

## Significant ULP Cases in 2006

By

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I have set forth below the significant ULP cases decided by the Board in 2006.

### 1. Section 8(a)(1)

#### a. Interrogation

Washoe Medical Center, 348 NLRB No. 22

The Board (Battista and Schaumber; Liebman, dissenting in part) reversed the ALJ's finding that the Employer, a hospital, unlawfully interrogated employees regarding a potential strike. Immediately following service upon the Employer of the Union's strike notice, the Employer sent a letter and preprinted response card to unit employees informing them that it had received the strike notice and stating in part:

[W]e need to know whether you intend to work or not. Please indicate your decision on the enclosed response card and return it to the Nursing Administration Office by 4:00 p.m. on Tuesday, June []. If you do not complete and submit the enclosed response card by this date, we must assume you intend not to work on June 26.

The letter also stated: “[N]o one can require you to strike if you do not want to do so . . . Regardless of your decision, no reprisal can or will be taken against you.”

The Board majority found that the prestrike letter satisfied the safeguards set out in Johnnie's Poultry, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965) to minimize the coercive effect of otherwise unlawful interrogation under circumstances where an employer has a legitimate need to know. The Board explained that the letter contained a straightforward, factual explanation of the Employer's legitimate purpose for ascertaining employees' intentions regarding work during the strike, was tailored to serve only that legitimate purpose, and described the means of collecting the needed information and the timeframe for the submission. The letter also acknowledged the voluntary nature of the Employer's request for the information by explaining what it would do in the event of nonsubmission. The Board stressed that the letter unambiguously and evenhandedly assured employees that no reprisal can or would be taken against them as a result of their decisions regarding strike participation.

Member Liebman, dissenting on this point, would find the letter unlawfully coercive. Despite the letter's generalized assurance of no reprisal, she found that

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additional language in the letter emphasizing that “no one can require you to strike” and its references to “peer” pressure to “walk off the job and leave patients” could reasonably be read to promise protection only for employees who chose not to strike. In her view, the combination of the inquiry about employees’ intent to strike with these one-sided remarks was coercive, notwithstanding the purported assurance of no reprisal.

## **b. Polling**

### 1. Unifirst Corporation, 346 NLRB No. 52

The Board (Battista and Schaumber; Liebman, dissenting) reversed the ALJ’s finding that the Employer violated Section 8(a)(1) by polling employees about their union sentiments while a decertification petition was pending. The majority reasoned that since an employer that is presented with evidence of actual loss of majority status may lawfully withdraw recognition even if a decertification petition is pending, an employer presented with the same evidence, could, a fortiori, take the lesser step of lawfully polling employees. The majority disagreed with the dissent’s assertion that Struksnes Construction Co., 165 NLRB 1062 (1967) is to the contrary. Struksnes dealt with the lawfulness of a poll taken to determine whether a union that sought recognition had majority status; no certification election had been filed with the Board. By contrast, the majority said, here the Employer wished to withdraw recognition from an incumbent union based on the employee petition showing the Union’s apparent loss of majority status. The poll was conducted for the purpose of avoiding a violation of the Act. The majority also found that the Employer’s conduct was consistent with the Supreme Court’s suggestion in Allentown Mack Sales & Service v. NLRB, 522 U.S. 359 (1998) that an employer that *could* lawfully withdraw recognition might want to poll first to secure conclusive evidence that the union had in fact lost majority support, as well as to maintain good employee relations.

Member Liebman, dissenting, would find that the Struksnes prohibition against polling employees while a petition is pending remains the law and clearly applies to the facts here. She rejected the majority’s attempt to limit Struksnes to situations when a union has filed a representation petition with the Board seeking initial recognition from the employer, and not, as here, when employees have filed a decertification petition. Nothing in Struksnes limits the rule to representation petitions in the initial-recognition context. Nor do the Board’s later decisions suggest such a limitation. More importantly, she pointed out, the rationale for the Struksnes rule--that when a petition is pending, a Board election better serves any legitimate employer interest in determining employee sentiment than an employer-conducted poll does--is equally applicable in the context of a decertification election petition.

### 2. Alan Ritchey, Inc., 346 NLRB No. 26

The Board (Battista and Schaumber; Liebman, concurring in part and dissenting in part) dismissed allegations that the Employer violated Section 8(a)(1), (2), and (5) of the Act when it conducted a poll of employees as to whether they wanted a discharged

employee to remain as their bargaining representative in upcoming collective-bargaining agreement negotiations.

In finding that the poll did not violate Section 8(a)(1), the majority agreed with the ALJ who had found that time was of the essence, the employees were involved in an intra-union dispute, the poll was conducted for a legitimate reason, the Employer did not indicate a preference for one negotiator over another, the employees were aware of the surrounding circumstances, there was no anti-union animus by the Employer, and there were no contemporaneous unfair labor practices that would cause the Employer's motives to be suspect.

The majority also found that the poll did not amount to direct dealing and thus did not violate Section 8(a)(5). Although the Employer did communicate directly with union-represented employees, the majority found that it polled the employees only to resolve the dilemma of the identity of the employees' representative for the forthcoming negotiations, that terms and conditions of employment were not discussed, and that the Employer did not denigrate the Union. The Board also found that the communication was not for the purpose of excluding the Union, but to the contrary, was to assure that the Union, through a representative, would be involved in the bargaining.

Under the special circumstances of this case, the Board found no Section 8(a)(2) violation. The majority explained that the Employer was under time pressure to negotiate with *someone* from the Union, it was unclear who that was, and the Union was so loosely organized that it was virtually impossible to find out who the representative would be. Accordingly, the Employer, on a one-time basis, "took the prudent step of letting the employees choose a representative."

Member Liebman, dissenting, would find that the polling violated both Section 8(a)(1) and (2) of the Act. In her view, the Employer interfered with the Union's internal administration and with the employees' exercise of the fundamental right to choose their representatives free from employer influence. The proper course, she explained, would have been for the Employer to continue to bargain with the discharged employee unless and until he was replaced. Even if the Employer had a legitimate interest in determining the identity of the Union's negotiator, it could have and should have communicated with the discharged employee himself. "Employers simply are not entitled to intermeddle in union affairs as the employer here did," Member Liebman concluded, finding it unnecessary to address the majority's Section 8(a)(5) direct-dealing discussion.

### **c. Access to Property**

#### **1. Salmon Run Shopping Center, LLC, 348 NLRB No. 31**

The Board (Liebman, Kirsanow, and Walsh) held that the Respondent violated Section 8(a)(1) of the Act by denying the Union access to its mall to distribute union literature. A Union official met with the Employer's marketing director on August 13, 2003 to request access to the mall to distribute union literature. There was no discussion

about what message that literature would convey. The marketing director asked the Union official to send her a letter requesting two access dates. The official did so, and one week later, after receiving no response, called her. She replied she would get back to him the following week. When she did not, the Union official went to see her on September 19. At that time, she said that she had never received a request from a union before and would have to contact her corporate office for advice. When she did not get back in touch, the Union official contacted the mall's general manager who also promised to get back to him, but never did. Finally, on October 7, the marketing director called the union official. She again said that the mall had never before been asked for access by a union and then stated that the mall believed the Union was a "profit organization," and that the access request was denied. The Union tried again in April 2004. This time, the general manager cited the mall's "community action program," which states that the Respondent welcomes "civic, charitable, or other organizations to solicit in the common areas of the Mall when the solicitation will benefit both the organization and our tenants.

The Board found that the Respondent directly admitted that it delayed acting on the access request because the Charging Party was a union, without knowing what message the Union intended to convey, or to whom. The Board also pointed out that the Respondent offered shifting and pretextual reasons for denying the Union's request. As a result, the Board found, a compelling inference arises that the Respondent's decision to deny the Union access was based solely on the Union's status as a labor organization and its desire to engage in labor-related speech. Although the general rule, pursuant to Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), is that an employer cannot be compelled to permit union agents to distribute literature on the employer's premises, the Board found that the Respondent's discriminatory exclusion here was unlawful under the "discrimination exception" set out in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

## 2. Supervalu Holdings, Inc. d/b/a Bigg's Foods, 347 NLRB No. 39

The Board (Liebman, Kirsanow, and Walsh) found that the Employer violated Section 8(a)(1) of the Act when it orally amended its written no-distribution rule in response to its off-duty employees' union handbilling activities and when it prohibited off-duty employees from distributing union handbills to customers.

The Employer's written no-distribution rules provided that "[e]mployees may not distribute materials to other employees in working areas of the business." The rules did not mention distribution to customers. The Employer orally told an off-duty employee that she could not distribute union handbills to customers in an area that was approximately 10 feet away from products on display. Later that day, at another of the Employer's stores, the off-duty employee was given a similar directive while handbilling to customers approximately 20-25 feet away from products on display. The following day, at another store, she was told that she could not handbill to customers anywhere in the shopping plaza.

The Board found that the Employer violated Section 8(a)(1) of the Act when it orally amended its written no-distribution rule in response to its off-duty employees' union handbilling activities. It also found that the Employer did not clearly communicate to its employees the scope of the oral amendment and that a reasonable employee would not know what conduct was prohibited by the orally amended rule. Consequently, the Board found that the amended no-distribution was also ambiguously overbroad as to the areas where handbilling to customers was not permitted.

The Board found that the appropriate analysis was that set out in Santa Fe Hotel & Casino, 331 NLRB 723 (2000). In Santa Fe, the Board held that an employer may not effectively destroy employees' right to distribute literature by categorizing as a work area entrances to its facility where the activities performed are incidental to its main function. Applying that standard, the Board found that the Employer unlawfully prohibited its off-duty employees from distributing union handbills to customers. The Board also found that on certain occasions, the Employer unlawfully prohibited off-duty employees from handbilling anywhere on the premises when there were locations in the shopping plazas where handbills would have been permissible under either the Employer's written or amended no-distribution rules.

#### **d. Rules**

##### 1. U-Haul Co. of California, 347 NLRB No. 34

A majority of the Board (Liebman and Schaumber; Battista, dissenting in part) held that the Employer violated Section 8(a)(4) and (1) by maintaining a mandatory arbitration policy as a condition of employment. The ALJ found that the arbitration policy, as stated, violated the Act because it would reasonably tend to inhibit employees from filing charges with the Board. Specifically, the ALJ found that the phrase "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" reasonably included the filing of unfair labor practice charges with the Board, and thus employees could reasonably believe that they were precluded from filing such charges with the Board.

In agreement with the ALJ, Members Liebman and Schaumber found that the arbitration policy was unlawful under the test set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), for rules that do not explicitly restrict activities protected by Section 7. In the majority's view, the breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board and employees would reasonably construe the remedies for violations of the Act as included among the legal claims recognized by federal law that are covered by the policy. They concluded that the policy's language was reasonably read to require employees to resort to the Employer's arbitration procedures instead of filing charges with the Board. They noted that their decision was limited to the specific clause at issue and that they were not passing on the lawfulness of mandatory arbitration

provisions. They also noted, however, that even in the context of other employment statutes, the courts and other administrative agencies have consistently recognized that individuals possess a nonwaivable right to file charges with the EEOC, and that mandatory arbitration procedures that attempt to restrict such rights are void and invalid as a matter of public policy.

Dissenting, Chairman Battista found that the policy was not unlawful. He contended that there was no evidence that the rule had been applied to the protected activity of invoking Board processes, that there was no evidence that it was intended to apply to such activity, and that the policy did not explicitly bar any Section 7 activity. Observing that the Board in Lutheran Heritage had found that there was no violation in cases of this kind unless the policy expressly interfered with Section 7 rights or it was reasonable to read it in that manner, he concluded that the mere fact that this policy could possibly be read in that manner was not sufficient absent evidence that it was actually applied in that manner or that it was intended to be applied in that manner.

Another Board majority (Battista and Schaumber; Liebman, dissenting in part) dismissed allegations that the Employer violated Section 8(a)(1) by interrogating an employee at an employee meeting and by maintaining a statement in its employee handbook requiring employees to bring work-related complaints first to their supervisor and then to the Employer's president and chairman of the board. The Board unanimously adopted the ALJ's finding that the Employer unlawfully discharged two union supporters in violation of Section 8(a)(3).

## 2. St. Francis Medical Center, 347 NLRB No. 35

The Board (Battista, Schaumber, and Walsh) found that the Employer violated Section 8(a)(1) by refusing to remove from various work areas flyers that disparaged and personally attacked an employee because of her union activities. The Board also found, however, that the Employer did not violate Section 8(a)(1) by disparately enforcing its no-solicitation, no-distribution rule as to posting materials in the workplace. The General Counsel sought to prove that the Employer had disparately enforced its no-solicitation, no-distribution rule as to the flyer postings by comparing the Employer's inaction regarding the posted flyers in the instant case to its decisions to discipline prounion employees who violated its no-solicitation, no-distribution rule at other times in the past. The General Counsel relied on evidence produced in a related case as well as documentary evidence to show that union supporters had been disciplined for discussing the Union and for passing out union-related literature. Contrary to the ALJ, the Board found this evidence did not support the conclusion that the Employer had disparately enforced its rule in the instant matter by allowing employees to post antiunion flyers.

The Employer here maintained one rule for solicitation and distribution and a separate rule for posting materials on bulletin boards. The Board observed that its

finding in the earlier case that the Employer had disparately enforced its rule against union solicitation and distribution was not relevant to the Employer's alleged disparate action in this matter regarding postings. In the circumstances of this case, the Board reasoned that the comparison between solicitation/distribution and posting is a comparison of "apples to oranges." The Board found that the Employer had condoned the posting of offensive flyers by refusing to remove them. However, the General Counsel did not produce any evidence that the Employer acted disparately in regard to what else it permitted to be posted. Without this predicate against which to compare the Employer's actions regarding posting in this case, the Board reasoned that it could not find that the Employer had disparately enforced a no-solicitation no-distribution against union supporters, as alleged in the complaint.

3. Longs Drug Stores California, Inc., 347 NLRB No. 45

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Employer violated Section 8(a)(1) by maintaining overbroad confidentiality provisions in its employee handbooks. During the organizational campaign period culminating in the Union's losing the Board election, the Employer concurrently maintained two employee handbooks entitled "Mainland 2000" (2000 handbook) and "Employee Handbook" (2003 handbook). The 2000 handbook, under the heading "Corrective Action/Employee Conduct," stated that "Unauthorized disclosure of confidential information regarding customers, employees, or the business of the company" is conduct subject to discipline, including discharge. A provision directly following this general confidentiality provision, under the heading "Privileges of a Team Member," stated, "Your pay is confidential company information and should not be discussed with fellow employees." Neither of the aforementioned provisions appeared in the 2003 handbook, which at relevant times was distributed to only five unit employees. However, the 2003 handbook, under the heading "Professional Behavior," stated that the Employer "expects compliance with the following behaviors . . . Maintain confidentiality, including but not limited to, information regarding customers, employees and the company." The handbook further stated that employees are "expected to adhere to the policies and procedures that protect customer and employee confidential information, and thereby, comply with federal and state privacy laws," and that the Employer trusts employees not to disclose "such information to unauthorized persons, or organizations, or using it for personal gain." Notwithstanding the limited circulation of the 2003 handbook, the provisions of the 2000 handbook remained in effect throughout the critical preelection period in 2004. The Employer's human resources manager testified that he was responsible for enforcing the handbooks' provisions and that the purpose of the provisions was to make employees aware of prohibited conduct. He also testified that individual employee wage rates constituted confidential information. Despite his testimony and the maintenance of the confidentiality provisions in both handbooks, employees openly discussed wages without being disciplined.

In finding the provisions unlawful, the Board relied on Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). As noted, the 2000 handbook contained a general confidentiality provision and a particular confidentiality provision prohibiting the discussion of wages. The 2003 handbook contained a general confidentiality provision. Because the complaint did not appear to challenge the particular provision as independently unlawful, the Board did not pass on whether that provision explicitly restricted activities protected by Section 7. With regard to the general provisions, the Board reasoned that they must be read in context of the particular provision and the Employer's specific affirmation that the Employer considered employee wage rates to be confidential information. So read, the Board concluded that the general provisions of the 2000 and 2003 handbooks, which prohibited the disclosure of confidential information, were unlawful.

Unlike the ALJ, Chairman Battista and Member Schaumber found that the Employer did not engage in objectionable conduct by maintaining the confidentiality provisions, and by campaigning near the voting area during the representation election. The majority found that maintaining the confidentiality provisions fit within the "virtually impossible" exception to Dal-Tex Optical Co., 137 NLRB 1782 (1962). Thus, the confidentiality provisions were not adopted in response to the Union's organizing campaign. While copies of the 2000 handbook were distributed widely, the 2003 handbook was only distributed to five unit employees. There was no evidence that the Employer called employees' attention to the confidentiality provisions in either handbook when it was distributed or during the critical preelection period. There was also no evidence that these provisions were ever enforced. Indeed, there was affirmative evidence that employees openly discussed wages and other terms and conditions of employment during the critical period, and a chart listing job classifications and wage rates was posted in the employee break room. The Union also lost the election by a wide margin of votes. Chairman Battista and Member Schaumber also found, that whether or not the Employer's lead employees were agents, they did not engage in objectionable electioneering under Milchem, Inc., 170 NLRB 362 (1968). While employees waiting in line to vote may have overheard the statements made by the lead employees, those statements were not conversations with the employees. Rather, the lead employees were speaking to each other, not to the employees waiting to vote. Accordingly, the majority overruled the Objections and certified the results of the election.

Dissenting, Member Liebman would set aside the election based on the two alleged instances of Employer objectionable conduct. She explained that given Board precedent, the majority erred in finding the electioneering unobjectionable and in concluding that it is "virtually impossible" that the confidentiality rules could have affected the election results. She concluded that whether or not the two instances of objectionable conduct present independent grounds for setting aside the election, certainly together they interfered with employees' free choice to a degree that the election result cannot stand.

## e. Buttons

### 1. Starwood Hotels & Resorts Worldwide, Inc., d/b/a W San Diego, 348 NLRB No. 24

A Board majority (Battista and Schaumber; Liebman, dissenting in part) found that the Employer did not violate Section 8(a)(1) when it prohibited an employee from wearing a union button in public areas of its hotel. The Employer marketed itself as providing an alternate hotel experience referred to as “Wonderland” where guests could fulfill their “fantasies and desires” and get “whatever [they] want whenever [they] want it.” In furtherance of the hotel’s hoped-for ambience, the Employer commissioned special uniforms for its public-contact employees in order to achieve a trendy, distinct, and chic look. As part of their uniform, employees had to wear a small (1/2 inch) “W” pin on the upper left chest. The Employer’s attire policy prohibited all other uniform adornments, including sweatbands, scarves worn as belts, and professional association pins. In-room delivery (IRD) server uniform was a black T-shirt, black slacks, and a black apron. IRD servers delivered food orders from the kitchen to guest rooms. When delivering an order, the IRD servers started in the hotel kitchen (a nonpublic area), then took a service elevator to the guest’s floor, delivered the order to the guest’s room, and then returned to either the hotel kitchen or another nonpublic area to await the next order. The IRD servers’ contact with the public varies widely on a daily basis. IRD server Sergio Gonzalez worked the night shift. One day, he put on a button distributed by the Union. The button was 2 inches square and contained the wording: “JUSTICE NOW! JUSTICIA AHORA! H.E.R.E. LOCAL 30” in blue or red letters on a yellow background. At about 3 a.m., while Gonzalez was on a meal break in a nonpublic area, a supervisor ordered him to remove the button.

An employer may lawfully restrict the wearing of union insignia where “special circumstances” justify the restriction. Pathmark Stores, Inc., 342 NLRB 378, 379 (2004); Albis Plastics, 335 NLRB 923, 924 (2001). The employer bears the burden of proving such circumstances. Pathmark, 342 NLRB at 379. Regarding the display of the union button in the hotel’s public areas, the ALJ found that the Employer proved special circumstances—interference with the Employer’s public image—justifying the no-button order while Gonzalez was in public areas where he would come in contact with guests. The ALJ emphasized that Gonzalez spent the majority of his work time in nonpublic areas, that the Employer had issued the no-button rule order while Gonzalez was in a nonpublic area, and that the Employer’s no-button order was not limited to public areas. The ALJ found that the order was lawful with regard to the times that Gonzalez was in public areas and unlawful with regard to the times Gonzalez was in nonpublic areas. Chairman Battista and Member Schaumber agreed with the ALJ regarding the display of the button in public areas. They noted that the button would have interfered with the Employer’s use of a particular in-room server uniform (professionally-designed all-black shirt, slacks, and apron) to create a special atmosphere for hotel customers. The Employer therefore could lawfully prohibit the button with regard to the time Gonzalez was in public areas. Dissenting, Member Liebman asserted that the Employer submitted no evidence demonstrating that the Union’s 2-inch square button would detract in any

significant way from the Employer's efforts to create a "wonderland" atmosphere and that the Employer failed to carry its burden of demonstrating that the employees' wearing of the Union's button on their uniforms in public areas could interfere with the creation of that atmosphere so as to warrant the Employer's ban.

