Summaries of NLRB Decisions, Rules, and Proposed Rules and General Counsel Initiatives
October 1, 2010 through August 31, 2011

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I. **Jurisdiction**

Chicago Mathematics & Science Academy, 13-RM-1768 (pending)

Early in 2011 the National Labor Relations Board (“the Board”)
invited the parties and interested amici to file briefs by March 11 (with responsive briefs due on March 25) in *Chicago Mathematics & Science Academy*, 13-RM-1768, because the petition raised substantial issues of whether a charter school is a “political subdivision” under Section 2(2) of the National Labor Relations Act (“the Act) and therefore exempt from the Board’s jurisdiction. Multiple amicus briefs (and responses) were filed by the deadlines. As of “press time,” the case was still pending before the Board.

II. **Organizing and Elections**

A. **Employer Objectionable Conduct**

*CEVA Logistics U.S., Inc., 357 NLRB No. 60 (2011)*

In *Ceva Logistics U.S., Inc.*, 5-RC-16452, the Board denied the union’s request for review, upholding the Regional Director’s overruling of two objections related to (1) a delay by the employer in forwarding the *Excelsior* list to the union, and (2) the holding of the election on a nonwork day on which the employer held a mandatory employee meeting. With respect to the objection concerning the *Excelsior* list, the Board held that under current precedent the union’s delayed receipt of the *Excelsior* list did not constitute objectionable conduct sufficient to set aside the election and noted that the “recurring issue” of delay in receipt of *Excelsior* lists is addressed by the procedures set forth in the Board’s recent rulemaking initiative related to the processing of representation petitions, which is discussed below in this paper.

With respect to the objection regarding the date of the election, the Board held that the mechanics of an election are left to the discretion of the Regional Director and that he acted within his discretion in scheduling the election on the only date on which all employees were scheduled to appear at the employer’s facility. The Board specifically noted that the mandatory meeting was scheduled before the direction of the election and that there was no evidence that employees were coerced or pressured to vote by their mere attendance at the meeting.

*Stevens Creek Chrysler Jeep Dodge, Inc., 357 NLRB No. 57 (2011)*

In *Stevens Creek Chrysler Jeep Dodge, Inc.*, 20-CA-33367, a supplemental decision in light of *New Process Steel, L. P. v. NLRB*, 130 S.Ct. 2635 (2010), the Board overruled the administrative law judge and found that the employer violated Section 8(a)(3) of the Act by discharging an employee for union activity during an organizing campaign. Specifically, the judge found the employee had attended a union meeting along with other employees, and when

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1 In this paper, references to the “Board” at times refer to a Board majority or a panel majority rather than to the entire Board. Due to the length of the paper, discussions of dissenting and concurring opinions have not been included.
his manager found out, that manager threatened that if he found out the employees had organized the meeting, he would “blow them out.” The judge found that, even though General Counsel had established its initial burden under *Wright Line*, the employer satisfied its rebuttal burden by showing that it would have terminated the employee even in the absence of union activity given the employee’s documented attendance problems. The Board noted that the judge’s findings were deficient because he relied almost exclusively on the testimony of the employer’s officials and that he had failed to consider the countervailing evidence in his supplemental decision even though the initial panel had instructed him to do so. The Board weighed the evidence and found that the judge’s credibility findings must be reversed.

Due to this and multiple other violations that the Board found the employer had committed, the Board issued a *Gissel* order. Subsequently, the Board found the employer unilaterally eliminated an employee’s bargaining unit position and refused the union’s request for information in violation of Section 8(a)(5) of the Act.

**Dollar Rent a Car, 357 NLRB No. 6 (2011)**

In *Dollar Rent a Car*, 28-CA-23059, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by interrogating an employee in a manager’s office, prohibiting union discussions, and threatening an employee with discharge for her union activities. The Board further affirmed the administrative law judge’s finding that the employer did not unlawfully discharge three employees, despite their union activities, because it found the evidence established that the employees were discharged for violating company policy.

**Divi Carina Bay Resort, 356 NLRB No. 60 (2010)**

In *Divi Carina Bay Resort*, 24–CA–10700, the Board upheld the administrative law judge’s decision that a comment by a hotel manager to an employee, “[v]ote for the hotel, everything would be all right,” prior to a certification election was not unlawful, but that the manager’s announcement of a new package of benefits two days before the election was improper. The Board agreed that because the manager and the employee were friends, and because no specific promises or threats were made, the statement was merely an allowable expression of preference. The announcement of new benefits was found to be unlawful because, although the new benefits package had been in the works for months, if not years, there was no indication that it was going to be put into effect soon. The Board distinguished *Weather Shield of Connecticut*, 300 NLRB 93 (1990), where the announcement concerned a new pension plan that had already been disclosed to the employees and was set to begin on a date certain. Here, the Board found that four months after the announcement, the benefit plan still had no planned start date.

**Metro One Loss Prevention Services Group (Guard Division NY), Inc., 356 NLRB No. 20 (2010)**

In *Metro One Loss Prevention Services Group*, 2–CA–39315, the Board upheld the administrative law judge’s determination that officers of Metro One, which provided security services for certain New York City area stores, made improper statements to employees during a unionization campaign. The judge found employees were told that working conditions would
become worse, an employee would not be showing his “gratitude” by voting for the union, a
particular pro-union employee would have “problems” and would likely be fired after the
election, and unionization could lead to layoffs. The Board found the statement -- “[You] need
to be grateful for the number of years that [you] have been working with Metro and for [your]
pay rate; it could be worse; it could get much worse in the event the Union comes in” was an
unlawful threat in violation of the Act.

B. Union Objectionable Conduct

Stericycle, Inc., 357 NLRB No. 61 (2011)

In Stericycle, Inc., 32-RC-5603, the Board considered whether the filing of a lawsuit,
financed by a union, prior to a representation election interferes with a fair election. The Board
adopted a new approach to this issue, holding that “a union engages in objectionable conduct
warranting a second election by financing a lawsuit filed during the narrow time period -- known
as the ‘critical period’ -- between the date of the filing of the representation petition and the date
of the election.” The Board reasoned that “protection of employee free choice in a representation
election is better achieved by holding a union’s filing of a wage and hour lawsuit on behalf of
unit employees during the critical pre-election period objectionable, as the filing of such a lawsuit
during the critical period could be viewed by unit employees as a gratuitous grant of benefits
even though it is related to the workplace concerns leading them to consider unionization.” In
the context of the case, the Board ultimately directed a second election due to the objectionable
conduct of filing and funding such a lawsuit during the critical period.

The Board further clarified that a union may (1) file and fund employment-related
litigation on behalf of employees prior to the filing of an election petition or post-election and (2)
may continue to fund such litigation during the critical period, provided that the litigation is filed
before the petition.

Somerset Valley Rehab. & Nursing Ctr., 357 NLRB No. 71 (2011)

In Somerset Valley Rehab. & Nursing Ctr., 22-RC-13139, the Board adopted the
administrative law judge’s findings and certified the results of the election. The judge had
overruled the employer’s objection contending that the union distributed a flyer during the
critical period containing words “I’m voting yes” or “We’re voting yes” near employees’
photographs without the employees’ prepublication verification. In affirming the judge’s ruling,
the Board held that the employees had signed release forms stating that they were willing to be
photographed and/or videotaped and to provide statements of support for the union and,
therefore, it was reasonable for the union to believe the employees would vote for the union.
Additionally, the Board found that employees would reasonably view the flyers as campaign
propaganda. As such, the Board held that the employer failed to meet the standard of showing
that the union had used “forged documents which render the voters unable to recognize
propaganda for what it is,” see Midland Nat’l Life Ins. Co., 263 NLRB 127 (1982), and the
conduct was thus not objectionable.
Sam’s Town Hotel and Gambling Hall Tunica, 357 NLRB No. 14 (2011)

In *Sam’s Town Hotel and Gambling Hall Tunica*, 26-CB-5146, the Board adopted the administrative law judge’s recommended order dismissing a complaint that alleged a union agent made coercive statements to an employee during a card-check campaign. Specifically, union agents were alleged to have (1) told an employee that the employee could not resign from the union, (2) threatened an employee with bodily harm when the employee asked what would happen if the employee returned to work during a strike, (3) told an employee that the union would not represent employees who did not pay union dues and instructed the employee to tell other employees who did not want to be dues-paying members that they would not be represented, (4) failed to provide correct information about resignation of union membership, and (5) failed to provide correct information regarding dues revocation. The administrative law judge recommended dismissal of the complaint because he discredited a complaining employee who was also the Counsel for the General Counsel’s primary witness.

