National Labor Relations Board

Weekly Summary of NLRB Cases

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

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CASES SUMMARIZED
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Press Releases (R-2531): NLRB Boston Regional Office Will Use FMCS Office From July 26 – 30, 2004 While Federal Building is Closed During Democratic National Convention

(R-2532): Labor Board Denies Requests for Extensions of Time to File Amicus Briefs in Two Cases Involving Neutrality Agreements

Alexandria NE LLC (4-CA-32368; 342 NLRB No. 23) Wilkes-Barre, PA June 30, 2004. The Board adopted the administrative law judge's recommended Order and dismissed the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee David Stavetski because of his union and other protected activity. The judge found that the General Counsel failed to make an initial showing that Stavetski's discharge was motivated by unlawful considerations. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 401; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on Jan. 6, 2004. Adm. Law Judge Robert A. Giannasi issued his decision Feb. 18, 2004.

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Atlantic Veal & Lamb, Inc. (29-CA-24484, et al.; 342 NLRB No. 37) Brooklyn, NY June 30, 2004. Chairman Battista and Member Walsh upheld the administrative law judge's conclusions that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Modesto (Cuidadano) Lora and discharging employee Jeorge Ogando, and violated Section 8(a)(1) by threatening employees with plant closure and discharge and interrogating employees. In adopting the judge's conclusion that the Respondent unlawfully discharged Jeorge Ogando, the majority did not rely on his entire rationale. They found that the Respondent had actual knowledge of, or suspected, Ogando's union activity based on a confluence of circumstances surrounding his discharge. The majority affirmed the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employee Cecilio (Leo) Soto and by laying off certain employees. [HTML] [PDF]

In a reversal of the judge, the majority dismissed the allegation that the Respondent failed to recall employee Franklyn Rosario in violation of Section 8(a)(3) and (1), finding that the General Counsel failed to meet his initial *Wright Line* burden of establishing that animus against union activities was a motivating factor in the failure to recall Rosario.

Member Schaumber, dissenting in part, concluded, contrary to his colleagues, that the judge failed to make sufficiently detailed credibility resolutions to satisfy the requirements of 5 U.S.C. § 557(c) of the Administrative Procedures Act and to permit meaningful review of his credibility assessments. He would remand to the judge for additional findings the complaint allegations that the Respondent violated Section 8(a)(1) by interrogating employees and threatening them with discharge and plant closure, violated Section 8(a)(3) by suspending Lora, and violated Section 8(a)(3) by discharging Soto and Ogando.

No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent created the impression of, or engaged in, surveillance in violation of Section 8(a)(1).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by UNITE Local 155; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York City during 11 days commencing Feb. 27, 2002 and concluding March 3, 2003. Adm. Law Judge D. Barry Morris issued his decision Aug. 19, 2003.

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Boghosian Raisin Packing Co., Inc. (32-CA-17721-1, et al.; 342 NLRB No. 32) Fowler, CA June 30, 2004. Chairman Battista and Member Schaumber, with Member Liebman dissenting, affirmed the administrative law judge's dismissal of the complaint, finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate 42 economic strikers and Section 8(a)(5) and (1) by subsequently withdrawing recognition from Teamsters Local 616 and changing terms of employment. [HTML] [PDF]

The majority found, as did the judge, that the Respondent was not required to reinstate the strikers because they had, under the express language in the loss-of-status provision of Section 8(d), lost their protected status as employees under the Act by reason of their Union's failure to file a notice of its intent to strike with the Federal Mediation and Conciliation Service (FMCS) before commencing an economic strike as required by Section 8(d)(3). Further, the majority found that subsequently the Respondent lawfully withdrew recognition from the Union based on a petition signed by an uncoerced majority of the unit employees, and changed their terms of employment.

Member Liebman wrote:

> Today's decision rewards conduct that is precisely the opposite of what the National Labor Relations Act envisions: good-faith collective bargaining that will avert unnecessary strikes. Here, an employer waited for employees to strike before revealing that their union—ignorant of its own clerical error—had failed to file a statutorily required notice of dispute with the Federal Mediation and Conciliation Service. The employer then: rejected the union's offer to return employees to work under the employer's last bargaining proposal; threatened employees with mass discharge to get more concessions; and, when the union did not give in, quickly fired all the strikers. New workers were hired who declared their opposition to the union, letting the employer withdraw recognition.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 616; complaint alleged violation of Section 8(a)(1), (3), (4) and (5). Hearing at Fresno, July 10-12, 2000. Adm. Law Judge James L. Rose issued his decision Oct. 31, 2000.