A Board majority (Liebman and Schaumber; Battista, dissenting in part) found that the Employer violated Section 8(a)(1) by prohibiting Gonzalez from wearing the union button in nonpublic areas. In rejecting the Employer's principal contention that it would be impractical for the Employer to allow Gonzalez to wear the union button in nonpublic areas while prohibiting the button in public areas, Members Liebman and Schaumber found that the Employer had introduced no actual record evidence to support this assertion of impracticality and it had not demonstrated even a reasonable concern that would justify a property-wide ban on the wearing of union insignia. They observed that simply removing a button—without any other alteration in employee uniform or appearance required—did not seem to present a barrier of impracticality. Dissenting, Chairman Battista found that the Employer demonstrated special circumstances—the impracticality of requiring Gonzalez to remove the union button each time he entered a public area—justifying its order prohibiting Gonzalez from wearing the button in public and non-public areas.

Finally, the Board unanimously reversed the ALJ's finding that the Employer violated Section 8(a)(1) by prohibiting a cook from wearing union stickers on her shirt while working in the hotel's kitchen, a nonpublic area. The stickers measured 2½ inches by 1 inch and said, "Justice Now! Justicia Ahora!" The Board reasoned that health and safety concerns may constitute special circumstances justifying restrictions on employees' right to wear union insignia. The Board found that the "uncontradicted testimony" established that that foreign objects in food preparation areas pose risks of contamination constituting a special circumstance. The union stickers were held in place only by the adhesive customarily used on the back of address labels and at least one sticker was already starting to peel off after only a few hours. The evidence further showed that the Employer's kitchen was subject to State and County health regulations and that these regulations prohibited employee actions that may result in contamination of food or food preparation surfaces. Although the Employer allowed kitchen employees to keep personal items, including cigarettes, in unbuttoned shirt pockets, these items were inside the pockets and therefore the Employer could reasonably make the judgment that these objects were less likely to fall into the food than the stickers that were loosely attached to the outside of the employees' clothing.

## 2. Jupiter Medical Center Pavilion, 346 NLRB No. 61

The Board (Battista, Liebman, and Schaumber) unanimously agreed with the ALJ that the Employer lawfully instructed a certified nursing assistant (CNA) to take off his union button while he was working with a patient. On the date in question, the CNA wore a pin on his uniform which read: "LOCAL 1199 FLORIDA, SEIU STRONGER."

The button was square, with sides measuring approximately 2¼ inches each. While providing care to one of the Employer's elderly residents, the CNA was approached by the Employer's director of nursing (DON), who asked him to remove the pin. The ALJ credited the DON's testimony that she told the CNA that she was concerned that the squared edges of the pin could possibly tear the fragile skin of an elderly patient.

The Board found that the ALJ properly dismissed the allegation pertaining to the removal of the union button. The Board stated that in the health care industry, rules prohibiting the wearing of buttons in patient care areas are presumptively valid, and a health care facility may prohibit the wearing of buttons in areas where patients are treated. Beth Israel Hospital v. NLRB, 437 U.S. 483, 507 (1978). Under the circumstances, the Board concluded that the Employer lawfully chose to put a premium on patient safety. The Board observed that there was no evidence that the Employer had tolerated the wearing of other kinds of pins or buttons in patient care areas, where the wearing of such insignia carries the risk of endangering patients. More particularly, the General Counsel did not show that the other employees were wearing their buttons while physically handling a patient. While the Board recognized that the edges of the pin *may* not be sharp enough to injure a patient, even in such close physical proximity, that did not diminish the Employer's concern that this could have occurred. Given the need for extraordinary care in physically dealing with elderly patients, the Board would not fault the Employer for erring on the side of caution.

### 3. Sacred Heart Medical Center, 347 NLRB No. 48

The Board (Battista and Schaumber; Liebman dissenting) reversed the ALJ's findings and dismissed the complaint alleging that the Employer violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a policy that prohibited its employees from wearing an "RNs Demand Safe Staffing" union button in those parts of the Employer's medical facility where employees might encounter patients or their families.

Chairman Battista and Member Schaumber agreed with the ALJ that the Employer's restriction on wearing the "RNs Demand Safe Staffing" button was presumptively invalid because it extended beyond immediate patient care areas to areas where employees might encounter patients or their families. Contrary to the ALJ, however, the majority found that the Employer rebutted the presumption of invalidity by showing "special circumstances" justifying the restriction. First, the Employer established that the message presented by the button was one that would inherently disturb patients. Thus, a reasonable person would construe the "Safe Staffing" button as a claim that the Employer's staffing levels were unsafe. Such a claim was likely to cause unease and worry among patients and their families, and disturb the tranquil hospital atmosphere that was necessary for successful patient care. Second, the nurses' direct supervisors, who worked on the hospital floor and were in a position to gauge patients'

reaction to the button, had expressed concern over the impact the button may have on the patients. Citing to NLRB v. Baptist Hospital, 442 U.S. 773, 784 (1979), the majority stated that a hospital need not wait for the awful moment when patients or family are disturbed by a button before it may lawfully be restricted.

The majority disagreed with the ALJ and the dissent that this case was controlled by Mt. Clemens General Hospital, 335 NLRB 48 (2001), enfd. 328 F.3d 837 (6th Cir. 2003), in which the Board rejected the employer's defense that it would be disruptive for nurses to protest forced overtime by wearing a button with "FOT" and a line drawn through the letters. In their view, Mt. Clemens was distinguishable. First, the button's message in Mt. Clemens was "cryptic" and the employer's rationale for banning it rested on a chain of inferences, while the button here sent a clear message to patients that current staffing levels were unsafe. Thus, no inferential leap was required here in order to conclude that a reasonable patient would be disturbed by this message. Second, in Mt. Clemens, even if patients and their families were able to understand the button's message, they would have discerned that the dispute concerned the nurses' own terms and conditions of employment, i.e., forced over-time. Here, however the message on the button related directly to issues of patient care and hospital safety. Finally, the majority stated that the fact that the Employer allowed other buttons to be worn during the relevant time period did not establish the violation. The mere fact that an employer has not previously forbidden union insignia does not foreclose that employer from ever imposing restrictions on buttons, particularly where, as here, that insignia is potentially disruptive. The Employer here reasonably determined that one union button was distinguishable from another and was not as likely to disturb patients or their families. The majority would not second guess the Employer's business judgment or condemn its decision not to broaden its ban.

Dissenting, Member Liebman stated that the majority's decision was flawed in two critical respects. First, the Employer had not even come close to showing that its "special circumstances" defense was supported by anything other than mere speculation that the button's message would likely disturb patients and their families. Second, the undisputed fact that the Employer imposed no restrictions whatsoever on the wearing of a second button with a much more controversial message completely undermined its asserted reasons for broadly prohibiting the wearing of the button at issue. On this record, she concluded there should be no doubt that the Employer violated the Act. Like the ALJ, Member Liebman found Mt. Clemens to be directly on point.

#### **f. Promise of Benefit**

##### **1. Field Family Associates, LLC d/b/a Hampton Inn NY—JFK Airport, 348 NLRB No. 2**

The Board (Battista and Schaumber; Liebman, dissenting in part) reversed the ALJ and held that the Employer did not violate the Act when it promised new benefits in

anticipation of a union organizing campaign among employees working at the Employer's two hotels located at JFK Airport.

The Union began organizing the employees at another of the Employer's hotels in March or April 2004, and won the representation election held in May 2004. In late April, the Employer hired a labor relations specialist to meet with its employees at the two airport hotels. The Employer conceded that its concerns included the ongoing organizing drive at its other hotel and the possibility that the Union would commence organizing among the employees at the airport hotels. At a May 25 joint meeting with employees of both airport hotels, the Employer promised wage increases and other benefits based on concerns the employees had shared with the labor relations specialist. On May 28, the Union filed a representation petition for the employees at the airport hotels.

The majority found that General Counsel failed to establish that the Employer knew that the Union had begun organizing efforts among the employees at the airport hotels when the Employer made its promises. The Board noted that management representatives testified without contradiction that their first indication of union activity at the JFK hotels came at the meeting at which it promised wage increases and other benefits when some employees chanted for the Union.

The majority also concluded that the Employer did not unlawfully make the promises even if it thought that such a campaign might begin at some point. The majority stated:

Thus, to find an employer's promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees, rather than whether the respondent wanted to stay 'one step ahead' of the union by diminishing the appeal of unionization. If, as the judge held, correctly anticipating union activity was sufficient to establish an 8(a)(1) violation, the result would effectively prohibit nonunion employers from improving working conditions in hopes of diminishing the appeal of unionization generally, even when no union is present and where employees have not shown any desire to bring a union onto the scene. In sum, the judge's reasoning that it is unlawful to promise a wage increase and other benefits in anticipation of possible union activity conflicts with the law.

Member Liebman, dissenting in part, found that the majority's employer-knowledge requirement makes no sense in this case, given the Act's goal of protecting employees' right freely to choose whether to have union representation. She "would find that an employer violates Section 8(a)(1) of the Act by promising a benefit when: (1) the employer is motivated by a desire to prevent employees from unionizing; (2) organizing activity is in fact under way; and (3) the employees reasonably would perceive a connection between the employer's promise of benefits and their protected activity." In her view, all three elements were satisfied here and thus the Employer violated Section 8(a)(1).

**g. 8(c)**

1. Children's Center for Behavioral Development, 347 NLRB No. 3

The Board (Battista and Schaumber; Liebman, dissenting in part) reversed the ALJ's finding that the Employer, a not-for-profit center for emotionally disturbed children, violated Section 8(a)(1) by issuing a memorandum to its employees that assertedly would reasonably tend to chill their exercise of Section 7 rights. The memo stated that the center was suffering from financial difficulties and that the Union "has been doing everything in its power to harm" the center. The memo continued that the Union was interfering with the center's relationship with the United Way, which affected the center's funding, that the Union was trying to arbitrate grievances, which has caused the center to incur costs and legal fees that it cannot afford, and that the Union was claiming it had a contract with the center, even though the Union rejected the center's last offer.

Chairman Battista and Member Schaumber found that the memo was protected by Section 8(c) of the Act. They held that the memo conveyed nothing more than the Employer's negative opinion of the Union, its positions, and its actions. The memo did not suggest that the employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights. The majority also rejected the dissent's argument that the Employer's violations of Section 8(a)(5) of the Act created a "strong antiunion atmosphere" in which the memo would be perceived as a threat.

The majority also reversed the ALJ's finding that the Employer violated Section 8(a)(1) by maintaining an overbroad no-solicitation policy. The Employer's policy provided that "Staff should not be permitted to solicit, obtain, accept or retain services, merchandise, commodities, etc. for personal gain/profit during working hours. This conduct is prohibited in all buildings and on surrounding grounds." The majority found that employees would not reasonably believe that the policy applied to protected concerted activity and thus the policy did not violate the Act. The Board pointed out that the language in the policy was not directed at protected concerted activity and that the policy expressly targeted personal commercial business, rather than concerted protected activity.

The Board agreed with the ALJ that the Employer violated Section 8(a)(5) of the Act when it eliminated employee hours performed for family-therapy services. However, Chairman Battista and Member Schaumber reversed the ALJ's finding that the Employer's actions in this regard also violated Section 8(a)(3). The majority found that the Employer eliminated family-therapy hours not in response to union activity, but because it had lawfully terminated its relationship with the United Way, which was the sole source of funding for that therapy.

Dissenting in part, Member Liebman would find that the Employer's memo constituted a threat of adverse action if the employees maintained their support for the Union. She would also find that the Employer violated Section 8(a)(3) when it eliminated the family-therapy hours. In her view, the Employer unlawfully punished the employees because they had sought the United Way's assistance in collective-bargaining negotiations.

2. Sara Lee d/b/a International Baking Co. and Earthgrains, 348 NLRB No. 76

The Board (Battista and Schaumber; Liebman, concurring in part and dissenting in part) reversed the ALJ and found that various remarks by the Employer's supervisors did not violate Section 8(a)(1) of the Act. The majority found that statements by the Employer's supervisor to an employee during an organizing campaign that "the Union wasn't a good thing," that he was making decent money, that the Union would harm him, and that it would be better for him not to sign a Union card were protected by Section 8(c) of the Act. The majority reasoned that the supervisor was merely expressing her lawful opinion concerning the effects of unionization on the employees. The majority also found that another supervisor's statement, 1 or 2 days before the election, that the employee should not "do wrong by us" was protected by Section 8(c). The Board found that the comment did not unlawfully equate voting for the Union with disloyalty to the Employer and did not impart a threatening meaning. Finally, the Board also found protected by Section 8(c) remarks by the Employer's human relations director at pre-election meetings that if employees were even 5 minutes late under a union contract with a disciplinary procedure "we would not have the luxury of deviating from it because we end up with union grievances as a result of it." The Board explained that an employer may lawfully tell employees that its freedom to deal directly with them will be constrained if they choose union representation, especially where the change would be the result of a negotiated collective-bargaining agreement. The fact that such a statement might tend to discourage union support among employees who prefer to deal directly with their employer on an individual basis does not render the statement unlawful, the Board said.

Member Liebman, dissenting in part, would find that the human relations director's remarks violated Section 8(a)(1). In her view, her statements went "far beyond" indicating that the Employer would be legally required to deal with the Union. The director stated no basis for predicting the terms of a contract that did not exist, and her statement was therefore not a lawful prediction of the consequences of unionization. Member Liebman found that the director's statement was both an implicit promise that the Employer would continue its current, purportedly more lenient policy if the Union lost the election and an implicit threat that it would impose discipline more strictly if the Union won.

**h. Constructive Discharge**

Wackenhut Corp., 348 NLRB No. 30

The Board (Schaumber and Kirsanow; Liebman, dissenting in part) agreed with the ALJ that the Employer neither discharged nor constructively discharged a guard at a nuclear power station who had been accused of threatening and harassing other employees. The Employer's operations manager relieved the employee and a coworker of their weapons and told them to clean out their lockers. When the coworker asked the manager, "We're not coming back, Bob?" in the employee's presence, the manager looked down and shook his head. The manager then escorted both employees to an office where the Employer's training manager met with each employee separately. The employee was told that he had been accused of threatening and harassing other employees, which he denied. At the end of the interview, the training manager told the employee that he was suspended, pending determination and that a decision would be made in 2 days. After the meeting, the operations manager escorted the employee to his car and stated, "What these guys are doing to you, Tim, is wrong." The employee responded, "I know, Bob, but what can you do." The employee shook hands with the operations manager and left. On his way home, the employee called the operations manager's office and told the facility's office manager: "I want to verbal[ly] tender my resignation, and I will follow with a fax." He then drove to a commercial messaging center and faxed the following to the operations manager: "Effectively immediately, I am resigning my position with the Wackenhut Corporation."

The majority explained that in determining whether an employee has been terminated, the Board considers whether the employer's words or actions would logically lead a prudent person to believe that his tenure had been terminated. Acknowledging that some of the Employer's conduct here arguably, considered in isolation, would tend to support a finding of discharge, the Board found that subsequent statements by the training manager should have reasonably eliminated any impression of discharge. The training manager clarified that the employee was being suspended, that a determination about his status had not been made, and that such a determination would be made within 2 days. Taking these statements into account and given the employee's hearing testimony that he was aware that employees often were suspended without being terminated, the Board concluded that the entire course of the Employer's conduct would not reasonably lead a prudent person in the employee's position to believe, when he later resigned, that his employment had been terminated.

Member Liebman, dissenting in part, would find that the employee reasonably believed that he had been, or was about to be, unlawfully fired. She stressed that Board law makes it clear that the situation must be viewed through the employee's eyes and that an employer must be held responsible when its statements or conduct create an uncertain situation for the affected employee. Here, she pointed out, the Employer has not excepted to the finding that it unlawfully suspended the employee. In her view, it must be presumed that a reasonable employee would perceive that the Employer was acting illegally in pursuing discipline. In these circumstances, the employee was hardly required to accept the training manager's statements at face value, to believe that his status would be fairly reviewed, and to conclude that he might keep his job.

## 2. Section 8(a)(2)

### 1. Road & Rail Services, Inc., 348 NLRB No. 77

The Board (Schaumber and Walsh; Battista, dissenting in part) found that the ALJ properly dismissed the allegation that the Employer, a successor employer, violated Section 8(a)(2) of the Act by recognizing the Union and entering into a collective-bargaining agreement with it prior to the hiring of the Employer's work force and commencement of its operations. The ALJ had found that the Employer was a "perfectly clear" successor within the meaning of NLRB v. Burns International Security Services, 406 U.S. 272 (1972) and therefore did not violate the Act.

In agreeing with the ALJ that the Employer was a "perfectly clear" successor, Members Schaumber and Walsh emphasized that the Employer never expressed any intention to invoke the right of an "ordinary" Burns successor to establish its own initial terms and conditions of employment. Instead, the Employer expressed its clear intention to staff the facilities with the predecessor's employees and to bargain with the employees' designated representative, thereby securing a skilled and experienced work force and avoiding the uncertainty of attempting to recruit new employees based on unilaterally established employment terms. Thereafter, the Employer did not, in fact, unilaterally set initial terms, but met with the Union for the purpose of collective bargaining and executed a contract that included the initial terms to be effective the date the Employer was to begin operations. The majority also noted that at no point during the parties' negotiations or these proceedings was there ever evidence of a loss of majority support for the Union or evidence that the negotiations were anything other than bona fide, arm's-length dealings between the parties.

Chairman Battista, dissenting in part, contended that when the Employer began negotiating with the Union, it was not clear that the Union would have majority status. In his view, until the new contract terms were set, and the predecessor employees accepted employment under those terms, it was not perfectly clear that the Union would remain the majority representative. Accordingly, he would find that the Employer was not a "perfectly clear" successor and that the Employer violated Section 8(a)(2) of the Act by prematurely recognizing the Union.

### 2. Dairyland USA Corporation, 347 NLRB No. 30

The Board (Battista and Schaumber; Liebman, concurring) reversed the ALJ and found that the Employer violated Section 8(a)(2) of the Act by recognizing the Union as the employees' collective-bargaining representative at a time when the Union did not have the support of an uncoerced majority of employees.

The Employer, a wholesale food distributor, employed approximately 150 employees as warehousemen and drivers at its New York facility. On January 23, 2003, the Employer and the Union signed a neutrality agreement that allowed the Union to

come to the facility to meet with the Employer's employees. On January 27, Union representatives went to the facility and were given space in the dispatch office to meet with employees and solicit authorization cards. The warehouse supervisor told 18 employees that they had to go to the dispatch office to meet with the Union "to sign" a card. The Employer's operations manager went in and out of the card-signing meetings, told one driver "[I]f you don't sign the card, you won't be working here," and told another driver that the Union was "there for us" and would "supply medical benefits." On January 31, pursuant to the neutrality agreement, an arbitrator conducted a card check. He found that the Union had received 111 signed cards out of a proposed unit of 150, and he certified the Union as the collective-bargaining representative of the unit employees. The Employer and Union signed a collective-bargaining agreement the next day. In May, several days after an employee raised a complaint about timecards during a union meeting, the Employer told that employee that "he's hearing things about me that he's not liking and that I should put a stop to it." In June, several employees met away from the facility to discuss representation by a different labor organization. Two days later, the Employer's vice president told an employee that he knew the employee was there and if that labor organization comes into the company, "we're going to cut 30 routes."

The Board found that the Employer's conduct demonstrated a pattern of unlawful assistance to the Union sufficient to taint the Union's majority support. The Employer's conduct on January 27 was itself a substantial indication of a pattern of unlawful assistance to taint the Union's showing of majority support, the Board found, and its subsequent coercive behavior demonstrates that the events of January 27 were part of a larger course of conduct. The Employer continued to demonstrate unlawful support for the Union by additional threats, unlawful interrogation, surveillance, and creating the impression of surveillance. The Board concluded that the totality of circumstances establishes that the Employer engaged in a pattern of unlawful assistance to the Union over a period of several months.