Go Ahead North America, LLC, 357 NLRB No. 18 (2011)

In *Go Ahead North America, LLC*, 14-RD-01946, the Board set aside the results of a decertification election and directed a second election where, during the campaign, the union offered to waive past dues owed by members. The predecessor employer had failed to deduct dues that the union was entitled to collect directly from the employees. The Board held that while the union could permissibly have waived the debt, it did not do so in a timely manner, and instead did so during the critical period preceding the decertification election. The Board held that the waiver constituted an objectionable grant of a tangible financial benefit because employees reasonably would have inferred the purpose of the union’s expressed willingness to forgive the obligation was to induce them to support the union.

Goffstown Truck Center, Inc., 356 NLRB No. 33 (2010)

In *Goffstown Truck Center, Inc.*, 1–RC–22272, the Board reversed the decision of a hearing officer and held that a union organizer’s statements suggesting that she was acting on behalf of the NLRB compromised an election. The Board found that the union violated the Act when an organizer informed voters that she worked for the NLRB and stated that the Board was interested in how they might vote.

The Humane Society for Seattle/King County, 356 NLRB No. 13 (2010)

In the *Humane Society for Seattle/King County*, 19-RC-15235, the Board majority ordered a new election because the union’s factual misstatements caused significant misunderstandings among the voters. The organizing drive was run by Animal Control Officers Guild (ACOG), which already represented employees at another animal shelter in the same geographic area. The record showed that Humane Society employees wanted to be represented, but had reservations about representation by ACOG. ACOG organizers told voters that they would have their own union, and that this union would be completely separate from ACOG. The Board found that the resulting confusion cast enough doubt on the voting results, which were 15-to-14 in favor of representation, to warrant a new election.
C. Third Party Objectionable Conduct

Mercedes-Benz of San Diego, 357 NLRB No. 67 (2011)

In Mercedes-Benz of San Diego, 21-RC-21210, the Board affirmed the administrative law judge’s decision to overrule an election objection related to the eligibility of two voters, sustain the challenge of an alleged supervisor, and certify the results of the election. The objection alleged that the Board agent engaged in misconduct by refusing to allow two employees to vote. The Board held that the agent did not act improperly based on the information available to him, i.e., that the employer had allegedly improperly transferred the employees to a unit classification only days before the end of the eligibility period in order to affect their voting eligibility. The judge concluded the two employees were not eligible to vote based on the evidence presented by the employer at the pre-election hearing.

Garda Cl Atlantic, Inc., 356 NLRB No. 91 (2011)

In Garda Cl Atlantic, Inc., 10–RC–15788, the Board held that the closure of a voting booth three minutes early could have disenfranchised enough voters to change the outcome of a 30-to-29 election in favor of the union. The Board found that once the agent began dismantling the booth, three employees entered and were told that they could either vote under challenge or return for an afternoon voting session. The employer contended that other employees, who might have been nearby, could have concluded that voting was over. The Board, relying on both the closeness of the election and the fact that 20 eligible employees never voted, ordered a new election because only a “possibility of disenfranchisement” was required to be shown.

American Medical Response, 356 NLRB No. 42 (2010)

In American Medical Response, 8–RC–17008, the Board majority upheld the results of an election and rejected the employer’s objections to a voting booth that they found allowed observers, stationed four to five feet away, to see the voter’s face and arm movements, but not the voter’s actual vote. The majority relied on Avante At Boca Raton, 323 NLRB 555, 558 (1997), which held that the election results remain valid unless a voter’s actual vote is disclosed.

D. Conflict of Interest

Supershuttle Int’l Denver, Inc., 357 NLRB No. 19 (2011)

In Supershuttle Int’l Denver, Inc., 27-RC-08582, the Board reinstated a representation petition that the Regional Director had dismissed, finding that the employer had not met the heavy burden of establishing that the union was disqualified from representing the employer’s employees because of a conflict of interest involving the union’s relationship with Union Taxi Cooperative (“UTC”), a nonprofit taxicab cooperative that the employer claimed was its competitor. Specifically, the evidence showed the union had lobbied for UTC’s formation, the union’s address was listed as UTC’s principal office, and the union had a commercial lease with UTC through which UTC rented office space and used the union’s parking lot. The Board found, however, that the employer failed to establish that the relationship between the union and UTC posed a clear and present danger of interfering with collective bargaining with the employer.
E. Mail Ballot/Situs of Elections

Austal USA, LLC, 357 NLRB No. 40 (2011)

In *Austal USA, LLC*, 15-RC-8394, the Board considered, on the union’s motion for special permission to appeal, whether the Regional Director erred by directing a second rerun election be held on the employer’s premises over the objection of the union, which had requested that the election be held at a neutral location or by mail ballot. The Board had set aside the results of the first two elections, both of which were held on the employer’s premises, because of its finding of unlawful and objectionable conduct by the employer in both instances. Citing to the Casehandling Manual, the Board recognized that “in the absence of cause to the contrary, the election should be held somewhere on the employer’s premises” and that the decision is ultimately at the discretion of the Regional Director. The Board concluded, however, that it was unable to determine whether the Regional Director abused that discretion and whether she had considered: “(1) the extent and nature of the employer’s prior unlawful conduct; (2) the appropriateness of the alternative, neutral site proposed by the Petitioner; or (3) the factors the Board has indicated are best evaluated by the Director.” As such, the Board remanded the case to the Regional Director with instructions to consider the enumerated factors, as well as the union’s objection to holding the third election on the employer’s premises and the employer’s request that it be held there (and the grounds for the objection and request), the fact that the union made a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct had not yet closed, the advantages available to the employer over other parties if the election is conducted on premises it owns or otherwise controls, the alternative site proposed by the union as well as other available sites, and the propriety of conducting the election by mail ballot.

CPMC St. Luke’s Hosp., 357 NLRB No. 21 (2011)

In *CPMC St. Luke’s Hosp*, 20-RC-18207, the Board majority directed that the election be conducted by mail ballot. Disagreeing with Member Hayes’s dissent that mail ballots should be limited to extraordinary circumstances because of the inherent unreliability and procedural issues involved with mail ballots, the Board majority found a mail ballot to be appropriate because the Regional Director concluded that a manual election, in this case, was not administratively practicable.

The Board majority also found a single-facility unit to be inappropriate. The Regional Director ruled that the petitioned-for unit of employees at one hospital was appropriate and that those employees were not required to be included in a unit with employees at the employer’s three other hospitals. Contrary to dissenting Member Hayes’s findings, the Board found that the single campus’s local autonomy diminished the significance of the high degree of administrative centralization and integration and that there was little interchange between the campuses.

Mental Health Association, Inc., 356 NLRB No. 151 (2011)

In *Mental Health Association, Inc.*, 1–RC–22449, the Board directed the Regional Director to conduct a second election based on the employer’s conduct, which included “without advance notice, chang[ing] the route and method by which employees would enter the facility,”
“giving control over that entrance to openly antiunion employees for a substantial portion of the voting period” and “hir[ing] security, erect[ing]a fence around part of its parking lot, and post[ing] private property signs, all apparently without security justification.” The Board declined the petitioner’s request that the Board rescind its presumption in favor of holding an election at the employer’s premises.

F. Procedures Relating To Challenged Ballots

CHS, Inc., 357 NLRB No. 54 (2011)

In *CHS, Inc.*, 18-RD-2722, after a mail ballot election, the union timely challenged an employee’s ballot on the basis that he was not on the payroll at the time of the election. The employer changed its position and agreed with the union that he was not eligible to vote because he was not employed on the date the ballots were to be returned. Shortly thereafter, the union withdrew its challenge and the Regional Director ordered that the employee’s ballot be opened and counted in the event the ballot became determinative following resolution of the remaining challenges. The Employer objected and raised its own challenge, but the hearing officer found that the challenge was untimely because it was raised after the ballot count.

The Board disagreed and found no post-election challenge at odds with the Board’s timing requirements because a party may, at hearing, raise an alternative ground for a properly challenged ballot, even if that alternative ground was not raised in a timely challenge. The Board reasoned that this case was not one where ballots had already been commingled and a party then filed a late challenge. Rather, a timely initial challenge was filed, and the challenged ballot was segregated. The ballot remained sealed, and the issue of eligibility was litigated. Consequently, the Board ordered that the Regional Director hold in abeyance the challenged ballot and take further action consistent with its decision should the ballot become determinative.

The Board also adopted the hearing officer’s recommendation to overrule the challenge of a ballot on the basis that the union failed to meet its burden of showing supervisory status. The Board’s remand included instructions that the Regional Director open and count the ballot.

G. Deauthorization Petitions

Los Angeles Times Comms., LLC, 357 NLRB No. 66 (2011)

In *Los Angeles Times Communications, LLC*, 21-UD-415, the Board reversed the Regional Director’s decision to administratively dismiss the petitioner’s deauthorization petition. The union-security clause at issue provided that “the requirement that employees become members of the Union and remain in the Union in good standing, as condition of employment [sic], shall be deemed satisfied so long as a non-member of the Union pays to the Union an amount equivalent to the Union’s regular dues and initiation fees, or such amounts reduced by the portion therefore, if any, not germane to collective-bargaining, contract administration, or grievance adjustment . . . .”