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Southeastern Industrial Services d/b/a Bradley Steel, Inc. (10-RC-15285; 342 NLRB No. 22) Cleveland, TN June 30, 2004. The Board, reversing the Regional Director, found that the detailers and the purchasing agent/expediter do not share such a substantial community of interest with the petitioned-for unit of production and maintenance employees employed by the Employer at its Cleveland, Tennessee facility, as to require their inclusion in the unit. The Board remanded the proceeding to the Regional Director for further appropriate action. By order dated October 24, 2002, the Board granted the Petitioner's (Iron Workers Local 526) request for review of the Regional Director's decision and order requiring the inclusion of the detailers and the purchasing agent/expediter in the unit and dismissing the petition in light of the Petitioner's unwillingness to proceed to an election in a unit that included the detailers and purchasing agent/expediter. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

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Citizens Investment Services Corp. (6-CA-33153; 342 NLRB No. 26) Pittsburgh, PA June 30, 2004. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(1) of the Act by discharging financial consultant Christopher Hayward because of his protected concerted activities in seeking changes to the structure of consultants' compensation and complaining about problems with actual compensation paid within the existing structure. Chairman Battista and Members Meisburg disavowed the judge's apparent reliance on Hayward's *subjective* belief that he was acting on behalf of the financial consultants as evidence that Hayward was, in fact, engaged in protected concerted activity. They held that only the *objective* evidence establishing that Hayward's actions constituted concerted activity, including the fact that Hayward repeatedly raised the consultant's compensation issues during monthly meetings conducted by management, may be considered. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Christopher Hayward; complaint alleged violation of Section 8(a)(1). Hearing at Pittsburgh, Sept. 11-12, 2003. Adm. Law Judge Paul Buxbaum issued his decision Dec. 23, 2003.

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Detroit Newspaper Agency, d/b/a Detroit Newspapers, et al. (7-CA-38079, et al.; 342 NLRB No. 24) Detroit, MI June 30, 2004. The Board affirmed the administrative law judge's findings that Respondents Detroit Newspaper Agency, d/b/a Detroit Newspapers (DNA) violated Section 8(a)(3) and (1) of the Act by discharging strikers Floyd Davis Jr., Anthony Edwards, Douglas McPhail, Steven Montagne, Gary Rusnell, Larry Skewarczynski, Ben Solomon, Harry Thompson, and Mike Youngmeier, without an honest belief that they had engaged in serious misconduct or where the strikers had not in fact committed the acts relied upon for their discharge; and issuing a warning to Gene Schroll. [HTML] [PDF]

Member Schaumber, dissenting in part, concluded that Skewarczynski was guilty of serious strike misconduct and that the Respondent lawfully discharged him for it. He noted that it was undisputed that while on the picket line, Skewarczynski squirted liquid into the eyes of security guard Jeffrey Spurlock and that Spurlock immediately left work for medical treatment at a hospital.

Members Liebman and Walsh found that, under the circumstances, Skewarczynski's conduct was not sufficiently egregious to bar his reinstatement, explaining: "Skewarczynski had been playfully squirting his own fellow strikers with the water pistol, and he credibly testified that he did not intend to squirt water into Spurlock's eyes but had only attempted to squirt at Spurlock's camera. It is simply unreasonable to conclude that any person who witnessed this occurrence would likely have felt coerced or intimidated by Skewarczyski's wielding of the water pistol."

The consolidated complaint alleged that Respondents DNA, Detroit News, and Detroit Free Press had committed violations of Section 8(a)(3) and (1) by discharging or disciplining a number of employees who had participated in a strike against the Respondents. Since the judge issued his decision, the parties have entered into a series of non-Board settlements, which have resolved all but 10 of the allegations contained in the consolidated complaint. All of the remaining allegations are directed against DNA. The Board modified the Order and Notice to reflect the settlement of the other charges.

The Board also modified the Order to grant the discriminatees only the rights of economic strikers under the Board's decision in *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1970). Member Schaumber disagreed with his colleagues' order to the extent it requires Respondent to cease and desist from [d]iscouraging its employees' activity on behalf of a labor organization by discharging striking employees . . . where they had not engaged in serious misconduct" and would revise the order in a manner consistent with the order he suggested in *Detroit Newspapers*, 340 NLRB No. 121 (2003).