In her concurring opinion, Member Liebman agreed that Board precedent dictates the results in the case. However, she continued:

I write separately to point out that the Board's approach in this area—which has never been carefully explained—seems to be at odds with its approach to analogous legal issues. In the context of bargaining orders issued to remedy employer unfair labor practices during union-organizing campaigns, the Board requires a union to demonstrate an actual card majority. And in the election context, the Board requires specific proof that objectionable conduct potentially affected enough employees to change the result of the election. But where, as here, the issue is employer conduct that aids a union, no analogous showing is demanded. At some point, the Board should reconcile its precedents.

The majority rejected Member Liebman's contention that its analysis was at odds with the Board's treatment of Gissel bargaining orders and election objections. It

pointed out that in the Gissel context, it is not sufficient to infer that a majority of employees would have designated or selected the union if there had been no unlawful conduct because Sections 8(a)(5) and 9(a) explicitly provide that the duty to bargain does not exist unless a majority of employees have designated or selected the union. In the instant case, the majority said, there is no statutory impediment to the Board's drawing a reasonable inference that unfair labor practices have tainted a union's card majority. Objections cases are also different from the instant case, the majority explained. In objections cases, the issue is not whether the cards are tainted, but whether, notwithstanding the protections afforded by a secret-ballot election, the objectionable conduct so interfered with the laboratory conditions as to prevent the employees' free choice in the election. The instant case involves authorization cards and a pattern of unlawful conduct in obtaining those cards. To find Section 9(a) status, "the Board must be satisfied that the cards are valid—i.e., that a majority has designated or selected the union," the majority explained.

3. Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, 346 NLRB No. 34

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Union violated Section 8(a) (2) of the Act by requiring its clerical employees to become and remain members of the Union as a condition of employment.

The majority noted that in Retail Store Employees Local 428, 163 NLRB 431 (1967), the Board clarified the circumstances in which a union may require its employees to become and remain members of the union as a condition of employment. In that case, the Board observed that:

A union-employer, just as any other employer, may impose on its employees requirements reasonably related to the proper performance of their jobs. . . . It is clearly proper for [a union] to be concerned about not hiring employees who do not adequately understand or agree with [its] general goals as well as its specific methods of operation and ways of achieving its goals to the extent such understanding is necessary for *the performance of their duties*. [Emphasis added.]

According to the majority, this test explains that membership can be required of employees if an understanding of the union's goals is "necessary for the performance of their duties." After reviewing the job duties of the clerical employees, Chairman Battista and Member Schaumber concluded that union membership is not necessary for the performance of the clerical functions here. The clericals have no responsibility for explaining to members or others the benefits of membership or how the union functions. The clericals perform only two isolated and routine tasks that even bring them into contact with members: responding to members' inquiries regarding dues arrearage and acting as receptionist. There is no evidence that in performing these functions, the clerical employees have ever been called on to explain how the union functions or the desirability of unionization. The majority noted that the record shows only that the clericals perform the perfunctory task of accessing the Union's database and reporting to members the extent of their arrearages. The majority also found that even if the test is

simply whether membership is “reasonably related” to the proper performance of their jobs, the requirement of union membership is not reasonably related to performance of the clerical functions here.

Member Liebman, dissenting in part, would read Retail Store Employees to establish the “reasonably related” standard as the appropriate test for determining the lawfulness of the union-membership requirement. She concluded that: “[T]he judge’s key finding—that ‘the clericals who perform duties dealing with membership issues and collective bargaining are performing the type of work which permits [the Union] to require them to be members and thus sisters or brothers to the members it represents’—is consistent with record evidence and the principles of Retail Store Employees.”

### **3. Section 8(a)(3)**

#### **a. Inherently Destructive**

Roosevelt Memorial Medical Center, 348 NLRB No. 64

The Board (Battista and Schaumber; Liebman, dissenting in part) reversed the ALJ and found that the Employer did not violate Section 8(a)(3) of the Act when it reduced the work hours of intended strikers after the Union cancelled an impending strike.

The Employer operates a nursing home, hospital, and rural health clinic. When no agreement was reached after 10 months of bargaining for initial collective-bargaining agreements, the Union notified the Employer of its intent to strike a little more than 1 month later. After questioning unit employees about whether they intend to participate in the strike, the Employer arranged with an employment agency to supply strike replacements and drew up a work schedule for the period of the anticipated strike. Four days before the strike was scheduled to begin, the Union postponed the strike indefinitely while the parties met with a federal mediator. The Employer requested that the Union bargain over how to return the intended strikers to the schedule. The Union did not respond to this request, and the Employer then revised the work schedule. It retained some of the temporary and per diem employees who had been lined up as striker replacements. As a result, six unit employees who planned to strike were assigned fewer hours than they customarily worked before the strike notice.

The ALJ had found that the Employer’s conduct was “inherently destructive” of employee rights because it penalized the would-be strikers for announcing that they would engage in union activity, thereby distinguishing among workers based on their participation in conduct protected by the Act. The majority rejected the ALJ’s “inherently destructive” characterization, finding instead that the scheduled and actual reduction in employees’ hours was at most “comparatively slight.” It explained that only six employees were scheduled for fewer hours than normal, and the reduction was small—from 4.5 to 8 hours. Further, four of the six employees actually worked their full workweek because of other employees’ absences, and a fifth did not request to work

more than she was scheduled during the first 3 days and thereafter became unavailable to work. The remaining employee declined to work in the Alzheimer's unit where she could have increased her hours.

The majority found that the temporary nature of the Employer's actions and the small impact on the affected employees would not create the kind of cleavage among unit members that the Board has found to be "inherently destructive" in other cases. The Employer demonstrated legitimate and substantial business justifications for its conduct, the majority decided, including the fact that it would have to pay for the agency-supplied temporary employees and that it wanted to maintain the good will of per diem employees who had rearranged work schedules and on whom the Employer depended to cover future shifts. Finally, the majority found that the General Counsel failed to demonstrate an antiunion motive for the Employer's actions, noting that the Employer's attempt to confer with the Union and its attempt to be fair in working the would-be strikers back into the schedule clearly demonstrate its lack of antiunion animus.

Unlike her colleagues, Member Liebman would find that the Employer's conduct was inherently destructive. The only employees who were adversely affected were those who had indicated that they would participate in the strike. In these circumstances, the poststrike schedule signaled to all nursing employees that even the potential exercise of Section 7 rights would cost them. The Employer failed to provide a legitimate and substantial business justification for its scheduling, Member Liebman stated, assessing the Employer's various explanations for failing to restore the would-be strikers to their former schedules and finding that "[n]one rings true."

#### **b. Discharge of Strikers**

Universal Truss, Inc., 348 NLRB No. 41

The Board (Battista and Schaumber; Walsh, dissenting in part) found that the Employer did not violate Section 8(a)(3) of the Act when it discharged eight economic strikers for strike misconduct.

Four days into the strike, several strikers and an associate followed a car carrying three nonstriking employees to an offsite parking lot, where the strikers assaulted the employees, and beat one employee so severely that he was knocked unconscious and required overnight hospitalization. The strikers also vandalized the nonstrikers' vehicle, flattening two tires, denting a door, and breaking lights. The next day, other strikers endorsed the previous day's assault, asking employees as they arrived at work if they wanted the same to happen to them. One striker made this threat while aiming and shooting an imaginary gun at employees. During the remainder of the strike, strikers engaged in other misconduct, including throwing rocks at nonstriking employees and threatening to follow workers home and rape female employees and the wives of male workers. After the Union abandoned the strike and instructed employees to return to work, the Employer terminated 28 employees for strike misconduct. The ALJ dismissed

the unfair labor practice allegations regarding 18 of the strikers, but found that 10 of them had been unlawfully discharged.

Chairman Battista and Member Schaumber agreed with the ALJ that the Employer unlawfully discharged two of the strikers. However, they reversed the ALJ as to the other eight strikers. Applying the standard of Clear Pine Mouldings, 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9<sup>th</sup> Cir. 1985), cert. denied 474 U.S. 1105 (1986), the majority found that the Employer had an honest belief that these eight strikers had engaged in conduct that would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act, and that the General Counsel failed to show that the strikers did not in fact engage in the misconduct or that the conduct was not serious enough for the strikers to forfeit the protection of the Act.

The majority observed that it is appropriate to consider all of the circumstances in which the alleged strike misconduct occurred, including other instances of vandalism, threats, and violence occurring during the course of the strike because threats to inflict similar harm in the future are likely to have a greater coercive impact. Here, the majority noted that there were a large number of relevant circumstances, including: the ambush and violent assault and the strikers' endorsement of that beating and threats to repeat it; threats of rape and beatings; following employees home and harassing them while driving; rock throwing; vandalism and other attempts at vandalism; and repeated incidents of sexual harassment. "This pattern of coercive misconduct directed at nonstrikers can, and does, color the subsequent similar threats directed at other employees," they concluded.

Member Walsh, dissenting in part, would find that the Employer unlawfully discharged five of the strikers. In his view, the Employer's belief that one of the strikers had engaged in serious strike misconduct was mistaken, and the alleged acts of the other four strikers did not meet the test for serious strike misconduct established by Clear Pine Mouldings. He asserted that "the majority misapplies the Clear Pine Mouldings standard, ignores the balancing of interests the Board must undertake in strike-misconduct cases, and condones the principle of collective punishment."

### **c. Lockout**

#### Bud Antle, Inc., 347 NLRB No. 9

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Employer did not violate Section 8(a)(3) of the Act when it initially delayed in reinstating formerly locked out employees and when it treated the returning employees as new employees for the purpose of assigning full overtime during their first 4 weeks back on the job. It also found that the Employer did violate Section 8(a)(3) when it further delayed the reinstatement of the formerly locked-out employees.

This case arose at the end of a 14-year lockout, pursuant to an agreement among the Employer, the Charging Party Union, and a second union. The ALJ had found that

the Employer's obligation to reinstate the formerly locked-out employees began upon receipt of their individual acceptances of the Employer's reinstatement offers. The Board, however, decided that the obligation did not mature until approximately 1 month later on the agreed-upon cutoff date for accepting the reinstatement offers. The Board found that the Employer's initial delay in reinstating the formerly locked-out employees was not "inherently destructive" of employees' statutory rights and that it had only a "comparatively slight" impact on them. Thus, the Employer had the burden of showing that the delay had a legitimate and substantial business justification. The Employer met this burden, the Board found, based on its need to determine the identity and the number of returning employees and to dovetail their seniority with the seniority of the replacement workers. The Board noted that there was a potential to have more than 220 employees seeking to fill between 90 and 100 jobs. By waiting until the agreed-upon cutoff date for accepting the reinstatement offers, the Employer did not have to bump employees who might not need to be bumped and/or bump employees who ultimately would be needed if formerly locked-out employees failed to return as they said they would. The Board also accepted as a legitimate and substantial business justification the Employer's desire to train all the returning employees together.

The Board agreed with the ALJ that the Employer did not have a legitimate and substantial business justification in further delaying the reinstatement of the formerly locked-out employees from the date the Employer had all of the acceptances of its reinstatement offers until the date, 1 month later that the Employer established as the return-to-work date. The Board found that the Employer's desire to have the formerly locked-out employees return on a Monday was nothing more than an administrative convenience that did not rise to the level of a legitimate and substantial business justification. It also rejected the Employer's claim that the start date had to be delayed so a certain manager could be present for training.

Chairman Battista and Member Schaumber, reversing the ALJ, also found that the Employer did not violate Section 8(a)(3) of the Act when it treated the returning employees as new employees during their first 4 weeks back on the job for purposes of assigning overtime. They found that the Employer's decision had only a "comparatively slight" impact on employee rights and that the Employer had a substantial and legitimate business justification for its decision given the many years that the returning employees had not worked for the Employer and the operational changes that had taken place during those years. The majority found that it was reasonable for the Employer to require these employees to be retrained and not take on full overtime until that training period had been completed.

Member Liebman, dissenting in part, found that the Employer unlawfully discriminated against the formerly locked-out employees when it limited their overtime opportunities. She explained that the returning employees were analogous to returning economic strikers, who must be treated as qualified to perform their job, unless their inability to perform is actually demonstrated (and not merely assumed). She also found that the Employer's business justification for treating the returning employees as new employees in terms of overtime assignments "fails to withstand scrutiny."

#### **d. Wright Line**

##### **1. Amcast Automotive of Indiana, Inc., 348 NLRB No. 47**

The Board (Battista and Schaumber, Walsh, dissenting in part) reversed the ALJ's finding that the Employer violated Section 8(a)(3) of the Act when it discharged an employee who had spent approximately 29 minutes during work time searching the Internet for information about a company that was rumored to be purchasing the Employer's facility.

The majority held that the Employer violated Section 8(a)(1) of the Act when it told the employee that union activity played a role in his discharge. However, the majority also found that the General Counsel failed to satisfy his Wright Line burden of establishing that the employee's discharge was motivated by protected activity. The employee's activity of surfing the Internet for information on the potential purchaser may have been concerted, the majority decided, but it was not protected. The most that can be said is that the employee was acting on a rumor that a future sale might occur and that if and when it actually occurred, it might affect the value of the employee's stock and also could affect the employees' terms and conditions of employment. These "possibilities were simply too attenuated" to bring the employee's Internet activity within the scope of Section 7, the majority concluded. It also found that the General Counsel failed to establish that the employee's union activity was a motivating factor in his discharge. In particular, the majority found that the gap in time between his 2002 pronunion activity and his 2004 discharge was too great to support such a connection. It also noted that there was little evidence that the employee engaged in union activity after 2002, with the record showing, at most, that he occasionally wore a union T-shirt to work in 2003 and 2004. The majority also rejected the ALJ's assessment that the Employer acted on a mistaken belief that the employee was still involved in union activity in 2004.

Dissenting in part, Member Walsh agreed with the ALJ that the Employer unlawfully discharged the employee because of his actual or suspected union and other protected activity when he searched the Internet for information about the Employer's potential purchaser. In his view, the judge properly found that the Employer believed that the employee was still involved in union activity and that the employee was engaged in other protected activity when he searched the Internet. Member Walsh found unconvincing the majority's conclusion that the employees' concerns over the potential sale were too attenuated from their interest as employees. He noted that the sale was more than a remote possibility—the parties were engaged in due diligence negotiations. As a broader matter, Member Walsh found that the majority's conclusion was at odds with the Board's responsibility to adapt the Act to changing patterns of industrial life. In his view, the employee's union and other protected activity was at least a motivating factor in his discharge, and the Employer failed to establish that it would have discharged him in the absence of his protected activities.

##### **2. Caribe Ford, 348 NLRB No. 74**

The Board (Battista and Kirsanow; Liebman, dissenting in part) reversed the ALJ and held that the Respondent did not violate Section 8(a)(3) of the Act when it discharged an employee who was a leading union supporter. The majority found that the General Counsel failed to meet his Wright Line burden of proving that the Employer had knowledge of union activity at the time of the employee's discharge. The majority refused to infer knowledge of union activity from animus toward union activity in the absence of evidence that the Employer here was even generally aware of union activity among its employees at the time it discharged the employee. The majority pointed out that the conduct allegedly showing animus began in March 1999, while the employee was discharged in January 1999. The majority also refused to infer knowledge from the purported openness of the employee's union activities, finding that the employee was discreet about those activities. Neither could knowledge be inferred from the timing of the discharge, the majority said, in the absence of the required elements of employer knowledge of union activity and demonstrated animus at the time of the alleged discriminatory action.

Member Liebman, dissenting on this issue, would find that the Employer violated Section 8(a)(3) of the Act when it discharged the prounion employee. Agreeing with the ALJ, she would infer that the Employer knew that the discharged employee was a leading union supporter when it discharged him a few days after he engaged in open union activity. She noted that the employee contacted the Union and conducted a meeting about the Union in an open public area in the Employer's facility. She also found that the inference of knowledge was supported by the timing of the discharge, the pretextual reason given for the discharge, and the Employer's animus. In her view, there was good reason to infer animus with respect to the discharge given the subsequent unfair labor practices committed by the Employer and the shifting explanations it gave for the employee's discharge. Finally, Member Liebman agreed with the ALJ that the Employer failed to prove that it would have discharged the employee even absent his union activity.

### 3. PHC-Elko, Inc., d/b/a Elko General Hospital, 347 NLRB No. 123

The Board (Battista and Schaumber; Liebman, dissenting), in a Section 8(a)(1) case applying Wright Line, found that the Employer did not violate the Act when it discharged an employee who insubordinately attempted to halt the Employer's meeting and also called for the Employer's ouster. The Employer operates an acute-care hospital. It also operates the kitchen for the county jail pursuant to a terminable-at-will contract with the county. The discharged employee prepared meals at the jail kitchen. After the Union commenced an organizing campaign at the hospital and the jail, the Employer held a series of employee meetings to encourage a vote against union representation. At one of these meetings, the Employer's chief operating officer told the employees that they should serve as "ambassadors and marketers" for the hospital in the community, and that this effort would lead not only to improved economic conditions for the hospital but also to improved pay and working conditions for all staff. The employee stated that she would rather resign than say anything positive about the hospital and related her husband's negative experience as a hospital patient. Later in the meeting, the employee

announced that she did not want to work with the Employer, but “wanted to be county.” When the Employer’s chief financial officer started a presentation, the employee stood up and said: “Come on girls. . . we’ve got to go cook the food for the prisoners.” She defied the Employer’s directive to sit down.

Finding that this was a “mixed-motive case,” the majority assumed that the General Counsel met his burden of proof by showing that the Employer discharged the employee for engaging in protected concerted activity. The majority then found that the Employer established that it would have discharged her in any event for her unprotected activity in insubordinately attempting to call a halt to the Employer’s mandatory meeting in direct defiance of the Employer’s officials and in calling for the ouster of the Employer at the jail. An employer need not tolerate the disloyal actions of an employee who wishes to oust her own employer from its position, the majority stated.

In dissent, Member Liebman argued that the majority has failed to hold the Employer to its Wright Line burden of proving that it would have discharged the employee even in the absence of her protected activity. In her view, the majority has assumed that the Employer met its defense burden, based simply on the finding that there was unprotected conduct for which the Respondent *could* have discharged the employee. However, “[t]his approach is clearly at odds with Wright Line.” She continued that the Employer never sought to prove that it would have fired the employee solely for the conduct that the majority finds unprotected, presumably because the Employer has never conceded that this is a mixed-motive case. She also noted that the ALJ found that the employee was terminated for all of the reasons listed in a termination letter—including the protected conduct of voicing opposition to the demand that employees serve as ambassadors and spokespersons for the Employer. This finding, she pointed out, essentially negates a Wright Line defense that the Employer would have fired the employee even absent her protected conduct.

#### **e. FES**

##### **1. Planned Building Services, Inc., 347 NLRB No. 64**

The full Board (Battista, Liebman, Schaumber, Kirsanow, and Walsh) unanimously clarified that the standard set forth in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), rather than the framework of FES, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), is to be applied in cases where an employer allegedly refuses to hire its predecessor’s employees to avoid an obligation to bargain with the union that represents those workers.

The Board found that a refusal to hire in a successorship context is analogous to a discriminatory discharge situation, where FES has no application. It explained that in successorship cases, the predecessor’s employees presumptively meet the successor’s qualifications for hire. Therefore, it serves no purpose to require the General Counsel to demonstrate, as required by FES, that the employees have relevant experience or training for essentially the same jobs in the successor’s work force that they performed for the

predecessor. Second, the Board explained, because a successor needs to fill vacant positions in starting its business, it is of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire. Thus, the Board concluded, these additional elements present in FES are not appropriately part of the General Counsel's burden in establishing refusal-to-hire allegations in a successorship setting. Instead, the Board held that the proper standard is the traditional standard set forth in Wright Line for determining whether an employer committed an unfair labor practice by taking an action against an employee based on antiunion animus or the employee's protected union activity.

