National Labor Relations Board

Weekly Summary of NLRB Cases

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Allied Mechanical Services, Inc. (7-CA-40907, 41390; 351 NLRB No. 5) Kalamazoo, MI Sept. 28, 2007. The Board unanimously reversed the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, refusing to furnish information, and unilaterally revising its job application procedure to require applicants to apply in person at its Kalamazoo office. [HTML] [PDF]

The Board granted the General Counsel's and Union's motions for reconsideration of the Board's prior decision, 341 NLRB 1084 (2004), in which the Board had adopted the judge's dismissal of the 8(a)(5) allegations. Contrary to its prior decision, the Board found that the lack of a membership vote on a union merger did not relieve the Respondent of its obligation to recognize and bargain with the Union. In so finding, the Board applied its recent decision in *Kravis Center for the Performing Arts*, 351 NLRB No. 19 (2007), which overruled the Board's "due process" requirement for union mergers or affiliations, i.e., the rule that, following a union merger or affiliation, an employer's obligation to recognize and bargain with the union ended if the union's members had not been afforded an opportunity to vote, with adequate due process safeguards, regarding the merger or affiliation. The Board thus found that lack of a membership vote on the union merger was not a defense to the 8(a)(5) allegations against the Respondent.

The Board then addressed the judge's two other rationales for his dismissal of the 8(a)(5) allegations. Contrary to the judge, the Board found that the General Counsel established that the Respondent and the Union had a Section 9(a) bargaining relationship, not a Section 8(f) relationship. The parties' bargaining relationship originated in a 1991 settlement of an unfair labor practice complaint. The Board found that the settlement, under which the Respondent agreed to recognize and bargain with the Union, coupled with the Board's finding in a 2001 case that the Respondent had violated Section 8(a)(5) at a time when it did not have a collective-bargaining agreement with the Union, together showed that the Respondent and the Union had a Section 9(a) bargaining relationship.

The Board also rejected the judge's rationale that the Respondent was relieved of its bargaining obligation because the parties had bargained for a reasonable period of time. Rather, under the applicable law at the time that the Respondent withdrew recognition, the Respondent could lawfully withdraw recognition only by showing either that the Union had actually lost the support of a majority of the bargaining unit employees or that the employer had good-faith doubt or uncertainty, based on objective considerations, of the Union's continued majority status.

The Board rejected the Respondent's contention that it had reasonable, good-faith doubt or uncertainty of the Union's majority status. The Board found that the fact that the only employees who engaged in union activities were "salts" did not support good-faith doubt or uncertainty regarding the Union's continued majority status. The Board found inapposite the Respondent's argument that the Union had never demonstrated majority support, because a presumption of majority support was created by the Respondent's recognition of the Union under the 1991 settlement agreement. Having rejected all of the Respondent's defenses, the Board found that the General Counsel established that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, refusing to furnish information, and unilaterally revising its job application procedure.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Anheuser-Busch, Inc. (14-CA-25299; 351 NLRB No. 40) St. Louis, MO Sept. 29, 2007. The Board, by a 3-2 vote, reaffirmed its 2004 holding that the Act prohibits the Board from granting a make-whole remedy to employees disciplined or discharged for misconduct discovered as a result of unlawful conduct by their employer. [HTML] [PDF]

Without bargaining with the union that represents the employees at its St. Louis facility, Anheuser-Busch installed hidden surveillance video cameras. Through use of the cameras, Anheuser-Busch learned that certain employees were engaged in misconduct, and it disciplined or discharged 16 of them.

In its initial decision, the Board found the installation and use of the cameras to be an unlawful unilateral change, and it issued a cease-and-desist order against Anheuser-Busch. But by a 2-1 decision, the Board declined to order reinstatement or backpay for the employees. The Board held that it lacked authority to order reinstatement or backpay because the employees were disciplined for cause, regardless of the fact that their employer learned of their misconduct only as a result of its own unfair labor practice. On petition for review to the United States Court of Appeals for the District of Columbia Circuit, the court affirmed the Board's unfair labor practice finding, but found that the Board had not adequately reconciled with existing caselaw its decision to withhold a reinstatement and backpay remedy from the employees.

On remand, the Board majority (Chairman Battista and Members Schaumber and Kirsanow) reviewed the NLRA and its legislative history and determined that the statute and compelling policy considerations bar the Board from granting a remedy to employees who have been disciplined or discharged for cause. In particular, the majority was guided by the principle that employees should not benefit from their misconduct through a windfall award of reinstatement and backpay. The Board overruled cases previously identified by the court as inconsistent with that holding.

In dissent, Members Liebman and Walsh stated that the court's decision precluded the Board from deciding this case on purely statutory grounds. In their view, neither the statutory language relied on by the majority nor the legislative history addresses the issue presented. The dissenters stated that a make-whole remedy for the employees is necessary to repair the damage that Anheuser-Busch's unlawful unilateral changes caused to the union's status as the employees' bargaining representative and to deter future unlawful unilateral changes.

(Full Board participated.)

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D.L. Baker, Inc. t/a Baker Electric and its alter ego and/or successor Baker Electric, Inc.; Herndon Animal Medical Center, Inc.; and Daniel L. Baker, and Maggie Barry, Individually (5-CA-24131, 24190; 351 NLRB No. 35) Vienna, VA Sept. 29, 2007. This compliance proceeding was the latest chapter in protracted litigation over a variety of remedial issues arising out of the Board's decision and order finding certain unfair labor practice violations in *Baker Electric*, 317 NLRB 335 (1995). [HTML] [PDF]

In the liability phase, the Board found that D.L. Baker (DLB) violated Section 8(a)(3) of the Act by discriminatorily discharging an employee (Tangy) due to his union organizing efforts, and Section 8(a)(5) by refusing to recognize the Union and by failing to honor the terms of an 8(f) prehire agreement. As to the latter, the Board rejected DLB's defense that the charges were untimely filed under Section 10(b) of the Act because of the passage of 16 years and the occurrence of intervening events that assertedly precluded applying and enforcing the 8(f) agreement against DLB. The Board's remedial order provided for three categories of claimants: (1) Tangy, (2) DLB's own employees, and (3) hiring hall claimants (individuals DLB should have, but did not, hire under the 8(f) agreement's hiring hall provisions). Almost immediately after the Board's Order issued, DLB, also in trouble with the IRS, sold its assets to Baker Electric, Inc. (BEI). BEI's sole shareholder, Maggie Barry (Barry), is the wife of DLB's sole shareholder, Daniel L. Baker (Baker). DLB's assets were not offered to any other potential buyer. Barry is also the sole shareholder of Herndon Animal Medical Center, Inc. (HAMCI).