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by Graphic Communications Local 13N, Detroit Mailers Union No. 2040, Teamsters; Teamsters Local 372; Newspaper Guild of Detroit Local 22; Detroit Typographical Union No. 18, Communications Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on 53 dates between Sept. 22, 1997 and Sept. 23, 1998. Adm. Law Judge Richard A. Scully issued his decision Dec. 17, 1999.

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Electrical Workers IBEW Local 3 (Slattery Skanska, Inc.) (29-CD-568; 342 NLRB. 21) Queens, NY June 28, 2004. The Board determined that employees of Slattery Skanska, Inc. represented by Building Concrete & Common Laborers Local 731, rather than those represented by Electrical Workers IBEW Local 3, are entitled to perform the setting of precast concrete boxes into the ground, through which electrical conduit is to be installed, at the Corona Rail Yard Project in Queens, NY. [HTML] [PDF]

In making its award, the Board relied on the factors of collective-bargaining agreements, employer preference, employer past practice, and relative skills and training. Regarding the latter factor, the Board noted that employees represented by Local 731 receive extensive training at the Laborers' school in order to perform the disputed work, including training in digging the hole, sheeting or bracing the hole, tamping or compacting the soil, directing the crane with special signals relied on by the crane operator, rigging the manhole to the crane, off-loading the manhole. There is no evidence that the Electricians possess a similar degree of skill. There is evidence that the Electricians are capable of performing the disputed work.

(Members Schaumber, Walsh, and Meisburg participated.)

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First Legal Support Services, LLC (20-CA-29922-1; 342 NLRB No. 29) San Francisco, CA June 30, 2004. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act in response to an organizing drive by Warehouse Union Local 6 among the Respondent's bicycle and driver couriers in November 2000. The Respondent did not except to any of the judge's findings of violations or his recommended remedy. The judge recommended an Order with standard cease-and-desist language, reinstate/instate provisions and make whole remedies for certain employees unlawfully mistreated, and the cancellation of the Respondent's unlawful conversion of its field employees to independent contractor status. [HTML] [PDF]

The judge concluded that a remedial bargaining order was inappropriate under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969) because a majority of the Respondent's bicycle and driver couriers had not executed authorization cards. He found that 10 of the 20 unit employees had signed authorization cards prior to the Respondent's unlawful conduct. The judge rejected an eleventh card, an undated authorization card purportedly signed by employee Casey Cook before November 24. He also declined to issue a nonmajority bargaining order, citing *Gourmet Foods*, 270 NLRB 578 (1984). The General Counsel and Union excepted to the judge's refusal to recommend a remedial bargaining order of any kind and to his findings pertaining to the Cook card.

Members Schaumber and Meisburg found no merit in the exceptions and agreed with the judge that a remedial order is inappropriate because the General Counsel failed to establish the Union's majority status. They adhered to established Board precedent on nonmajority bargaining orders and concluded, contrary to dissenting Member Liebman, that *Gourmet Foods*, was correctly decided and should not be overruled. They pointed out that the judge "simply had no collateral evidence (e.g. other witness testimony or an official Board time and date stamp on the photocopy) to authenticate the undated Cook card and establish when it had been signed."

Member Liebman concluded that the Respondent's violations demand special remedies. She said that the "Board may and should issue a remedial bargaining order because the judge erroneously refused to count employee Casey Cook's decisive authorization card. Even

assuming, however, that the General Counsel failed to establish that a majority of unit employees supported the Union, the Board still should issue a bargaining order." To grant such an order, Member Liebman would overrule *Goumet Foods*.

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Warehouse Union Local 6; complaint alleged violation of Section 8(a)(1) and (3). Hearing at San Francisco, Jan. 8 and March 6-7, 2002. Adm. Law Judge James M. Kennedy issued his decision June 12, 2002.