The Board also refined the remedy for this type of case to strike a better balance between two principles that guide the Board's remedial discretion: placing the burden of uncertainty on the wrongdoer and avoiding a punitive remedy. The Board explained that to remedy a Section 8(a)(3) refusal to hire, the successor employer must offer reinstatement to the discriminatees and make them whole. To remedy a Section 8(a)(5) unlawful implementation of initial terms and conditions of employment, the successor must, at the union's request, rescind the unilateral changes made by the successor and restore the previous terms; recognize and bargain with the union; and make the employees whole. The Board noted that a substantial issue exists as to how long the backpay should run at the predecessor's rate. It is difficult to know what would have occurred if the successor had fulfilled its duty to bargain instead of unilaterally imposing terms and conditions of employment. In doubt are both what terms would have been reached and when such terms would have been established. Accordingly, the Board refined its traditional make-whole relief to allow the Employer, in a compliance proceeding, to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of that agreement, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. If the Employer carries its burden of proof on these points, the Employer's make-whole obligation may be adjusted accordingly, the Board said.

## 2. Tambe Electric, Inc., 346 NLRB No. 39

The Board (Battista, Liebman, and Schaumber) reversing the ALJ, found that the Respondent did not unlawfully fail to consider or fail to hire union applicants for electrician positions because they were members of the Union. Even assuming arguendo that the General Counsel met his initial burden under FES, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002) of establishing that antiunion animus contributed to the decisions not to consider or hire the union applicants, the Board found that the Respondent met its burden of showing that it would not have considered or hired the applicants in accordance with its lawful hiring policies and preferences even absent their union affiliation.

The Respondent had a preference for hiring entry-level applicants who were eligible to participate in the state-certified apprenticeship program and therefore eligible

to work for apprentice level wages on prevailing wage projects. The Board found that this was a legitimate, neutral hiring policy. It also found that when the Respondent hired some experienced applicants, it maintained a preference for those who had been former employees or those who had been recommended by current employees, family members, or business acquaintances. Such referral policies have been found to be legitimate employment practices as well, the Board pointed out.

The Respondent met its burden of showing that its decisions not to consider or hire the union applicants were made in accordance with these lawful hiring policies and preferences, the Board found. It explained that all of the union applicants were journeymen electricians with at least several years of experience and thus were ineligible for enrollment in the Respondent's state-certified apprenticeship program. Additionally, none of the union applicants provided references from any of the Respondent's personal or professional acquaintances, and none had worked for the Respondent before. Looking at the refusal to hire allegations, the Board noted that during the relevant period, the vast majority of employees hired were entry-level employees who satisfied the Respondent's valid preference for hiring entry-level workers. Although the Respondent did hire five journeymen employees, each of these employees met the Respondent's legitimate preference for former employees or those recommended by current employees, family members, or business acquaintance. By contrast, the Board explained, the union applicants were journeymen with at least several years of experience or they failed to meet the Respondent's other hiring criteria.

#### **f. Strikers**

##### Sutter Health Center d/b/a Sutter Roseville Medical Center, 348 NLRB No. 29

The Board (Battista and Liebman; Schaumber, concurring) found that the Employer unlawfully delayed the reinstatement of strikers after a 1-day economic strike, and by closing its cafeteria for 5 days and thereby delaying reinstatement of the strikers employed there. The Board found that the Employer failed to establish substantial and legitimate business justifications for its actions, and rejected the Employer's argument that there was "no principled reason" for not extending to the economic strike situation the 5-day grace period for reinstating unfair labor practice strikers, as provided in Drug Package, 228 NLRB 108 (1977). The Board noted that in the usual unfair labor practice strike situation, it may be necessary to discharge replacement workers before strikers return to work, and that 5 days is a reasonable amount of time to do the necessary tasks to accomplish this. Here, by contrast, the Employer needed only to return the replacements to their prestrike regular positions, and had ample time to do this, given that it received notice of the 1-day strike 2 weeks before the strike began. In addition, the Union had previously engaged in 1-day strikes, and the strikers had returned to work as announced in the strike notice. Thus, the prestrike period was available to the Employer to make the necessary arrangements for a smooth transition upon the strikers' return, and the history of such strikes between the parties lessened the possibility that the Employer would be faced with uncertainties as to the strikers' return to work.

Member Schaumber, concurring, would apply the Drug Package 5-day grace period in this case and in other cases involving economic strikes with temporary replacements. In his view, the reasons set out by the majority for not applying the grace period in this case are not determinative, since, as noted in Drug Package, a primary purpose for setting a specific grace period is to avoid compelling the parties in each case to litigate how long a reinstatement period would be appropriate. In the absence of a Board majority to extend the Drug Package rule, however, he concurs with his colleagues in finding the Sec. 8(a)(3) violation.

#### **4. Section 8(a)(5)**

##### **a. Withdrawal of Recognition**

###### **1. HQM of Bayside, LLC, 348 NLRB No. 42**

The Board (Liebman, Schaumber, and Walsh) found that the Employer violated Section 8(a)(5) of the Act when it withdrew recognition from the Union as the employees' collective-bargaining representative.

In September 2002, the Employer's employees circulated a disaffection petition stating that they no longer wanted to be represented by the Union. By letter dated October 30, the Employer notified the Union that it would withdraw recognition from the Union, effective December 1 when the collective-bargaining agreement between the parties expired. The letter stated that the disaffection petition was signed by "a clear majority" of the employees. However, in early November, another petition was circulated. It stated that the employees did not wish to withdraw recognition from the Union; this petition was presented to the Board's regional office on November 15. In a November 26 letter, the Union notified the Employer that it had submitted to the Board a petition signed by a majority of bargaining-unit employees who stated that they desired to keep the Union as their bargaining representative. The Employer withdrew recognition from the Union on December 1. On that date, at least 58 employees were in the unit. The disaffection petition was signed by 34 employees. Four employees who signed the disaffection petition were not employed on the date that the Employer withdrew recognition. In addition to one of these four former employees, 12 employees signed both petitions.

Applying the standard set out in Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), under which an employer must show that a union had actually lost its majority status when the employer withdrew recognition, the Board found that the evidence that the Employer relied on in withdrawing recognition did not demonstrate the Union's actual loss of majority support. The Employer was not entitled to rely on the signatures of employees who had signed both the disaffection and the union petitions, the Board said. It explained that on December 1, subsequent signatures on the Union's petition had effectively nullified 12 of the 35 signatures on the disaffection petition. Moreover, the Board noted, the Union had informed the Employer prior to the withdrawal of recognition that it was in possession of evidence of continued majority

support. Disregarding the crossover signatures and the signatures of the employees who were no longer employed, the Employer has shown that, as of the date of the withdrawal of recognition, 19 employees no longer wished to be represented by the Union. This, the Board found, is insufficient to meet the Employer's burden of showing an actual loss of the Union's majority status.

In a footnote, Member Schaumber noted that he did not participate in Levitz, and he expressed no view as to whether it was correctly decided.

2. Garden Ridge Management, Inc., 347 NLRB No. 13

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Employer violated Section 8(a)(5) of the Act by refusing to meet at reasonable times with the Union, but that the Employer did not engage in surface bargaining or unlawfully withdraw recognition from the Union.

The parties began negotiations for a first collective-bargaining agreement on May 15, 2002. They negotiated on 20 occasions over 11 months and reached tentative agreement on 28 articles. During negotiations, the Employer refused without explanation approximately eight requests from the Union that they meet more frequently. On April 25, 2003, the Employer withdrew recognition based on an employee petition indicating that a majority of the unit employees no longer wanted the Union to represent them.

In dismissing the surface-bargaining allegation, Chairman Battista and Member Schaumber found that the General Counsel failed to prove that the Respondent did not intend to reach agreement with the Union. The Employer's proposal seeking the Union's agreement to refrain from organizing certain non-bargaining-unit employees was not unlawful, the majority found, and thus did not evidence an intent not to reach agreement. The majority also found no intent to avoid reaching agreement from the Employer's conduct in withdrawing a broader management-rights proposal and in resubmitting more specific ones or from the Employer's failure to meet more frequently. Finally, the majority failed to find bad-faith bargaining based on statements by two of the Employer's managers. One statement that "there's all kinds of things that we could do, and . . . the bargaining would go on and the union is not going to get anything that we don't want to give them" indicated nothing more than the fact that the law does not require a party to make concessions or to agree to particular proposals. Although the majority found more troublesome the other manager's statement that "we would basically tie the union up at the bargaining table and we would not come to an agreement," it found that it was insufficient to satisfy the General Counsel's burden of proof when considered in light of all of the evidence regarding the negotiations.

In view of its finding that the Employer did not engage in surface bargaining, the majority found that the Employer did not violate the Act when it withdrew recognition from the Union. Applying Master Slack Corp., 271 NLRB 78 (1984), the Board found that the 5-month period between the Employer's last refusal to hold additional bargaining sessions and the time the disaffection petition was presented to it weighs against finding

that the unfair labor practice caused employee sentiment against the Union. It also found that the nature of the violation did not support a finding of taint, and that there was no showing that the scheduling disputes had a tendency to cause employee disaffection toward the Union or had an effect on employee morale, organizational activity, or membership in the Union.

Member Liebman, dissenting in part, would find that the Employer's unlawful refusal to meet with the Union at reasonable times was enough, by itself, to taint the Employer's withdrawal of recognition. She would also find that the Employer engaged in surface bargaining, relying on the statements by the Employer's managers, as well as a remark by the Employer's chief negotiator that "he enjoyed taking time off between meetings to contemplate what was done during the meeting," and on the Employer's withdrawal and resubmission of proposals included in the management-rights provision. She also found that no agreement was reached on significant issues, such as wages and health care, and that the parties engaged in few, if any substantive discussions with regard to these issues. In these circumstances, she would find that the number of meetings and the list of proposals upon which agreement had been reached were not enough to prevent a finding of surface bargaining.

### 3. Goya Foods of Florida, 347 NLRB No. 103

The Board (Battista, Liebman, and Schaumber) found that the Employer violated Section 8(a)(5) of the Act when it withdrew recognition from the Union in both its warehouse and sales units. The Employer relied on disaffection petitions in withdrawing recognition; in the warehouse unit, 26 of 38 employees had signed the disaffection petition, and in the sales unit, 44 of 62 employees had signed the petition.

Applying Master Slack Corp., 271 NLRB 78 (1984), the Board found that the Employer's substantial and continuing unfair labor practices tainted the disaffection petitions and thus the petitions did not provide a basis for a lawful withdrawal of recognition. The Employer's unfair labor practices had a strong temporal nexus with both employee petitions, the Board found. It noted, among other things, that in July 1999, the Employer unlawfully discharged three employees in the warehouse unit and that it unlawfully suspended and began to underemploy a sales unit employee. The employees in the sales unit began circulating the disaffection petition in late August, and the warehouse unit disaffection petition began circulating in late December. Throughout the year, and concurrent with the circulation of both petitions, the Employer unilaterally and unlawfully assigned and reassigned salesmen's stores and changed drivers' routes. It also continued throughout the year to refuse to recognize and deal with union-designated employee representatives. The Board also pointed out that the Employer's discharge of three active union adherents and its suspension and underemployment of a fourth were hallmark violations that were highly coercive and likely to remain in the employees' memories for a long time. In addition, the Employer's unilateral changes in routes, assignments, radio phone policy, and emergency leave policy, its increased use of temporary drivers, and its refusal to recognize union-designated representatives are the types of violations likely to have a lasting and negative impact on employees' support for

the Union. Finally, the Board found that the Employer's unfair labor practices resulted in the Union's loss of support in both units.

4. Parkwood Developmental Center, Inc., 347 NLRB No. 95

The Board (Battista, Liebman, and Kirsanow) found that the Employer violated Section 8(a)(5) of the Act when it withdrew recognition from the Union. On December 2, 2002, the Employer received a petition from a majority of bargaining-unit employees stating that they no longer wished to be represented by the Union. On that same date, the Employer advised the Union that it had received objective evidence from a majority of employees that they no longer wished to be represented by the Union and that the Employer would withdraw recognition on the expiration of the existing collective-bargaining agreement on March 8, 2003. Sometime later, the Union gathered signatures on a petition authorizing it to represent the employees and revoking, rescinding, and canceling any previous contrary statements. The Union also collected authorization cards and delivered its evidence of majority support to the Employer the day before the expiration of the collective-bargaining agreement. That same day, the Employer indicated that it would not continue to recognize the Union.

Applying Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), under which an employer must show that the union had actually lost its majority status when the employer withdrew recognition, the Board found that the operative date for the withdrawal of recognition was not when the Employer announced that it would withdraw recognition, but rather the later date on which the contract expired. By that date, the Union had demonstrated to the Employer that it enjoyed majority support. At most, then, the Board found, the Employer had conflicting evidence concerning the employees' support for the Union. Although such evidence might have supported the filing of an RM election petition with the Board, it was not sufficient to support a withdrawal of recognition. The Board rejected the Employer's claim that it was seeking to "obliterate" or "render moot" the ability of an employer to engage in an anticipatory withdrawal of recognition. An employer can still follow through on its anticipatory withdrawal of recognition, the Board explained, if it can prove actual loss of majority support on the date that recognition is subsequently withdrawn.

In a footnote, Chairman Battista and Member Kirsanow noted that they did not participate in Levitz, and they expressed no view as to whether it was correctly decided.

**b. Unilateral Changes**

1. E.I. du Pont de Nemours, 346 NLRB No. 55

The Board (Battista and Schaumber; Liebman, dissenting in part) found, contrary to the ALJ, that the Employer's implementation of its healthcare proposal did not violate the Act since the parties were at impasse over this proposal, and that this case was distinguishable from McClatchy Newspapers, 321 NLRB 1386 (1996), enfd. 131 F.3d

1026 (D.C. Cir. 1997), and KSM Industries, 336 NLRB 133 (2001). The proposal that the Employer implemented was a narrow, specific clause that, by its terms, set limits on the Employer's discretion to act, by phasing in a specific change in the cost allocation structure of the health care plan. The clause did not accord the Employer unfettered discretion to change the cost share percentage. In contrast, the provisions in McClatchy and KSM were broad, discretionary clauses which gave the employers sole discretion over future merit pay increases and health benefits, respectively, and the employers subsequently sought to implement changes in those areas without bargaining. The instant case involves the implementation of a fixed, narrow healthcare term over which the parties had bargained to impasse. Although, as in McClatchy and KSM, the Employer's healthcare plan also contained a broad provision that, on its face, permitted the Employer to make changes in the plan, this provision predated current negotiations and had always been included in the plan, and thus was not a new proposal that the Employer was offering.

Member Liebman, dissenting in part, would find that the provision implemented by the Employer was not "narrow and specific," but rather gave the Employer broad authority to resolve various issues involved in cost sharing, and thus was a McClatchy-type proposal. She further noted that under Courier-Journal, 342 NLRB No. 113 (2004), the Board indicated that if a union should object to impasse about an employer's retention of discretion over allocating the cost of premium increases, the employer could not implement its proposal, because it vested complete discretion in the employer. Here, the Union objected to impasse, so even apart from questions concerning past practice, the Employer could not implement its proposal for being allowed to make discretionary changes.

## 2. North American Pipe Corporation, 347 NLRB No. 78

The Board (Battista and Schaumber; Walsh, dissenting) found that the Employer's unilateral one-time grant of a companywide stock award to employees in connection with an initial public stock offering constituted a gift, and thus was not a mandatory subject of bargaining. Applying the gift analysis in Benchmark Industries, 270 NLRB 22 (1984), affd. 760 F.2d 267 (5<sup>th</sup> Cir. 1985), the Board found that the award was not tied to employee remuneration, the size of the award was established without regard to any employment-related factors, all employees received the same amount of stock, and the award was related to a one-time event with no prospect of repetition. The Board stated that the gift analysis is not limited to items of token value, but applies regardless of the amount involved. The fact that only employees with 6 months of service received the award did not mean that the award was tied to seniority; to establish such a link, the seniority of employees must either be proportionately related to the amount received, or the stock must be given in recognition of an employee's attaining a specific level of seniority. Further, while vesting of the award was conditioned upon continued employment for 6 months, the award was not dependent on the quality or quantity of work during that period or any period. Also, while the Employer stated that the award was made in recognition of the employees' significant contributions and in

appreciation for their efforts, these statements do not relate the award to any discrete and specific work performed by employees.

Member Walsh, dissenting, disagreed that the stock award was a “gift.” He noted that the award, which was worth approximately \$1,450, was tied to “employment-related factors,” i.e., an employee had to have at least 6 months of continuous service, and then for the award to vest an employee had to remain continuously employed for an additional 6 months. The requirement that the employee remain employed for an additional 6 months is inconsistent with the understanding of a “gift” being given “with no strings attached,” and it indicates that the stock award was a form of deferred compensation. The stock award was also conditioned on the nature of an employee’s service, since it was granted only to regular, full-time employees. Further, although the substantial economic value of the award is not determinative, it is relevant, and supports a finding that the award constituted compensation.

### 3. The Neighborhood House Association, 347 NLRB No. 52

The Board (Battista and Schaumber; Walsh, dissenting) found, contrary to the ALJ, that the Employer’s following conduct was lawful: (1) withholding a regularly scheduled cost-of-living increase (COLA) from unit employees, and (2) proposing a 2.2% COLA increase and then conditioning implementation on the Union’s waiving its right to bargain further over the COLA amount. Applying Stone Container, 313 NLRB 336 (1993), Alltel Kentucky, 326 NLRB 1350 (1998), and TXU Electric, 343 NLRB No. 132 (2004), the Board stated that because the COLA constituted a discrete event that was scheduled to recur during negotiations for an initial contract, the Employer was free to implement its proposal as long as it provided the Union with reasonable advance notice and an opportunity to bargain, which it did. In response to the dissent’s argument that the instant case was distinguishable from the above cases because here the Union expressly protested the Employer’s proposal and the Employer’s position was not prompted by economic considerations, the majority stated that these factual distinctions were not the basis for the Board’s holding in TXU Electric. The majority further found that the Employer bargained in good faith over the COLA increase and did not adopt a “take-it-or-leave-it” position, thus distinguishing this case from Hydrotherm, 302 NLRB 990 (1991).

Member Walsh, dissenting, would find that Hydrotherm was directly on point, noting that the Employer could have lawfully implemented the scheduled 2.2% COLA while continuing to negotiate about the Union’s proposal for an additional .8%, and thus the Employer unlawfully withheld an established benefit as a bargaining tactic. Member Walsh would also find that, as in Lee’s Summit Hospital, 338 NLRB 841 (2003), the annual COLA had become an established condition of employment that the Employer was not free to change unilaterally. Member Walsh stated that he would find that TXU was wrongly decided, and further that, in any event, TXU, Stone Container, and Alltel Kentucky were inapposite to the instant case.

### 4. St. Mary’s Hospital of Blue Springs, 346 NLRB No. 76

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Employer's implementation of changes in health coverage for unit employees was permissible even though the parties had not reached an overall impasse, under Stone Container, 313 NLRB 336 (1993), and its progeny. The Employer gave the Union timely notice of the prospective changes and an opportunity to bargain over them, and also remained willing to bargain over the changes after implementation. The Employer established that the changes were consistent with a past practice, established when the employees were unrepresented, under which the Employer implemented changes in the terms of the health plan coverage on an annual basis. The parties were negotiating for a first contract, but had not reached agreement on health coverage by the time the changes at issue would normally have been implemented. Moreover, if the Employer had not taken any action prior to the implementation date, the employees would have suffered a disruption in coverage.

### **c. Impasse**

#### **1. Richmond Electrical Services, Inc., 348 NLRB No. 62**

The Board (Battista and Schaumber; Liebman, dissenting), reversing the ALJ, concluded that the Employer lawfully implemented its final proposal because the parties had reached an impasse in bargaining. The Union conceded that the most-favored-nation clause in its other collective-bargaining agreements effectively precluded it from agreeing with the Employer on a wage that was lower than the one in the National Electrical Contractors Association (NECA) agreement (the Union was a signatory to the NECA agreement, but the Employer was not a NECA member). The Union never proposed a wage lower than the one in the NECA agreement, and the Employer consistently made clear that it would not agree to the NECA wage. The considerable gulf between the parties' wage proposals presented an insurmountable obstacle to an agreement. The parties' course of bargaining demonstrated that an agreement on wages was critically important to an overall agreement, and the impasse over wages led to a complete breakdown in negotiations, with the parties able to make progress only on limited matters. The parties' failure to fully discuss wages for the final 2 years of the 3-year contract term did not demonstrate that the parties failed to exhaust negotiations, because the wage issue would have presented a similar insurmountable obstacle to an agreement for those future years.