In finding that it was required to process the petition, the Board considered the first proviso of Section 8(a)(3), which provides that nothing in the Act “shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment
membership therein.” The Board went on to find the clause to be lawful, constituting an agreement made pursuant to Section 8(a)(3), and thus requiring the processing of the petition under Section 9(e)(1). In other words, the Board ruled that the language of the relevant statutory provisions compelled it to process the petition, even though loss of employment was not a possible sanction for the employees’ non-payment.

III. Bargaining and Representation

A. Withdrawal of Recognition/Refusal to Recognize

Erie Brush & Mfg. Corp., 357 NLRB No. 46 (2011)

In Erie Brush & Mfg. Corp., 13-CA-43530, the Board affirmed the administrative law judge’s findings that absent a mutually acknowledged and actual impasse, an employer’s refusal to bargain with, and withdrawal of recognition of, a union representing its employees violated Section 8(a)(5) of the Act. In finding that that the employer failed to demonstrate that the parties had reached a good-faith impasse on union security and arbitration provisions, the Board noted that a perceived impasse must be mutual and, despite the union negotiator’s early rhetoric, the Board found the union’s actions belied the suggestion of a mutual agreement on impasse. Specifically, the Board found the union negotiator suggested going to a mediator, which the Board noted suggested that he did not think that further bargaining would be futile. Although the Board found the negotiator used the term “impasse” to describe the status of negotiations, the Board ultimately ruled that his words were made in “the give and take atmosphere of collective bargaining. The Board further found that even if there was an impasse, it did not lead to the breakdown of negotiations. Rather, the Board concluded that the union stated it was willing to discuss union security and arbitration and that it was the employer’s refusal to meet that broke down negotiations, not the purported impasse.

Mesker Door, Inc., 357 NLRB No. 59 (2011)

In Mesker Door, Inc., 10-CA-35863, a panel majority of the Board found that the employer unlawfully withdrew recognition and then made several unilateral changes in violation of Section 8(a)(5) of the Act. More specifically, the panel held that a decertification petition signed by a majority of employees was tainted due to the employer’s unlawful conduct, including a finding that a threat was made in a speech by the plant manager that bonus payments were lower due to the filing of unfair labor practice charges, and earlier violations of the Act. Therefore, the panel majority held that the employer was prohibited from relying on the petition to withdraw recognition.

In addition, the unanimous panel found that the employer unlawfully suspended an employee for discussing union issues with another employee.

New Vista Nursing and Rehab., LLC, 357 NLRB No. 69 (2011)

In New Vista Nursing and Rehab., LLC, 22-CA-29988, the Board ruled that the employer violated Section 8(a)(5) of the Act by refusing the union’s requests to bargain and to furnish information following the union’s certification. On the Acting General Counsel’s unopposed motion for summary judgment, the Board ruled against the employer, who contended that the
unit was inappropriate, because it found all representation issues could have been litigated in the prior representation proceeding.

All Seasons Climate Control, Inc., 357 NLRB No. 70 (2011)

In All Seasons Climate Control, Inc., 8-CA-37931, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(5) of the Act by withdrawing recognition of the union following the solicitation and encouragement of employees to circulate decertification petitions. Specifically, the Board found that two supervisors, over a period of six months, expressly solicited and encouraged an employee to distribute a petition and gave him advice on what it should say and when it should be circulated. The Board further affirmed the judge’s finding that the employer unlawfully refused to furnish information requested by the union, including the names of all employees, their contact information, dates of hire, titles, and starting pay rate and benefits.

The Board adopted the judge’s recommended remedies, including an affirmative bargaining order, a twelve-month extension of the certification year, and a bargaining schedule requiring the employer to bargain with the union for a minimum of 15 hours per week and to submit periodic progress reports to the compliance officer.

Land-O-Sun Dairies, LLC, 357 NLRB No. 73 (2011)

In Land-O-Sun Dairies, LLC, 5-CA-36199, the Board held the employer violated Section 8(a)(5) of the Act by refusing to recognize the union as the representative of its clerical employees and by failing to apply the terms and conditions of its collective bargaining agreement. The Board rejected the employer’s argument that the charge was time-barred because the union filed it more than six months after it was on notice of the employer’s refusal to bargain. The Board reasoned that because the parties had not reached final agreement concerning the status of the employees at issue when they signed the collective bargaining agreement and the employer had filed a unit clarification petition, it was therefore reasonable for the union to assume that the employer was not refusing to bargain until after resolution of that petition.

Gene’s Bus Co., 357 NLRB No. 85 (2011)

In Gene’s Bus Co., 2-CA-38713, the Board affirmed the administrative law judge’s finding that the employer withdrew recognition in violation of Section 8(a)(5) of the Act based on a decertification petition it found was tainted by unfair labor practices. The Board also found that the employer: (1) further violated Section 8(a)(5) by failing to provide requested information about bus routes, by direct dealing, by failing to post jobs for bidding in violation of the labor contract, by refusing to consider the union’s proposals until it received the union’s proposals in writing, by unilaterally changing terms and conditions of employment after withdrawing recognition, by refusing to meet for a scheduled grievance meeting, and by refusing to bargain with the union if a discharged steward was at the bargaining table; (2) violated Section 8(a)(1) of the Act by assaulting a union representative and by threatening an employee that it would be futile for the union to bring a grievance; and (3) violated Section 8(a)(3) of the Act by suspending a shop steward for requesting union representation at a disciplinary meeting. The
Board further affirmed the judge’s dismissal of the allegations that the employer had unlawfully interrogated employees and unlawfully discharged a shop steward after he disrupted a state-mandated medical exam.

Warren Unilube, Co., 357 NLRB No. 9 (2011)

In Warren Unilube, Co., 26-CA-23999, the Board held that the employer violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the union. The Board rejected the employer’s objections to conduct alleged to have occurred that allegedly affected the results of the election because it found the employer failed to raise those issues during the representation proceedings. The Board found that representation issues are not litigable in an unfair labor practice proceeding and that no newly discovered evidence was present, so therefore the Board held that the Acting General Counsel was entitled to summary judgment.

SFO Good-Nite Inn, LLC, 357 NLRB No. 16 (2011)

On remand in light of New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010), the three-member panel in SFO Good-Nite Inn, LLC, 20-CA-32754, agreed with the administrative law judge that the employer improperly withdrew recognition, but ruled that the judge should have applied the standard articulated in Hearst Corp., 281 NLRB 764, enf’d mem., 837 F.3d 1088 (5th Cir. 1988), rather than in Master Slack, 271 NLRB 78, 78 n.1 (1984). The Board held that the finding of the employer’s misconduct in encouraging its employees’ decertification efforts per se precluded its reliance on the petitions as a basis for withdrawing recognition under Hearst.

Fairfield Toyota, 356 NLRB No. 174 (2011)

In Fairfield Toyota, 20-CA-35310, the Board ruled that the predecessor and successor employers violated Section 8(a)(5) of the Act by refusing the union’s requests to bargain and by failing to furnish information following the union’s certification. Both employers contested the union’s certification. On the Acting General Counsel’s unopposed motion for summary judgment, the Board ultimately ruled against the employers, finding that all representation issues could have been litigated in the prior representation proceeding. Therefore, the Board concluded that the predecessor employer should have recognized the union following the election and certification, and the successor employer, operating the car dealership in unchanged form and employing a majority of unit employers, likewise was obligated to recognize the union as a successor employer.

Pacific Beach Hotel, 356 NLRB No. 182 (2011)

In Pacific Beach Hotel, 37-CA-7311, the Board concluded the employer committed multiple violations of the Act, including unlawfully withdrawing recognition from the union. More specifically, the Board held that the employer violated: (1) Section 8(a)(1) of the Act by promulgating overbroad rules discouraging employees from engaging in protected concerted activity; polling employees concerning their union membership, activities, and sympathies; and threatening employees with job loss if the hotel had to close because of union boycotts; (2) Section 8(a)(3) of the Act by discharging seven members of the union’s bargaining team; and (3)
Section 8(a)(5) of the Act by bargaining in bad faith for an initial contract; withdrawing recognition from the union; unilaterally promulgating overbroad rules discouraging employees from engaging in protected concerted activity; unilaterally changing housekeepers’ workloads; unilaterally imposing new conditions of employment on employees; unilaterally implementing wage increases for both tipping and nontipping category employees; refusing to provide requested information to the union; effecting layoffs without bargaining with the union; unilaterally imposing a 90-day probationary period on rehired employees; and unilaterally reassigning employees to jobs and lowering their wage rates.