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Georgia Power Co. (10-CA-33361; 342 NLRB No. 18) Atlanta, GA June 30, 2004. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in unit employees' terms and conditions of employment by implementing the Workplace Ethics program without providing Electrical Workers IBEW Local 84 notice and adequate opportunity to bargain; and bypassing the Union and dealing directly with unit employees by communicating directly to unit employees regarding the formation of Workplace Ethics program by its memorandum dated June 1, 2001. Chairman Battista found it unnecessary to decide whether there was a direct dealing violation with respect to the Respondent's June 1 memo, noting that the Respondent had met with and notified the Union of its intention to implement the committee prior to sending the memo to the employees. [HTML] [PDF]

The Board agreed also with the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(2) and (1) by creating its Workplace Ethics Program, and by recognizing, supporting, and assisting it, finding that the record supported the judge's "key" finding that Workplace Ethics is not a labor organization under Section 2(5) because it does not exist, even in part, for the purpose of "dealing with" the Respondent.

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent unlawfully bypassed the Union and dealt directly with unit employees by establishing a "Crew Leader Selection Committee" (CLSC) to review the selection process for crew leader positions. They noted that an employer may lawfully consult with its own employees in formulating proposals for bargaining and that the Respondent's establishment of the CLSC was a lawful effort by the Respondent to formulate proposals regarding the crew leader selection process. Member Walsh, in dissent, found that the Respondent's total exclusion of the Union from the CLSC process "undermines the collective-bargaining process and the principle of exclusive representation on which it depends."

The judge did not address the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by establishing the CLSC unilaterally and without notice to the Union. No party filed exceptions on this issue.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 84; complaint alleged violation of Section 8(a)(1), (2), and (5). Hearing at Atlanta on May 13, 2002. Adm. Law Judge Pargen Robertson issued his decision Sept. 12, 2002.

***

High Point Construction Group, LLC (6-CA-32853-1; 342 NLRB No. 36) Buckhannon, WV June 30, 2004. The Board affirmed the administrative law judge's findings, to which no proper exceptions were filed that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating its employees about their support for Carpenters Mid-Atlantic Regional Council, telling its employees there was a good possibility of lack of upcoming work because of the Union, telling its employees that it would shut down and file for bankruptcy if the employees selected the Union as their representative, and engaging in surveillance and intimidating its employees where they are gathered at a Union meeting. [HTML] [PDF]

The Board disagreed with the judge that the Respondent violated Section 8(a)(1) by threatening to reduce its employees' wages if the Union prevailed in a representation election.

Contrary to the judge, the Board held that a bargaining order is not necessary and that the imposition of special remedies should "serve to cleanse the atmosphere" of the Respondent's unlawful conduct. Agreeing with the judge, the Board found that a broad cease-and-desist order enjoining the Respondent not only from committing again the specific violations found, but also from violating the Act "in any other manner" is warranted. It required that a responsible management official of the Respondent, at its Buckhannon, WV facility, read aloud to employees the notice to employees. A Board agent may instead read the notice to employees, at the Respondent's option and in the presence of a responsible management officer. Chairman Battista did not join his colleagues in ordering the expanded remedy, noting that the Respondent is not a recidivist and the violations are not egregious. He found that the Board's traditional cease and desist remedy, as posted for employees, would suffice to erase the effects of the Respondent's unfair labor practices.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Carpenters Mid-Atlantic Regional Council; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Clarksburg, Nov. 18 and Dec. 17-19, 2002. Adm. Law Judge Benjamin Schlesinger issued his decision April 28, 2003.

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The Kroger Co. (9-CA-39712, 9-RC-17712; 342 NLRB No. 20) Groveport, OH June 30, 2004. The Board adopted, absent exceptions, the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act and interfered with the representation election

held on October 31, 2002 by coercively interrogating and threatening employees, and the judge's recommendations to sustain the challenge to the ballot of Theresa Streich and to overrule the challenges to the ballots of Estella Clary, Michelle Spencer, and Kimberly Harris. [HTML] [PDF]

Chairman Battista and Member Schaumber, with Member Walsh dissenting, agreed with the Respondent that the judge erred in sustaining the challenge to Erin Spetnagel's ballot because he found her to be an excluded office clerical employee. They found that Spetnagel is a plant clerical, part of the bargaining unit, and eligible to vote. Member Walsh agreed with the judge that the challenge to Spetnagel's ballot should be sustained because she is an office clerical, expressly excluded from the bargaining unit.

The election resulted in 14 for and 10 against the Union, with 5 challenged ballots. Case 9-RC-17712 was remanded to the Regional Director to open and count the ballots of Estella Clary, Michelle Spencer, Kimberly Harris, and Erin Spetnagel and to issue a revised tally of ballots. If the revised tally shows the Union has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Union has not received a majority of the votes cast, the election shall be set aside and a new election shall be conducted.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Food and Commercial Workers Local 1059; complaint alleged violation of Section 8(a)(1). Hearing at Columbus, March 6-7, 2003. Adm. Law Judge Arthur J. Amchan issued his decision May 14, 2003.