Member Liebman, dissenting, stated that the Employer failed to carry its burden of demonstrating that there could be no progress on any aspect of negotiations until the single issue of wages was resolved. Rather, after the parties' last bargaining session, the parties had agreed to meet again to discuss open issues; neither party had presented a "final proposal"; the parties had not begun to discuss the second and third years of the contractual wage rate; the Union never had a chance to respond to the Employer's drug-testing proposal, which the Employer's negotiator termed "the most important issue," and it is possible that Union concessions on this issue could have softened the Employer's stance on wages; and the Employer presented its drug-testing proposal after the parties

had disagreed on the wage issue, with the parties agreeing to meet again to discuss drug-testing, thus indicating that the wage issue did not preclude progress on other important issues. Finally, the Union's concession on the economic issue of unit inclusion of foremen broke any impasse, because it created new and significant matters to discuss regarding the impact of that concession on wage costs.

2. ACF Industries, LLC, 347 NLRB No. 99

The Board (Battista and Schaumber; Liebman, dissenting in part) concluded that the Employer lawfully implemented its final proposal because the parties had reached an impasse in bargaining. The Employer had informed the Union that its economic conditions necessitated major concessions in wages and benefits, and the parties engaged in hard but good-faith bargaining in 12 sessions over a 2-month period. By the time the Employer declared impasse, the parties had engaged in extensive bargaining but still remained far apart on a number of major issues. The Employer had nothing left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals to demonstrate that further progress was possible. Although the Union stated, shortly after the Employer declared impasse, that it had additional proposals, the Union failed to divulge any specifics regarding those proposals, and thus it gave the Employer no reason to conclude that further bargaining would have been fruitful.

The Board also concluded that the Employer lawfully delayed the furnishing of information requested by the Union 2 days after the Employer had declared impasse, finding that the Union's request was purely tactical and was submitted solely for purposes of delay. The Board noted that the Union requested the information after months of extensive bargaining, after the contract's expiration, after the Union's rejection of the Employer's final offer, and after the Employer declared it had nothing left to offer.

Member Liebman, dissenting in part, would not find that impasse had been reached. She noted that the Union had made significant concessions on the three biggest economic issues, and indicated that it would make more. Also, on several occasions after asserting that it had made its "final" offer, the Employer either made further concessions or indicated that it would make them, thus giving the Union good reason to believe that the Employer might make additional concessions. Thus, neither party could reasonably believe that further bargaining would be futile. Further, in response to the Union's assertion that it had additional proposals to make shortly after the Employer declared impasse, the Employer told the Union that new proposals would be futile, and thus the Union cannot be faulted for failing to give specifics regarding those proposals. Finally, regarding the Union's information request, Member Liebman finds that given the lateness of the request, the Employer's failure to provide the requested information did not taint the asserted impasse, but that the Union still had a right to the information on a timely basis.

**d. Gissel**

1. Evergreen America Corp., 348 NLRB No. 12

The Board (Battista, Liebman and Walsh) adopted the ALJ's findings and recommendations and held that the Employer violated Section 8(a)(1) prior to the 2002 election by: (1) coercively threatening employees with plant closure, with loss of jobs and benefits, and with unspecified reprisals because of their union activities; (2) creating the impression that the union activities of employees were under surveillance; (3) instructing employees not to attend union meetings, not to read union literature, and to throw such literature away; (4) coercively interrogating employees about their union activities and about how they intended to vote in the election; and (5) soliciting grievances from employees, impliedly promising to remedy grievances and other employee concerns, and explicitly promising to do so. The Board also adopted the ALJ's findings that the Employer violated Section 8(a)(3) and (1) prior to the election by: (1) granting unprecedented and excessive across-the-board wage increases to unit employees; (2) manipulating its promotion process in order to promote more unit employees than in past years; and (3) granting employees new or improved benefits, some of which were granted after the election.

The Union lost the election by a vote of 61 to 52. The ALJ concluded that the Employer's unfair labor practices interfered with the election and that the election results should be set aside. He further found that the Employer's violations so tainted the work environment that the possibility of assuring a fair rerun election was slight, and that employee sentiment here expressed by authorization cards would be better protected by a bargaining order pursuant to NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Agreeing with the ALJ that a Gissel bargaining order was warranted, the Board set aside the election and dismissed the representation petition.

As a preliminary matter, the Board rejected the Employer's argument that the Union lacked a card majority. Thus, the Board found that the Union possessed signed cards from a majority of the employees (62 in a unit of 115 employees), as of the agreed-upon date for establishing majority status. That prerequisite having been established, the Board went on to consider the propriety of a bargaining order. The Board found, like the ALJ, that the violations committed by the Employer were sufficiently numerous, serious and extensive to warrant a bargaining order under the second category (category II) of cases, which includes "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614.

Of particular significance, the Board found that of the many violations committed by the Employer, three sets were of the "hallmark" variety—violations that are particularly coercive because of their tendency to destroy election conditions, and to persist for longer periods of time than other unfair labor practices. As the Board has explained with respect to two sets of the Employer's hallmark violations—its beneficial grants of wage increases and promotions—they have "a particularly longlasting effect on employees and are difficult to remedy by traditional means not only because of their

significance to the employees, but also because the Board's traditional remedies do not require an employer to withdraw the benefits from the employees." Gerig's Dump Trucking, 320 NLRB 1017, 1018 (1996). Similarly, with respect to the Employer's third set of hallmark violations, viz. threats of plant closure and job loss, the Board has emphasized that they "are among the most flagrant of unfair labor practices and are likely to affect the election conditions negatively for an extended period of time." Cardinal Home Products, 338 NLRB 1004, 1011 (2003).

In addition, the Board relied upon the coercive impact of the Employer's nonhallmark violations, which were both numerous and serious. Thus, at the outset of the organizational effort the Employer reacted swiftly with a torrent of 8(a)(1) violations committed over a 3-month period. They included 13 separate instances of unlawful interrogations by 11 different supervisors; 15 instances of implied promises to remedy solicited grievances; 8 instances of actual promises to do so; 2 instances in which employees were instructed not to attend union meetings, not to read union literature and to throw the literature away; and 1 instance of creating the impression that the union activities of employees were under surveillance. Accompanying these 8(a)(1) violations were a series of eight separate grants of benefits to employees before and after the election, in violation of Section 8(a)(3). Notably, most of these benefits were requested by employees in response to the Employer's unlawful solicitation of grievances, thereby fortifying the impression in the minds of employees that the benefit grants were designed to dissuade them from supporting the Union. Each of the violations discussed above directly affected all or significant portions of the bargaining unit, a factor particularly supportive of a bargaining order. Other violations, although not directed against the entire unit, were committed against many employees. Further, the coercive and lasting effect of the Employer's unlawful conduct was magnified by the fact that many of the violations were committed by high management officials, a point that has consistently been emphasized by the Board as supporting the issuance of a bargaining order.

The Board rejected the Employer's contention that a fair rerun election was possible and that a bargaining order was unnecessary because, on the day before the election, the Employer's president addressed the "paramount employee concern of job security" by issuing a letter of "guarantee" to all employees, stating that there would be "no relocation, no loss of positions and no reprisals" based on the election outcome. The Board found that, even apart from the insufficiency of the letter to cure the earlier threats, the threats, in fact, recurred. Similarly, the Board rejected the Employer's argument that passage of time and the addition of new employees since the foregoing violations weighed against a bargaining order. With respect to employee turnover, the Board observed that the Employer failed to indicate how many, if any, of the new employees were additions to the bargaining unit that was subjected to the Employer's unfair labor practices. Nor did the Employer present any evidence of the number of employees who were in the unit during the commission of the unfair labor practices who had since departed from the unit. As for the passage of time, the Board noted that, while 4 years had elapsed since the commission of the unfair labor practices, and a little of over a year had passed since the ALJ's decision, the parties had only filed exceptions some nine

months earlier. The Board also observed that the United States District Court for the District of New Jersey had issued an injunction pursuant to Section 10(j) of the Act ordering the Employer to recognize and bargain with the Union and that the Board's decision would effectively maintain those obligations.

## 2. California Gas Transport, Inc., 347 NLRB No. 118

The Board (Battista, Liebman, and Walsh) upheld the ALJ's findings that the Employer committed severe and pervasive unfair labor practices affecting its employees in El Paso, Texas, and Nogales, Arizona, in violation of Section 8(a)(3) and (1) and that a remedial bargaining order for the Nogales-based drivers unit was warranted under NLRB v. Gissel Packing Co., 395 U.S. 575 (1960). Consequently, it adopted the ALJ's related findings that the Employer violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union and by making unilateral changes and engaging in direct dealing. The Employer's misconduct here included discharging nine employees at its El Paso facility who had engaged in a protected work stoppage and had informed the Employer that they were going to seek union representation, discharging two employees at its Nogales facility who had engaged in union and other protected concerted activity, and subsequently giving negative employment references about the two employees.

The Employer is based in the United States and its employee drivers are employed primarily in the United States. Their duties required visits to Nogales and Juarez, Mexico where they unloaded propane at distribution facilities operated by Transportadora Silza (Silza). The majority of the drivers' worktime, however, was spent in the United States driving to and from United States-based refineries. Citing Asplundh Tree Expert Co., 336 NLRB 1106 (2001), *enf. denied* 365 F.3d 168 (3d Cir. 2004), the Board found that, under the circumstances, it was appropriate to assert jurisdiction over the Employer's unfair labor practices committed in Mexico. The Board asserted jurisdiction in Asplundh because "the main effect of the [Employer's] actions . . . was not extraterritorial[,] the Board's assertion of jurisdiction would not interfere with Canadian law[, and] a remedial order would have no demonstrable effect." *Id.* at 1107. The Board observed that its decision in Asplundh was consistent with the Supreme Court's post-EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244 (1991), decisions, which no longer applied a strict presumption against extraterritoriality, but rather an "effects" test that presumes that Congress does not intend to regulate extraterritorial conduct, "extraterritorial conduct" defined as conduct that occurs outside of the United States and causes no effects with the United States., i.e., conduct with effects in the United States is not necessarily deemed extraterritorial. The Board found that the conduct of the Employer's supervisors and agents, in the form of 8(a)(1) violations, caused unlawful effects in the United States, i.e., the violations clearly interfered with and restrained the employees' ability to freely exercise their Section 7 rights in the United States. Thus, the Board found that the Employer should not be permitted to escape responsibility for its actions directed at its American work force simply because they occurred a short distance beyond an international border. Accordingly, the Board affirmed the ALJ's finding that the Employer violated Section 8(a)(1) when the Employer's operations manager

threatened employees with unspecified reprisals, the Employer's accounting manager solicited employees to resign and threatened them with discharge, and the Employer's business agent threatened employees with discharge.

Based on the Employer's unfair labor practices, the Board found that this is a Gissel category II case. Having reached this conclusion, the Board determined that the Board's traditional remedies were not sufficient to negate the coercive impact of the Employer's unfair labor practices on the employees' right to freely choose whether to be represented. The Board found that the Employer engaged in a calculated and systematic campaign to frustrate and suppress the Section 7 activities of its employees at both its Nogales and El Paso facilities. The Employer committed numerous violations of the Act, including "hallmark" violations (i.e., discharging two leaders of union organizing drive and then giving them negative employment references and discharging nine other nonunit employees engaged in a protected work stoppage and then explicitly telling employees that the discharges were based on the employees' concerted conduct). The magnitude of those violations was compounded by the fact that the unit at issue (the Nogales drivers) was small (i.e., 19 employees), the Employer commenced its campaign of unfair labor practice immediately after it found out that its employees were engaging in union activities, and high-level officials of the Employer were involved in committing the violations. Indeed, the Board noted that the effectiveness of the Employer's unlawful assault on its employees' Section 7 rights was illustrated by the clear dissipation of union support that resulted. The Union had obtained 16 valid authorization cards from a unit of 19 employees. Less than 2 months later, the Union may have received as few as 4 votes in the election.

The Board rejected the Employer's contention that the violations committed against the El Paso-based drivers did not provide support for a bargaining order in the Nogales unit. Thus, the Board found that the Employer's unfair labor practices directed against nonunit El Paso-based drivers were inextricably linked with its unfair labor practices against the Nogales-based drivers, and therefore provide support for a Gissel bargaining order at Nogales. See Holly Farms Corp., 311 NLRB 273, 282 (1993) (out-of-unit violations appropriately considered for Gissel remedy, where conduct concentrated among units close to each other, employer's labor relations centrally controlled, unlawful conduct overt and highly publicized, and employer brought violations to the attention of unit employees), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *cert. denied* in pertinent part 516 U.S. 963 (1995). The Board also found no merit to the Employer's contention that changed circumstances, i.e., employee turnover, militated against issuing a bargaining order. Accepting, *arguendo*, that changed circumstances were a relevant factor in a Gissel analysis, the Board stated that it would still issue a bargaining order. Thus, it found that the effects of the unlawful conduct were unlikely to be sufficiently dissipated by turnover to ensure a free second election. Although a number of the employees who were employed at the time of the unlawful conduct surrounding the election may have left the Nogales facility, others who remained would recall the serious unfair labor practices committed at both the Nogales and El Paso facilities. In addition, the Employer did not contend that any of its managers,

supervisors, or agents involved in the unlawful conduct ceased to be in its employ. Further, new employees may well be affected by the continuing influence of the Employer's past unfair labor practices. The Board noted it was difficult to believe that the impression made by the Employer's barrage of unlawful conduct could have dissipated in the minds of those employees who were then employed, and that the virulence of the Employer's response to its employees' union and other protected concerted activities would not restrain employee free choice in a second election. Indeed, the Employer offered no evidence that it attempted to mitigate the effects of its unlawful conduct and presented no evidence showing a new willingness to allow its employees to freely exercise their rights.

### 3. Concrete Form Walls, Inc., 346 NLRB No. 80

The Board (Battista and Liebman; Schaumber, dissenting in part) upheld the ALJ's findings that the Employer violated Section 8(a)(3), (4), and (1) by discharging four employees because they voted in the representation election, and violated Section 8(a)(1) and engaged in objectionable conduct by promising employees a wage increase on the eve of the election. The Board agreed with the ALJ that the Employer's challenges to seven voters on the basis that they were undocumented aliens and not statutory employees should be overruled. Contrary to the ALJ, however, the Board found that the Employer did not violate Section 8(a)(1) when a supervisor told unit employees that the Employer had searched one of the supervisor's trucks or by creating the impression of surveillance of its employees' union activities. Based on the Employer's hallmark violations of the Act, Chairman Battista and Member Liebman agreed with the ALJ that a bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), based on 18 signed authorization cards in the 25-employee unit, was warranted to remedy the Employer's unlawful conduct.

In finding that the Employer violated the Act by terminating four Hispanic group I employees who voted in the election, the Board rejected the Employer's argument that undocumented workers are not statutory employees. To the contrary, the Board observed that it has long held that undocumented workers are properly considered "employees" under Section 2(3)'s broad definition. See, e.g., Duke City Lumber Co., 251 NLRB 53 (1980). The Supreme Court has agreed. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984). The Board stated that the Employer's argument that Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), mandates that undocumented workers be excluded from protection of the Act finds support in neither Hoffman's language, the legislative history of the Immigration Reform and Control Act (IRCA), nor other post-Hoffman decisions. Further, the Board agreed with the ALJ that the Employer failed to show that the discharged employees were undocumented workers and that the Employer discharged them for that reason. To support its position that the discharged employees were undocumented workers, the Employer relied on the results of an internet database search showing that the social security numbers did not match the names the Employer entered into the database. The reports were missing critical information—namely, to whom the social security numbers were assigned. At best, the Employer's evidence

showed that the employees provided false social security numbers for some reason, a reason not relied on by the Employer. Furthermore, even if the Employer's evidence was sufficient to show that the four discharged employees were undocumented workers, the Employer's 11th-hour concern with complying with IRCA was insufficient to excuse the termination of only four Hispanic group I employees who voted in the election. Indeed, the Employer was aware that these four employees were potentially undocumented aliens well before they voted in the election. Thus, the Employer was content to violate IRCA and employ workers whom its owner believed were illegal aliens until those workers decided to vote in a Board-conducted election. The Employer then limited its concern with its IRCA obligations to the four Hispanic group I employees who voted in the election, making no attempt to discover whether its other employees were legally permitted to work. Accordingly, the Board found that the Employer's selective compliance with IRCA was a pretext for unlawful discrimination and could not stand as a valid defense. Although they concluded that the Employer's immigration-based defense to its ballot challenges and discriminatory conduct lacked merit, Chairman Battista and Member Liebman did not pass on whether the Employer may argue in compliance proceedings that its backpay liability can be reduced under Hoffman, based on the discriminatees' immigration status.

Concluding that this was at least a Gissel category II case, the Board determined that, given the extensiveness of the Employer's unfair labor practices, the Board's traditional remedies were not sufficient to negate the coercive impact of the violations on the employees' right to freely choose whether to be represented. Here, the Employer's hallmark violations of the Act, directed by its president and sole shareholder, struck at the very heart of the employees' Section 7 rights. The Employer targeted the four Hispanic group I employees who voted in the election, looked behind their employment verification documents, and terminated them based on the barest of evidence that they might be undocumented aliens. As found by the ALJ, a supervisor told the employees that those who voted in the election would not have work with the Employer. The Employer's apparent willingness to threaten employees with termination for voting in a Board-conducted election and to follow through on those threats cast serious doubts on whether a fair second election could be held. In addition to the four unlawful terminations, the Employer also violated Section 8(a)(1) by promising a wage increase. Here, the coercive impact of the Employer's unfair labor practices was unmistakable. First, the size of the unit was small, consisting of 25 employees, only 17 of whom were current or former Hispanic group II employees. In a unit of that size, the termination of four employees who voted in the election would have a deep and lasting impact on each employee. Second, the Employer wasted no time before beginning its campaign of unfair labor practices. Within 24 hours of the Union's demand for recognition, the Employer unlawfully promised a \$1-an-hour wage increase to those group II employees who provided employment verification documentation sufficient to move them to the formal group I payroll. The same employees, who took the Employer's offer, were shortly thereafter terminated simply because they exercised their Section 7 rights to vote in a Board-conducted election against the Employer's wishes.

Without minimizing the routine effectiveness of the Board's traditional reinstatement and notice-posting remedies, Chairman Battista and Member Liebman found that such remedies could not erase the long-term effect of the Employer's unlawful actions here. The Employer's work force was comprised almost entirely of Spanish-speaking employees with questionable ability to work in the United States legally. Accordingly, the other Hispanic employees stood in virtually the identical situation as the four discharged employees. Chairman Battista and Member Liebman noted that this was unlike the typical situation where an employer finds some employee-specific rule violation or performance problem to justify a termination. Here, the Employer's message from the first election was received clearly by the unit employees—vote in the election and risk having your employment documentation questioned and being terminated as an undocumented alien. Acknowledging that the Board has declined to issue a remedial bargaining order in a number of recent cases, they observed that in this case the Employer committed several hallmark violations of the Act, and its unlawful discharges affected approximately 16 percent of the overall unit and nearly 20 percent of the Hispanic employees. Given the nature of the Employer's unlawful conduct directed against employees who are naturally vulnerable to threats related to immigration status, the associated threats that those who voted in the election would not have work, and the unlawful promise of a wage increase, they concluded that there was scant possibility that the Board's traditional remedies alone might cleanse the atmosphere sufficiently to provide the employees with a fair second election.

Dissenting, Member Schaumber argued that a Gissel bargaining order is an extraordinary remedy and the preferred route was to provide traditional remedies for the unfair labor practices and to hold an election once the atmosphere had been cleansed by those remedies. He noted that the Board adopted the ALJ's recommended special remedy of requiring the notice to be read aloud to employees by a management official or a Board agent in the official's presence. He found that this remedy, together with the Board's traditional remedies, were sufficient. He would not include among those remedies, however, a broad cease-and-desist order, which the ALJ recommended and his colleagues adopted.

#### **e. Refusal to Apply Contract**

Horizon Group of New England, 347 NLRB No. 74

The Board (Liebman and Walsh; Battista dissenting) held that the Employer violated Section 8(a)(5) and (1) by refusing to apply to jobsites in Trenton and Newark, New Jersey, the terms and conditions of a collective-bargaining agreement that the Employer entered into by signing a short-form agreement at its Burlington, New Jersey jobsite.