With respect to the bad faith bargaining and unlawful withdrawal of recognition findings, the Board first concluded that (1) the employer unlawfully “steadfastly adhered” to bargaining proposals on union recognition, management rights, and a grievance procedure that would have allowed the union no role in representing employees and (2) the regional vice president of operations emphasized that the union had won the election by only one vote. The Board next concluded that, although the employer argued that it should have been allowed to present employee testimony at the hearing showing that the union did not enjoy majority support at the time of the withdrawal of recognition, such testimony would not have provided the required proof of actual loss of majority support under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and, therefore, the employer had no legal basis for withdrawing recognition.

The Board awarded extraordinary remedies, based on its conclusions that the employer had engaged in serious misconduct and had a proclivity to violate the Act. The remedies included a broad cease-and-desist order, reimbursement of negotiating expenses, and the public reading of the notice by a responsible corporate executive. In addition to the reimbursement of negotiating expenses, the Board remedied the finding that the employer had bargained in bad faith by (1) requiring the employer to reinstate all tentative agreements and (2) extending the certification year by twelve months.

*The Musical Arts Ass’n*, 356 NLRB No. 166 (2011)

In *The Musical Arts Ass’n*, 8-CA-38834, the Board affirmed the administrative law judge’s ruling that the employer violated Section 8(a)(5) of the Act in withdrawing its recognition of the American Federation of Musicians (“AFM”) as the joint representative of the bargaining unit and refusing to bargain with the AFM regarding the production and use or development of electronic media. The judge reasoned that the history of bargaining, the recognition provisions in the AFM’s agreements with the employer, the industry practice, the AFM’s bylaws, and the language of the Local 4’s trade agreement with the AFM showed that the employer had recognized Local 4 and the AFM as joint representatives of employees in the bargaining units covered by the agreements and, therefore, the employer could not refuse to bargain with the AFM over matters with which it had historically bargained with the AFM, including matters related to electronic media.

*Gateway Care Center*, 356 NLRB No. 34 (2010)

In *Gateway Care Center*, 22–CA–28708, the Board upheld the administrative law judge’s decision that an employer unlawfully refused to sign a collective bargaining agreement (CBA) after having agreed to a memorandum of understanding (MOA) that contained substantially the
same provisions. The judge found that after signing the MOA, counsel for the employer and a union representative reviewed all documents incorporated by reference in the MOA, made the needed changes and assembled the complete CBA. In the weeks that followed, however, the employer refused to meet and sign copies of the CBA. The Board found a violation of the Act because the CBA had incorporated all of the changes that had been agreed to by both parties during the period when they reviewed the MOA together.

**B. Voluntary Recognition**

*Lamons Gasket Co., 357 NLRB No. 72 (2011)*

In *Lamons Gasket Co.*, 16-RD-1597, the Board overruled *Dana Corp.*, 351 NLRB 434 (2007), in which the Board had created a 45-day window for employees to petition for an election if their employer had voluntarily recognized a union. Finding the approach in *Dana* to be “flawed, factually, legally, and as a matter of policy,” the Board returned to the previous rule under *Keller Plastics Eastern*, 157 NLRB 583 (1966), which barred an election petition for a “reasonable period” of time after voluntary recognition of a representative designated by a majority of employees. The Board defined “reasonable period of time” to range from no less than six months to no more than a year, depending on the circumstances.

**C. Unilateral Changes/Mandatory Subjects of Bargaining**

*International Bridge & Iron Co., 357 NLRB No. 35 (2011)*

In *International Bridge & Iron Co.*, 34-CA-12616, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(5) of the Act by (1) failing to bargain with the union regarding the effects of its decision to cease operations and terminate all unit employees and (2) subsequently unilaterally terminating health, dental, and life insurance benefits. The Board found that the employer had no duty to bargain regarding the decision to go out of business, but held that it had a duty to bargain about the effects of that decision. Because it found that the employer did not officially notify the union that it was ceasing operations until the day of closure, the Board held that the employer failed to meet its effects bargaining obligations. The Board rejected the employer’s argument that it was relieved of its duty to bargain because of an emergency or because the decision to terminate the benefits was that of the insurance carriers.

*Daycon Prods. Co., Inc., 357 NLRB No. 52 (2011)*

In *Daycon Prods. Co., Inc.*, 5-CA-35043, the Board found, contrary to the administrative law judge, that the employer violated Sections 8(a)(5) and (d) of the Act by unilaterally reducing the contractual wage rates of eight bargaining unit employees. More specifically, the Board found that during the term of a collective bargaining agreement, the employer determined that the employees had been overpaid due to mistaken raises years earlier under the prior contract and sought to correct the clerical error, and while the union opposed any action by the employer to recoup the overpayments by reducing the employees’ wages, the employer did so nonetheless. The Board found that there was no mistake as to the amounts paid to the employees under the current contract. As such, the Board reasoned, the employer was barred from unilaterally altering the wage rates once it entered into the new contract. The Board further found that to the
extent the wage rates were truly inflated by a clerical error made during the prior term, the union had no notice of the mistake and relied in good faith on the representations made in the employer’s proposed wage schedule. Consequently, the Board ordered the employer to restore the wages of the eight employees and to make them whole for any loss of wages and benefits suffered as a result of the unlawful wage reduction.

**Virginia Mason Hosp., 357 NLRB No. 53 (2011)**

In *Virginia Mason Hospital*, 19-CA-30154, the Board overruled the administrative law judge’s findings that the employer was not required to bargain before it implemented its flu-prevention policy. The judge had found that even though the subject was one that required mandatory bargaining, the employer was exempt under *Peerless Publications*, 283 NLRB 334 (1987), because the policy protected the core purpose of the enterprise. The Board disagreed and held that *Peerless Publications* applied only in very limited circumstances not present here. As such, the Board remanded the case with instructions for the judge to analyze the employer’s other affirmative defenses and ultimately to determine whether the employer’s actions violated the Act.

**Garden Grove Hosp. & Med. Ctr., 357 NLRB No. 63 (2011)**

In *Garden Grove Hosp. & Med. Ctr.*, 21-CA-39301, the Board adopted the administrative law judge’s finding that the employer violated Section 8(a)(5) of the Act when it unilaterally rescinded a sick leave benefit. The employer purchased the hospital from a predecessor during the term of a collective bargaining agreement. Although the employer agreed to recognize the union and to honor significant portions of the contract, it also retained the right to set initial terms and conditions of employment. However, the judge found that the employer made no mention of the sick leave benefit in the new terms, that the employer did not notify the union that it was not implementing the benefit, and that due to clerical error, the employees received the benefit for a period of time. The judge found that because sick leave is a mandatory subject of bargaining, the employer acted unlawfully when it unilaterally decided not to offer the benefit.

The Board modified the judge’s recommended remedy to provide that the employer must not only restore unit employees’ accrued sick leave benefit time, but must also credit unit employees with additional time they would accrue until the employer restores the benefit.

**Quality Roofing Supply Co., 357 NLRB No. 75 (2011)**

In *Quality Roofing Supply Co.*, 4-CA-36852, the Board adopted the administrative law judge’s finding that the employer violated Section 8(a)(5) of the Act by unilaterally implementing health insurance premium increases for its union-represented employees. The Board agreed with the judge that the union did not “clearly and unmistakably” waive its right to file a charge challenging the unilateral change when it entered into a later non-Board settlement agreement with the employer that provided, among other things, that “the Union will inform the Region and/or [NLRB] that the Union and its members are withdrawing all unfair labor practice charges or appeals . . . with prejudice.” The Board noted that the union’s unilateral-change charge was not pending at the time of the non-Board settlement and that the charge involved different unlawful conduct from any of the unfair labor practice charges that the union withdrew.
as part of the settlement. The Board further found the employer’s argument that it was privileged to implement the health insurance premium increases due to impasse to be without merit because the employer had not established that an increase in employees’ health insurance premiums was a discrete, annually recurring event. Finally, the Board adopted the judge’s finding that the employer violated Section 8(a)(5) of the Act by refusing to bargain with the union without the presence of a federal mediator.

Solutia, Inc., 357 NLRB No. 15 (2011)

In Solutia, Inc., 01-CA-45447, the Board affirmed the administrative law judge’s findings that the employer did not unlawfully modify the unit or unlawfully modify the recognition clause in the collective bargaining agreement in violation of Section 8(d) of the Act because the transferred work did not affect the bargaining unit. In that regard, the judge found that the transferred employees did not continue to perform the same work outside the unit after the transfer, and the transferred jobs had not been included in the unit.

The Board further affirmed the judge’s conclusion that the employer’s decision to consolidate work and transfer jobs was a mandatory subject of bargaining and, therefore, the employer violated Section 8(a)(5) of the Act by failing to afford the union an opportunity to bargain over the decision and effects, rejecting the employer’s argument that there was a change in the nature, scope, or direction of the corporate enterprise.

