ABOUT THE WEEKLY SUMMARY

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

Weekly Summary of NLRB Cases

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(GC 02-01) Guideline Memorandum Concerning *Levitz*

Mackie Automotive Systems (10-CA-31189; 336 NLRB No. 27) Norcross, GA Sept. 28, 2001. Members Liebman and Walsh, with Member Truesdale dissenting, affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, without notice to or consultation with Teamsters Local 728, discontinuing its practice of paying unit employees for their lunchbreak. [HTML] [PDF]

The Respondent operates an automobile parts warehouse (warehouse) in Norcross, Georgia and continuously supplies parts to General Motors Corp. at GM's automobile assembly plant in nearby Doraville, Georgia. The Respondent employs approximately 16 supply delivery truck drivers (the unit employees) at the warehouse. All of the other approximately 200 workers at the warehouse are employees of GM, but the Respondent supervises them. The Respondent's operational practice, established prior to the Union's certification as the exclusive representative of the unit employees, was to mirror the operating hours of the GM plant.

The majority agreed with the judge that the Respondent's adherence to its pre-Union past practice did not legitimize the Respondent's unilateral implementation of the 30-minute unpaid lunchbreak. It found that the Respondent's conduct was not justified on any other grounds, i.e., there was no contention or showing that the parties were at impasse when the Respondent unilaterally implemented the change, or that the Union was avoiding or delaying bargaining. The Respondent was not excused by compelling economic considerations from its obligation to bargain with the Union about the change in lunchbreak or excused by the fact that the unilateral change was prompted by a bona fide scheduling change implemented by GM.

Dissenting Member Truesdale said the critical issue is what exactly was the status quo that existed before the change. Finding that the Respondent's alteration of its midday scheduling was a routine modification consistent with past practices and thus did not violate the Act, he wrote: "[T]here is no evidence in the record that the Respondent ever paid employees for time not worked, whatever the reason, or ever scheduled its drivers during times the General Motors' production line was not running. The issue is simply whether the Respondent's conduct in effecting the . . . schedule change to continue these practices was unlawful because it was accomplished without bargaining. I conclude it was not."

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Teamsters Local 728; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Atlanta on Feb. 17, 1999. Adm. Law Judge William N. Cates issued his decision March 12, 1999.

* * *

American Tissue Corp. (29-CA-20226; 336 NLRB No. 36) Brooklyn, NY Sept. 28, 2001. Affirming the administrative law judge's supplemental decision, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging

26 employees, including Holman Flores, Victor Fuentes, Julio Ceasar Rivas, and Marcos Rivas; and violated Section 8(a)(1) by threatening employees with discharge if they supported Service Employees Local 707 or engaged in other protected concerted activities, denying employees the opportunity to work overtime, issuing written warnings to employees, and reassigning an employee to a less desirable job. By order dated June 26, 2000, the Board remanded to the judge to clarify whether the four above-named individuals were unlawfully discharged and should be reinstated and made whole as well as the 22 discriminatees named in the judge's Order. [HTML] [PDF]

In its exceptions to the judge's supplemental decision, the Respondent contended that Victor Fuentes was not alleged as a discriminatee in the complaint and that there is no evidence to support the judge's finding that he was discharged for striking along with the alleged discriminatees. Members Liebman and Truesdale noted although the complaint specifically named 21 discriminatees who allegedly engaged in a strike and were discharged on July 30, 1996, it also alleged that "approximately five other employees whose names are presently unknown" were included in that group; and the General Counsel submitted into the record a copy of Fuentes' timecard indicating that he punched out during the same time that the other 25 discriminatees' timecards were punched out. Based on this evidence and credited testimony, the judge found that Fuentes was among the employees who joined in leaving the plant to go to the Labor Department and that Fuentes was among those discharged, that the employees were told they would be fired if they left, and when the employees attempted to return to their jobs that day and the following day, they were denied entrance to the facility.

Chairman Hurtgen would not find that the Respondent terminated Fuentes in violation of Section 8(a)(3), noting Fuentes was not listed as a discriminatee in the complaint and the record evidence shows only that his timecard indicates that he left the facility. "Even assuming arguendo that his departure was linked to the concerted activity of the others, there is no showing that he was discharged or, if he was, that the discharge was because of concerted activity," the Chairman said. He also found a "procedural impediment" to finding a violation as to Fuentes and would require the General Counsel to formally move to amend the complaint, explaining: "On the introduction of that record evidence [as to Fuentes], one would think that the General Counsel would have amended the complaint to name Fuentes as a discriminatee, inasmuch as Fuentes was then 'known' to the General Counsel. The General Counsel never did so. Notwithstanding this failure, Respondent was apparently supposed to guess that Fuentes was an alleged discriminatee, and to mount any defense it may have had in this regard." Chairman Hurtgen would not leave this to guesswork.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Service Employees Local 339; complaint alleged of Section 8(a)(1) and (3). Hearing at Brooklyn on various dates between March 31 and Sept. 29, 1997. Adm. Law Judge Jesse Kleiman issued his decision Nov. 12, 1998 and his supplemental decision July 17, 2000.

* * *

Vincent Industrial Plastics, Inc. (25-CA-23311, et al.; 336 NLRB No. 50) Henderson, KY Oct. 1, 2001. On remand from the U.S. Court of Appeals for the D.C. Circuit, the Board examined the particular facts of this case, including a balancing of three considerations, and reaffirmed its original finding that an affirmative bargaining order is the appropriate remedy for the Respondent's refusal to recognize and bargain with Chemical Workers Local 1032. The court had remanded the case to the Board to justify the imposition of an affirmative bargaining order "by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d 727. [HTML] [PDF]

In its earlier decision, the Board found that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about union activities, Section 8(a)(3) by issuing written warnings to and discharging employees because of their union activities, and Section 8(a)(5) by making several unilateral changes in terms and conditions of employment during contract negotiations and by withdrawing recognition and refusing to recognize and bargain with the Union. The Board ordered, among other things, that Respondent bargain on request with the Union. 328 NLRB 300 (1999). Subsequently, the Respondent filed a petition for review and the Board cross-petitioned for enforcement. On April 14, 2000, the court enforced the Board's remedial order, except for the affirmative bargaining order.

(Members Liebman, Truesdale, and Walsh participated.)