The Employer argued that it was not obligated to adhere to the collective-bargaining agreement because its signature on the short-form agreement was procured by

“fraud in the execution.” The ALJ rejected the Employer’s defense. The ALJ found that although the Southern New Jersey Laborers’ business agent had misrepresented to the Employer’s project manager that the short-form agreement was part of the project labor agreement, when it was not, the short-form agreement was nevertheless unambiguous and could not now be modified. He went on to find that “fraud in the execution” did not occur and observed that the Employer did not sign the short-form agreement because of any misrepresentation by the Union, but because the Union threatened not to refer it any laborers and to make “trouble” for the Employer if it did not sign. He concluded that the Employer “knew full well” when it signed the short-form agreement that it would be obligated to apply the contract to all jobs in New Jersey.

The majority found that “fraud in the execution” was not established for three reasons. First, the Employer did not show that, in deciding to sign the short-form agreement it had relied on the Union’s misrepresentation that the short-form agreement was part of the project labor agreement. Rather, the Employer decided to sign the document to avoid the “trouble” and cutoff of referrals threatened by the Union. Second, the Employer did not show that, at the time it signed the short-form agreement it did not know the character or essential terms of that agreement. To the contrary, the Employer did know. The express language of the document signed by the Employer made it clear that it was not a project-only agreement. The Employer’s later conduct with respect to the attempted termination of the collective-bargaining agreement also demonstrated that the Employer knew it that the contract was not limited to the Burlington project. Third, even if the Employer did not fully understand the implications of the short-form agreement that it was signing, the defense would still fail because the Employer did not show that it did not have a “reasonable opportunity” to read the entire contents of the agreement before signing.

Dissenting, Chairman Battista found that the Union misrepresented the essential terms of the short-form agreement, that the Employer reasonably relied on this misrepresentation, and that the Employer’s signature on the short-form agreement was procured through fraud in the execution. Unlike his colleagues, Chairman Battista found that the Employer had clearly relied on the misrepresentation of the Southern New Jersey Laborers’ business agent and that it did not know the real scope of the document that it signed. For Chairman Battista, the issue was whether that ignorance was excusable. In his view, it was. In his view, the Employer exercised prudence in asking the question of whether the proffered agreements were simply part of the project labor agreement and the Union responded falsely in order to induce a signature.

#### **f. Union Access**

Nestle Purina Petcare Co., 347 NLRB No. 91

The Board (Battista, Liebman, and Walsh) found that Employer unlawfully denied the Union access to a warehouse to conduct a time-and-motion study of the work

performed by forklift drivers who had complained of work overload. The Board, applying Holyoke Water Power Co., 273 NLRB 1369 (1985), found that Employer had not established that its property rights should take precedence over Union's right to reasonable access. The Board found that the time study was plainly relevant to the Union's representation of forklift drivers on the work-overload issue and that Employer failed to carry its burden of showing that there were alternative means by which the Union could represent Employees on this issue. Employer claimed that the Union could effectively represent forklift drivers by requesting information from the Employer on the pace of work, work output and production, disciplinary records, forklift speed, and safety records. The Board rejected Employer's claim and found that Employer did not show that it actually had any data regarding the forklift drivers' pace of work.

In addition, the Board distinguished the instant case from Brown Shoe Co. v. NLRB, 33 F.3d 1019 (8<sup>th</sup> Cir. 1994), denying enf. to 312 NLRB 285 (1993), in which the Court of Appeals for the Eighth Circuit held that a Union could responsibly represent employees without access to Employer's facilities to perform a time study on the effect of new machines on piece-rate wages of employees. The Board found that unlike the situation in Brown Shoe, there is no evidence in the instant case that the Union had previously resolved similar work-related grievances without a time study and Employer did not show that the Union had similar, alternative sources of information to assess the claimed work overload on the forklift drivers' pace of work.

#### **g. Refusal to Supply Information**

##### **1. Northern Indiana Public Service Co., 347 NLRB No. 17**

The Board (Battista and Schaumber; Liebman, dissenting) held that the Employer did not violate Section 8(a)(5) of the Act when it refused, on the basis of confidentiality, to furnish the Union with a copy of notes from interviews conducted by the Employer in investigating a bargaining-unit employee's complaint about the threatening conduct of his supervisor.

The employee complained to his union representative that his supervisor had behaved in a threatening manner toward employees, including an incident when the supervisor allegedly approached the employee and stated, "Peace, love, and understanding, and then you empty the clip," while pointing his finger at the employee as if it were a gun. After the union representative informed management of the employee's concerns, the Employer's EEO manager interviewed the employee, the Employer's operations manager, and the supervisor in question. Each individual spoke to the EEO manager voluntarily, and the EEO manager prefaced her interviews by assuring each of them that she would keep their conversation confidential. She personally typed up her handwritten notes, protected them with a computer password, and did not provide them to the Employer's other managers. The union representative later filed a grievance on the employee's behalf, citing the article of the collective-bargaining agreement requiring the Employer to provide a safe workplace. The union representative requested information

regarding the Employer's investigation of the employee's complaint. The Employer provided the names of employees who were interviewed, but, citing confidentiality, refused to provide the EEO manager's notes.

The majority first found that the Employer had a legitimate and substantial confidentiality interest in the requested information. Treating interview notes as confidential encourages witnesses to participate in investigations of workplace misconduct and protects these witnesses from retaliation because of their participation, the majority said. It also found that the balance between the Union's asserted need for the information and the Employer's interest in confidentiality favors the Employer. The information sought was qualitatively different from the type of information on which a union relies to carry out its statutory responsibilities in the processing of a grievance, the majority said, explaining that the information was not sought to determine the basis for any action by the employer against an employee or to assess that basis against a contractual standard. Rather, the question was whether the statements made by the supervisor were consistent with the contractual obligation to maintain a safe workplace. Finally, the majority found that the Employer offered accommodations, including providing the Union with the names of the interviewees and those involved in the incident, and all of the requested information regarding its handling of the employee's complaint, other than the EEO manager's notes. Any further accommodation, the Board stated, would compromise the interviewees' safety and the pledge of confidentiality on which they relied.

Member Liebman, in dissent, disagreed with the majority's finding that the Employer's confidentiality interest was legitimate and substantial, noting that it was not even known that the EEO manager's notes contained sensitive information. She also argued that the majority's conclusion was "out of sync" with the approach taken by Federal courts in declining to recognize evidentiary privileges for similar information. In her view, even assuming that the Employer had a confidentiality interest, she would find that the balance between the Union's need for the information and the Employer's interest in nondisclosure favors the Union. The information in the notes was important to the Union's enforcement of the collective-bargaining agreement's provision that the Employer would provide a "safe working environment." Finally, she found "purely hypothetical and wholly unsupported by the record" the majority's conclusion that any further accommodation would compromise the interviewees' personal safety.

2. West Penn Power Co. and the Potomac Edison Co. d/b/a Allegheny Power and Allegheny Energy Supply Co., LLC, 346 NLRB No. 42

On remand from the U.S. Court of Appeals for the Fourth Circuit, the Board (Battista, Schaumber, and Walsh) accepted the court's decision as the law of the case and concluded that the Employer violated Section 8(a)(5) of the Act by refusing to provide the Union with requested subcontracting cost data. In its previous decision (339 NLRB 585 (2003)), the Board found that the Employer violated Section 8(a)(5) by refusing to provide the Union with requested "non-financial" information pertaining to

subcontracting, such as contractors' names, project locations, dates of work, and number of workers, as well as "financial information" on the costs of the subcontracting.

The court enforced the Board's order to the extent that it required the Employer to provide the requested "non-financial" information, but refused to enforce the part of the order requiring the Employer to furnish the requested "financial" information. While the court found the financial information relevant, it concluded that the Board erred in not expressly determining that the Union had demonstrated a "specific need" for the cost data. It remanded the case to the Board for a determination of whether the Union had shown such a need.

The Board explained that two contract provisions were involved in this dispute: the contract work provision and the resource sharing provision. The contract work provision permitted subcontracting if the Employer maintained a work force of sufficient size to take care of the expected regular work of the company. The resource sharing provision granted the Employer the right to move unit employees temporarily but it was required to follow an order of preference specified in the contract and contractors could only be used as a last resort.

Applying the standard set forth by the court, the Board found that the Union demonstrated that it needed to know how much subcontracting was actually occurring in order to police the Employer's compliance with these provisions. The Board pointed out that the Employer's unlawful conduct of providing untimely, incomplete, and inadequate information put the Union in the position of needing the subcontracting data to assess the volume of contracting that was occurring. The Board also found that the Union demonstrated that it needed the information for contract negotiation purposes. The parties' collective-bargaining agreement was scheduled to expire, and in order to determine whether to attempt to renegotiate issues relating to subcontracting, the Union needed to ascertain the extent and pattern of subcontracting that was occurring. The Union's request for the information was not premature, the Board found, noting that at the time of its first request for financial information, the contract expiration was 8 months away and when it renewed its request, the contract was due to expire in less than 4 months.

## **5. Section 8(b)(1)(A)**

National Association of Letter Carriers, Branch 1227 (United States Postal Service), 347 NLRB No. 27

The Board (Battista, Liebman, and Schaumber) dismissed the allegation that the Union violated Sec. 8(b)(1)(A) by allocating a lesser portion of the proceeds of a grievance settlement to retirees than to active employees. In so finding, the Board did not reach the issue of whether the Union owed a duty of fair representation to the retirees, but rather found that even assuming such a duty was owed, the Union did not breach that duty. The Union relied, in good faith, on the advice of counsel in allocating the settlement proceeds. The Union's attorney had advised the Union that it had no duty to

include retirees in the distribution of the proceeds, which was reasonable advice in view of the ambiguous nature of the legal landscape on the issue of whether unions owe any duty of fair representation to retirees. Under their attorney's advice, the Union could have given the retirees nothing, but it chose to give them a half share. In these circumstances, the Union's distribution of the proceeds cannot be said to be arbitrary, discriminatory, or in bad faith. Accordingly, the Union did not breach any duty of fair representation that it may have owed to the retirees.

## **6. Section 8(b)(4)**

### Sheet Metal Workers Local 15, 346 NLRB No. 22

The Board (Battista and Schaumber; Liebman, concurring in part) found that the Respondent Union violated Section 8(b)(4)(ii)(B) by unqualifiedly threatening to picket with the object of forcing Beall's, Inc., the operator of a retail store chain, to cease doing business with nonunion sheet metal contractor Energy Air, Inc., and by picketing Brandon Regional Medical Center, with the object of forcing it to cease doing business with nonunion sheet metal contractor Massey Metals and Workers Temporary Staffing (WTS), a temporary employment agency providing employees to various employers including Massey Metals. The Board also found that the Respondent Union violated Section 8(g) by failing to give notice to Brandon Regional Medical Center of its intention to picket on March 15, 2004.

In affirming the ALJ's finding that the Respondent Union, in furtherance of its primary dispute with Massey Metals and WTS, unlawfully picketed at the neutral secondary site of the Brandon Regional Medical Center, the Board agreed with the ALJ that the Respondent Union's conduct in holding a "mock funeral procession" at the site constituted picketing. The procession accompanied by leafleting, involved members of the Respondent Union patrolling on the public sidewalk in front of the Medical Center while carrying a faux casket and accompanied by a member dressed as the Grim Reaper. Chairman Battista and Member Schaumber agree with Member Liebman as to the reasons why the Respondent Union's conduct was picketing. However, to the extent that she implies that picketing required a physical or symbolic barrier, they do not necessarily agree. Since the funeral procession was such a barrier, they find it unnecessary to pass on whether such a barrier is a *sina qua non* of picketing. They observed that it may be that other conduct, short of a barrier, can be "conduct" that is picketing or at least "restraint or coercion" within the meaning of Section 8(b)(4)(ii)(B).

As for the leafleting that the Respondent Union concurrently undertook at the Medical Center during the mock funeral, the Board reversed the ALJ's finding that such activity was unlawful because the complaint did not allege that the leafleting violated the Act and the General Counsel, in his answering brief, expressly disavowed that the leafleting was unlawful.

The Board adopted the ALJ's finding, that the Respondent Union, in its Sept. 26, 2003 letter to pharmacy chain CVS pursuant to its labor dispute with Energy Air, did not violate Section 8(b)(4)(ii)(B). In its letter, the Respondent Union indicated that it understood that Energy Air "may be bidding" on future CVS projects and that there would be leafleting and protesting at the site if Energy Air worked on any CVS projects. In their argument to the ALJ, and in their respective exceptions and cross-exceptions to the Board, Energy Air and the General Counsel argued that the letter should be read in context with an attached newspaper article that described the Respondent Union's display of a large inflatable rat during the Respondent Union's protest at a CVS construction site three months earlier. Assuming that the letter is to be read in context with the newspaper article, and assuming further, but without deciding, that the previous display of the rat constituted picketing, the Board agreed with the ALJ that the newspaper article reported that the Respondent Union's activities at the previous CVS construction site appeared to have been confined to the primary employer and, therefore, would not have violated Section 8(b)(4)(ii)(B). It therefore determined that the letter and article indicated that whatever protest activity that the Respondent Union intended to undertake at a future CVS site would likewise be primary and in conformity with the standards set forth in Sailors Union (Moore Dry Dock), 92 NLRB 547 (1950).

Member Liebman joined her colleagues in finding that the Respondent Union violated Section 8(b)(4)(ii)(B) by engaging in the mock funeral procession. In her view, the gravamen of the violation was not that patrollers carried a faux casket and a costumed "grim reaper" figure carrying a large sickle, for these expressive displays offer "mere persuasion" and do not serve to erect a physical or symbolic barrier to the Medical Center's entrance. Rather, it was the patrolling itself that erected a barrier to entering the Medical Center.

## **7. Section 8(e)**

### Heartland Industrial Partners, LLC, 348 NLRB No. 72

The Board (Schaumber and Walsh; Battista, dissenting) found that the two challenged clauses in the Employer's agreement with the Union governing union organizing at companies acquired by the Employer did not require the Employer to cease doing business with another business or employer, and thus did not violate Sec. 8(e). The challenged clauses defined future acquisitions by the Employer, known as "covered business entities" (CBEs), and required that no less than 6 months after the Employer acquired a CBE, the Union could notify the Employer of its intent to organize that CBE, and the Employer would then cause that CBE to execute a neutrality agreement with the Union. The Board rejected the General Counsel's position that this requirement established a prohibited cease doing business object because it operated as a restriction on the Employer's investments. Rather, the Board found that on their face, the challenged clauses did not limit the Employer's discretion to invest in or acquire any company it chose, imposed no obligation on the Employer either at the time of an investment or during the ensuing 6 months, and did not require the Employer to cease

doing business with anyone even after the 6-month period had expired. These clauses are different from clauses that have been found to violate 8(e) because, on their face, they do not require the Employer to choose between inducing a CBE to become unionized or severing its relationship with the CBE, and, crucially, they do not require the Employer to sever its relationship with a CBE that does not become bound by the agreement. Although the agreement does provide for binding arbitration of disputes concerning violations of its terms, no provision specifies the remedy to be imposed if a CBE does not become bound. Finally, the Board noted that its finding that the clauses are lawful on their face did not preclude it from finding a violation if they were subsequently applied in an unlawful manner.

Chairman Battista, dissenting, would find that the agreement is aimed squarely at the labor relations of the CBEs, and thus is a secondary agreement proscribed by Sec. 8(e). In his view, the only distinction between the clause here and a union-signatory clause is that the union-signatory clause requires the other company to have a present bargaining relationship with the union, while the instant clause requires the other company to recognize the union as the collective-bargaining representative based on cards – thus, just as union-signatory clauses are secondary and unlawful because they are addressed to the other company’s labor relations, so too is the instant clause secondary and unlawful.

## **8. Accretion**

### United Parcel Service, 346 NLRB No. 49

The Board (Battista, Schaumber, and Walsh) found that Union’s execution and maintenance of collective bargaining agreement with UPS, which extended the existing bargaining unit it represents to include all clerk auditors, constitutes an unlawful accretion at five facilities in which the clerk auditors had been historically excluded from the unit. The Board found that the General Counsel did not present sufficient evidence to establish a nationwide violation since it is unclear from the record which of the remaining nearly 1000 facilities historically excluded clerk auditors from the unit and which did not.

## **9. Deferral to Arbitration**

### 1. Kvaerner Philadelphia Shipyard, Inc., 347 NLRB No. 36

The Board (Battista and Schaumber; Liebman, dissenting) deferred to the arbitrator’s decision upholding the discharge of an employee for gross misconduct of distributing a letter to coworkers criticizing the Employer’s deductions for medical, dental, and union dues from employees’ paychecks. Thus, the Board dismissed the Section 8(a) (3) allegation regarding employee’s discharge for engaging in protected activity. The Board did not address the arbitrator’s finding that the employee was discharged for engaging in protected activity.

The Board found that the arbitrator adequately addressed the components of the unfair labor practice allegation in finding that employee had lost the protection of the Act. The Board found that the arbitrator's factual determination that employee had acted with reckless disregard for the truth, with the intent to incite employee distrust of the Employer, and to defame the Employer is not inconsistent with Board precedent. The arbitrator's finding was not palpably wrong and was susceptible to an interpretation consistent with Board precedent that employees lose the protection of the Act by acting in reckless disregard for the truth.

Liebman, dissenting, would not defer to the arbitrator's award because it was palpably wrong and repugnant to the Act. Liebman noted that employee's distribution of letter was protected activity and the Board has repeatedly refused to defer to arbitration awards sustaining discharges that were based on activities protected by Section 7.

## 2. United Cerebral Palsy of New York City, 347 NLRB No. 60

The Board (Battista, Liebman, and Walsh) found that the Section 8(a)(5) allegations that Employer violated the Act by distributing to employees a handbook that changed their terms and conditions of employment without notifying or bargaining with the Union and by directly dealing with employees by requiring them to sign a statement agreeing to comply with the handbook and acknowledging that they understood that Employer may make further changes without providing advance notice is not appropriate for deferral.

The Board found that Employer's conduct amounted to a rejection of the collective bargaining process and, as such, deferral was not appropriate. The handbook clearly provided that it superseded all employment practices which include practices established by the collective bargaining agreements. The Board also noted that Employer's rejection of the collective bargaining relationship was further evidenced by the handbook's provision reserving to the Employer the right to "change, cancel or suspend any of its personnel policies at anytime without advance notice." The Board found that Employer effectively announced that it was no longer bound by the collective bargaining agreements and that it no longer intended to bargain over terms and conditions of employment prior to making such changes. The Board found that the case involved allegations of conduct amounting to a de facto rejection of the bargaining relationship between the Employer and the Union.

## **10. Jurisdiction**

### Firstline Transportation Security, 347 NLRB No. 40

The Board (Battista, Liebman, Schaumber, and Walsh; Kirsanow, dissenting) held that it would exercise jurisdiction over Firstline Transportation Security, a private company that provides passenger and baggage screening service at an airport pursuant to a contract with the Transportation Security Administration (TSA). The majority found

that employees of Firstline are covered by the Act and are permitted to organize for purposes of bargaining collectively with their employer.

The Board, in considering whether to assert jurisdiction, examined the intersection of the Aviation and Transportation Security Act (ATSA), which created the TSA, and the National Labor Relations Act. The Board noted that TSA's statement to the Board provided that the ATSA does not prohibit privately employed airport screeners from engaging in collective bargaining.

The Board noted that 60 years of precedent established that the Board has not asserted national security or defense as a reason to deny employees their Section 7 rights to organize and bargain collectively. The Board found that assertion of jurisdiction is not incompatible with the maintenance of national security requirements and that unionism and collective bargaining are capable of adjustments to accommodate the special functions of security screeners. In addition, the regulations set forth in the ATSA already limit the collective-bargaining rights of security screeners. The Board concluded that Employer's employees should be able to avail themselves of rights under the Act and the policy decision of removing privately employed screeners from the Act's coverage should be left to Congress.

Member Kirsanow, dissenting, acknowledged that the Board is not statutorily barred from asserting jurisdiction over private employers of airport security screeners but that the Board, as a matter of public policy, should decline to assert jurisdiction over such employers in the interest of national security. Kirsanow noted that the Federal official at TSA entrusted with responsibility over airport security determined that national security precluded extending organizational rights to Federally-employed airport security screeners. Kirsanow added that such a determination is outside the Board's expertise and that privately employed screeners perform exactly the same security functions as the Federally-employed screeners. Kirsanow concluded that while Section 7 rights of employees are vitally important, the imperatives of national security are of paramount importance.