After the Board's Order was enforced, see 105 F.3d 647, 1997 WL 5771 (4th Cir. 1997) (table) (per curiam), the Regional Office issued a compliance specification (CS). The original CS alleged that BEI was both a successor to and an alter ego of DLB, and, under either theory, jointly and severally liable for DLB's obligations. The CS further alleged that Baker and Barry diverted DLB's and BEI's corporate funds to themselves; therefore, the CS sought to pierce the corporate veils of DLB and BEI and hold Baker and Barry individually liable. The CS was amended to add HAMCI as a party. The Board granted partial summary judgment on the CS. See *Baker Electric*, 330 NLRB at 522-523 (2000).

The CS alleged a backpay liability period for the Respondents' failure to adhere to the 8(f) agreement from Aug. 7, 1993 (the beginning of the 10(b) period) through May 28, 1997 (when the Respondents sent a letter to the Union formally repudiating the 8(f) agreement and bargaining relationship). The Respondents countered that the agreement was repudiated no later than March 31, 1994 (when they filed an answer denying that a contract was in effect). The CS also alleged a continuing backpay obligation to employee Tangy. The parties contested the validity of a July 1997 reinstatement offer to Tangy; they stipulated that the Respondents made a valid reinstatement offer to Tangy in Sept. 2000. The administrative law judge bifurcated the proceedings, deciding the issues of alter ego/successor liability, piercing the corporate veil, the contract repudiation date, and Tangy's make-whole remedy, and remanding the issues of HAMCI's alleged derivative liability and net backpay due DLB's employees and hiring hall claimants.

The Board, in a 3-0 decision, adopted in part and reversed in part the judge's findings and conclusions, and remanded certain issues. First, the Board affirmed the judge's interpretation of the Board's previous summary judgment Order as encompassing both backpay calculation formulae and the actual calculations. Second, the Board found that the judge erred in interpreting the summary judgment Order as precluding the Respondents from seeking to exclude from its scope individuals claimed by the Respondents to be non-unit office and supervisory personnel. Third, the Board adopted the judge's findings that BEI is liable for DLB's unfair labor practices both as a successor and as an alter ego. Fourth, the Board reversed the judge and found that the corporate veils of DLB and BEI should be pierced to reach Baker and Barry individually. In so doing, the Board found, contrary to the judge, that both

prongs of the *White Oak Coal* test, see 318 NLRB 732 (1995), were met, and that adherence to the corporate form would sanction a fraud, promote injustice, or lead to the evasion of legal obligations. Fifth, the Board reversed the judge's finding that repudiation of the 8(f) agreement occurred on October 5, 1994 (the last day of the hearing in the liability phase), finding instead that it occurred on March 31, 1994. Sixth, the Board adopted the judge's findings that DLB's 1997 reinstatement offer to Tangy was invalid, that he was entitled to backpay at the 8(f) contractual rate even after contract repudiation, and that with very limited exceptions, Tangy reasonably mitigated his damages and was entitled to his claimed expenses. However, the Board found that the judge erred in accepting the General Counsel's "alternate" calculations (which calculations imputed earnings for each of Tangy's minor attendance derelictions) as the measure of Tangy's backpay. Instead, the Board found that the General Counsel's "revised" calculations (except as to certain discrete issues, which the Board remanded) accorded with traditional Board methodology (which focuses on reasonable efforts to search for work) in determining backpay in compliance proceedings and more appropriately measured the Respondents' backpay obligation. Finally, the Boarded interpreted and clarified its previous summary judgment Order vis-à-vis the judge's remand Order.

(Members Liebman, Kirsanow, and Walsh participated.)

Hearing at Washington, D.C. over more than 40 days between June 12 and Nov. 16, 2000. Adm. Law Judge Thomas R. Wilks issued his decision March 28, 2001.

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BP Amoco Chemical-Chocolate Bayou (16-CA-20258, 20361, and 16-RC-10189; 351 NLRB No. 39) Austin, TX Sept. 29, 2007. One issue in this case is whether 37 alleged discriminatees waived their right to file charges with the Board—or have charges filed on their behalf—when executed termination agreements in exchange for enhanced severance benefits. The Board agreed with an administrative law judge's finding that the releases signed by the workers are valid waivers of all claims, whether filed by the individuals or on their behalf. In making its determination, the Board applied the factors discussed in *Independent Stave*, 287 NLRB 740 (1987), the same standard used by the Board in determining whether to give effect to a private settlement agreement. [HTML] [PDF]

The Board also agreed with the judge's findings that BP Amoco Chemical violated Section 8(a)(1) before an election lost by the union by making statements threatening employees with the loss of wages and benefits if they chose the union. Te Board found that these statements constituted objectionable conduct and ordered that a second election be conducted in Case 16-RC-10189.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Paper, Allied-Industrial, Chemical & Energy Workers Local 4-449; complaint alleged violation of Section 8(a)(1). Hearing at Houston, Aug. 21, 22-25, and 28-31, Sept. 5-8, and Oct. 25-26, 2000. Adm. Law Judge Keltner W. Locke issued his decision Jan. 8, 2001.

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Carpenters New England Regional Council (Village Construction Co.) (1-CC-2712; 351 NLRB No. 38) Salem, MA Sept. 29, 2007. The Board remanded the case for further consideration in light of its recent decision in *BE&K Construction Co*., 351 NLRB No. 29 (2007). Specifically, the Board directed the administrative law judge to consider whether the analysis the Board adopted in *BE&K* is applicable to the Union's filing of comments and an appeal with the Massachusetts Department of Environmental Protection and, if so, whether the comments and appeal were reasonably based under the facts and circumstances of this case. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Village Construction Co., Inc.; complaint alleged violation of Section 8(b)(4)(ii)(B). Hearing at Boston, Feb. 9-11 and April 30, 2004. Adm. Law Judge Raymond P. Green issued his decision July 15, 2004.

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Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland (32-CA-17432; 351 NLRB No. 56) Oakland, CA Sept. 29, 2007. The Board found, contrary to the administrative law judge, that a lawsuit filed by the Respondent had not been shown to be baseless. Citing its recent decision in *BE&K Construction Co.*, 351 NLRB No. 29 (2007), the Board dismissed the complaint without passing on the judge's finding that the Respondent's lawsuit was brought with a retaliatory motive. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by California Nurses Association; complaint alleged violation of Section 8(a)(1). Hearing at Oakland on June 16, 2003. Adm. Law Judge Gerald A. Wacknov issued his decision Sept. 30, 2003.