* * *

Southern Labor Services, Inc./Florida Transportation Services, Inc., Joint Employers (12-RC-8602; 336 NLRB No. 53) Ft. Lauderdale, FL Oct. 1, 2001. Affirming the hearing officer's recommendation, the Board sustained the Petitioner's Objection 2A, which alleged that, at a March 8, 2001 meeting attended by nearly all employees, John Gorman Jr., the president of the Joint Employers' Port Canaveral operations, threatened loss of contracts and employment if the employees voted for union representation. The Board wrote in agreeing with the hearing officer that Gorman's own testimony established that a threat or implied threat to close down the Joint Employers' operation was communicated to all, or nearly all, bargaining unit employees: [HTML] [PDF]

> Here, Gorman stated that the employees were 'playing Russian roulette' and that there were two bullets, one that could result in Disney, their only customer, terminating the business relationship, and the other that could result in the Joint Employers' closing down and relocating elsewhere. Neither of these predictions of possible adverse consequences was supported by any objective facts. . . .[B]oth therefore clearly interfered with the employees' free choice in the election and were objectionable.

The tally of ballots for the March 15, 2001 election shows 21 for and 21 against, Longshoremen's Locals 1359 and 1922, with 4 challenged ballots. In the absence of exceptions, the Board adopted pro forma the hearing officer's recommendations that Petitioner's Objections 1, 2B, 3, and 4 be overruled, that Objection 5 be withdrawn, and that the challenges to the 4 ballots be overruled. It remanded the proceeding to the Regional Director to open and count the ballots of Chuck Malone, Thomas Baron, Clinton Hodge Jr., and Calvin Barlett and to issue a revised tally of ballots. If the Petitioner receives a majority of the valid votes cast, the Regional Director will issue a certification of representative. If not, the election will be set aside and a second election held.

(Members Liebman, Truesdale, and Walsh participated.)

* * *

Robert F. Kennedy Medical Center (31-RC-7915; 336 NLRB No. 63) Hawthorne, CA Oct. 1, 2001. Chairman Hurtgen and Member Truesdale, agreeing with the hearing officer, overruled Petitioner's Objection 2 alleging that the election held October 12, 2000 should be set aside because the doors to the polling place were locked during the third voting period. The majority certified the results of the election (50 for and 53 against, Robert F. Kennedy Nurses Association, with 7 sustained challenged ballots) and that the Union is not the exclusive representative of the bargaining unit employees. Member Liebman dissented. [HTML] [PDF]

The election was conducted in a room located within the Employer's cafeteria, which has two entrances-a set of double doors proceeding from a hallway and a single door proceeding directly from the Employer's main lobby area. The signs directing voters to the polling place were posted by the double door entrance. Although the double doors were open when the third session began, the doors were subsequently locked. One of the Board agents made the discovery while checking the election signs posted earlier and requested hospital security to unlock the doors. The Board agent estimated that the double doors were locked for about 10-15 minutes.

The majority stated, in noting that the polling place was always accessible through the single door entrance off the main lobby, an entrance that was regularly used by employees: "That this entrance was not posted as an entrance to the polling place during the entire time the double doors were locked does not change the fact that this was a well-known and easily accessible entrance." The majority found, contrary to dissenting Member Liebman, that neither *Whatcom Security Agency, Inc.,* 258 NLRB 985 (1981), nor *Wolverine Disptach, Inc.,* 321 NLRB 796, 797 (1996), where each election was set aside because the polling place was inaccessible for a certain period of time during the polling period, requires a different result.

Member Liebman would find that a new election is necessary "to safeguard the integrity of the election process" because a determinative number of employees were potentially disenfranchised as a result of the obstructed access. She noted that 10 of

the 115 voters on the eligibility list have not been accounted for and may have been disenfranchised by the absence of a posted, unlocked entrance to the polls during the final session. "These 10 eligible voters could have determined the outcome of the election, which the Petitioner lost by three votes," Member Liebman said. Applying the objective standard of Wolverine Dispatch, she found that the evidence presented to the hearing officer required that the election be set aside.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

* * *

Painters District Council 9 and Local 18 (Creative Finishes Ltd.) (2-CB-17886, 17887; 336 NLRB No. 46) New York, NY Oct. 1, 2001. The Board held, in agreement with the administrative law judge, that the Respondents violated Section 8(b)(2) and (1)(A) of the Act by causing the Employer to terminate the employment of Bruce Reich, a former union financial secretary of Local 18 and business representative of the Council. [HTML] [PDF]

Following Reich's resignation as financial secretary, an audit of the local union's financial records revealed a total of $26,974 in unaccounted dues payments. The Local found Reich guilty of failing to report missing funds and to turn over all monies collected. It decided to expel him, which was revocable if Reich made restitution of the $26,974 and paid a $5000 fine. Reich did not pay either amount, but he tendered union dues. Local 18 refused to accept Reich's tender of dues and dropped him from its membership roll. On learning that Creative employed Reich, Local 18 filed a grievance alleging the Employer was violating the union-security clause by employing "one nonunion man." Creative subsequently terminated Reich's employment, informing him that owner "Hillary Klein was informed by the union that you are no longer a union member in good standing and therefore we could not employ you anymore."

The Board found, as did the judge, that *Philadelphia Typographical Union 2 (Philadelphia Inquirer),* 189 NLRB 829 (1971), relied on by the Respondent in its exceptions, is distinguishable, explaining:

> In *Philadelphia Inquirer,* the union removed a former treasurer from the seniority list and caused his layoff specifically because he had been indicted and convicted of embezzling union funds. The union did not act under color of a union-security clause. Here, the Respondents refused to accept Bruce Reich's dues payments until he made restitution and paid a union-imposed fine, and at the same time filed a grievance with the employer under the union-security clause for employment of a 'nonunion man.' Further, unlike *Philadelphia Inquirer,* there is no evidence in the record that Reich has been indicted or convicted of misappropriation of union funds.

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Bruce Reich, an individual; complaint alleged violation of Section 8(b)(2) and (1)(A). Hearing at New York on Feb. 6, 2001. Adm. Law Judge D. Barry Morris issued his decision May 11, 2001.