Palm Beach Metro Trans., LLC, 357 NLRB No. 26 (2011)

In Palm Beach Metro Trans., LLC, 12-CA-25842, the Board affirmed the administrative law judge’s conclusion that the employer violated Section 8(a)(5) of the Act when it unilaterally reduced the number of hours and days of work for unit employees. The Board found that the employer failed to establish a past practice of reducing hours in response to fluctuations in available work. The Board noted that it found the unilateral reduction was a first time event with no established past practice.

Lawrence Livermore Nat’l Security, LLC, 357 NLRB No. 23 (2011)

In Lawrence Livermore Nat’l Security, LLC, 32-CA-23902, the Board disagreed with the administrative law judge’s finding that the employer did not violate Sections 8(a)(5) of the Act when it laid off nine unit employees without the union’s agreement or bargaining to good-faith impasse. The judge had found that the parties agreed to bifurcate bargaining and had not begun bargaining for an initial contract at the time of layoffs. The Board concluded that the parties were in fact engaged in negotiations at the time of the layoffs because of an agreement on ground rules and the union’s information request and, therefore, the employer was required to bargain to good-faith impasse before implementing the layoffs.

Décor Group, Inc., 356 NLRB No. 180 (2011)

In Décor Group, Inc., 22-CA-29379, the Board affirmed the administrative law judge’s conclusion that the employer violated Section 8(a)(5) of the Act in ceasing to make health care contributions on behalf of its bargaining unit employees after the underlying collective bargaining agreement expired. The judge noted the employer’s obligation to refrain from
unilateral changes absent overall impasse on bargaining for the agreement as a whole and prior Board decisions holding that an employer is obligated to pay benefit fund contributions beyond the expiration of the contract until a successor agreement or lawful impasse. The judge rejected all of the employer’s defenses, finding that (1) it was inappropriate to defer the dispute to arbitration in light of the expired collective bargaining agreement, (2) it was irrelevant that only 27 percent of the employees used the contractually provided health benefits, (3) the charge was not res judicata and collaterally estopped as a result of a settlement of an underlying lawsuit brought by the benefit fund against the employer because the fund is a separate party from the union and the Section 8(a)(5) issues were not litigated or settled in the lawsuit, and (4) the union did not have unclean hands.

Eugene Iovine, Inc., 356 NLRB No. 134 (2011)

In Eugene Iovine, Inc., 29–CA–21052, 29–CA–21086, 29–CA–21840–3, 29–CA–21879–1, 29–CA–21879–2, and 29–CA–22030, the Board affirmed the administrative law judge’s decision that the employer unlawfully laid off bargaining unit employees for economic reasons, without providing the union with notice and an opportunity to bargain about the layoff decision and its effects. The Board reaffirmed its prior holding that an employer may not establish a past practice defense based on a prior union’s acquiescence where the current union had not acquiesced to the unilateral changes.

Embarq Corp., 356 NLRB No. 125 (2011)

In Embarq Corp., the Board affirmed the administrative law judge’s decision that the employer did not violate the Act by refusing to bargain with the union over its decision to close its call center in Nevada and relocate the work to its call center in Florida. Applying the Dubuque Packing framework, the Board held that the employer failed to rebut the General Counsel’s prima facie case that the relocation was unaccompanied by a basic change in the nature of the employer’s operation. However, although the Board found labor costs were clearly a factor in the employer’s decision to relocate, it ruled that the employer proved the union could not have offered labor-cost concessions sufficient to alter the employer’s decision to relocate.

San Juan Bautista Medical Center, 356 NLRB No. 102 (2011)

In San Juan Bautista Medical Center, 24–CA–11419, the Board found that the employer’s unilateral refusal to pay statutorily- and contractually-mandated Christmas bonuses should not be deferred to arbitration. The collective bargaining agreement mandated payment of bonuses “according to Puerto Rico law.” The Board held that the resolution of the Christmas bonus issue should not be deferred to arbitration because the parties did not have a “long and productive bargaining relationship” and the dispute called for an interpretation of Puerto Rican law, not the CBA.


In O.G.S. Technologies, Inc., 34–CA–9336, the Board majority found that the employer, a successor to the original employer, violated the Act by unilaterally removing two employees from the bargaining unit, subcontracting their work and then laying off one of them. The majority relied on Bay Shipbuilding Corp., 263 NLRB 1133 (1982), which held that a successor
employer cannot alter the bargaining unit without first showing that there is no longer a community of interest. Distinguishing First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Board concluded that the decision to subcontract the work was a mandatory subject of bargaining because the subcontracted work, which constituted only 15% of the employer’s work, did not involve a core entrepreneurial decision.

Bebley Enterprises, Inc., 356 NLRB No. 64 (2010)

In Bebley Enterprises, Inc., 8–CA–38181, the Board upheld the administrative law judge’s decision that the employer violated the Act by unilaterally terminating the CBA before its expiration, reducing an employee’s hours of work, and then terminating the employee. The CBA, after its initial term was up, automatically renewed each year and was only terminable on 60-days’ notice before the annual renewal date. Rejecting the employer’s argument that it was entitled to repudiate the CBA because the union had sought salary information through a public records request, the judge found that the union’s request did not violate the CBA and, even if it did, the employer had not given the requisite 60-day notice. The Board agreed with the judge’s finding of anti-union animus, based on what it found to be the employer’s shifting and inconsistent explanations concerning the reasons for the employee’s termination.

Atlantis Health Care Group (P.R.) Inc., 356 NLRB No. 26 (2010)

In Atlantis Health Care Group (P.R.) Inc., 24–CA–11300, the Board upheld the administrative law judge’s determination that the employer violated the Act by granting a salary increase and, one month later, rescinding it without negotiation. The Board held that the employer’s “mistake” in granting the increase did not change the fact that a decrease in pay is a mandatory subject of bargaining.

St. Charles Refractory, 356 NLRB No. 5 (2010)

In St. Charles Refractory, 6-CA-36919, the Board found that an employer had improperly failed to bargain with the union concerning its decision to close the workplace and cease operations. In addition to requiring the employer to bargain, the Board issued a back pay remedy “until such time as the parties bargain to impasse or to an agreement on the closure issue.”

D. Refusal to Furnish Information


In Alta Vista Reg. Hosp., 28-CA-22280, the Board found that the employer violated Section 8(a)(5) of the Act when it refused to provide the union with information it requested (a list of all bargaining unit employees and an updated list of employees who had been terminated since certification), unilaterally changed its practice concerning “Fit Tests,” and discharged an employee pursuant to the unlawful unilateral change. The employer admitted that it engaged in such conduct, but did so while there were objections pending to an election. The Board found that the employer (1) acted at its own peril when it made these changes and (2) did not proffer compelling economic considerations for doing so.
Tenneco Auto., Inc., 357 NLRB No. 84 (2011).

In Tenneco Auto. Inc., 7-CA-49251, the Board held that the employer violated Section 8(a)(5) of the Act by failing to provide the union with requested information concerning: (1) its plan to install video surveillance cameras, even though the employer later abandoned that plan, because the information was relevant at the time of the request; and (2) home addresses of strike replacement employees because there was no “clear and present danger” that the union would misuse the addresses. The Board further held that the employer violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the union because the petition was tainted by what it found to be the employer’s unlawful conduct that effectively barred the union from communicating with employees, and (2) requiring employees to obtain approval prior to posting materials at the facility.

The Board additionally concluded that the employer violated Section 8(a)(3) of the Act by disciplining an employee for displaying the slogan “Though Shall Not Scab” on his shirt, and Section 8(a)(1) of the Act by directing employees to refrain from making statements to other employees that could “evoke a response.”

NTN Bower Corporation, 356 NLRB No. 141 (2011)

In NTN Bower Corporation, 10-CA-37271, 10-CA-37484, 10-CA-37545, 10-CA-37652, 10-CA-37692, 10-CA-37762, and 10-CA-37820 the Board affirmed the administrative law judge’s finding that the employer committed multiple unfair labor practices, including refusing to furnish the union with the addresses of permanent replacements following a strike. The Board majority found that the employer violated the Act under either the “clear and present danger” standard or the Seventh Circuit’s “totality of circumstances” standard, which balances concerns about the safety of replacements against the union’s legitimate need for the information.

Peterbilt Motors Co., 357 NLRB No. 13 (2011)

In Peterbilt Motors Co., 26-CA-23225, the Board held that the union was entitled to information related to the employer’s labor costs at the employer’s other facilities. In reaching that conclusion, the Board relied on evidence that during negotiations about a unionized plant the employer repeatedly asserted that plant was the company’s costliest to operate which, according to the Board, reasonably suggested that comparative operating costs played a role in the employer’s bargaining strategy. Consequently, the Board ruled that the requested information became at least potentially relevant to the union’s duties as a bargaining representative, entitling the union to information related to the other facilities’ financial data.