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Cossentino Contracting Co., Inc. (5-CA-29607; 351 NLRB No. 31) Baltimore, MD Sept. 29, 2007. The Board adopted the administrative law judge's findings that the Respondent failed to consider for hire and failed to hire 9 of 12 union applicants in violation of Section 8(a)(3) and (1) of the Act. The Board remanded to the judge the issue of whether the remaining three applicants were bona fide under the Board's modified framework set-forth in *Toering Electric Co.,* 351 NLRB No. 18 (2007). [HTML] [PDF]

In adopting the judge's findings, the Board applied the modified framework set forth in *Toering Electric,* supra, to determine whether the applicants were bona fide. The Board determined that the General Counsel met his burden to prove that 9 of 12 applicants were genuinely interested in working for the Respondent. As for the remaining three applicants, the Board determined that the Respondent put forward evidence "reasonably calling into question" their genuine interest in working for the Respondent. Accordingly, in order to afford all parties their due process rights, the Board remanded, Chairman Battista dissenting, these three applicants to the judge for further factual development and consideration.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Operating Engineers Local 37; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Baltimore, Oct. 3-5, 23, and 24, 2001. Adm. Law Judge Arthur J. Amchan issued his decision Dec. 31, 2001.

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Dial One Hoosier Heating & Air Conditioning Co., Inc., et al. (25-CA-24178, et al.; 351 NLRB No. 48) Indianapolis, IN Sept. 29, 2007. The Board affirmed the administrative law judge's finding that Respondents Dial One and American Residential Services (ARS) violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire union salts but reversed the judge's finding that Respondent USA Heating & Air Conditioning Co. discriminatorily refused to hire or consider union salts. The Board's decision also adopted the judge's additional findings that ARS is the *Golden State* successor to both Dial One and USA. [HTML] [PDF]

In affirming the judge's findings that Dial One and ARS unlawfully refused to hire union salts for advertised HVAC positions, the Board declined to adopt his rationale which compared the qualifications of the union salts against the nonunion applicants who were hired. Instead, the Board concluded that a prima facie violation was established because both Respondents failed to uniformly apply their qualification requirements and hiring preferences to the applicants who were hired and used these only as a pretext for not hiring the union salts. The Board found that both Respondents were motivated by antiunion animus and that neither met its burden to show that it would not have hired the union salts even in the absence of such animus. The Board rejected, as unsupported by the evidence, the Respondents' arguments that the union salts could not be bona fide applicants because they had no interest in employment but only sought to bring unfair labor practice charges.

The Board reversed the judge's finding of unlawful conduct by USA finding that neither the failure to hire any union applicants nor the admission that USA preferred to operate nonunion was sufficient to establish the prerequisite antiunion animus. Member Liebman dissented from this reversal and would find that animus was established by the failure of USA to consider or to hire any overt union applicant who met the Respondent's stated hiring qualifications and by the disparaging comments that USA representatives made about union applicants in general. She would also find that the charges filed on behalf of USA union applicants were not time-barred.

The Board summarily affirmed the judge's remaining findings that Respondent ARS violated the Act by unlawfully instructing employees not to discuss the Union, by prohibiting employees from wearing union hats and insignia at work, by threatening employees with unspecified reprisals or termination if they discussed the Union and by unlawfully laying off two employees because of their union activities; that statements made by ARS's General Manager at an employee meeting did not violate Sec. 7 rights; and that Respondent Dial One did not unlawfully change its hiring policies.

(Chairman Battista and Members Liebman and Kirsanow participated)

Charges filed by Sheet Metal Workers Local 20; complaint alleged violations of Sections 8(a)(1), (3), and (5). Hearing at Indianapolis, March 6, 8-10, April 25-27, May 1- 4, May 30 - June 1, 2000. Adm. Law Judge Bruce D. Rosenstein issued his decision Jan.16, 2001.

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Domsey Trading Corp., et al. (29-CA-14548 et al.; 351 NLRB No. 33) Brooklyn, NY Sept. 30, 2007. This is a backpay case that involves 202 discriminatees who were found to be entitled to a remedy under the Board's decision in *Domsey Trading Corp.*, 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2d Cir. 1994). In that case, the Board found, inter alia, that, after the Union made an unconditional offer to return unfair labor practice strikers to work on Aug.10, 1990, the Respondent unlawfully refused to reinstate them on Aug.13, 1990. Since the Respondent did offer the former strikers reinstatement on Aug. 20, 1991, the backpay period runs from Aug. 13, 1990 to Aug. 20, 1991. From Aug. 13, 1990 through Feb.1, 1991, the Union paid the former strikers $12 a day for each day that the former strikers came to the site of the former picket line and signed in with the Union. (Although the strike ended on Aug. 10, 1990, the decision terms the benefits "strike benefits," as did the judge and the parties.) The former strikers had to sign a voucher or ledger at the end of the week when they received their benefits for that week. [HTML] [PDF]

The Board majority of Chairman Battista and Member Schaumber reversed the judge's finding that the strike benefits of certain discriminatees (the "non-machinists") were collateral benefits and found instead that they were interim earnings deductible from gross backpay. In finding that there was a "nexus" between the payments and the services that the former strikers performed for the Union that evidenced the payments were interim earnings, the majority found that

> the weight of the evidence demonstrates that the strike benefits received by the non-machinists were contingent upon the strikers' continuous presence at the picket line and more akin to compensation for services than collateral benefits. . . . the benefits here were directly proportional to the number of days the non-machinist strikers spent on the line, and the Union kept close tabs on the picketers through sign-in sheets and vouchers. Further, the non-machinist strikers generally testified that they understood that all benefits were received for showing up to demonstrate in support of the Union's organizing campaign by singing, marching and chanting on the picket line. Indeed, once the picketing ceased, so also did the payment of benefits cease.

In dissent, Member Walsh would adopt the judge's finding that the strike benefits were collateral benefits and disagreed with the majority's finding of a "nexus" between the strike benefits and the former strikers' services for the Union. In Member Walsh's view, the former strikers, many of whom were unskilled and foreign born, understood (erroneously) that the strike ended only when the benefits ended on Feb.1, 1991. Thus, while they assumed that they were obligated to spend time at the picket line in support of the Union after the strike ended in Aug. 1990 in order to continue to receive benefits, Member Walsh found the "testimony embodying that assumption [was] in conflict with more reliable evidence and [was] otherwise unsupported."