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McClain E-Z Pack, Inc. (15-CA-16812, 16913; 342 NLRB No. 27) Demopolis, AL June 30, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice to and bargain with Paper, Allied-Industrial, Chemical and Energy Workers over its decision to lay off employees. There were no exceptions to the judge's finding that the November 2002 layoffs were not unlawful or to his finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its practice of yearly across-the-board wage increases. The Board found merit in the Charging Party's exception to the judge's failure to require that the Respondent make employees whole for any losses suffered as a result of the unilateral discontinuance of yearly wage increases, and modified the Order accordingly. [HTML] [PDF]

Member Meisburg would review further, in an appropriate case, "the circumstances in which an employer may be privileged to act unilaterally in regard to a *decision* to lay off employees, where such decision does not otherwise violate Section 8(a)(1) and (3)."

(Members Liebman, Walsh, and Meisburg participated.)

Charges filed by Paper, Allied-Industrial, Chemical and Energy Workers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Selma, July 8-9, 2003. Adm. Law Judge George Carson II issued his decision Aug. 26, 2003.

***

Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home (28-CA-17777; 342 NLRB No. 28) Deming, NM June 30, 2004. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide Steelworkers District 12, Subdistrict 2, with the names, addresses, and seniority dates of unit employees. The Board noted that this information was presumptively relevant. [HTML] [PDF]

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Steelworkers District 12, Subdistrict 2; complaint alleged violation of Section 8(a)(1) and (5). Hearing held on July 9, 2002. Adm. Law Judge Thomas M. Patton issued his decision Sept. 24, 2002.

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Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home (28-CA-16762, et al.; 342 NLRB No. 33) Deming, NM June 30, 2004. The Board agreed with the administrative law judge, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful refusal to bargain with Steelworkers District 12. [HTML] [PDF]

Members Liebman and Meisburg adhered to the view, as reaffirmed in *Caterair*, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Member Schaumber disagrees with that view and instead agrees with the D.C. Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. See *Eden Gardens Nursing Home*, 339 NLRB No. 12, slip op. at 2-3 fns. 9 and 10 (2003). He found that a bargaining order is warranted on the facts of this case.

The Board noted the D.C. Circuit's requirement that it justify in each case the imposition of an affirmative bargaining order by a reasoned analysis that includes an explicit balancing of three considerations. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000). Although respectively disagreeing with the court's requirement, the Board found that a balancing of the three factors warranted an affirmative bargaining order with its temporary decertification bar in this case. It reiterated that the judge found, with its approval, that the Respondent failed to establish that, when it withdrew recognition, it had a reasonable uncertainty as to the Union's majority status.

The Board also pointed out the Respondent's repeated unfair labor practices in violation of its duty to bargain, including: its unilateral change in the work schedule of Garry Kavanaugh, the Union's committeeman and spokesman in the bargaining unit, to include weekends, as well as Kavanaugh's later suspension; and an earlier Board decision finding the Respondent also committed violations of its duty to bargain with the Union in *Mimbre Memorial Hospital*, 337 NLRB 998 (2002), in which the Board withheld an affirmative bargaining order. The Board wrote: "A cease-and-desist order alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union . . . because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement."

(Members Liebman, Schaumber, and Meisburg participated.)

Charges filed by Steelworkers District 12, Subdistrict 2; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Deming on March 13, 2002. Adm. Law Judge Lana H. Parke issued her decision May 13, 2002.

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Nations Rent, Inc. (25-CA-27257; 342 NLRB No. 19) Elkhart, IN June 29, 2004. Chairman Battista and Member Schaumber found merit in the Respondent's exceptions and reversed the administrative law judge's findings that the Respondent discharged employee Jerry Bickel on May 19, 2001 in violation of Section 8(a)(3) and (1) of the Act because of his union activities and because he engaged in a lawful strike and instigated police interference with lawful picketing in violation of Section 8(a)(1). The Respondent argued that the record evidence does not establish that Bickel was discharged and that it involved local police in speaking to pickets to allay legitimate concerns that the pickets were violating the law. [HTML] [PDF]

Member Walsh, dissenting, found no merit in the Respondent's exceptions and agreed with both of the judge's unfair labor practice findings. He said the judge correctly determined that the Respondent unlawfully discharged Bickel in May 2001 by treating his declaration of an unfair labor practice strike as a resignation and interfered with lawful picketing by instigating the questioning of pickets by local police.