The Board next considered whether the employer’s refusal to furnish the information transformed an otherwise lawful lockout into an unlawful one. The Board recognized that there could be circumstances where an employer’s unlawful failure to provide information could cause a lockout to become unlawful (e.g., where an employer locks out employees for failing to accept its proposals and refuses to provide information necessary to assess the proposals). However, in this case, the Board found that the withholding of information did not materially affect the progress of negotiations.
In National Extrusion & Mfg. Co., 8-CA-37672, the Board majority applied the standard set forth in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), and held that, because it found the employer premised its demand for substantial wage concessions on a need to remain competitive in the marketplace, the union was entitled to information concerning the employer’s current and former customers, job quotes, outsourcing, pricing structure, market studies and competitors. The Board majority went on to find that, because the employer unlawfully withheld the requested information, the employer’s lockout of employees, temporary replacement of them, and cancellation of their health insurance coverage violated Sections 8(a)(3) and (5) of the Act.

In Kaleida Health, Inc., 3-CA-27507, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(5) of the Act by refusing to provide accident reports noting all patient falls. The judge found the employer discharged a nurse for failing to report a patient fall, and the union grieved the discharge. The judge held that the information requested by the union was necessary and relevant to its evaluation of the grievance, that the reports’ protection from disclosure under New York state law was not absolute, and that the union’s need for the information superseded the general policy against disclosure. Moreover, the judge ruled that the employer did not fulfill its duty to accommodate the union’s need for the information because the employer’s offer to provide the union with a list of employees who had not made the appropriate reports did not include an offer to provide any evidence regarding the specific circumstances of any previous incidents involving fallen patients. The Board upheld the judge’s recommended order requiring the employer to furnish the requested reports with redacted patient names to the union and to post a notice.

In A-1 Door and Building Solutions, 20–CA–33485, the Board affirmed the administrative law judge’s determination that the employer violated the Act by refusing to give the union information concerning non-bargaining unit employees’ profit-sharing data and the company’s contract-bidding history. Finding that the employer’s proposal to cut the profit-sharing plan justified the union’s information request, the Board, relying on Comar, Inc., 349 NLRB 342 (2007), concluded that the disclosure of employees’ wage and benefit information, standing alone, does not impinge on employees’ privacy interests. It also ruled that the request for the company’s contract bidding history was proper because it found the employer had claimed during negotiations that a wage increase would reduce its competitiveness in contract bidding.

In U.S. Postal Service, 24–CA–10805, the Board required the Postal Service to turn over the test scores and veterans’ service history of 22 applicants accepted for positions. The Board found that, because of the written warning on the test materials, no applicant could have had a reasonable expectation that his scores would remain private.
E. Other Unlawful Conduct in Bargaining


In United Steel, Paper & Forestry, Rubber Manufacturing, Energy, Allied Industrial & Service Workers I, 33–CB–4317, the Board dismissed an employer’s Section 8(b)(3) complaint against a union based on the union’s statement that it would bargain only “provisionally” over subjects that the employer failed to present by the first day of bargaining. Relying on WWOR-TV, 330 NLRB 1265 (2000), the Board found that the union’s declaration merely preserved a contractual litigation position, without affecting its willingness and ability to engage in good-faith negotiations.

F. Appropriate Units/Unit Clarification Petitions

Specialty Healthcare and Rehab. Ctr. of Mobile, 357 NLRB No. 83 (2011)

In Specialty Healthcare and Rehab. Ctr. of Mobile, 15-RC-8773, the Board found that certified nursing assistants (“CNAs”) at a non-acute care nursing home comprised an appropriate unit without the inclusion of other non-professional employees. The Board concluded that its decision in Park Manor Care Ctr., 305 NLRB 872 (1991), in defining appropriate units in non-acute healthcare facilities, “ha[d] become obsolete, is not consistent with our statutory charge, and has not provided clear guidance to interested parties or the Board.” The Board ultimately held that nursing homes, rehabilitation centers, and other non-acute health care facilities are subject to the same community-of-interests standard applicable to all other employers.

The Board additionally ruled that where an employer argues that a proposed unit inappropriately excludes certain employees, the employer will be required to prove that the excluded employees share “an overwhelming community of interest” with employees in the proposed unit. The majority stated that it drew this test from Board precedent endorsed by the United States Court of Appeals for the District of Columbia Circuit in Blue Man Vegas, LLC v. NLRB, 529 F.3d 417 (D.C. Cir. 2008).

Specialty Hosp. of Washington-Hadley, LLC, 357 NLRB No. 77 (2011)

In Specialty Hosp. of Washington-Hadley, LLC, 5-CA-33522, the Board considered “whether an employer that satisfies all of the criteria for being a successor and would have an obligation to recognize and bargain with the representative of its predecessor’s employees, but for the fact that its predecessor recognized the representative in an inappropriate unit, nevertheless becomes so obligated if the representative ‘perfects’ the unit by disclaiming interest in representing specified employees in the predecessor’s unit.” The predecessor long-term acute care hospital had voluntarily recognized a “mixed unit” of 169 employees, including ten security guards and five pharmacists. After the employer became a successor, the employer informed the union that it refused to recognize or bargain with the union because the preexisting unit included guards and professional pharmacists and was therefore inappropriate. In response, the union renewed its request to bargain and excluded the guards and pharmacists from the scope of the unit. The employer again refused to recognize or bargain with the union. The administrative law
judge issued a decision finding that the unit in question, as perfected, was appropriate, and therefore the employer had violated Section 8(a)(5) of the Act.

The Board, affirming the judge’s findings, concluded that the facts supported a finding of substantial continuity of the workforce. The Board further found that the perfected unit fell into the “existing non-conforming unit” exception to the Board’s Rule 103.30(a) governing health care units. The Board thus ordered the employer to recognize and bargain with the union and to rescind any unilateral changes made to terms and conditions of employment.

**Interstate Bakeries Corp., 357 NLRB No. 4 (2011)**

In **Interstate Bakeries Corp.**, 17-CA-23404, the Board concluded, on remand from the United States Court of Appeals for the Tenth Circuit following the Supreme Court’s decision in **New Process Steel, L. P. v. NLRB**, 130 S.Ct. 2635 (2010), that the employer and union violated Sections 8(a)(3) and 8(b)(1)(A) and (2) of the Act, respectively, when they agreed to endtail, rather than dovetail, the seniority of a previously unrepresented employees following the merger of two represented units. The Board overruled the administrative law judge’s findings and dismissal of the complaint and held that in the context of a unit merger, a union and an employer are not lawfully permitted to discriminate against all or some of the merged employees on the basis of their previously unrepresented status. In other words, the employer and union, under the circumstances of the case, were required to consider unit seniority, not union seniority. Their failure to do so was deemed unlawful.

**International Bedding Co. (IBC of Pennsylvania), 356 NLRB No. 168 (2011)**

In **International Bedding Co.**, 4–RC–21705, the Board held that a unit consisting of all drivers, jockeys, production, and warehouse employees of a plant was an appropriate unit because it found the employees shared benefits, work rules, employee meetings, and break rooms, were paid on an hourly basis, worked on the same schedule, had common supervision and frequently interacted with each other. The Board also found that excluding certain employees would result in a small, residual unit, and that the employer failed to demonstrate that the employees’ interests were disparate.

**Kansas City Repertory Theatre, Inc., 356 NLRB No. 28 (2010)**

In **Kansas City Repertory Theatre, Inc.**, 17–RC–12647, the Board majority held that a bargaining unit comprised entirely of temporary musicians constituted an appropriate bargaining unit.

**New York University, 356 NLRB No. 7 (2010)**

In **New York University**, 2-RC-23481, suggesting that it was reconsidering **Brown University**, 342 NLRB 483 (2004) (holding that graduate students performing teaching/research services were not statutory employees), the Board granted review of the Regional Director’s dismissal of the union’s petition seeking representation of graduate students employed by the university to provide teaching and research services. The Board majority noted that the decision in **Brown University**, which overruled **New York University**, 332 NLRB 1205 (2000), may have been based on policy considerations “extrinsic to the labor law we enforce and thus not properly
considered in determining whether the graduate students are employees.” In remanding to the Regional Director for a hearing, the majority also noted that an evidentiary record was required in order to evaluate two “significant factual representations”: first, that NYU had, since 2000, reclassified most of its graduate students as adjunct faculty (who are entitled to representation) and, second, that many graduate students receive external grants, making them ineligible for representation even if Brown University was overruled.

G. Bars

Ace Car & Limousine Serv., Inc., 357 NLRB No. 43 (2011)

In Ace Car & Limousine Serv., Inc., 29-RD-1140, the employer and union were parties to a collective bargaining agreement with an expiration date of May 15, 2012. On December 19, 2009, the petitioner filed a decertification petition. The Board held that the contract was not a bar to the election because the contract contained an unlawful union security provision. The Board rejected the union’s argument that the preface to the provision acted as a savings clause that made the provision lawful.