He explained:

> What the facts show, and what the judge found, is that after August 10, the former strikers were required only to appear at the former picket line and sign in in order to receive strike benefits. There is no evidence to support the majority's assertion that the Union kept track, in effect, of the hours that the former strikers spent at the site or that it required them to demonstrate in support of the Union's organizing campaign to receive benefits. Thus, there is no nexus between the former strikers' activities at the former picket line and the benefits they received from the Union.

The Board also reversed the judge's finding that discriminatees who were not authorized to be present and employed in the United States during the backpay period were entitled to backpay. After the judge issued his supplemental decision, the Supreme Court issued its opinion in *Hoffman Plastice Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), where it found that after the enactment of The Immigration Reform and Control Act of 1986 (IRCA), discriminatees who were not authorized to be present and employed in the United States were not entitled to backpay. Applying *Hoffman*, the Board reversed the judge and found that four discriminatees who admitted that they were unauthorized during the backpay period were not entitled to backpay.

The Board remanded to the judge six other discriminatees whose authorization status during the backpay period remained unresolved. The remand order directed the judge "to develop a complete factual record consistent with this supplemental decision and to issue a second supplemental decision setting out his factual findings based on that record."

As to the individual discriminatees, the Board adopted the judge's findings of the backpay amounts owed to certain discriminatees and reversed his findings as to others. As to certain other discriminatees, the Board majority of Chairman Battista and Member Schaumber, relying on compliance forms and other documentary evidence, reversed certain of the judge's findings based on credibility. In dissent, Member Walsh would not have done so.

(Chairman Battista and Members Schaumber and Walsh participated.)

Hearing at Brooklyn on multiple dates between Oct. 27, 1997 and Jan. 29, 1999. Adm. Law Judge Michael A. Marcionese issued his supplemental decision Oct. 4, 1999.

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Innes Construction Co., Inc. (7-CA-43674; 351 NLRB No. 34) Battle Creek, MI Sept. 29, 2007. The Board majority of Members Schaumber and Kirsanow reversed the administrative law judge's finding that the Respondent unlawfully refused to hire or consider for hire 12 union applicants. Contrary to the judge, the Board found that the Respondent would have refused to consider or hire the applicants even in the absence of their union affiliation. The Board analyzed the case under *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), finding that, even assuming that the General Counsel established its prima facie case, the Respondent established that it would have refused to hire or consider the applicants even in the absence of their union affiliation. [HTML] [PDF]

The Board found that the Respondent's vice president, Jeff Johnson, had a reasonable belief that the applicants were not willing to work for the wages offered by the Respondent. The Board found that union organizer Chad Miller spoke on behalf of the applicants during the application process, and attempted to persuade Johnson to sign a union contract. When Johnson refused, neither Miller nor the other applicants indicated that they were willing to work for the Respondent without a union contract. Consequently, the Respondent was privileged to refuse to hire or consider the applicants with these conditions attached.

Member Liebman dissented, arguing that the Respondent's purported reason for refusing to hire or consider the applicants was an after-the-fact justification. Member Liebman argued that Miller told Johnson that the applicants' intent was to organize the Respondent, a task that could only be accomplished by obtaining jobs with the Respondent. Member Liebman also argued that Johnson could have dispelled any doubts as to the motivations of the applicants by making employment offers or asking the applicants what wages they were willing to work for.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Michigan Regional Council of Carpenters Local 525; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Battle Creek, May 16-17, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision July 25, 2001.

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Marshall Engineered Products Co., LLC (18-CA-16303; 351 NLRB No. 47) Marshalltown, IA Sept. 29, 2007. In this case, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging employee David Spillman. [HTML] [PDF]

The Board (Chairman Battista and Member Schaumber; Member Liebman dissenting) reversed the judge's finding that the Respondent violated Section 8(a)(1) by discharging employees Kelley and Cripps. The Board found, after evaluating the record independently, that the judge erred in his credibility resolutions. The majority found that the General Counsel had not met his burden of establishing that Kelley and Cripps did not engage in misconduct for which the Respondent discharged them. Member Liebman would find that it is not the Board's role to second-guess a judge and reassess the credibility of witnesses.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Auto Workers Local 893, Unit 7; complaint alleged violation of Section 8(a)(1). Hearing at Marshalltown, Jan. 16-17, 2003. Adm. Law Judge Benjamin Schlesinger issued his decision March 21, 2003.

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McBurney Corp. (26-CA-17564, et al.; 351 NLRB No. 49) Norcross, GA Sept. 29, 2007. The Board adopted the administrative law judge's findings that the Respondent engaged in unlawful surveillance of employees' union activity and unlawfully transferred employee Daniel Barney to a more onerous job. The Board majority of Members Liebman and Walsh adopted the judge's finding that the Respondent unlawfully refused to hire certain union applicants at three of its jobsites. [HTML] [PDF]

In affirming the refusal-to-hire finding, the majority rejected the Respondent's argument that its hiring decisions were based on a neutral application of its preferential hiring policy. The majority distinguished the facts from *Zurn/N.E.P.C.O.,* 345 NLRB No. 1 (2005), petition for review denied sub nom. *Northern Michigan Building & Construction Trades Council v. NLRB*, 182 LRRM 2241 (6th Cir. 2007), where the Board accepted the employer's preferential hiring defense as to certain decisions made in adherence to the policy because the employer followed its policy a great majority of the time. The majority found the case to be more like *Jesco, Inc.,* 347 NLRB No. 92 (2006), where the Board completely rejected the employer's hiring policy as a defense because the deviations from the policy were so substantial. It found that the Respondent's "systematic" manipulation of that policy, along with other evidence that the Respondent attempted to frustrate applications from union applicants, precluded the Respondent from relying on its policy as a defense.

Chairman Battista dissented only from the majority's findings regarding the Respondent's preferential hiring policy as an affirmative defense to the refusal-to-hire allegations. The Chairman found that the case was more like *Zurn/N.E.P.C.O.,* supra, than *Jesco,* supra, and he consequently found that the Respondent should not be entirely precluded from asserting its hiring policy as a defense. He found that the Respondent rebutted the General Counsel's prima facie case with respect to the nonunion hires holding a higher preference than the rejected union applicants. In his dissent, those rejected union applicants who lacked a corresponding nonunion hire with an equal or lower preference category would have been entitled to a refusal-to-consider remedy rather than a refusal-to-hire remedy.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Boilermakers International; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Scranton, PA, Aug. 25-27, 1997, and at Atlanta, GA, Oct. 6-8, 1997. Adm. Law Judge Karl H. Buschmann issued his decision Sept. 21, 1998 and his supplemental decision March 30, 2001.