## **11. Protected Concerted Activity**

### **1. Noble Metal Processing, Inc., 346 NLRB No. 78**

The Board (Liebman and Walsh; Battista, concurring) found that an employee who was a union steward was engaged in protected activity when, during a meeting between the department manager and department employees, he protested the unilateral nature of the Employer's announced changes in the department. Further, balancing the four factors in Atlantic Steel, 245 NLRB 814 (1979), the Board agreed with the ALJ that the employee did not lose the Act's protection during the meeting when he told other employees that they did not have to listen to the manager, and when he got up to leave the meeting before complying with the manager's instructions to return to his seat. Although the ALJ erred in failing to weigh the fourth Atlantic Steel factor – the absence of unlawful provocation – as militating against continued protection, this factor was

clearly outweighed by the initial three factors (the place of the discussion, the subject matter of the discussion, and the nature of the outburst).

Chairman Battista, concurring, agreed with his colleagues that the employee's conduct did not cost him the Act's protection, but he did not agree with all aspects of the ALJ's Atlantic Steel analysis. Specifically, the ALJ found that the fourth Atlantic Steel factor – whether the employee's conduct was provoked by the Employer's unfair labor practices – could not be applied because there was no evidence that the Employer committed any concurrent unfair labor practices that provoked the employee's conduct. Chairman Battista would find that since the employee was not responding to unlawful or provocative behavior by the Employer, this factor weighed against finding that his conduct was protected.

## 2. Phoenix Processor Limited Partnership, 348 NLRB No. 4

The Board (Battista and Schaumber; Liebman, dissenting in part) found, contrary to the ALJ, that the Employer's discharge of 23 fish processors for engaging in a work stoppage on board a ship was lawful, since the processors were seamen and as such they were not entitled to engage in a concerted shipboard work stoppage, pursuant to Southern Steamship, 316 U.S. 31 (1942). The processors were found to be seamen because they contributed to the function of the vessel – the function of the vessel was to process fish, and the processors performed this function continuously. Further, their connection to the vessel was substantial in duration and nature, as evidenced by the fact that they lived and worked aboard the ship while it was at sea. As seamen, the processors were subject to maritime law which established the necessity of following an order to return to work. The processors, like the Southern Steamship crew, engaged in a concerted work stoppage aboard the ship, were told to return to work, and subsequently refused. Thus, the operative facts in this case are indistinguishable from those in Southern Steamship, where the refusal of the seamen to return to work was not protected by the Act, and thus the concerted work stoppage in this case was also unprotected.

Member Liebman, dissenting, stated that while she concurred with the finding that the employees were seamen, she did not think that Southern Steamship compelled a finding of no violation. She noted that Southern Steamship has been sharply criticized for restricting the labor-law rights of seamen in favor of an older, harsher legal regime and for undercutting application of the Act in other contexts where it intersects with potentially competing federal statutes. She noted that the Board was bound by Southern Steamship, but was not required to read the decision broadly or to apply it reflexively, as the majority did here, and that the Board had rejected such an approach before. She also found that the facts in the instant case were very different from those in Southern Steamship.

## 3. Media General Operations, Inc., d/b/a The Tampa Tribune, 346 NLRB No. 38

The Board (Battista and Schaumber; Liebman, dissenting) found, contrary to the ALJ, that an employee who was also a union steward was not engaged in union or other

concerted activity when he was called into the foreman's office for a "coaching" session regarding his shutting down of a pressline without running a backup pressline. The employee called another union steward into the meeting. The employee became loud and argumentative during the meeting, charging that the foreman showed favoritism to her brother-in-law. The Board noted that the employee's actions do not automatically constitute "union activity" simply because he also happened to be a union steward. The Board concluded that the employee was present in the foreman's office as an employee and not in his capacity as a union steward, since he was called in so she could counsel him about not shutting the pressline down, and that he understood as much as shown by his requesting union representation. Further, when the employee defended his decision to shut the pressline down, there was no evidence that he asserted a position on behalf of the Union. Also, when he accused the foreman of favoritism, there was no evidence that he was raising this issue on behalf of his coworkers. Finally, the fact that the employee was represented by a steward does not transform his individual protest into a concerted one.

Member Liebman, dissenting, would find that the employee's protest constituted both union and other protected concerted activity. Noting that the employee was the Union's primary representative at the workplace, his protest that the foreman was treating him unfavorably was consistent with his union activities. His request for the presence of a fellow steward was further evidence of the union-related nature of the dispute. Although the majority cites the Union's failure to explicitly mention favoritism in its campaign, the concept of fair treatment underlied the issues the Union emphasized to employees. Further, even if the employee was acting solely as an employee, he was still engaged in protected concerted activity, since he was asserting a "workplace grievance" by challenging the basis for the foreman's criticism of his performance, and his insistence on fair treatment would benefit all employees. Also, the presence of the other union steward brought the unit employees' shared interests into play.

#### 4. Ogihara America Corporation, 347 NLRB No. 10

The Board (Battista, Schaumber, and Kirsanow) found, contrary to the ALJ, that an employee who sent the Employer a package documenting a supervisor's alleged poor workmanship, and who deliberately falsified the name of the sender on the package by using the name of a coworker, lost the protection of the Act. Even assuming *arguendo* that the employee's complaints about the supervisor were protected, he lost the Act's protection by deliberately falsifying the name of the sender of the package. The Board found that the employee's use of a coworker's name on the package was a "deliberate falsity" that had the potential of harming the coworker's reputation and jeopardize his employment. The employee used the coworker's name on the package because he feared that the Employer would retaliate against the sender of the package, and thus his deliberate falsification posed a substantial risk to the coworker's reputation and employment status. Thus, the employee's misconduct was sufficiently egregious to remove the sending of the package from the protection of the Act.

## 12. Remedies

### a. Backpay

#### 1. Cibao Meat Products, 348 NLRB No. 5

The Board (Battista and Walsh; Member Schaumber dissenting in part) adopted the ALJ's recommended order as modified and ordered that the Employer pay Jose Luis Mendez a total of \$59,967.96, plus interest. The Employer unlawfully discharged production worker Mendez after a group of coworkers, including Mendez, protested the unlawful suspension of his brother. Cibao Meat Products, 338 NLRB 934 (2003), enfd. 84 Fed. Appx. 155 (2d Cir. 2004), cert. denied 543 U.S. 986 (2004). The Employer contended that Mendez' backpay should be denied in certain quarters because he willfully concealed his interim earnings. Specifically, the Employer argued that a finding of willful concealment was warranted here, based on discrepancies between the 2000 and 2001 tax returns attached to a mortgage application, which indicated higher income than Mendez had reported on the 2000 and 2001 tax returns he had submitted to the Board and a credit card application in which Mendez' stated income for 2002 was higher than the income he reported on a 2002 tax return he had also submitted to the Board.

Chairman Battista and Member Walsh found that Mendez did not deliberately mislead the Board or withhold information concerning his interim earnings and employers. See American Navigation Co., 268 NLRB 426, 428 (1983) (holding that where the employer has carried its burden of showing willful concealment in a given quarterly period, backpay for that period is eliminated entirely). In their view, Mendez made a good-faith effort to accurately report his earnings during the backpay period. In this regard, they noted that Mendez voluntarily updated his reported earnings from one employer by providing a 2000 W-2 form that showed higher earnings than he initially reported, thereby reducing the Employer's backpay liability, and that such conduct was inconsistent with an intent to willfully conceal interim earnings. They acknowledged the obvious discrepancies between the items of evidence provided by Mendez to other parties and the Board, but they did not believe that the mere existence of such discrepancies suggested willful concealment. More importantly, they found that the Employer, who had the burden of proof in this matter, failed to show that the discrepancies reflected a willful concealment of earnings from the Board. See Atlantic Limousine, Inc., 328 NLRB 257 (1999), enfd. 243 F.3d 711 (3d Cir. 2001). Mendez testified that the tax returns he submitted to the Board were consistent with those he filed on his behalf with the Internal Revenue Service. The Employer failed to rebut this testimony. At worst, Chairman Battista and Member Liebman found Mendez exaggerated his earnings in order to enhance his applications for a mortgage and a credit card. Even assuming, arguendo, that this was an effort to mislead third parties, they did not believe that this should operate to reduce this Employer's obligation to remedy its unfair labor practice. Where, as here, no such concealment was shown, backpay could yet be reduced by interim earnings. Again, however, the employer had the burden of proving that the interim earnings were otherwise than alleged in the compliance specification. See Atlantic Limousine, Inc., supra. Chairman Battista and Member Walsh found that the Employer

failed to rebut the General Counsel's interim earnings calculations, observing that mere suspicion and uncertainty are not enough. They noted that their dissenting colleague cited no Board precedent to support his "averaging" approach and in their view, such an approach erodes an employer's settled burden to prove willful concealment.

Dissenting in part, Member Schaumber agreed with his colleagues in all respects except their decision not to reduce Mendez' backpay award. He would reduce Mendez' backpay award by averaging the interim income claimed by Mendez at the hearing and in his various tax returns and credit applications. He explained, in this way, the Board could insure that a remedy was provided for the unlawful discrimination practiced by the Employer while still accounting for the unnecessary uncertainty caused by Mendez' misrepresentations.

2. Parts Depot, Inc., 348 NLRB No. 9

The Board majority (Battista and Liebman; Schaumber dissenting) in this backpay proceeding ordered that the Employer pay four of the five discriminatees amounts totaling \$185,027.83, together with interest and minus tax and withholdings required by Federal and State laws. The Board found in 2000 that the Employer had unlawfully laid off several of its warehouse employees in 1994, including, but not limited to, Enrique Flores, Isabel Martinez, Aundria McGregor, Angela Wilson, and Altonia Wright. Parts Depot, Inc., 332 NLRB 670 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). For reasons stated by the ALJ, Chairman Battista and Member Liebman rejected the Employer's contention that it met its burden of proving that Martinez, McGregor, Wilson, and Wright failed to mitigate damages. See Atlantic Limousine, Inc., 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001). Chairman Battista and Member Liebman modified the backpay calculations as to each of those discriminatees.

Chairman Battista and Member Liebman rejected the Employer's contention that the ALJ erred by precluding it from eliciting testimony from its expert witness, Dr. John M. Williams, that, based on his review of employment trends and job advertisements, the backpay claimants did not exercise reasonable diligence in seeking work. They observed that the Employer's attempt to equate the claimants' lack of success with a lack of trying was a "bootstrap argument" that runs counter to Board and court precedent. Food & Commercial Workers Local 1357, 301 NLRB 617, 621 (1991) (citations omitted). They noted the well established principle that an employer's burden is not met by presenting evidence of a lack of employee success in getting interim employment or low interim earnings. Rather, the employer must affirmatively demonstrate that the claimant neglected to make a reasonable effort to find interim work. Id. Thus, the Board, on numerous occasions, has refused to rely on expert testimony, similar to that offered here, where the expert is only "referring to the probability of job opportunities, not to a given individual's situation" and he "forms his opinions" about the claimant without having any personal knowledge of the latter's particular circumstances. United States Can Co., 328 NLRB 334, 343 (1999), enfd. 254 F.3d 626 (7th Cir. 2001). Applying that precedent, they found that the ALJ properly precluded Williams' testimony as to his opinion of the adequacy of the claimants' job search. Here, the ALJ did allow this witness to present

evidence relevant to the context of the claimants' job searches, including unemployment rates, market trends and conditions, job ads in a local newspaper and information from a state job service.

Member Schaumber, dissenting, would remand the case and instruct the ALJ to reopen the record and allow the Employer to fully explore the reasonableness of the claimants' job search efforts. Member Schaumber wrote that in a backpay proceeding, an employer may mitigate its liability by showing that a claimant did not make "a reasonably diligent effort to obtain substantially equivalent employment." Glenn's Trucking, 344 NLRB No. 41 (2005). He contended that the ALJ's restrictive evidentiary rulings unfairly limited the Employer's ability to meet its evidentiary burden. He disagreed with the ALJ's refusal to allow the Employer's expert witness to testify concerning matters within the scope of his expertise, including whether, based on his analysis of employment trends and available jobs, the claimants' efforts to obtain interim employment were reasonable. In his view, evidence of the economic conditions in which a job search occurred provides useful context for an evaluation of a claimants' efforts.

The ALJ ordered that the backpay due Flores, whose whereabouts were unknown, be held in escrow for a period not to exceed 1 year. Chairman Battista and Member Schaumber found that the backpay for Flores raised significant issues of law and policy. The Board severed the backpay issues relating to him. In Member Liebman's view, Flores' gross backpay and the Employer's matching FICA were appropriately determined under extant law, and should be placed in escrow. See Starlite Cutting, Inc., 284 NLRB 620 (1978).

### 3. Midwestern Personnel Services, Inc., 346 NLRB No. 58

The Board (Battista and Member Walsh; Member Schaumber, dissenting in part) adopted the ALJ's recommendations and ordered the Employer to pay 24 individuals backpay amounts totaling \$649,593.93.

The Board found in 2000 that the Employer violated Section 8(a)(3) and (1) by refusing to reinstate its truckdrivers, who had commenced an unfair labor practice strike on Jan. 17, 1998, after the Union made an unconditional offer to return to work on their behalf on March 27, 1998. Midwestern Personnel Services, Inc., 331 NLRB 348 (2000), enfd. 322 F.3d 969 (7th Cir. 2003).

The Board found that the Employer's April 12, 1999 letter was not a valid offer of reinstatement sufficient to toll backpay because the positions were not substantially equivalent to those the discriminatees previously held. See L.A. Water Treatment, 263 NLRB 244, 246 (1982); Standard Aggregate Corp., 213 NLRB 154 (1982). First, the positions offered paid \$10.80 an hour, while the discriminatees' prestrike positions paid \$12.10 to \$13.20 an hour. Second, those discriminatees who called the Employer in response to the letter were told that they would lose the seniority they had previously held. Because the discriminatees would not have retained their rates of pay or seniority, the letter did not constitute a valid offer of reinstatement and did not toll the backpay

period. Accordingly, the Board found that an evaluation of the discriminatees' response to the letter is unnecessary.

The Employer filed exceptions to the ALJ's recommended amounts of backpay for 12 of the 24 discriminatees: Timothy Cronin, Jerry Fickas, Greg Harris, Wade Carter, Robert Linendoll Jr., Scott Taylor, Randal Underhill, Garry Williams, David Wyatt, Henry Langdon, Randy Leinenbach, and Christopher Pentecost. In support of its position that these 12 discriminatees should not receive either part or all of the backpay awarded by the ALJ, the Employer called an expert witness, Dr. Malcolm Cohen, to testify about the conditions of the job market at the time in question. Dr. Cohen reviewed the "help wanted" section of four local newspapers, picked one day from each quarter during the backpay period, and counted the number of advertisements he deemed applicable to the discriminatees. However, he did not include data as to the pool of applicants, nor analysis regarding the ability of the discriminatees to secure the trucking positions he identified. In addition, Dr. Cohen's findings focused on the number of trucking positions statewide, rather than in the geographic area in which the discriminatees lived. With regard to the "help wanted" ads, Dr. Cohen made no mention of whether the jobs would be comparable to the wages and hours of the discriminatees' former positions.

Chairman Battista and Member Walsh found that Dr. Cohen's report and testimony were insufficient to meet the Employer's burden of demonstrating that the discriminatees failed to seek interim employment with reasonable diligence. In this regard, they observed that the Board has previously found that the existence of "help wanted" advertisements does not serve to meet the employer's burden of proving that discriminatees failed to search for work with reasonable diligence. Acme Bus Corp., 326 NLRB 1447, 1448-1449 (1998). Turning to the individual discriminatees, they found that the Employer failed to establish that any of them failed to exercise reasonable diligence in their search for interim employment and adopted the ALJ's backpay awards. With respect to Langdon, they found that the Employer did not show a failure to search for work. There was no showing that Langdon's reliance on the Union's looking-for-list work was unreasonable. That list was successfully used to find work for several discriminatees. Moreover, they found that Langdon turned to other sources when it appeared to him that the union list was insufficient. As for Leinenbach, they observed that the fact he was unsuccessful in his initial search for interim employment did not establish that he failed to conduct a search with reasonable diligence. Chem Fab Corp., 275 NLRB 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985). There was no evidence that Leinenbach ever stopped looking for work. Indeed, he registered with the unemployment office, made regular and ongoing applications for work, engaged in self-employment, and worked for his parents' company. Finally, Pentecost applied at several employers and sought work through several unions. He worked at five different employers during the backpay period. Taking the backpay period as a whole, the record established that Pentecost searched for work with reasonable diligence. See Electrical Workers Local 3 (Fischbach & Moore), 315 NLRB 1266 (1995) (stating that the sufficiency of a discriminatee's efforts to search for employment is determined with respect to the backpay period as a whole, not on isolated portions); Weldun International,

Inc., 340 NLRB 666, 682 (2003) (stating that there is no requirement that a discriminatee's efforts to seek interim employment be successful).

Member Schaumber agreed with his colleagues in all respects except their decision to affirm the ALJ's awards of full backpay to Langdon, Leinenbach, and Pentecost. He reasoned that each of those individuals was an experienced truckdriver employed by the Employer at its facilities in Indiana and Kentucky prior to the strike in 1998. In his view, their remarkable lack of success in obtaining interim employment for many months at a time, despite a strong job market for truck drivers was a predictable consequence of their sporadic and desultory efforts to obtain work. Accordingly, he would decline to hold the Employer liable for all their lost income. Specifically, he would reduce Langdon's backpay award by an amount equal to 6 months' pay, find that Leinenbach was not entitled to a backpay award, and deny Pentecost backpay for the last three quarters of 1999.

#### **b. Individual Liability**

##### **1. SRC Painting, LLC, 346 NLRB No. 67**

Respondents were alter egos of each other and that they violated Section 8(a) (1), (3), and (5) of the Act. While the Board agreed with the ALJ that some individuals were individually liable for unfair labor practices, the Board also found that two other individuals were not individually liable, notwithstanding that they had participated in the diminution of corporate assets.

The Board relied on White Oak Coal Co., 318 NLRB 732 (1985), enfd. mem. 81 F.3d 150 (4<sup>th</sup> Cir. 1986), in determining whether the corporate veil would be pierced and an individual would be liable for corporate unfair labor practices. The Board noted that even though these individuals received assets from the corporations for noncorporate purposes such as car, mortgage and utility payments, the Board found that this was not "participation" in the abuse of the corporation sufficient to impose individual liability for the corporate unfair labor practices. Here, the General Counsel failed to present any evidence that these two individuals played an active role in the operations of any of the respondents' corporations. Thus, they did not become the business entity and are not individually liable for the business entities' obligation.

##### **2. Flat Dog Productions, Inc., 347 NLRB No. 104**

The Board (Battista and Schaumber; Liebman, dissenting in part), in a supplemental decision, found that Flat Dog Productions, Inc. (Flat Dog) and Frank T. DeMartini, P.C. (the P.C.), are a single employer and are liable for backpay. The Board further found that the corporate veils of Flat Dog and the P.C. should not be pierced and that DeMartini should not be held personally liable for remedial obligations of the respondents. The Board, applying the test in White Oak Coal Co., 318 NLRB 732 (1985), enfd. mem. 81 F.3d 150 (4<sup>th</sup> Cir. 1986), found that piercing the corporate veil to

hold individual shareholders personally liable for corporate remedial obligations was not appropriate in these circumstances.

The Board noted that although it found a single-employer relationship, it found that there was no evidence that Flat Dog and the P.C. have not been kept separate and apart from each other and from DeMartini, individually. Moreover, there was no evidence that DeMartini used the assets of Flat Dog or the P.C. improperly. Applying the White Oak test, Board found it inappropriate to pierce the corporate veil to hold DeMartini personally liable for the backpay due.

Member Liebman, dissenting in part, noted that the White Oak test was satisfied and imposing liability only on the two corporations that DeMartini completely dominated and shielding DeMartini himself from liability unjustly rewarded the actor whose corporate instrumentalities were utilized in the commission of unfair labor practices. Liebman noted that the majority's refusal to pierce the corporate veil elevated the principle of limited liability above the effective enforcement of the Act.

**c. Mar Jac**

1. Mercy, Inc. d/b/a American Medical Response, 346 NLRB No. 88

The Board (Battista and Schaumber; Liebman, dissenting), contrary to the ALJ, found that a 1-year extension of the certification year was not justified. Instead, because the initial 10 months of the certification year were free from unfair labor practices and because the record contained no explanation for the lack of bargaining during those 10 months, the Board found that a 3-month extension was appropriate. Noting that the 10-month delay in bargaining was not explained by the record, the Board found it inappropriate to assume that the delay was caused by the Employer. The Board also rejected the ALJ's view that the fact that a decertification petition was pending supported extending the certification year for a full 12 months, noting that it was circular to say that because a petition had been filed the certification year must be extended, and also that it was legitimate for employees to express their Sec. 7 rights through such a petition after the certification year expired.