* * *

More Truck Lines, Inc. (31-CA-23883, 31-RC-7554; 336 NLRB No. 69) Corona, Irvine, and Westminster, CA Oct. 1, 2001. The Board agreed with the administrative law judge that the Respondent's threat to "freeze" employees' wage levels and deny them their annual increases if the Teamsters were certified violated Section 8(a)(1) of the Act, and his finding that the Respondent's objectionable conduct warranted setting aside the May 20, 1999 runoff election. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Teamsters Local 952; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles on March 1, 2000. Adm. Law Judge Frederick C. Herzog issued his decision June 19, 2000.

* * *

Suffield Academy (34-CA-7798, et al.; 336 NLRB No. 65) Suffield, CT Sept. 30, 2001. The Board agreed with the

administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its tentative agreement to provide health coverage through the Teamsters' A-Plus plan after signing a tentative agreement to provide that insurance. In adopting this finding, the majority of Members Liebman and Truesdale adhered to *Driftwood Convalescent Hospital,* 312 NLRB 247, 252 (1993), enfd. sub nom. *NLRB v. Valley West Health Care,* 67 F.3d 307 (9th Cir. 1995). In a concurring opinion, Chairman Hurtgen maintained "the *Driftwood* standard of 'good cause' imposes a burden upon an employer that is not permitted by the Act." He said "the controlling question is not whether the employer acted in good faith in view of all the circumstances, but whether it had good cause to withdraw from a tentative agreement." [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Teamsters Local 559; complaint alleged violation of Section 8(a)(1) and (5) of the Act. Hearing at Hartford, March 4 and 5, 1998. Adm. Law Judge Wallace H. Nations issued his decision July 22, 1998.

* * *

Sun Tech Group, Inc., d/b/a St. Thomas Gas (24-CA-8421, 8495, 24-RC-8055; 336 NLRB No. 55) St. Thomas, U.S. Virgin Islands Oct. 1, 2001. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Chesterfield, Harrigan and Plaskett on the basis of protected union activity. It directed the Regional Director to count their ballots cast in the election held in Case 24-RC-8055 on September 9, 1999 and issue a revised tally of ballots and the appropriate certification. [HTML] [PDF]

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(3) and (1) of the Act. Hearing at St. Thomas, U.S. Virgin Islands, March 21, 2000. Adm. Law Judge Earl E. Shamwell, Jr. issued his decision Sept. 7, 2000.

* * *

Tawas Industries, Inc. (7-CA-39862; 336 NLRB No. 24) Tawas City, MI Sept. 28, 2001. Contrary to the administrative law judge, the Board majority of Members Liebman and Walsh found that the Respondent violated Section 8(a)(5) of the Act by refusing to recognize Tawas Independent Workers Association (TIWA) as an affiliate of the United Auto Workers (UAW) and by refusing to allow a UAW representative to attend a grievance meeting at the grievant's request. The majority further found, also contrary to the judge, that the Respondent violated Section 8(a)(1) by predicting that other employers would not give their business to the Respondent if the employees voted to affiliate TIWA with the UAW and by posting a notice encouraging employees to report the protected conduct of other employees to management. [HTML] [PDF]

The majority stated:

> Because TIWA's affiliation was valid and the later disaffiliation effort was ineffective, the Respondent's refusal to recognize TIWA as an affiliate of the UAW was unlawful. To the extent that the Respondent's action amounted to a withdrawal of recognition during the term of the contract, it was also unlawful. TIWA as a UAW affiliate had succeeded to the rights of TIWA as an independent union. The Respondent was therefore required to recognize affiliated TIWA as the employees' bargaining representative. In addition, the collective-bargaining agreement to which TIWA was a party remained in effect.

Dissenting on this issue, while concurring on others where the majority affirmed the judge, Chairman Hurtgen agreed with the judge's findings that affiliation with UAW had been accomplished with adequate due process safeguards and that there was substantial continuity between the pre-and postaffiliation union. He further agreed with the judge's finding that a majority of the Respondent's employees thereafter decided that they did not want TIWA to be affiliated with UAW and that they so informed the Respondent before UAW had committed any time or resources to representing the employees. The judge therefore found that the Respondent had not violated Section 8(a)(5) and (1) of the Act by refusing to recognize the affiliation with UAW. "The judge noted that it is the fundamental right of employees to select their representative, and the employees here made it clear that they did not want the affiliation with the UAW," Chairman Hurtgen said.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by the UAW; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Tawas City, January 28 and 29, 1998. Adm. Law Judge Martin J. Linsky issued his decision June 2, 1998.

* * *

S. Bent & Brothers and Samuel Bent LLC (1-CA-37851, et al.; 336 NLRB No. 72) Gardner, MA Oct. 1, 2001. The Board reversed the administrative law judge's finding that Respondent Samuel Bent could not be held liable as a successor under *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973), for unremedied unfair labor practices committed by Respondent S. Bent and Brothers (Bent), because it did not know at the time it purchased Bent's assets that unfair labor practice charges had been filed by the Union. It stated, "the interests of the public and the victimized employees in this case are best served by requiring Samuel Bent to remedy the unfair labor practices of its predecessor, Bent." [HTML] [PDF]

The Board agreed with the judge's finding that Samuel Bent was a Burns successor to Bent and that Samuel Bent did not have sufficient grounds to support a good-faith doubt that the Union retained the support of a majority of unit employees after the transition in business operations. The judge concluded that Samuel Bent violated Section 8(a)(5) and (1) of the Act when it failed and refused to recognize and bargain with the Union and implemented unilateral changes in terms and conditions of employment.

In finding that Samuel Bent is a successor under Golden State, jointly and severally liable with Bent for remedying Bent's unlawful termination of the employee benefit plans, the Board stated:

> [W]hile a successor employer is not required to aggressively investigate its predecessor in order to meet the reasonable diligence standard, it cannot with impunity ignore its predecessor's noncompliance with a collective-bargaining agreement, as Samuel Bent in this case did, and then rely on its ignorance to argue that it was not on notice of the predecessor's unfair labor practices. Here, Samuel Bent was on notice of the existence of the collective-bargaining agreement, of its provisions for medical and dental plans, of the fact that Bent had also been providing employees with a vision plan, and of Bent's termination of all three plans. Reasonable diligence required Samuel Bent to inquire as to whether Bent had bargained with the Union before terminating these plans. Therefore, we find that Samuel Bent knew, or reasonably should have known, that Bent had terminated the unit employees' medical, dental, and vision plans in violation of Section 8(a)(5) and (1) of the Act. See *South Harlan Coal, Inc.,* 844 F.2d 380, 386 (6th Cir. 1988) (evidence supported the finding that successor 'had knowledge, or reasonably should have known' of predecessor's unfair labor practices; successor was therefore liable under *Golden State*).