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Metro Transport LLC, d/b/a Metropolitan Transportation Services, Inc. (17-CA-20061, et al., 17-RC-11771; 351 NLRB No. 43) Kansas City, MO Sept. 29, 2007. The Board adopted the administrative law judge's findings of Section 8(a)(1) violations to which no exceptions were filed, including one violation for which the exception failed to meet minimum Board requirements. The Board also both adopted and reversed certain 8(a)(1) and 8(a)(3) findings by the judge to which exceptions were filed. [HTML] [PDF]

First, the Board affirmed the judge's finding that the Respondent's discharge of David Lindgren violated Section 8(a)(3). The Board found pretextual all the reasons given by the Respondent for its discharge of Lindgren. Thus Lindgren's alleged "smoking in a company vehicle" had occurred more than a month ago. Lindgren's taking his ticket bag home and bringing it in the next day had been specifically authorized by the Respondent since Lindgren was sick. Furthermore, given the authorization, there was no "gross insubordination." The Board also found that while the Respondent may have articulated a legitimate reason for discharging Lindgren in citing the "customer complaints" against him, the Respondent failed to show by a preponderance of the evidence that it did, in fact, rely on that reason. The Respondent documented complaints but failed to take any action until after Lindgren made known his pro-union sentiments to the Respondent. Then the Respondent not only cited the "customer complaints," but also the obviously false reasons concerning the smoking and ticket bag incidents. (Members Liebman and Kirsanow participated in this decision; Member Schaumber dissented).

Second, the Board reversed the judge and found that Dale Stripling was a supervisor. The Board found that the Respondent twice told Stripling that he possessed the authority, on his own, to discipline employees. Moreover, this authority was not limited to a single incident or an emergency situation. Rather, the Respondent clearly empowered Stripling to exercise supervisory authority from that time forward. As a result, the Board dismissed the charges that the Respondent's interrogations of Stripling and implied threats towards Stripling violated Section 8(a)(1), and the Respondent's discharge of Stripling violated Section 8(a)(3). (Members Schaumber and Kirsanow participated in this decision; Member Liebman dissented).

Third, the Board reversed the judge and found that the Respondent did not violate Section 8(a)(3) by suspending certain mechanics. The Board applied the three part test: (1) whether the protest originated with the employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; and (3) whether the identity of the supervisor was directly related to terms and conditions of employment. See *Southern Pride Catfish*, 331 NLRB 618, 620 (2000). The Board noted that even assuming that the first two parts of the test were met, nonetheless the Board found that this suspension allegation must be dismissed because there was no relationship between Stripling and the mechanics' terms and conditions of employment. The Board noted that the record showed that the mechanics were only concerned with Stripling's employment situation; they made no mention whatsoever of their own. Moreover, this was so even though the mechanics had asked Stripling to present a list of their grievances to the Respondent only a day before Stripling's discharge. Nevertheless, the mechanics uttered not one word about these grievances when they walked out of the workplace to protest Stripling's discharge. The Board therefore dismissed the complaint allegation that the suspension of the mechanics violated Section 8(a)(3). (Members Schaumber and Kirsanow participated in this decision; Member Liebman dissented).

Fourth, the Board adopted the judge's finding that the Respondent's suspension and discharge of Joseph Webster violated Section 8(a)(3). The Board noted that, unlike the judge, it did not rely on the animus flowing from the earlier suspension of the mechanics, one of whom was Webster. Rather, the Board relied on the other evidence cited by the judge such as the Respondent's change in billing practices concerning the employees' use of parts for private work

and reporting Webster to the Human Resources Director pursuant to that change, the Respondent's incorrect allegation that Webster performed private work on company time rather than his own time, and the Respondent's after-the-fact promulgation of rules for private work when the prevailing rule was that mechanics could use the garage for private work as long as they did so on their own time and the work did not interfere with the Respondent's business, a rule with which Webster had always complied. The Board also noted certain violations of Section 8(a)(1) occurring shortly before Webster's suspension and discharge. The Board therefore concluded that the reasons that the Respondent gave for its suspension and discharge of Webster were pretextual and that this conduct violated Section 8(a)(3) without resort to the earlier mechanics' suspension. (Members Liebman, Schaumber and Kirsanow participated in this decision).

Finally, the Board issued a direction in the consolidated representation case and the challenged ballots pursuant to the decisions herein.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Teamsters Local 41; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Overland Park for 13 days between Aug. 31, 1999 and Oct. 7, 1999. Adm. Law Judge Richard J. Linton issued his decision May 12, 2000.

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North Carolina Prisoner Legal Services, Inc. (11-CA-20238; 351 NLRB No. 30) Chapel Hill, NC Sept. 29, 2007. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals, threatening to withhold a wage increase, and threatening to eliminate short-term disability benefits. Chairman Battista and Member Walsh, with Member Schaumber dissenting, adopted the judge's findings that the Respondent violated Section 8(a)(1) by withholding a wage increase, eliminating short-term disability benefits, threatening to eliminate reduced-hours work schedules, eliminating reduced-hours work schedules, and constructively discharging employee Linda Weisel. [HTML] [PDF]

Member Schaumber would find that the General Counsel failed to meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating that the Respondent's board of directors, who made the decisions to withhold the wage increase and to eliminate the short-term disability policy, was motivated by animus. Member Schaumber would further find that the Respondent demonstrated it would have eliminated reduced-hours work schedules even in the absence of the employees' protected activities, and that because the elimination of reduced-hours schedules was not imposed because of employees' protected activities, there can be no constructive discharge.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Linda Weisel, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Chapel Hill, June 22-24 and Aug. 2-5, 2004. Adm. Law Judge Pargen Robertson issued his decision Dec. 16, 2004.

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Special Touch Home Care Services, Inc. (29-CA-26661; 351 NLRB No. 46) Brooklyn, NY Sept. 29, 2007. A unanimous three-member panel (Chairman Battista and Members Liebman and Kirsanow) found that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to immediately reinstate 47 home care aides who participated in a three-day economic strike to their pre-strike clients and hours upon their unconditional offers to return to work. A split panel found that a 48th aide was entitled to reinstatement, at least initially, but was lawfully terminated for insubordination when, over the course of two days, she defied the Respondent's instructions to leave her client's home and not return to it. The majority noted that the Respondent had terminated an aide several months earlier for refusing to leave a client's home and distinguished this case from another in which the Board found that an employee was unlawfully disciplined when he engaged in insubordinate conduct after being subjected to an unfair labor practice. (*Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849 (2001)). Dissenting, Member Liebman found that the employee's right to reinstatement was not extinguished by her insubordinate insistence on immediate reinstatement. [HTML] [PDF]

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by New York's Health and Human Service Union 1199/SEIU. Hearing at Brooklyn, New York, May 17 through 23, 2005. Adm. Law Judge Raymond P. Green issued his decision on Sept. 15, 2005.