In UGL-UNICCO Serv. Co., 1-RC-22447, the Board overruled its decision in MV Transportation, 337 NLRB 770 (2002), which had created an immediate window after the sale or merger of a company for the union’s status to be challenged by the employees, the new employer, or a rival union. The Board held that its decision returned the Board to the doctrine articulated in St. Elizabeth’s Manor, 329 NLRB 341 (1999), which MV Transportation had overruled. Under this doctrine, the bargaining relationship between the incumbent union and the new employer is protected for “a reasonable period of time” without a challenge to the union’s status. As in Lamons Gasket, see supra, the Board set a benchmark for what constitutes a “reasonable period of time,” finding that in such cases the relationship would be protected for six months if the new employer adheres to the existing contract, and for up to one year if the successor imposes new terms and conditions of employment.

IV. Protected and Concerted Activity

A. Picketing, Banners & Non-Picketing Publicity

The Carpenters’ Banning Cases

Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.) (Eliason), 355 NLRB No. 159 (2010)

In Eliason, 28-CC-055, the Board upheld the right of employees to peacefully and silently hold banners in front of secondary employers’ places of business. In three related actions, employees set up banners outside businesses receiving services from contractors with which the union had disputes. The banners contained messages such as “SHAME ON [business]” with “Labor Dispute” in smaller letters. The Board majority held that Section 8(b)(4)(ii)(B) of the Act was not intended to prohibit peaceful, non-picketing demonstrations.
Additionally, the Board found that the canon of constitutional avoidance required it to refrain from concluding that federal law restricted clearly protected expressive activity.

**Southwest Regional Council of Carpenters, 356 NLRB No. 11 (2010)**

In *Southwest Regional Council of Carpenters*, 31-CC-2115, the Board held that the union’s area-standards picketing and related display of banners protesting a secondary employer’s dealings with the primary employer were lawful. Both the Board majority and the dissent found that the banner displays were indistinguishable from those at issue in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010)*.

**Southwest Regional Council of Carpenters, 356 NLRB No. 88 (2011)**

In *Southwest Regional Council of Carpenters*, 27–CC–877, the Board upheld bannering on job sites that were not directly in public view. The employer argued that the banners were aimed at the secondary employer’s workforce, rather than the public, and that some union members who worked at the sites would be more responsive to a “coded” encouragement to strike. The majority upheld the bannering because they found that it was not timed to coincide with the arrival and departure of the secondary workforce, there was no evidence that the bannerers conversed with the secondary workforce, no secondary employees actually struck and the banners faced well-traveled roads on which many non-employees traveled.

**Southwest Regional Council of Carpenters, 355 NLRB No. 227 (2010) and Southwest Regional Council of Carpenters and its Local 1506, 356 NLRB No. 16 (2010)**

In both of these cases, the Board held that union demonstrations employing largely stationary banners at secondary employers’ business premises did not violate the Act.

**Other Bannering Cases**

**Locals 1827, 1506, and 209, United Bhd. of Carpenters and Joinders of Am. (United Parcel Service), 357 NLRB No. 44 (2011)**

In *United Parcel Service*, 28-CC-933, the Board was confronted with the issue of whether the unions violated Section 8(b)(4)(ii)(B) by displaying large, stationary banners at the businesses of various secondary employers. In reversing the administrative law judge’s finding that the displays were unlawful because the banners constituted picketing and the unions acted with an unlawful objective, the Board held that the unions’ peaceful display of the banners was not coercive and was protected by the First Amendment.

With respect to the specific facts in this case, the Board found that the unions were engaged in a labor dispute with E&K, a subcontractor at a construction project for State Farm. The unions displayed banners at four locations near State Farm facilities, reading “State Farm Insurance, a Greedy Corporate Citizen.” The Board found that the banners did not block the “ingress or egress “ of any person, that the banner holders carried handbills that described the unions’ dispute with E&K and why, in their view, State Farm was greedy in doing business with E&K.
In light of its factual findings and its prior holdings in *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (2010), and related subsequent decisions, the Board found that neither the form, location, nor the message of the banners rendered their display unlawful under the Act. The Board concluded that “a union’s display of banners on a public sidewalk protesting substandard wages, together with its distribution of flyers explaining the relationship of the employer named on the banners and the employer paying the allegedly substandard wages is at the core of the concerted activities insulated by the Act.”

**Picketing**

*C. Correctional Medical Services, Inc.*, 356 NLRB No. 48 (2010)

In *Correctional Medical Services, Inc.*, 3–CA–23855, the Board, on remand from the Second Circuit, found that the employer’s termination and interrogation of several picketing workers was unlawful. When the Board initially heard the case, it held that the picketers’ activities were unprotected because the union had failed to give the 10-day notice to the employer required by Section 8(g) of the Act. The Second Circuit reversed, holding that the failure of the union to meet the Section 8(g) notice requirements did not result in individual picketers surrendering their rights under the Act. Accordingly, on remand, the Board found that the employees’ activities were protected.

**Handbilling & Other Activity**

*Roundy’s Inc.*, 356 NLRB No. 27 (2010)

In *Roundy’s Inc*, 30–CA–17185, the Board upheld the administrative law judge’s determination that the employer had failed to establish a sufficient property interest at twenty-three store locations that would entitle it to exclude union handbillers from the premises. The case involved union handbilling at Pick ‘N Save locations to protest the use of non-union contractors performing construction and renovation work in the stores. The Board found that the lease agreements at the stores did not give Pick ‘N Save the authority to ban handbillers from common areas where it had a nonexclusive easement. Regarding two other Roundy’s store locations, the Board severed the allegations to consider the General Counsel’s allegations that at those locations the employer had unlawfully discriminated by denying union access to premises that the employer had permitted other “individuals, organizations and groups” to use for various activities. In late 2010, the Board invited the parties and interested amici to file briefs in the case on the following questions: (1) Whether in cases alleging an employer has discriminated in nonemployee access to property, the Board should continue to apply the standard articulated in *Sandusky Mall Co.*, 329 NLRB 618 (1999), or should adopt a new standard to define discrimination in this context?; and (2) What relevance, if any, does Register Guard, 351 NLRB 1110 (2007), have on the Board's standard for finding unlawful discrimination in nonemployee access cases? The deadline for filing briefs passed in January 2011, and the discrimination aspect of *Roundy’s, Inc.* remains pending before the Board.

*Sheet Metal Workers Local #15 (Brandon Regional Hospital)*, 356 NLRB No. 162 (2011)

In *Sheet Metal Workers Local #15*, 12–CC–1258, the Board held that the union’s use of a large inflatable rat together with a union leafletter’s holding leaflets out with two arms directed
at drivers did not violate the Act. Applying its analysis in *Eliason*, the Board determined that neither the inflatable rat nor the leafletter’s conduct “threatened, coerced or restrained anyone through violence, blocking ingress or egress or a similar direct disruption of the hospital’s business.”

B. Work Stoppages

Lockouts

*Alden Leeds, Inc.*, 357 NLRB No. 20 (2011)

In *Alden Leeds, Inc.*, 22-CA-29188, the Board affirmed the administrative law judge’s conclusion that the employer violated Section 8(a)(3) of the Act by unlawfully locking out its employees. The judge found that the parties had only three bargaining sessions prior to the lockout, the union was confused by the employer’s health care proposal, the employer failed to clarify the substantial ambiguities, the employer gave the union only one-day’s notice to evaluate and understand the uncertain offer, and the employer’s later, complete proposal did not cure the initial illegality of the lockout. Moreover, the employer did not except to the judge’s finding that it did not prove that its failure to restore the *status quo ante* had no adverse effect on subsequent bargaining and, therefore, the Board barred the employer from making such arguments during compliance proceedings.

Additionally, the judge found that the employer did not violate Section 8(a)(1) of the Act when a manager explained how the employer could and would continue to operate during the lockout by moving work to Oklahoma or Section 8(a)(5) of the Act when it failed to provide information to the union and locked out employees. The Board upheld these finding as well, although the union filed no exceptions to the judge’s decision in this regard.

Strikes

*Special Touch Home Care Servs.*, Inc., 357 NLRB No. 2 (2011)

In *Special Touch Home Health Care Services, Inc.*, 29–CA–26661, the Board, on remand, affirmed its prior conclusion that the employer violated Section 8(a)(3) of the Act when it failed to immediately reinstate strikers who unconditionally offered to return to work. Although the union had served two Section 8(g) notices informing the employer of the strike, the employer also polled the employees about whether they intended to strike and required them to provide a minimum two-hour notice of intent to strike. At the end of the strike, the employer did not immediately reinstate the employees who had failed to notify it of their intent to strike. Distinguishing other cases approving of strike “notification” rules, the Board found the union’s Section 8(g) notice sufficient to relieve the employees of additional individual notification requirements.