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Electronic Workers (IUE) Local 154; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Boston, December 4-5, 2000. Adm. Law Judge Bruce D. Rosenstein issued his decision March 2, 2001.

* * *

Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast (3-CA-21569; 336 NLRB No. 77) Albany, NY Oct. 1, 2001. In a prior decision (332 NLRB No. 24 (2000)), the Board remanded to the administrative law judge for further consideration, in light of *M.B. Sturgis,* 331 NLRB No. 173 (2000), his finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it failed to apply the provisions of its collective-bargaining agreement to temporary employees supplied by Accustaff and other referral agencies and performing unit work at the Respondent's facility. In this supplemental decision, Members Liebman and Truesdale, with Chairman Hurtgen dissenting, affirmed the judge's supplemental decision finding that the Respondent's failure to apply the provisions of its collective-bargaining agreement to those employees violated Section 8(a)(5) and (1). [HTML] [PDF]

The judge found that the employees referred by the temporary agencies are jointly employed by the Respondent and their

respective supplier employers; that the supplier employers recruit and hire the temporary employees, determine their hourly wages, issue their paychecks, pay their workers' compensation, and make other payroll deductions; and that the Respondent assigns work to the employees, provides day-to-day control through its own supervisors, and determines the employees' hours and work schedules, including overtime. He found the jointly employed employees perform the same work as their solely employed counterparts, working side by side under the same provisions, at the same facility, and under common working conditions. And, that the temporary employees share a community of interest with the Respondent's other warehouse employees.

The majority disagreed with the current General Counsel's assertion that, contrary to the former General Counsel's endorsement of the judge's community of interest standard, this case should be considered under an accretion analysis and the jointly employed employees should be accreted into the bargaining unit. Instead, it found the circumstances here distinguishable from cases involving employees hired into newly created classifications not plainly included in or excluded from the established unit, explaining:

> In such cases, disputes concerning the unit status of employees in the new classifications are resolved through unit clarification proceedings applying an accretion analysis. Here, by contrast, the unit definition is plain and includes the classification of warehousemen to which the temporary employees are assigned. Although the Respondent may not have contemplated obtaining its warehousemen from suppliers such as those involved in this proceeding, the unit definition provides no basis for excluding those employees from the established unit. . . .
>
> Moreover, we held in M.B. Sturgis that units combining solely and jointly employed employees are employer units under Section 9(b) of the statute, and that the unit is not rendered inappropriate because some of the employees are jointly employed. Thus, in the circumstances of this case, we conclude that the warehousemen employed by the Respondent through the supplier employers are included in the established bargaining unit described in the parties' agreement.

The majority then considered whether the Respondent was obligated to apply the agreement's terms to the supplied temporary employees, as the Union demanded (a question that was not directly answered by M.B. Sturgis, a representation proceeding involving an initial unit determination). It required the Respondent to apply the agreement's provisions to the employees only as to the working conditions the Respondent controls. In a separate concurring opinion, Member Liebman said she would adopt the judge's conclusion that the Respondent was obligated to apply all of the agreement's terms.

Chairman Hurtgen, in dissent, said his colleagues "leap five stages ahead" of the M.B. Sturgis proposition that the Act does not prohibit joining together, in one unit, the employees of a user and the employees jointly employed by a user and supplier. He wrote: "(1) They hold that the unit employees of the two groups are an appropriate unit, notwithstanding significant differences in terms and conditions of employment; (2) They hold that the temporary employees are to be placed into the user employer unit, without their consent; (3) They ignore contract language in the user's collective-bargaining agreement; (4) They subject the temporary employees to portions of the user's collective-bargaining agreement, and thus modify the contract without the consent of the user; and (5) They determine the unit placement of employees without notice to, or participation of, the suppliers."

Chairman Hurtgen did not pass on the issue of whether the regular and temporary employees share a community of interests. Even if they do, it is not an "overwhelming" community of interests, the Chairman observed. While he agreed with the General Counsel that the accretion test is the appropriate one to be applied, he disagreed with the General Counsel's further contention that, applying the accretion analysis, the temporary employees meet the overwhelming community-of-interest test.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Adm. Law Judge Bruce D. Rosenstein issued his supplemental decision December 1, 2000.

* * *

Brandt Construction Co. (33-CA-12420, et al.; 336 NLRB No. 58) Milan, IL Oct. 1, 2001. Affirming the administrative law

judge, Chairman Hurtgen and Member Truesdale held that the Respondent did not unlawfully refuse to hire or refuse to consider for hire named union-affiliated applicants, finding that the judge's analysis is consistent with the framework of *FES,* 331 NLRB No. 20 (2000), to establish a discriminatory refusal to hire. The Respondent was hiring during all material times and there is no contention that the union-affiliated applicants lacked experience or training relevant to those positions. The Respondent did not except to the judge's finding that it violated Section 8(a)(1) of the Act by changing its hiring practices to restrict the receipt of employment applications from prounion applicants. The majority agreed with the judge that this unfair labor practice finding demonstrated the Respondent's antiunion animus. It also agreed the Respondent showed it would not have hired the prounion applicants even in the absence of their union activity or affiliation because they did not meet any of the applicant-priority categories in its established hiring policy. [HTML] [PDF]

Member Liebman, concurring in part and dissenting in part, would find that the Respondent unlawfully refused to consider for employment those employees who were precluded from applying on April 21, 1997, because they did not have photo identification.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Operating Engineers Local 150; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Rock Island, Nov. 30-Dec. 4, 1998 and Aug. 23-27, 1999. Adm. Law Judge Bruce D. Rosenstein issued his decision Jan. 12, 2000.