Bickel, a member of Operating Engineers Local 150, sought employment at the Respondent's Elkhart facility in late March 2000 with the objective of organizing the Elkhart employees. He secured a position with the Respondent and began actively promoting the Union in the spring of 2000. During the ensuing year, the Respondent took several measures to counteract Bickel's organizing effects. The Respondent does not except to the judge's findings that some of those measures constituted unfair labor practices, including maintaining in effect an unlawful no-solicitation/no-distribution rule in its employee handbook, prohibiting Bickel from

engaging in solicitation of other employees during nonwork time, telling Bickel that he could not wear a union button while working, threatening to close the business if employees selected Operating Engineers Local 150 as their collective-bargaining representative, and discharging Bickel on September 26, 2000 because of his union activities.

In an earlier decision, 339 NLRB No. 101 (2003), the Board found that the Respondent failed to adhere to certain terms of a settlement agreement and that the judge had erred in reinstating the agreement and dismissing the complaint. The Board remanded the proceeding remanded to the judge to consider the merits of the presettlement unfair labor practice allegations and to issue a supplemental decision. Member Schaumber dissented in the earlier proceeding and would not have set aside the settlement agreement.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge Margaret M. Kern issued her supplemental decision Aug. 28, 2003.

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HTH Corp. d/b/a Pacific Beach Hotel (37-RC-4022; 342 NLRB No. 30) Honolulu, HI June 30, 2004. The Board, adopting the administrative law judge's recommendations, sustained the challenge to the ballot of Emyl Schlenker and overruled the challenges to the ballots of Patricia Bell and Brenda Dolente. In adopting the judge's recommendation to sustain the challenge to the ballot of Lisa Hayashi, the Board relied on the judge's finding that Hayashi was a casual employee and did not pass on the additional finding that Hayashi's familial relationship warrants her exclusion from the unit. [HTML] [PDF]

Members Liebman and Walsh adopted the judge's recommendation to sustain Petitioner's (Teamsters Local 142) Objections 1 and 8, alleging that the Employer engaged in objectionable conduct by coercively interrogating employees and maintaining an overly broad no-solicitation policy. They found it unnecessary to pass on the judge's recommendation that Objections 2 and 9 also be sustained in light of their finding that Objections 1 and 8 warrant setting aside the election, and found it unnecessary to pass at this time on the challenge to the ballot of Patricia Fee because it may not be determinative.

Chairman Battista would adopt the judge's recommendation to sustain the challenge to the ballot of Jane Fee for the reasons set forth in the judge’s decision, including his finding that Fee is a supervisor within the meaning of Section 2(11) of the Act. He would reverse the judge's recommendations to sustain Objections 1, 2, 8, and 9 and direct the Regional Director to issue a revised tally of ballots and the appropriate certification.

Members Liebman and Walsh remanded the proceeding to the Regional Director to open and count 19 ballots and to issue a revised tally of ballots. If the revised tally of ballots shows that a majority of the valid ballots have been cast for the Petitioner, and that the challenged ballot of Jane Fee would not be determinative, the Regional Director shall issue the appropriate

certification. In the event that the challenged ballot of Fee is determinative, any certification shall be held in abeyance pending the resolution of the challenge to her ballot. If the revised tally of ballots following disposition of the challenge to Fee's ballot shows that a majority of the valid ballots have not been cast for the Petitioner, the majority directed that the election held on July 31, 2002, be set aside and that a second election be conducted.

The tally of ballots showed 209 for and 204 against the Petitioner, with 36 challenged ballots. The parties stipulated at the hearing that 13 challenged ballots should not be counted, and the Petitioner withdrew challenges to 3 ballots and Objections 3 and 5. In the absence of exceptions, the Board adopted, pro forma, the judge's recommendation to sustain the challenge to l ballot and to overrule the challenges to 14 other ballots, Objections 4, 6, 7, 10, 11, 12, 13, 14, and portions of Objections 1 and 2.

(Chairman Battista and Members Liebman and Walsh participated.)