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St. George Warehouse (22-CA-23223, et al.; 351 NLRB No. 42) South Kearny, NJ Sept. 30, 2007. The Board, by a 3-2 vote, modified its procedures in backpay cases. Under the new rule, the General Counsel will have the burden of producing evidence concerning employees' efforts to find interim employment after an unlawful discharge. [HTML] [PDF]

In a prior proceeding, the Board found that St. George Warehouse, which operates a warehousing facility in Kearney, New Jersey, violated the Act by discharging two employees because of their union activities. The Board ordered St. George Warehouse to remedy those unfair labor practices by reinstating the two employees and paying them back wages and benefits. An administrative law judge then conducted a compliance, or backpay, proceeding to determine the amount of backpay owing.

In a backpay proceeding, the burden to prove a reasonable amount of gross backpay is on the Board's General Counsel, who prosecutes cases before the Board. That amount is then reduced by the employees' interim earnings from the time of their discharge to the date the employer offered them reinstatement, a figure usually derived from social security data. The employer may seek to reduce that net backpay amount further by showing, among other things,

that the employees had not sought to mitigate damages by making reasonable efforts to find interim employment. Under prior Board law, the employer bore the burden of production and persuasion with respect to that affirmative defense.

In its decision in this case, the Board reaffirmed the principle that the employer bears the ultimate burden of persuasion concerning whether an unlawfully discharged employee made an adequate search for interim employment. But the Board determined that, once the employer shows that there were comparable jobs available in the relevant geographic area, the burden of production "is properly on the discriminatee and the General Counsel . . . to show that the discriminatee took reasonable steps to seek those jobs." To meet this burden of production, the General Counsel must produce the employee to testify or offer other competent evidence of the employee's interim job search.

The Board majority (Chairman Battista and Members Schaumber and Kirsanow) based their decision on the "mixed" reception the Board's prior rule received in the courts of appeals and on the General Counsel's superior access to discharged employees and information regarding their job searches. The majority observed that its new rule is not burdensome to the General Counsel, who under existing internal guidelines routinely gathers evidence of job searches in employment discrimination cases likely to result in backpay.

The dissenters (Board Members Liebman and Walsh) asserted that the majority offered no persuasive reason for modifying the current procedure, which placed all aspects of the burden of proof to reduce backpay upon the wrongdoer. The dissenters observed that the existing rule had been followed for more than 40 years and that it was supported by the weight of judicial authority. In a separate dissent, Member Liebman called the majority's action an "unfortunate" continuation of "the Board's recent trend of weakening the backpay remedy under the National Labor Relations Act."

(Full Board participated.)

Hearing at Newark on Oct. 8, 2002. Adm. Law Judge Margaret M. Kern issued her supplemental decision Oct. 30, 2002.

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Supervalu, Inc. (6-CA-31960, et al.; 351 NLRB No. 41) Pittsburgh, PA Sept. 30, 2007. In this case, the Board examined whether the Respondent, having entered into agreements containing an "additional stores" clause, violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to conduct card checks at three of its stores to determine whether the Union possessed majority support at those stores. [HTML] [PDF]

The Board (Members Schaumber and Kirsanow; Member Walsh, dissenting) reversed the administrative law judge's finding that the Respondent violated 8(a)(5) and (1) by refusing to conduct a card check and dismissed the underlying complaint. The Board determined that the General Counsel had failed to meet its burden, under *Pittsburgh Plate Glass*, to establish that the "additional stores" clause, which pertained to non-unit employees, "vitally affected" the terms

and conditions of employment of the bargaining unit employees. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185–188 (1971). Accordingly, the Board found that the "additional stores" clause constituted a permissive, rather than mandatory, subject of bargaining, and that the Respondent's refusal to conduct the requested card check did not violate Section 8(a)(5) and (1).

Member Walsh, reasoning that it is "beyond question that organized employees are vitally affected by the degree of organization at their employer's other facilities," would find that the "additional stores" clause constituted a mandatory subject of bargaining and, therefore, that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's request for card checks.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Food and Commercial Workers Local 23; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Pittsburgh on Feb. 11, 2002. Adm. Law Judge Joel P. Biblowitz issued his decision April 16, 2002.

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The Earthgrains Co. (11-CA-18006-1, et al.; 351 NLRB No. 45) Johnson City, TN; Norton and Bristol, VA; and Jenkins, KY Sept. 29, 2007. In a 3-0 decision, the Board affirmed all but one of the administrative law judge's numerous findings that the Respondent committed violations of Section 8(a)(1) of the Act. The Board reversed the judge's finding that the Respondent had threatened stricter enforcement of its rules and policies, noting that the allegation was not alleged in the complaint and that the General Counsel had not requested an amendment to the complaint in that regard. [HTML] [PDF]

The judge also found that the Respondent violated Section 8(a)(3) and (1) by discharging employee Tommy Duncan and transferring employee Barry Mullins. The Board affirmed those findings, and supplemented the judge's reasoning, regarding Mullins transfer and finding that allegations of unlawful threats made to Mullins were not timed barred, and that an amendment to the complaint at hearing that the Respondent had "coerced its employees to sign false statements to impede a Board investigation," did not violate the Respondent's right to due process and was not time barred. The Board also found that a common "notice to the employees" for the various facilities involved in this case was inappropriate.

The Board also rejected the Respondent's contention that it was denied due process by the judge allowing the General Counsel, at hearing and over the Respondent's objections, to amend the complaint to allege that the Respondent "coerced its employees to sign false statements to impede a Board investigation." The Respondent contended that it made an off-the-record request for a recess to prepare a defense which was denied by the judge. The Board also rejected the Respondent's contention that the allegation was time-barred.

Contrary to the judge's recommendation, the Board found that a common notice to employees for the facilities involved in the case, located at Johnson City, TN; Norton and Bristol, VA, and Jenkins, KY was inappropriate, and that separate notices were appropriate for

the Respondent's Johnson City, TN, and Bristol, VA facilities, but that a common notice was warranted at the Jenkins, KY, and Norton, VA facilities.