* * *

McDonald Partners, Inc. d/b/a Rodgers & McDonald Graphics (21-CA-32908; 336 NLRB No. 74) Carson, CA Oct. 1, 2001. Members Liebman and Truesdale agreed with the administrative law judge that the evidence on which the Respondent relied is insufficient to establish that it had a good-faith reasonable uncertainty of the Union's continuing majority status at the time it withdrew recognition, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from CWA Local 14904, and that an affirmative bargaining order is an appropriate remedy for the Respondent's unlawful withdrawal of recognition. [HTML] [PDF]

The majority adhered to the view, reaffirmed by the Board in *Caterair International,* 322 NLRB 64 (1996), 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." Although it disagreed with the D.C. Circuit's view that an affirmative bargaining order must be justified in each case by a reasoned analysis that includes an explicit balancing of three considerations, it found that a balancing of the factors warranted an affirmative bargaining order: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.

Chairman Hurtgen, dissenting in part, agreed with the finding of the violation only because the evidence of employee disaffection is not close in time to the withdrawal of recognition, as required by precedent, and instead predated the withdrawal by a considerable period. He disagreed that an affirmative bargaining order is warranted after balancing the D.C. Circuit's three considerations and would restore recognition and enter a standard cease-and-desist order. Among other issues, the Chairman said he "parted company" with his colleagues and the judge in their discounting the fact that the Union had no dues-paying members. He also noted that while he has joined his colleagues in finding affirmative bargaining orders warranted in cases involving an unlawful withdrawal of recognition and other unlawful conduct, this case involved only a withdrawal of recognition.

Respondent and CWA Local 14917, the Union's predecessor, were parties to a series of collective-bargaining agreements, the most recent of which was effective from June 1, 1995 through May 31, 1996. The merger between the Union and Local 14917 was effective January 1, 1997. Following expiration of the 1995-1998 contract, the Union requested that Respondent bargain with it for a new contract. The parties had one bargaining session. Thereafter, the Respondent refused to continue bargaining and, on August 5, 1998, withdrew recognition from the Union based on: the lack of certification of Local 14917; the mechanics of the merger vote between the Union and Local 14917; one former union steward's expressed dissatisfaction with union representation; the union's inactivity (failure to process grievances); and the failure of employees to join the Union or execute dues checkoff authorizations.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by CWA Local 14904; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles on June 29, 1999. Adm. Law Judge Mary Miller Cracraft issued her decision Sept. 17, 1999.

* * *

Freund Baking Co. (32-RC-4221; 336 NLRB No. 75) Hayward, CA Oct. 1, 2001. Agreeing with the hearing officer, Members Truesdale and Walsh sustained the Petitioner's Objection 1 and set aside the second election held March 9, 2000 (Bakery Workers Local 119 lost 30 to 3), finding objectionable the Employer's employee handbook, which included the "Security: Confidential Information" section stating: [HTML] [PDF]

> Proprietary information includes all information obtained by the employees during the course of their work. This Manual, for example, contains proprietary information . . . . You may not disclose or use proprietary or confidential information except as your job requires. Anyone who violates this guideline will be subject to discipline and possible legal recourse.

The majority found employees could reasonably construe the quoted section as prohibiting them from discussing their wages and working conditions with a union and others outside of the company and, contrary to the hearing officer's conclusion, with other employees as well. As for the substantial margin of the Union's defeat, the majority noted the objectionable conduct affected all of the employees in the unit because the Employer required each employee to receive and review a handbook. "In these circumstances, we find that the Employer's objectionable conduct may have directly accounted for the Petitioner's margin of defeat," the majority wrote. It observed that whether an election should be set aside turns upon an analysis of the character and circumstances of the alleged misconduct, not on the election results

Chairman Hurtgen, dissenting, would certify the results of the election. He agreed that the "Security: Confidential Information" provision is unlawful on its face, but he did not find the maintenance of the rule, without more, warranted setting the election. See his dissent in *Diamond Walnut Growers,* 326 NLRB 28, 32 (1998), explaining he would not apply a per se rule that any unfair labor practice committed during the critical period requires a rerun election and would evaluate each case on its own facts. In this case, Chairman Hurtgen noted maintenance of the rule is the only unlawful conduct. The rule antedated the Petitioner's organizing campaign, and thus, was not discriminatorily motivated. There is no evidence the rule was used to punish protected activities or the rule deterred employees from discussing, either with the Petitioner's representatives or among themselves, employment-related matters. The Chairman also noted the very lopsided margin of the Petitioner's defeat, saying "I cannot accept my colleagues' proposition that 'the Employer's objectionable conduct may have directly accounted for' that electoral result."

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

* * *

Williamette Industries, Inc. (26-RC-8128; 336 NLRB No. 59) Nashville, TN Oct. 1, 2001. The Board reversed the hearing officer's conclusion that leadmen employees Adams and Moore are statutory supervisors. It found insufficient evidence to show that Adams and Moore exercise supervisory authority in evaluating permanent employees or in disciplining employees. In a footnote, Chairman Hurtgen noted that "the evidence fails to establish that the evaluations prepared by Moore or Adams directly affect or effectively recommend changes in the employment status of the rated employees." [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

* * *

Goad Co. (14-CA-25782(E), 25793(E); 336 NLRB No. 49) Ellisville, MO Oct. 1, 2001. In a supplemental decision, the Board affirmed the administrative law judge's denial of the Respondent's application for award of fees and expenses under the Equal Access to Justice Act. In the underlying case, the Board dismissed a complaint alleging that the Respondent violated the Act

by failing and refusing to bargain with Plumbers Local 420 unless Daniel P. Murphy ceased to act as the Union's agent. (333 NLRB No. 82 (2001)). [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Adm. Law Judge George Carson II issued his supplemental decision June 29, 2001.

* * *

Quality House of Graphics, Inc. (29-CA-21820, et al.; 336 NLRB No. 40) Long Island, NY Sept. 28, 2001. Affirming the administrative law judge, the Board majority of Members Truesdale and Walsh held that the Respondent was obligated to continue check-off and remittance of employee contributions to the Union's Inter-Local Pension Fund upon the expiration of its collective-bargaining agreement. Dissenting in part, Chairman Hurtgen would find the Respondent's obligation ceased at contract expiration. The Board concluded there was not a good-faith impasse prior to the Respondent's unilateral discontinuation of check-off. [HTML] [PDF]

In its exceptions, the Respondent contended the judge erred in failing to determine that its check-off and remittance of employee contributions to the Inter-Local Pension Fund violated Section 302 of the Labor Management Reporting Act (LMRA). Specifically, the Respondent argued that its remittance of employee contributions to the fund violated Section 302 because the fund fails to satisfy the joint administrative, arbitration, and other protective provisions of Section 302(c)(5)(B). Therefore, the Respondent said the Board cannot order it to remit employee contributions to the fund.