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Pathmark Stores, Inc. (29-CA-24285; 342 NLRB No. 31) Carteret, NJ June 30, 2004. The Board found, in agreement with the administrative law judge, that the Respondent did not violate Section 8(a)(3) and (1) of the Act by prohibiting its meat, seafood, and deli department employees from wearing certain union insignia while working in customer service areas of the Respondent's grocery stores, and suspending five employees who refused to remove the insignia prior to commencing work in these areas. [HTML] [PDF]

This case rose in October 1999 over the Respondent's sale of case-ready or "prepackaged" meat. The Respondent's decision to sell large quantities of prepackaged meat reduced the unit employees' working hours and the hiring of new unit employees. Food and Commercial Workers Local 342-50 filed grievances and initiated a "Freshness Campaign." It distributed to the Respondent's customers handbills that encouraged consumers to ask unit employees which meats they had cut fresh. The Union also distributed, and the unit employees wore, buttons throughout 2000 and 2001 that read, "Member of UFCW Local 342-50, Ask me Which Products Were *Cut Fresh Today*!"

The parties' dispute continued into the spring of 2001. In May 2001, the Union held a rally at which it distributed to employees T-shirts and hats bearing the message "Local 342-50 says: "Don't' Cheat About the Meat!" In the days following the rally, five unit employees arrived at work wearing "Don't Cheat About the Meat!" slogan-bearing T-shirts and hats. The Respondent threatened all five employees with suspension if they did not remove the T-shirts and hats before starting work. All five refused.

The Board held that, in this retail setting, given the "Don't Cheat About the Meat!" slogan and its reasonably likely effect on customers, the Respondent established that its legitimate interest in protecting its customer relationship outweighed any legitimate interest of employees

in wearing those particular T-shirts and hats during their working time. Moreover, the Board agreed with the judge that the "Don't Cheat About the Meat!" slogan was ambiguous and that it was reasonable for the Respondent to expect that the slogan likely could lead the Respondent's customers to believe that, aside from the issue of prepackaging, the Respondent was cheating them in some way with respect to the meat offered for sale.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Food and Commercial Workers Local 342-50; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn on May 14, 2002. Adm. Law Judge Howard Edelman issued his decision Aug. 21, 2002.

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Quality Building Contractors, Inc. (29-CA-25646; 342 NLRB No. 38) New York, NY June 30, 2004. Granting the General Counsel's motion for summary judgment, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish Bricklayers New York Local l, upon request in April 2003, the contract between the Respondent and the owner of the Park City Estates Project in Rego Park, NY, any requests for payments made under the contract, and timesheets for all employees on the project. [HTML] [PDF]

The Respondent is a general contractor engaged in the construction industry in and around New York City. In September 2002, the Respondent was awarded a contract to perform work at the Essex House in Manhattan. The contract required the Respondent to employ union labor. The Respondent executed a collective-bargaining agreement with the Union that was effective, by its terms, from July 1, 2000 through June 30, 2004. In late 2002 or early 2003, the Respondent began working at Park City Estates, where it was performing pointing, cleaning, and caulking work (PCC work).

The General Counsel contended that the requested information is relevant to the Union's claim that the Respondent breached its obligation under the parties' 2000-2004 collective-bargaining agreement to hire union members for the Park City job, which is encompassed by that agreement's geographical jurisdiction. The Board rejected the Respondent's arguments that it had no duty to provide the information because its collective-bargaining agreement with the Union covers only the Essex House project and that the information is not necessary and relevant to the Union's duties.

The Board found that the Respondent's obligation to provide the information is definitely resolved by its finding on the threshold issue—i.e., that the collective-bargaining agreement entered into between the Respondent and the Union by its terms, was ambiguously multisite in scope, that there are no factual issues warranting a hearing in this matter, and that the Respondent's affirmative defenses are inadequate to defeat the motion for summary judgment. The Respondent had argued, in its affirmative defenses, that Section 10(b) bars the complaint,

that the Union waived its right to obtain relevant information, and that the Union is not entitled to the requested information because the underlying grievance is in aid of an unlawful subject of bargaining.

(Chairman Battista and Members Liebman and Walsh participated)

Charge filed by Bricklayers New York Local 1; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for summary judgment Oct. 27, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Edison Electric and/or Edison Electric Group, Inc. (Electrical Workers [IBEW] Local 46) Bothell, WA June 21, 2004. 19-CA-29005; JD(SF)-50-04, Judge John J. McCarrick.