The Board found that at most, only one unfair labor practice was committed at all four locations, and only one additional violation was found to have occurred at the Bristol facility. Thus, the Board ordered that separate notices be posted at Bristol and Johnson City. However, the Board found that the Jenkins, KY, and Norton, VA facilities present a different situation. First, the Board noted that the Respondent made numerous 8(a)(1) threats to employees at both locations, the facilities were both involved in a contemporaneous organizing campaign by the Union, and that, Chandler was the area sales manager for the geographic area that included both facilities, and had directly participated in unfair labor practices at both locations. Moreover, Chandler informed an employee at the Norton facility, that the Respondent had gotten rid of the union "ringleader," at the Jenkins facility. The Board also took note of the fact that Mullins had testified that he attended a union meeting at Norton while working at Jenkins. Thus the Board concluded that under all of the circumstances, a common notice for the Jenkins and Norton facilities was appropriate.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Bakery Workers Local 343; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Bristol, TN on Dec. 6, 1999. Adm. Law Judge Benjamin Schlesinger issued his decision May 1, 2000.

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Tradesmen International, Inc. (5-CA-26411, et al.; 351 NLRB No. 37) Linthicum, MD Sept. 29, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) of the Act by refusing to hire 29 named electricians and carpenters because of their union affiliation, and affirmed the judge's dismissal of certain additional Section 8(a)(3) allegations relating to applicants Mark Bortle and John Steven Victor. However, the Board reversed the judge's dismissal of the Section 8(a)(3) allegation as to applicant Ivan Anderson, finding, contrary to the judge, that the Respondent's delay in hiring Anderson constituted unlawful conduct under the Act. In addition, a Board majority (Chairman Battista and Member Liebman) reversed the judge's finding that the Respondent violated Section 8(a)(1) by asking an applicant about his union affiliation. [HTML] [PDF]

In affirming the judge's refusal-to-hire findings, the Board made explicit its analysis of the facts under the standard set forth in *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). The Board found no merit in the Respondent's various defenses to the refusals to hire, including defenses that certain of the alleged discriminatees were lawfully denied employment because they were "too high priced" or were not bona fide applicants.

In affirming the judge's dismissal of the Section 8(a)(3) allegation as to applicant Mark Bortle, the Board found that the evidence does not support the General Counsel's theories of the violation—i.e., that the Respondent, a labor leasing company, was complicit in a client's

unlawful discharge of Bortle and refused to refer Bortle for other work following his discharge. The Board distinguished Bortle's discharge from a similar discharge addressed in *Tradesmen Intl.*, 351 NLRB No. 27 (2007), in which the Board found employer Tradesmen jointly liable for its client's unlawful conduct towards a Tradesmen-provided employee.

In reversing the judge's finding that the Respondent interrogated an applicant in violation of Section 8(a)(1), the Board considered the circumstances surrounding the Respondent's question regarding the applicant's union affiliation. The Board concluded that the Respondent's single question of an applicant would not reasonably have been coercive, given that the applicant was carrying a union hardhat that already conveyed his union affiliation and was not otherwise subject to coercion of any kind during the conversation. Member Walsh dissented, in a footnote, from the majority's finding that the Respondent's single question was not coercive, reasoning that questions regarding an applicant's union affiliation are "inherently coercive," and that, even under a totality-of-the-circumstances analysis, the question at issue was coercive because "posed in the context of the Respondent's obvious efforts to screen out union-affiliated applicants."

The Board amended the judge's recommended remedy for the refusal-to-hire violations, to take account of the Board's recent decision in *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007). In other respects, the Board affirmed the judge's recommended remedy for the refusals to hire and declined to pass on the request of the General Counsel and Charging Party for an additional publication remedy, reasoning that the Respondent is already subject to such a remedy under the terms of the Board's Order in *Tradesmen Intl.*, supra.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by the Carpenters Regional Council of Baltimore & Vicinity and Electrical Workers IBEW Locals 24, 143 and 229; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Washington, D.C. on 20 days between July 30, 1998 and Feb. 11, 1999. Adm. Law Judge Martin J. Linsky issued his initial decision Dec. 1, 1999 and his supplemental decision Jan. 12, 2001.

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Tradesmen International, Inc. (25-CA-24030, et al.; 351 NLRB No. 27) Indianapolis, IN Sept. 29, 2007. A unanimous Board found that the Respondent violated Section 8(a)(3) of the Act by refusing to hire or consider applicants because of their Union affiliation, discharged 2 employees because of their union affiliation, and interrogated applicants about their union status. A majority Board found an additional refusal to hire violation and unlawful discharge. A majority Board also ordered the Respondent to post at all of its facilities a notice stating its compliance with the Act. [HTML] [PDF]

The applicants were largely members of Sheet Metal Workers Local 20, which runs an apprenticeship program in which participants engage in salting campaigns at local businesses. Between Jan. 1995 and Nov. 1997, Local 20 sent approximately 37 applicants to apply for jobs with the Respondent. A unanimous Board found that the Respondent refused to hire or consider a large number of these applicants because of their affiliation with Local 20. The Board rejected

the Respondent's defenses that the applicants were not qualified, that there were no vacancies, and that it had a valid policy prohibiting employment while simultaneously employed by a union, finding the latter rationale to be a pretext. However, the Board reversed the judge on a smaller number of applicants for whom there was insufficient proof of a violation or who were rejected pursuant to the Respondent's valid policy prohibiting interviews of walk-in applicants who did not first secure an interview by telephone. The Board also clarified the number of vacancies during the relevant time period and reversed the judge's additional refusal to consider findings with regard to those discriminatees who received a refusal to hire remedy.

A Board majority also found that the Respondent unlawfully refused to hire union member Jay Bramlett, finding that an anonymous call to Bramlett's house originating from the Respondent's facility was sufficient evidence to infer knowledge of Bramlett's union affiliation. Chairman Battista dissented as to this violation, and would find insufficient evidence that the Respondent knew of Bramlett's union affiliation to find a violation.

A unanimous Board found that the Respondent unlawfully discharged two employees because of their union affiliation. Members Liebman and Walsh also found that the Respondent unlawfully discharged an additional employee, Brady Piercefield, who was discharged by the Respondent's contractor because of his union affiliation and not provided with additional assignments by the Respondent. Chairman Battista dissented as to Piercefield's discharge, finding that Piercefield did not contact the Respondent for additional assignments.

A majority Board adopted the judge's order, including a remedy requiring the Respondent to post notices at all of its facilities nation-wide stating its compliance with the NLRA. Chairman Battista dissented as to the nation-wide posting, and would find that there is insufficient evidence of prior violations or centralized control of personnel policies.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Sheet Metal Workers Local 20; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Indianapolis, Oct. 18-24, 1999, Jan. 24-28, and Feb. 1-2, 2000. Adm. Law Judge Richard H. Beddow issued his decision Oct. 6, 2000.