The majority, however, stated that it was not necessary to determine whether the Respondent had violated Section 302 because "even if it did, we would still find that the Respondent's unilateral discontinuation of the check-off violated Section 8(a)(5) of the Act." Even if the Respondent was facing an exigency of the second type identified in *RBE Electronics,* 320 NLRB 80 (1995), that may alter an employer's bargaining obligation, the majority found the Respondent violated Section 8(a)(5) by discontinuing the check-off because it failed to provide the Union with the required notice and opportunity to bargain.

Chairman Hurtgen, concluding the Respondent's obligation to deduct payments to the Union's pension fund expired with the contract, stated:

> My colleagues argue that the employer has made these payments in the past and that there was no compelling reason to unilaterally discontinue the payments. However, an unlawful subject is not a mandatory subject. And, past practice (and even contractual obligation) cannot convert a non-mandatory subject into a mandatory one. Thus, Respondent's discontinuance of the past practice was not a violation of Section 8(a)(5).

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Graphic Communications Local One-1; complaint alleged violation of Section 8(a)(1) and 5). Hearing at Brooklyn, Nov. 16 - 18, 1998. Adm. Law Judge Jesse Kleiman issued his decision July 22, 1999.

* * *

St. Francis Healthcare Centre (8-CA-29739; 336 NLRB No. 47) Green Springs, OH. Oct. 1, 2001. In a supplemental decision, the Board affirmed the administrative law judge's conclusion that the preelection circulation of a letter purporting to be from former employee Shirley Biddle involved objectionable misrepresentation under the standard set forth in *Van Dorn Plastic Machinery Co. v. NLRB,* 736 F.2d 343 (6th Cir. 1984). Accordingly, the Board directed that a third election be held. The letter challenged the Respondent's statements that its management officials had not received wage increases within the year before the second election on March 20-21, 1997 (the first election was held five months before). [HTML] [PDF]

On May 19, 2000, the U.S. Court of Appeals for the Sixth Circuit denied enforcement of the Board's previous order in this case, 325 NLRB 905 (1998). The Board had found a Section 8(a)(5) violation by the Respondent. The Union was certified on April 24, 1997, and the Board's bargaining order issued June 12, 1998. The court considered the Respondent's objection to the

second representation election, which had been rejected without a hearing, and remanded the proceeding to the Board for an evidentiary hearing on the objection based on the letter.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Health Care and Social Services District 1199, SEIU; complaint alleged violation of Section 8(a)(5) and (1). Hearing at Fremont, on March 1, 2001. Adm. Law Judge John T. Clark issued his supplemental decision May 3, 2001 and his second supplemental decision June 29, 2001.

* * *

Grosvenor Orlando Associates, Ltd. d/b/a The Grosvenor Resort (12-CA-18190, et al.; 336 NLRB No. 57) Orlando, FL Sept. 30, 2001. The Board decided that the Respondent engaged in conduct in violation of Section 8(a)(5), (3), and (1) of the Act, including refusing to bargain in good faith with Hotel Employees & Restaurant Employees Local 55, unilaterally changing bargaining unit employees' working conditions, discharging employees because they engaged in protected strike or picketing activities in support of the Union, and threatening employees that there was no contract with the exclusive representative and that it could unilaterally make changes in wages, hours, and working conditions. [HTML] [PDF]

The Board upheld the administrative law judge's finding that the Respondent engaged in bad-faith bargaining and it found, contrary to the judge, that consistent with the complaint's allegation, the Respondent's conduct constituted evidence of overall bad-faith bargaining rather than individual violations of Section 8(a)(5) of the Act. In this regard, the Board concluded "the Respondent's bad faith in bargaining is shown through its conduct in declaring impasse on a nonmandatory subject, and unilaterally implementing new terms and conditions of employment without bargaining to lawful impasse."

The judge found, with Board approval, that the strike, beginning on September 27, 1996, constituted an unfair labor practice strike. The judge also found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the strikers upon their unconditional offer to return to work on November 15, 1996 or soon thereafter. He concluded that the Respondent unlawfully discharged the strikers through its December 27, 1996 letter to them, stating that it had hired permanent replacements and would only consider them for new employment. The Board agreed with the General Counsel's and the Charging Party's exceptions to the judge's failure to find that the Respondent's previous letter to the strikers dated September 30, 1996, constituted an act of discharge. It wrote:

> The employees would reasonably have understood that they were discharged through the September 30 letter. It directed the strikers to return their uniforms, hotel identification and time cards, and any other property of the Respondent and pick up their final paycheck for their final wages that would include any outstanding vacation pay. While some of these actions may be, without more, consistent with how employers would treat strikers, the requirement that they pick up vacation pay would lead reasonable employees to conclude that they had been discharged because, here, they would receive such vacation pay only after discharge.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Hotel Employees and Restaurant Employees Local 55; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Orlando, Jan. 5-8, 1998. Adm. Law Judge Pargen Robertson issued his decision May 18, 1998.

* * *

Nortech Waste (20-CA-28057, et al.; 336 NLRB No. 79) Roseville, CA Sept. 28, 2001. The Board majority of Members Truesdale and Walsh adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging 11 undocumented workers on Oct. 1, 1997, after a successful organizing campaign by the Union. The majority rejected the Respondent's contention that its motivation was compliance with the Immigration Reform and Control Act (IRCA). "[W]e agree with the judge that the Respondent used IRCA as a smokescreen to retaliate for and to undermine the Union's election victory," it stated. [HTML] [PDF]

In dissent, Chairman Hurtgen said he would find that no discharge actually took place, and thus no violation occurred. He stated:

> The judge found that, on October 1, 1997, the Respondent informed the employees at issue that the INS had been contacted, and that they had 3 days to straighten out their paperwork with the INS. In the meantime, they could not work. No affected employee testified that he had been discharged.