Member Liebman, dissenting, would grant the 12-month extension of the certification. The parties did not bargain for the first 10 months of the certification year. Although the record did not explain the reason for this, the policy of the Board and the Act is to provide at least one year of good-faith bargaining, and that standard was not met here. Further, during the entire certification year, the parties did not engage in a single bargaining session that was free from the Employer's unfair labor practices. The Employer admitted that it insisted on unlawful "ground rules" that prevented real bargaining, and it unlawfully refused to answer the Union's information request made in furtherance of bargaining. Thus, the Employer has demonstrated no real willingness to bargain in good faith.

2. United Electrical Contractors Association, 347 NLRB No. 1

The Board (Battista, Schaumber; Walsh dissenting in part) found, contrary to the ALJ, that the Employer's refusal to provide all of the information requested by the Union, beginning 1 month before bargaining began and continuing through the cessation of bargaining approximately 4 years later, did not warrant a 12-month extension of the certification year. The Board noted, first, that the unlawful conduct was a refusal to furnish information, not a withdrawal of recognition or coercive conduct towards employees. Although the Board can extend somewhat the certification year for such a violation, it is not required to do so, and can exercise remedial discretion. Second, more than 11 years have passed since the certification. Given this time period, employees should be given the Sec. 7 right to oust or change their representative after a reasonable period of time during which the effects of the "information" violation can be remedied. Under these circumstances, a 12-month extension was unwarranted.

Member Walsh, dissenting in part, would find that a 12-month extension was proper. Applying the relevant factors, he noted first that the Employer withheld from the Union basic information concerning unit employees, such as their names, addresses, and telephone numbers. Thus, the Union was prevented from ascertaining the wishes of the very employees on whose behalf it was bargaining. Second, in a related case, the Board rejected the Employer's contention that the Union engaged in bad-faith bargaining. Finally, the Employer never fully supplied the requested information, so there was not a single session at which the Union had the information it needed to fully represent the employees.

The Board also found that timely service of the charge, which named each of the employer-members of the multiemployer association, on their multiemployer bargaining agent, constituted timely service on its employer-members also. Under agency law as well as the Federal Rules of Civil Procedure, service of process on an authorized agent constitutes effective service on the agent's principal. Thus, Sec. 10(b) did not bar the complaint against the individual employer-members of the association.

Member Schaumber would find it unnecessary to reach the issue of whether service on a multiemployer bargaining agent constitutes service on its employer-members, as he found that the record showed that each of the employer-members was a respondent. He noted that the General Counsel provided evidence that the charge was served on all employer-members except two, and that one of those failures was cured and the other employer-member acknowledged that it was a member of the association and was bound by the certification.

### **13. Supervisors**

#### **1. Oakwood Healthcare, Inc., 348 NLRB No. 37**

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting in part and concurring in part), in this decision, set forth new guidelines for determining

who is a supervisor under the National Labor Relations Act. The Board, in a 3-2 vote, found that the Employer's registered nurses (RNs) who serve as charge nurses on a permanent basis are statutory supervisors.

Section 2(11) of the Act defines "supervisor" as

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer." Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it. Exercising the Board's discretion to interpret ambiguous language in the Act, and consistent with the Supreme Court's instructions in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), the Board reexamined and clarified its definitions of the terms "assign," "responsibly to direct," and "independent judgment" as those terms are used in Section 2(11) of the Act.

The Board majority defined "assign" as the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to assign. In the health care setting, the term "assign" encompasses charge nurses' responsibility to assign nurses and aides to particular patients. Thus, if a charge nurse designates a licensed practical nurse (LPN) to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment; however, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the ad hoc instruction that the employee perform a discrete task.

The majority defined the statutory term "responsibly to direct" using the following example. If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both "responsible" and carried out with "independent

judgment.” The majority explained that for direction to be “responsible,” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he or she does not take these steps.

Finally, consistent with the Supreme Court’s decision in Kentucky River, the majority adopted a definition of the term “independent judgment” that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. The majority found that, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently “independent” under the Act. For example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. The majority observed that an RN’s hiring recommendations involve the exercise of independent judgment if he or she is called upon to assess the applicants’ experience, ability, attitude, and character references, among other factors. Similarly, if the charge nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, that assignment involves the exercise of independent judgment.

The majority also found that the degree of discretion exercised must rise above the “routine or clerical” in order to constitute “independent judgment.” For example, if there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating, or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. By contrast, if the hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse’s assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.

Applying the foregoing analysis, the majority found that the charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care during their shift. The majority found that such assignments, which consisted of giving “significant overall duties” to an employee, met the statutory definition of “assign” under the Act. The majority further found that the Employer established that its charge nurses exercised independent judgment in making such assignments. The majority also found, however, that the Employer failed to establish that charge nurses in the emergency room unit exercised “independent judgment” in making patient care assignments and that the rotating charge nurses exercised supervisory authority for a “substantial” part of their work time. As a result, the Board found that only the Employer’s 12 permanent charge nurses were supervisors under the Act.

Dissenting, Members Liebman and Walsh disagreed with the majority’s interpretations of the statutory terms “assign” and “responsibly to direct,” observing that the majority’s decision threatened to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees. They predicted that most professionals will end up losing their rights under the Act because most professionals have some supervisory responsibilities in the sense of directing another’s work.

Members Liebman and Walsh observed that the language of the Act, its structure, and its legislative history all point to significantly narrower interpretations of the ambiguous statutory terms “assign ... other employees” and “responsibly to direct them” than the majority adopts. They found that the assigning of tasks to other employees is a quintessential function of minor supervisors whom Congress clearly did *not* intend to cover in Section 2(11). They asserted that the more natural reading would limit the phrase “assign employees” to a significant employment decision on the order of determining (1) an employee’s position with the employer (in most settings identified by job classification); (2) designated work site (i.e., facility or departmental unit); or (3) work hours (i.e., shift).

As for responsible direction, Members Liebman and Walsh differ principally from the majority regarding the scope and scale of the authority required to satisfy the statutory test. In their view, the phrase “responsibly to direct” was intended to reach persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11). They explained that the floor statement of the senator who proposed the amendment that added “responsibly to direct” demonstrates that the phrase refers to the general supervisory authority delegated to foremen overseeing an operational department and the accountability that goes with it, in contrast to the kind of one-on-one task direction (mistakenly covered by the majority’s interpretation of “assign”) that would be given by minor supervisory employees (persons who themselves answered to the foreman) to other employees. They endorsed the test proposed by the General Counsel—an employee responsibly directs with independent judgment when the individual has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge,” the employee is

held accountable for the work of others, and the employee exercises significant discretion and judgment in directing his or her work unit.

Members Liebman and Walsh agreed with the majority's test for "independent judgment" and emphasized that it would have to be applied on a case-by-case basis. They stated that the Board's determinations in specific cases should be guided not by the dictionary or abstract considerations, but by practical realities viewed in light of the Congressional intent to exclude foremen and their equivalent, but not minor supervisory employees, from the Act. In sum, the dissent would find that none of the charge nurses whose status is at issue are supervisors within the meaning of Section 2(11). Accordingly, they concurred in the result reached by the majority with respect to the emergency room charge nurses and the rotating charge nurses.

## 2. Croft Metals, Inc., 348 NLRB No. 38

The Board (Battista, Schaumber, and Kirsanow) found, for the reasons given by the Acting Regional Director, that the Employer failed to show that the lead persons' role, if any, in the hiring, discipline, discharge, and evaluation of employees satisfied the definition of "supervisor" as set forth in Section 2(11) of the Act. The Board also found, applying the standards articulated in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), that the Employer failed to establish that the lead persons possessed the authority to "assign" within the meaning of Section 2(11). In addition, while the Board found that the lead persons had the authority "responsibly to direct," it concluded that the Employer failed to demonstrate that such direction by the lead persons involved a degree of discretion that rose above "merely routine or clerical" and that such discretion did not entail the use of independent judgment within the meaning of Section 2(11).

The Employer, a manufacturer of aluminum and vinyl doors and windows, employed approximately 350 production and maintenance employees and 15 admitted statutory supervisors. The employer also employed roughly 25-35 lead persons. The Board found that the Employer failed to adduce evidence sufficient to establish that the responsibilities carried out by its lead persons met the Oakwood Healthcare definition of "assign." The lead persons did not prepare the posted work schedules for employees, appoint employees to production lines, departments, shifts, or any overtime periods, or give significant overall duties to employees. For the most part, the lead persons worked along side their regular line or crew members who performed, consistent with their classifications, the same task or job on the line or in their department every day. If an employee was absent, the lead persons had no choice or flexibility concerning the personnel, if any, assigned to them, nor did they control whether or for how long the replacement remained. Any temporary work assignments under such circumstances were dictated largely by what work the replacement was capable of performing. The record reflected that the lead persons sometimes switched tasks among employees assigned to their line or department in order to finish projects or achieve production goals, but the frequency with which that occurred was not shown. Such occasional switching of tasks

by the lead persons here, however, did not implicate the authority to “assign” as that term is described in Oakwood Healthcare because the activity did not constitute the “designation of significant overall duties . . . to an employee.” 348 NLRB No. 37, slip op. at 4. Rather, the sporadic rotation of different tasks by the lead persons more closely resembled an “ad hoc instruction that the employee perform a discrete task” during the shift and as such was insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under Oakwood Healthcare. Id.

The Board also found that the preponderance of the evidence supported a finding that the lead persons “responsibly direct” their line or crew members as that 2(11) term was defined in Oakwood Healthcare. As part of their duties, the lead persons were required to manage their assigned teams, to correct improper performance, move employees when necessary to do different tasks, and to make decisions about the order in which work was to be performed, all to achieve management-targeted production goals. Lead persons instructed employees how to perform jobs properly, and told employees what to load first on a truck or what jobs to run first on a line to ensure that orders were filled and production completed in a timely manner. Thus, the lead persons directed individuals when they decided “what job shall be undertaken next [and] who shall do it.” Oakwood Healthcare, supra, slip op. at 6. As part of their duty to oversee the production in their area, the lead persons were also held accountable for the job performance of the employees assigned to them. The record revealed that the Employer had disciplined lead persons by issuing written warnings to them because of the failure of their crews to meet production goals or because of other shortcomings of their crews. This specific showing of “some adverse consequence [befalling the lead persons] providing the oversight if the tasks performed [were] not performed properly” adequately satisfied the Oakwood Healthcare “accountability” standard for purposes of responsible direction. Id., slip op. at 7. The Employer, however, failed to demonstrate that the lead persons exercised independent judgment in directing their crew or line members. Thus, the Board found that the lead persons’ exercise of judgment was either fundamentally controlled by pre-established guidelines, such as delivery schedules or loading patterns, or was simply routine. Accordingly, the Board found that the lead persons did not exercise supervisory authority under the Act.

3. Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center, 348 NLRB No. 39

The Board (Battista, Schaumber, and Kirsanow) applying the definitions for “assign” and “responsibly direct” set forth in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), found that the Employer’s charge nurses at a nursing home did not exercise supervisory authority under the Act. First, the Board found that the charge nurses at issue lacked the authority to “assign” other employees under the Act, emphasizing that the Employer had failed to establish that the charge nurses possessed the authority to require certified nursing assistants (CNAs) to stay past the end of their shifts, to come in from off-duty status, or to shift section assignments. In this regard, the party seeking to establish supervisory authority must show that the putative supervisor has the ability to

require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority to merely request that a certain action be taken. See, e.g., Heritage Hall, E.P.I. Corp., 333 NLRB 458, 459 (2001) (LPNs found not to exercise supervisory authority where they had no authority to require off-duty employees to fill a particular shift); accord Lynwood Health Care Center, Minnesota v. NLRB, 148 F.3d 1042, 1047 (8th Cir. 1998) (supervisory status not established where individual merely seeks “off-duty volunteers to help out when the facility is short handed”). Even if the charge nurses possessed the authority to shift section assignments, the Board found there was no evidence that they exercised independent judgment in that regard. The record established that such reassignments were made to balance only the quantity of work, without regard to residents’ needs, or other factors. Assignments made solely to equalize the quantity of workloads are routine and do not require independent judgment. Oakwood Healthcare, supra, slip op. at 8-9, 12.

The Board further found that the charge nurses at issue had the authority to “direct” the CNAs within the meaning of the definition set forth in Oakwood Healthcare. Thus, the record established that charge nurses oversaw the CNAs’ job performance and acted to correct the CNAs when they were not providing adequate care. For example, a charge nurse would correct a CNA if she perceived that the CNA was not using proper procedures in giving a resident a bath. The record also showed that the charge nurses would direct the CNAs to perform certain tasks when the charge nurse determined that such tasks were necessary. For example, the charge nurses would direct CNAs to clip residents’ toenails and fingernails, to empty catheters, or to change an incontinent resident. The Board found, however, that the Employer had not established that the charge nurses were accountable for their actions in directing the CNAs. The Employer did not present any evidence that any charge nurse had experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing the CNAs. Nor did the Employer present any evidence that a charge nurse was ever informed that any such material consequences might result from her performance in directing the CNAs. The Board found that the “accountability” requirement set forth in Oakwood Healthcare was not satisfied by evidence that the Employer had a practice of rating charge nurses in their annual evaluations on their performance in directing other employees. In the absence of any evidence of actual or prospective consequences to charge nurses’ terms and conditions of employment resulting from a rating on the “Directs CNAs” performance factor, the Board found that Employer had shown only “paper” accountability. See Training School at Vineland, 332 NLRB 1412, 1416 (2000) (“Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.”). Put another way, the mere fact that charge nurses were rated on this factor did not establish that any adverse consequences could or would befall the charge nurses as a result of the rating. Thus, the Board found that the “prospect of adverse consequences” for the charge nurses here was merely speculative and insufficient to establish accountability. Accordingly, applying the Oakwood Healthcare test for responsible direction, the Board found that the Employer’s charge nurses did not possess the authority to “responsibly direct” other employees under the Act.

4. American River Transportation Co., 347 NLRB No. 93

The Board (Battista and Member Schaumber; Member Walsh concurring in the result) reversed the ALJ and dismissed the complaint allegations that the Employer violated Section 8(a)(1) by making statements to employees implying that towboat pilots were assigned supervisory duties after May 1999 to discourage their union or protected concerted activity, and that the post-May 1999 assignment of supervisory duties to the pilots violated Section 8(a)(1) and (3). The ALJ found that prior to May 1999, the Employer's towboat pilots were not supervisors within the meaning of Section 2(11) of the Act because the pilots did not have supervisory authority to independently assign work and responsibly direct the crew. The ALJ issued his decision before the Supreme Court issued its decision in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001).

In September 1998, the Union filed a petition seeking to represent a unit composed of the Employer's towboat pilots. The Regional Director rejected the Employer's contention that the pilots were supervisors and issued a decision and direction. A Board majority denied the Employer's request for review of the Regional Director's decision. The election was subsequently held, and the Union failed to obtain a majority of the valid votes counted, and a certification of results issued on February 26, 1999.

Contrary to the ALJ, the Employer contended that its pilots possessed supervisory authority and duties prior to May 1999, and that the pilots were authorized to assign or responsibly direct work and exercised independent judgment in making work assignments and directing the crew. The Employer also argued that the Supreme Court's Kentucky River decision supported finding supervisory status for the pilots. The General Counsel agreed with the ALJ that the Employer did not meet its burden of proving supervisory status for the pilots, contending that the Employer did not historically treat its pilots as supervisors; it never informed its pilots that they had supervisory authority; and the pilots possessed none of the Section 2(11) indicia of supervisory status. The General Counsel maintained that the Supreme Court's Kentucky River decision did not require any factual or legal finding different than those made by the ALJ, and that the ALJ's findings of violations should be upheld.

Chairman Battista and Member Schaumber asserted that at all relevant times the Employer's pilots were supervisors within the meaning of Section 2(11). They had authority to responsibly direct the towboat crew in their work and to assign work. They used independent judgment in exercising that authority, and they did so in the interest of the employer. Chairman Battista and Member Schaumber observed that their finding that the Employer's pilots are statutory supervisors based on their authority to responsibly direct and assign employees is consistent with the approach taken by the Board in several similar post-Kentucky River pilots cases. In those cases, the Board found that the pilots

at issue used independent judgment in exercising their authority to responsibly direct the towboat crew in their work and to assign work to the crew. See Ingram Barge Co., 336 NLRB 1259 (2001); Alter Barge Line, Inc., 336 NLRB 1266 (2001); and American Commercial Barge Line Co., 337 NLRB 1070 (2002). Here, the Employer's pilots had the authority to make assignments and reassignments of the crew and ordered the crew to perform particular tasks such as standing lookout, repairing lights, cleaning windows, and fixing depth finders. During the course of navigation, the pilots used independent judgment to determine that the assignment of certain tasks to the crew was necessary for the safe passage of the boat and tow. The pilots did not check with others before ordering that action be taken. That the pilots' instructions and orders often were routed through the mate did not diminish the pilots' responsible direction inasmuch as the instructions and orders remained those of the pilots'. The pilots were in charge of the after watch and served as the sole wheelhouse official responsible for the safety of the vessel, crew, and cargo. They had authority over the crew during emergencies. Finally, the pilots also possessed the following secondary indicia of supervisory authority: higher pay; better benefits; and better sleeping quarters.

Member Walsh wrote that he concurred in the result reached by his colleagues, but not in their rationale. In particular, he did not agree that the majority's analysis of the pilots' alleged authority to assign and to responsibly direct other employees, or of the pilots' alleged exercise of independent judgment, was necessarily the proper way to harmonize the result in this case with the concerns expressed by the Supreme Court in Kentucky River. Nonetheless, he concurred in the result based solely on the fact that he acknowledges that the material facts concerning the supervisory status of the Employer's pilots cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classification in which supervisory status has been found.

#### **14. It's All in the Footnotes**

- a. Chairman Battista and Member Schaumber have concerns whether Dean General Contractors, 285 NLRB 573 (1987) was correctly decided.  
Hi-Tech Interiors, Inc., 348 NLRB No. 18, n. 8.
- b. Members Schaumber and Kirsanow, in finding the employer violated the Act by requiring union-subpoenaed employees to take vacation leave to attend a Board hearing, do not pass on or rely on Western Clinical Laboratory, Inc., 225 NLRB 725.  
Exelon Generation Company, 347 NLRB No. 77, n.3.
- c. Members Schaumber and Kirsanow view the information request to be encompassed by the parties' contractual arbitration clause and would defer the request to arbitration. However, in the absence of a majority to reverse current precedent, they would apply current Board law. Chairman Battista notes that the agreement contains no contractual provision as to providing information and thus is not covered by the arbitration clause. He does not pass on whether the

informational allegation would be deferrable if it were covered by the arbitration clause.

Team Clean, Inc., 348 NLRB No. 86, n. 1.

d. For institutional reasons, Member Kirsanow applies established law holding that unemployment compensation does not offset backpay. See Gullett Gin Co. v. NLRB, 340 U.S. 361 (1951). He reserves judgment on the merits of that precedent.

Superior Protection, Inc., 347 NLRB No. 105, n. 1.

e. While Member Kirsanow joined his colleagues in finding a refusal to bargain, he added the following observation:

“Relying on evidence that most of its unit employees presented social security numbers that do not match those in the Social Security Administration’s records, the Respondent contends that these employees are illegal immigrants and that its refusal to bargain is justified by that fact. Whether or not the Respondent’s employees are, in fact, working in the United States illegally is not an issue we need to address at this point.”

Assuming, however, that the Respondent’s contention in this regard is correct, Member Kirsanow submitted that an order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act, 8 U.S.C. Section 1324a (IRCA), may reasonably be seen as somewhat peculiar by the average person. Nonetheless, he acknowledged that, as the Board recently explained in Concrete Form Walls, 346 NLRB No. 80, slip op. at 3-4 (2006), such an order is compelled by Sec. 2(3)’s broad definition of “employees”. Member Kirsanow observed that although it may be more rational to resolve the tension between Sec. 2(3) and the IRCA in a manner that does not place employers in the position of having to bargain with a representative of workers not lawfully entitled to work, the Board’s duty is to enforce the Act as written.

Agri Processor Co., Inc., 347 NLRB No. 107, n. 2.