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S&F Market Street Healthcare LLC d/b/a Windsor Convalescent Center of North Long Beach (21-CA-36422, et al.; 351 NLRB No. 44) Long Beach, CA Sept. 30, 2007. This case involved the Respondent's takeover of Candlewood Care Center, a skilled nursing facility, on July 1, 2004. The complaint alleged that the Respondent was a successor to Candlewood Care Center and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after July 1. The Respondent denied that a bargaining obligation attached on July 1, arguing that it did not hire a full complement of employees until October 1 because it hired former Candlewood employees only on a temporary basis. Alternatively, the Respondent argued

that it had no successorship obligation as to one of the two bargaining units at issue (the LVN unit) because, under the Respondent's management, the LVNs were supervisors and hence the LVN unit was no longer an appropriate unit. [HTML] [PDF]

The Board, 3-0, adopted the administrative law judge's findings that the Respondent was a successor employer with a bargaining obligation as of July 1, and that it violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union thereafter (Member Schaumber dissented insofar as the LVN unit). Contrary to the judge's decision, however, the Board found, 2-1 (Member Schaumber dissenting) that the Respondent additionally violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment. In this connection, the majority found that the Respondent forfeited its right to set initial terms under *Spruce Up Corp.*, 209 NLRB 194 (1974), because it failed, prior to inviting former Candlewood employees to accept employment on or after July 1, to clearly announce its intent to establish new terms.

The complaint further alleged that the Respondent violated Section 8(a)(3) and (1) by (a) refusing to hire, (b) suspending, and (c) terminating certain employees because of their protected, concerted and/or union activities. The Board adopted the judge's findings that the Respondent violated the Act by suspending and/or terminating the discriminatees as alleged. However, contrary to the judge, the Board found that the Respondent additionally violated Section 8(a)(3) and (1) of the Act by refusing to hire four union stewards. Finally, the Board adopted the judge's findings that the Respondent violated Section 8(a)(1) by informing employees that there was no union at its facility or that its facility was nonunion.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Service Employees Local 434B; complaint alleged violations of Section 8(a)(5), (3), and (1). Hearing at Los Angeles on 8 days between Sept. 14 and Nov. 8, 2005. Adm. Law Judge Lana H. Parke issued her decision Jan. 31, 2006.

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Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center (9-CA-40471; 351 NLRB No. 50) Wurtland, KY Sept. 29, 2007. The Board reversed the administrative law judge's finding that, under *Levitz Furniture Co. of the Pacific,* 333 NLRB 717 (2001), the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition from the Union based on an employee petition seeking "a vote to remove the Union." [HTML] [PDF]

This case was before the judge upon a joint motion filed by the parties; the parties provided a stipulation of facts and waived a hearing. According to the stipulated facts, after the collective-bargaining agreement between the Respondent and the Union had expired, a unit employee filed a decertification petition. Included with this petition was an employee petition containing the signatures of more than 50% of the employees in the unit. The caption on the

employee petition stated, "We the employee's (sic) of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199." Based on this petition, the Respondent withdrew recognition from the Union.

The judge concluded that the Respondent's withdrawal of recognition was unlawful under *Levitz*, which held that an "employer may rebut the continuing presumption of majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Levitz, supra,* at 725. The judge reasoned that the petition language established only that a majority of unit employees wanted a vote to determine whether to remove the Union, not that they had already decided to do so.

In reversing the judge's finding, the Board majority of Chairman Battista and Member Schaumber noted that, although the judge's view of the petition language "vote to remove the Union" represented a possible interpretation of that language, the more reasonable interpretation is that the employees wished to remove the Union. In this regard, the majority noted that the language in the petition is not neutral in that it does not say that employees simply wanted a vote on union representation or on the Union's status as their representative; it also does not echo the official ballot language "do you wish to be represented" by the union. Rather, asserted the majority, the language speaks of the removal of the Union. In these circumstances, the majority concluded that the language in the employee petition signed by a majority of unit employees was more reasonably interpreted as stating that the employees wanted to remove the Union, and that, under the applicable preponderance of the evidence standard, it was "more probable than not that [the] employees rejected union representation." The majority contended that the Respondent was free to rely on this reasonable interpretation of the petition language. Accordingly, the majority found, contrary to the judge, that the Respondent had met its *Levitz* burden of showing that the Union had actually lost the support of a majority of unit employees at the time that it withdrew recognition, and that the withdrawal of recognition was therefore lawful.

In dissenting to the majority's reversal of the judge's finding, Member Walsh contended that, in light of the fact that the petition language at issue is subject to two possible interpretations, as the majority conceded, it cannot be said with confidence whether the employees were simply seeking an election or whether they were rejecting the Union as their representative. Thus, Member Walsh submitted that, given the ambiguity in the petition language, it could not be said with any certainty that the employees who signed the petition were expressing their rejection of the Union, and that the Union had, in fact, lost the support of a majority of employees in the unit. In these circumstances, Member Walsh found that the Respondent had failed to meet its *Levitz* burden by relying on the language in the ambiguously worded petition as a basis for its withdrawal of recognition.

Member Walsh further pointed out that elections – as opposed to unilateral withdrawals of recognition -- are the preferred means of testing employee sentiment when a question arises concerning a union's majority status. In this vein, he stated that, even though the employee petition in this case did not provide a sufficient basis for the Respondent to lawfully withdraw

recognition, it would have supported the filing of an RM petition for an election under the "good-faith reasonable-certainty" standard for such petitions that was announced in *Levitz.* Member Walsh further noted that, if the Respondent had not withdrawn recognition, there would have been no 8(a)(5) blocking charge and an election could have been held pursuant to the decertification petition filed by the unit employee -- "[i]n either event, we would have learned – through a secret-ballot election – the employees' true sentiments," he said.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Charge filed by Health Care and Social Service District 1199, SEIU; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Martinelli Interior Construction Co., Inc. (Carpenters Metropolitan Regional Council, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland) Wayne, PA Oct. 1, 2007. 4-CA-35167; JD-62-07, Judge Bruce D. Rosenstein.

SPE Utility Contractors, LLC (Teamsters Local 339) Port Huron, MI Oct. 2, 2007. 7-CA-49691, et al.; JD-67-07, Judge Arthur J. Amchan.

Milum Textile Services, Co. (UNITE HERE!) Phoenix, AZ Oct. 5, 2007. 28-CA-20898, et al.; JD(SF)-29-07, Judge Lana H. Parke.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

Guardsmark, LLC, Buffalo, NY, 3-RC-11739, Oct. 2, 2007 (Chairman Battista and Members Liebman and Schaumber)

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