While the Respondent filed objections to the Sept. 24, 1997 election, it subsequently withdrew them, Chairman Hurtgen pointed out. The employees returned to work on Oct. 14, 1997.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Operating Engineers Local 3; complaint alleged violation of Section 8(a)(1), (2), (3), (4), and (5) of the Act. Hearing at Sacramento, June 16-19, 1998. Adm. Law Judge James M. Kennedy issued his decision May 14, 1999.

* * *

First Healthcare Corp. d/b/a Healthcare Corp. in the State of CA d/b/a Hillhaven Highland House (31-CA-20973, et al.; 336 NLRB No. 62) Highland, Concord, and Bakersfield, CA Sept. 30, 2001. Members Liebman, Truesdale, and Walsh, with Chairman Hurtgen dissenting, held that: (1) under Section 7 of the Act, offsite employees (in contrast to nonemployee union organizers) have a nonderivative access right, for organizational purposes, to their employer's facilities; (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights; but (3) that, on balance, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees. [HTML] [PDF]

The majority said the test for determining the right to access for offsite visiting employees differs, at least in practical effect, from the one for off-duty, onsite employees spelled out in *Tri-County Medical Center,* 222 NLRB 1089 (1976), that, except where justified by business reasons, an employer rule that denies off duty-employees entry to outside nonworking areas of the employer's facility is invalid. In this case, the majority said it was "guided" by the U.S. Court of Appeals for the D.C. Circuit's opinion vacating and remanding the Board's decision in a case presenting the same issue. *ITT Industries v. NLRB,* 251 F.3d 995 (D.C. Cir. 2001), vacating and remanding 331 NLRB No. 7 (2000). There, the Board followed its prior decisions in *Southern California Gas Co.,* 321 NLRB 551 (1996), and *Postal Service,* 318 NLRB 466 (1995), applying the rule of *Tri-County Medical Center,* supra, to prevent an employer from denying access to visiting, offsite employees. Because the court in *ITT Industries* did not decide whether the employees in that case were entitled to access to their employer's property and remanded to the Board for further explanation of its holding, the majority said that case does not support dissenting Chairman Hurtgen's position. The Board has not yet requested or received additional briefing from the parties in *ITT Industries.*

Applying the above analysis to this case, the majority found that employees Chavez and Davenport were exercising their Section 7 rights to organize, to strengthen their own Union and ultimately to better their own working conditions when they sought access to the Respondent's Highland facility and its Bakersfield facilities-facilities other then the facility at which they worked. The majority noted the employees entered into the Respondent's parking lot or outside break area against the Respondent's wishes and rule and, thus, to that extent, trespassed on its property. It found however that the Respondent's property interest was not substantial after examining the Respondent's business justifications for its prohibition-the "welfare, peace and tranquility" of its nursing home and residents, the difficulty in determining whether an offsite visitor is in fact one of its own employees given its many facilities and employees, and the Union's dignity campaign.

The majority ruled the Respondent violated Section 8(a)(1) of the Act by maintaining a provision of its solicitation and distribution policy which it enforced to prohibit employees of one of Respondent's facilities from gaining access to the nonworking outside areas at any other facility for the purpose of union organizing and enforcing that provision. Finding that the Respondent maintained an unlawful rule at all its nonunion facilities in California, it ordered the Respondent post cease-and-desist notices at these facilities, rather than at the three facilities directly involved, as recommended by the judge.

Chairman Hurtgen, dissenting, found no violation in the Respondent's denial of access to the employees involved here. He agreed with his colleagues to the extent that they find that the Respondent, at least until July 12, 1995, maintained a rule that unlawfully limited the right of off-duty employees to enter the nonwork area *of the facility where they worked* to engage in organizational activity. However, he would limit the Respondent's obligation to post a notice to three facilities, as recommended the judge.

The Chairman believes that an employer can ordinarily post its property against intrusion by outsiders, i.e., those who do not work at the facility in question. Thus, the Respondent's employees at one facility do not have a Section 7 right to come onto the property of another facility of the Respondent, for the purpose of organizing employees of the latter facility. Balancing the employees' Section 7 right to organize employees at a different site and the employer's property rights, Chairman Hurtgen found that the balance favors the property right. Although the employees have a Section 7 right to assist employees elsewhere in their organizational drive, it does not follow from *Hudgens v. NLRB,* 24 U.S. 507 (1976), that they have a Section 7 right to come onto the property of the Respondent at a facility where they do not work. The Chairman said his position "is clearly supported" by D.C. Circuit's opinion in *ITT Industries.*

(Chairman Hurtgen and Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Service Employees Locals 399 and 22; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles, June 8-11, 1998. Adm. Law Judge Steven M. Charno issued his decision July 21, 1998.

* * *

Amalgamated Lithographers Local One (Metropolitan Lithographer Assn.) (22-CB-8101; 336 NLRB No. 73) Newark, NJ Oct. 1, 2001. The Board held, contrary to the administrative law judge, that language itself in the bargaining agreements which the Respondent Union had with the members of the Metropolitan Lithographers Association, Inc. (MLA), created an exclusive hiring hall and, thus, found it unnecessary to rely on the parties' practice or consider the consequences of a non-exclusive hiring hall as discussed by the judge. It concluded the judge's findings of specific violations of Section 8(b)(1)(A) and (2) of the Act when the Respondent failed and refused to refer Richard D'Amico to employer-members of the MLA in 22 numbered incidents and in the unnumbered MacNaughton Incident, are, with two exceptions (Incident 49 and 58), supported by the facts and the judge's analyses. [HTML] [PDF]

Member Walsh, dissenting in part, would find that the Respondent was justified in not referring pressman Richard D'Amico to an operator's job at employer MacNaughton Einson Graphics and therefore that it did not violate the Act in the MacNaughton Incident. The majority concluded that referring D'Amico to MacNaughton would not have taken work away from an operator.

In Incident 49, the judge found that requests for help from employer Atwater on two different occasions involved the same job. While the Board found that the two Atwater requests for hire were for the same job, it agreed with the judge's analysis of the incident, as modified, and found that the Respondent violated the Act in Incident 49 by referring James Vacca to the second job ahead of D'Amico. Reversing the judge's finding of a violation in Incident 58, which involved a request for help from employer Barton, the Board noted that the request for help does not specify the kind of press involved, stating: "When, as here, the request for help fails to specify the press involved, the Respondent-Union would be justified in not calling D'Amico because the request could be for a web press, a job D'Amico cannot perform."

