, HI, 37-RM-176, April 26, 2004

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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 DIRECTION [that Regional Director open and count one ballot]

Morton Hospital and Medical Center, Inc., Taunton, MA, 1-RD-2030, April 27, 2004

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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)

City Central Parking, Co., Detroit, MI, 7-RC-22631, April 30, 2004

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

The Toledo Blade Co., Toledo, OH, 8-UC-365, April 29, 2004
GTE d/b/a Puerto Rico Telephone Company, San Juan, PR, 25-UC-224; 225 formerly 24-UC-194; 206, April 29, 2004

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Miscellaneous Board Orders

ORDER [granting Employer's request to withdraw its request for review]

Beverly California Corporation d/b/a York Terrace Nursing Center, Pottsville, PA, 4-RC-18564, April 29, 2004

ORDER [denying Employer-Petitioners' request for review of Regional Director's determination to hold the petition in abeyance]

Diversified Roofing Corporation and Valley Supply, Inc, Phoenix, AZ, 7-RC-22631, April 30, 2004

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