Virginia Mason Medical Center (United Staff Nurses Local 141, Commercial Workers) Bainbridge Island, WA June 14, 2004. 19-CA-29046; JD(SF)-43-04, Judge Clifford H. Anderson.

Stationary Engineers Local 39, Operating Engineers (an Individual) Sacramento, CA June 15, 2004. 32-CA-20575-1; JD(SF)-48-04, Judge James M. Kennedy.

The Neighborhood House Association (Service Employees Local 2028) San Diego, CA June 15, 2004. 21-CA-35986; JD(SF)-46-04, Judge James L. Rose.

Children's Center for Behavioral Development (Children's Center Federation of Teachers Local 4485) Centreville, IL June 28, 2004.

*Ozark Mountain Interiors (*Carpenters District Council of Kansas City & Vicinity) Springfield, MO June 25, 2004. 17-CA-22224, et al.; JD(SF)-51-04, Judge Albert A. Metz.

C. Politis & Co., Inc. (Painters District Council 21) Newtown Square, PA June 29, 2004. 4-CA-32606; JD-62-04, Judge David L. Evans.

CBS Broadcasting, Inc. (Writers Guild of America, East, Inc.) New York, NY June 29, 2004. 2-CA-35421; JD(NY)-29-04, Judge D. Barry Morris.

AEI2, LLC (Laborers Local 199) Berlin, NJ June 30, 2004. 4-CA-32421; JD-63-04, Judge Jane Vandeventer.

Success Village Apartments, Inc. (Auto Workers Local 376) Bridgeport, CT June 30, 2004. 32-CA-9889-2, et al.; JD(NY)-12-04, Judge Steven Davis.

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TEST OF CERTIFICATION CASE

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

Rossman Farms, Inc. (Food and Commercial Workers Local 348-S) (29-CA-26159; 342 NLRB No. 34) Brooklyn, NY June 30, 2004.

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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.)

Frans Joseph, Inc. and De Colores, Inc., Alter Egos (Painters District Council 57 of Western PA) (6-CA-33771, 33911; 342 NLRB No. 35) Manor, PA June 30, 2004.

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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 DIRECTION [that Regional Director open and count ballots]

Reliable HVAC, Inc., Vancouver, WA, 36-RC-6208, June 29, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

Trane, an Operating Div. of American Standard, Inc., Timonium, MD, 5-RC-15605, June 30, 2004
State Plaza Hotel, Washington, DC, 5-RC-15599, June 29, 2004

DECISION AND ORDER REMANDING [to Regional Director for hearing on Employer's objections]

United Rentals, Inc., Columbiana and East Liverpool, OH, 8-RC-16598, June 30, 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 CERTIFICATION OF RESULTS OF ELECTION

Community Action Agency of Columbiana County, Inc., Toledo, OH, 8-RC-16577, July 2, 2004

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

Hartford Head Start Agency, Inc., Detroit, MI, 7-RC-22586, July 2, 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)

Air Products and Chemicals, Inc., Allentown, PA, 26-UC-193, June 30, 2004
Sunrise Senior Living, Inc., Rocky River, OH, 8-RC-16609, June 30, 2004
Kaiser Foundation Hospital & Kaiser Foundation Health Plan, Oakland, CA, 37-RC-4072, June 30, 2004
North Coast Express, Inc., Lacey, WA, 19-RC-14507, June 30, 2004
Overnite Transportation, Saginaw, MI, 7-RD-3371, June 30, 2004

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(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)

Tyson Foods, Inc., Jefferson, WI, 30-UD-165-1; -2, June 30, 2004

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Miscellaneous Board Orders

NOTICE TO SHOW CAUSE [why the Union's Motion to Dismiss Petition as Moot should not be granted] (Due 7/14/04)

Magic-Brite Janitorial, Las Vegas, NV, 28-RD-875, June 30, 2004

ORDER [denying Employer's motion for reconsideration of Board's 4/29/04 Order denying Employer's request for review]

Puerto Rico Telephone Company, San Juan, PR, 25-UC-224 (formerly 24-UC-194), et al., June 30, 2004

ORDER GRANTING REQUEST [to withdraw petition]

Concord Hyundai, Concord, CA, 32-RC-5226, June 30, 2004

DECISION ON REVIEW AND ORDER [affirming Regional Director's dismissal of the petition]

R-Con Corp., Wichita, KS, 17-RM-834, June 30, 2004

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