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Richard D'Amico, an individual; complaint alleged violation of Section (b)(1)(A) and (2). Hearing at Newark, Oct. 21-22, 1997 and Feb. 2-4 and 10, 1998. Adm. Law Judge Nancy M. Sherman issued her decision Nov. 18, 1999.

* * *

Lincoln Park Subacute and Rehab Center, Inc., One, and Lincoln Park Subacute and Rehab Center, Inc., Two (22-CA-22284, et al., 22-RC-11416; 336 NLRB No. 71) Lincoln Park, NJ Oct. 17, 2001. In this supplemental decision, the Board adopted the administrative law judge's finding that the discharges of Dorothy Baines and David Aldorando were unlawful and that the

Respondent failed to demonstrate it would have discharged these employees in the absence of their union activities. The Board set aside the election held April 19, 1998 in Case 22-RC-11416, and severed and remanded the case to the Regional Director for the purpose of conducting a new election when circumstances permitted the free choice of bargaining representative. [HTML] [PDF]

The Board, in the prior proceeding (333 NLRB No. 135), remanded to the judge for further consideration, the issue of whether the Respondent violated the Act when it discharged Aldorando and Baines and whether the election of April 19, 1998 should be set aside because of objectionable conduct.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge Raymond P. Green issued his supplemental decision July 3, 2001.

* * *

New Era Cap Co. (3-CA-21227, 21274; 336 NLRB No. 42) Buffalo, NY Sept. 28, 2001. The Board adopted the administrative law judge's finding that the Respondent, by its Buffalo Plant Manager, Vincent Farallo, violated Section 8(a)(1) of the Act by threatening to close or move Respondent's business if employees voted in favor of affiliation with the Communication Workers of America (CWA). It dismissed the complaint allegation that Supervisor Mike Selinski threatened employees with plant closure and informed them it was futile to attempt to affiliate with the CWA, noting that the allegation was not set forth in the General Counsel's amended complaint. [HTML] [PDF]

Chairman Hurtgen and Member Truesdale, contrary to the judge, found that the Respondent did not violate Section 8(a)(1) by reimbursing its employees for their time and expense in voting, while urging employees to vote against affiliation. Citing *Heintz Mfg. Co.,* 103 NLRB 768 (1953), they said "Board law is clear that an employer may provide transportation to and from a polling station, provided that the benefit is offered on a nondiscriminatory basis, and the employees are free to accept or reject the offer." Member Liebman, dissenting in part, would affirm the judge's conclusion that the Respondent unlawfully attempted to influence the vote against affiliation with the CWA, at the same time providing employees with free transportation to the polls and providing employees scheduled to work that day with paid time off to vote.

Members Liebman and Truesdale agreed with the judge that the Respondent violated Section 8(a)(1) and (3) by suspending Valerie Baldwin for her union activities. Dissenting in part, Chairman Hurtgen would dismiss the 8(a)(3) allegation with respect to Baldwin's 3-day suspension. He found that the Respondent had met its burden of rebuttal under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1982).

Respondent's Buffalo, Derby, and Hamburg plants have unionized work forces; the Buffalo and Hamburg employees are a part of the same bargaining unit and are represented by the Buffalo Plant Independent Union; the Derby plant employees are represented by CWA.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Valerie Baldwin, an individual and Communication Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Buffalo, Jan. 25-28, 1999. Adm. Law Judge Richard H. Beddow Jr. issued his decision July 9, 1999.

* * *

Transpersonnel, Inc. (11-CA-17507; 336 NLRB No. 39) Spartanburg, SC Sept. 28, 2001. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by soliciting employees to sign statements stating they do not want union representation and interrogating employees about the employees' desires regarding collective-bargaining representation. The Board also agreed with the judge's finding that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union on May 9, 1997. The Respondent contended that on May 9, it had valid disavowals of union support from 12 unit employees in a unit consisting of fewer than 24 employees. The Board determined the Respondent, at most, had 9 valid expressions of disaffection from unit employees and failed to establish that as of May 9, it

held a good-faith reasonable uncertainty regarding the Union's majority status. [HTML] [PDF]

As set forth in *Caterair International,* 322 NLRB 64 (1996), the Board held that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. It adhered to the view that an affirmative 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." The Board also found that an affirmative bargaining order is warranted after balancing three considerations as required by the U.S. Court of Appeals for the D.C Circuit.

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Teamsters Local 28; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Spartanburg Jan. 28 and 29, 1998. Adm. Law Judge Pargen Robertson issued his decision May 27, 1998.

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Gold Kist, Inc. (Food & Commercial Workers Local 1996) Douglas, GA October 15, 2001. 12-CA-21196, et al.; JD(ATL)-68-01, Judge George Carson II.

Stevens and Sons Painting, LLC (an Individual) Detroit, MI October 17, 2001. 7-CA-43734; JD-135-01, Judge Robert A. Pulcini.

Peck/Jones Construction Corp. (Ironworkers Local 433) Los Angeles, CA October 9, 2001. 31-CA-24883; JD(SF)-78-01, Judge James L. Rose.

* * *

NO ANSWER TO COMPLAINT

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

All American Fire Protection Inc. (an Individual) (7-CA-43221; 336 NLRB No. 64) Detroit, MI October 1, 2001.

Merzon Leather Co. (Food & Commercial Workers Local 342-50) (29-CA-24205; 336 NLRB No. 66) Brooklyn, NY October 1, 2001.

Congreso De Uniones Industriales De Puerto Rico (Pan American Grain Manufacturing Co.) (24-CB-2074; 336 NLRB No. 67) Cantano, PR October 1, 2001.

Apocalypse Entertainment (Cinematographers Local 600, I.A.T.S.E) (5-CA-29396; 336 NLRB No. 68) Washington, DC October 1, 2001.

* * *

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the ground that the respondent has not raised any representation issue that is litigable in the unfair labor

practice proceeding. The case did not present any other issues.)

South Hills Health System (Teamsters Local 926) (6-CA-32207; 336 NLRB No. 80) Pittsburgh, PA October 16, 2001.