*Pride Care Ambulance, Care-A-Van Div.*, 356 NLRB No. 128 (2011)

In *Pride Ambulance Company*, 7–CA–50741, the Board found that the employer violated Section 8(a)(3) of the Act by requiring returning strikers to sign a form acknowledging that there would be no health coverage for a period of ninety (90) days. Applying *Texaco, Inc.*, 285 NLRB
the Board held that while an employer may withhold benefits during a strike, it may not withhold such benefits after a striker returns to work.

C. Discrimination or Discharge for Engaging in Concerted, Protected Activity

Allstate Power Vac, Inc., 357 NLRB No. 33 (2011)

In Allstate Power Vac, Inc., 29-CA-28264, the Board found, contrary to the administrative law judge, that the employer unlawfully suspended two employees and discharged another for failing to wear safety equipment. The Board ruled that the General Counsel established the employer’s overall anti-union animus because it had previously ruled the employer had laid off other employees on account of their union support and unlawfully prohibited employees from wearing union insignia. The Board further ruled that the General Counsel established the employer knew that two of the employees it disciplined for failing to wear the safety equipment had engaged in union activity because they regularly wore union t-shirts to work, including on the day that they were disciplined. The Board inferred knowledge with respect to the third employee based on the knowledge of the other union adherents. Finally, the Board placed significant weight on the timing of the employer’s actions. Specifically, the employees were photographed not wearing their equipment the day before the election and were disciplined two weeks after the election.

Ultimately, the Board found that the employer failed to meet its burden of showing that it would have taken the same action in the absence of union activity because the supervisor did not take immediate action, but rather photographed the employees and walked away, an action that the Board reasoned undermined the employer’s contention that the violation was critical. Finally, the Board found that the employer did not follow standard procedures in responding to the failure to wear the gear.

The Board adopted the judge’s dismissal of allegations that the employer unlawfully discharged two employees for failing to return to work following an excused absence and urinating on a coworker’s drink bottle, respectively. The Board also adopted the judge’s finding that the employer violated Section 8(a)(3) of the Act by imposing more onerous working conditions on an employee.

Random Acquisitions, LLC, 357 NLRB No. 32 (2011)

In Random Acquisitions, LLC, 7-CA-52473, the Board affirmed the administrative law judge’s finding that the employer violated Section 8(a)(1) of the Act by discharging three employees after one of the employees complained about the employer’s failure to pay the employees earned wages for work already performed. The judge did not credit the employer’s witnesses and ultimately rejected the employer’s defenses that two of the employees were not statutory employees and that one of the employees was discharged prior to the complaint.

Santa Barbara News-Press, 357 NLRB No. 51 (2011)

In Santa Barbara News-Press, 31-CA-27950, the Board found that, during an organizing campaign, the employer had committed several unfair labor practices concerning newsroom employees who had resigned to protest what they claimed was interference with their ability to
report the news. Specifically, the Board agreed with the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by coercively interrogating these employees concerning their union activities, engaging in unlawful surveillance when it filmed employees during pro-union rallies, requiring employees to remove buttons and signs reading “McGaw Obey the Law,” and by terminating a supervisor because he refused to commit an unfair labor practice by issuing a pretextual reprimand. The Board also agreed with the judge that the employer violated Section 8(a)(3) of the Act by discharging two employees ostensibly for biased reporting, cancelling an employee’s subscription, lowering the evaluations of four union supporters, and discharging six union activists who hung a banner from a foot-bridge urging motorists to cancel their newspaper subscriptions.

The Board rejected the employer’s argument that the employees’ conduct did not implicate any statutorily recognized term or condition of employment, such as wages and benefits, and found that the employer’s change in policies, whether purely editorial or not, had a direct impact on employees’ terms of employment, as some of them resulted in several employees being disciplined. The Board further rejected the employer’s contention that a remedial order would interfere with the publisher’s First Amendment right to control the newspaper content.

**MasTec Advanced Tech., 357 NLRB No. 17 (2011)**

In *MasTec Advanced Tech.*, 12-CA-24979, the Board held the employer unlawfully discharged service technicians who appeared on a television news broadcast for the purpose of criticizing their employer and DirectTV. The record evidence showed the technicians were upset with MasTec’s decision to cut their wages if they did not meet a certain quota of connecting satellite receivers to an active phone line, a decision implemented when DirectTV started to charge MasTec $5 for each non-responder. Specifically, technicians said that “if we don’t lie to the customers, we get back charged for it. And you can’t make money” and “[supervisors have ordered us] to tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up . . . whatever it takes to get the phone line into that receiver.”

The Board disagreed with the judge’s finding that such statements were “so disloyal, reckless, and maliciously untrue” that the employees lost the Act’s protection under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). It concluded that the statements were not “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”

**Medco Health Solutions of Las Vegas, Inc., 357 NLRB No. 25 (2011)**

In *Medco Health Solutions of Las Vegas, Inc.*, 28-CA-22914, the Board held that an employer violated the Act by maintaining an overly broad dress code rule, enforcing that rule against an employee by requiring him to remove a t-shirt critical of the employer’s incentive program, and impliedly threatening him with discharge because of his criticisms of the program. The rule at issue prohibited employees from wearing “[a]rticles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous,
insulting or provocative.” In finding the rule overly broad, the Board concluded that it interfered with employees’ rights under Section 7 of the Act to engage in protected, concerted activities questioning or challenging employer personnel policies. The Board reasoned that the words “confrontational” and “provocative” might be read by employees in a manner that would inhibit them from exercising their statutory rights. Additionally, the Board concluded that the employer unlawfully changed the dress code without bargaining with the union.

The Register-Guard, 357 NLRB No. 27 (2011)

In The Register-Guard, 36-CA-08743, the United States Court of Appeals for the District of Columbia Circuit remanded and instructed the Board to determine whether the employer violated Section 8(a)(3) of the Act by disciplining a union president and employee for sending two union-related emails using the employer’s email system. On remand and contrary to the original panel’s finding, the Board held that the employer’s actions were in fact unlawful because the evidence established that the employer did not reprimand employees for sending personal, non-work related emails, which included party invitations, baby announcements, offers of sports tickets, and requests for services.

Beach Lane Mgmt, Inc., 357 NLRB No. 30 (2011)

In Beach Lane Mgmt, Inc., 2-CA-35720, the Board affirmed the administrative law judge’s findings that the employer engaged in conduct violative of Sections 8(a)(1) and (3) of the Act by, among other things, imposing more onerous working conditions on employees who engaged in union activities, including by increasing certain employees’ workloads, changing their schedules, requiring them to obtain permission before leaving their work places, failing to pay them for repair work, and more closely scrutinizing their work. The Board also found that the employer violated Section 8(a)(1) by offering its employees money to resign their employment and by threatening employees with discharge and directing them to resign because they engaged in union activities.

AltaBates Summit Medical Ctr., 357 NLRB No. 31 (2011)

In AltaBates Summit Medical Ctr., 32-CA-24459, the Board adopted the administrative law judge’s Wright Line analysis in finding that the employer violated the Act by giving an employee a disciplinary warning, evicting her from the cafeteria, threatening her with suspension, suspending her, and discharging her. The Board recognized that it would be unnecessary to apply the Burnup & Sims burden-shifting standard and that, in any event, the Acting General Counsel met his burden of establishing that the discharged employee’s misconduct did not occur, which rebutted the employer’s good-faith belief that she had engaged in misconduct in the course of protected, concerted activity, under the Burnup & Sims standard.

Likewise, the Board affirmed the judge’s holding that the employer had engaged in unlawful surveillance of its employees in the cafeteria by hiring two security officers to observe a membership meeting being held there. Member Hayes recognized that while the employer’s initial justification for surveying was lawful (i.e., because of legitimate concerns that the union would be “taking over” the cafeteria based on notices announcing plans for all-day meetings),
once it became clear that there would be no takeover and the employees were not being disruptive, the employer’s actions became unlawful in not ceasing the surveillance.

Finally, the Board adopted the judge’s finding that the employer improperly redefined its solicitation/distribution policies in order to “inhibit and stifle its employees” from engaging in union activities. The employer maintained lawful policies that prohibited solicitation and distribution during working time in patient care and work areas. Because it was found that the cafeteria was not a “work area,” and the employees had historically used the cafeteria for soliciting and distributing literature, the judge found that the employer discriminatorily enforced its otherwise lawful policies by prohibiting solicitation and distribution in the cafeteria.

National Security Techs., LLC, 356 NLRB No. 183 (2011)

In National Security Techs., LLC, 28-CA-22999, the Board affirmed the administrative law judge’s finding that the employer did not unlawfully refuse to hire an individual because of his union activities and affiliation. Specifically, the judge concluded that there was insufficient evidence of anti-union animus to establish that the employer’s decision not to hire the individual was premised on his union activities and affiliation and, therefore, the General Counsel failed to carry his burden of proving a violation under Section 8(a)(3) of the Act under the standard set forth in FES, 331 NLRB 9 (2000). The Board upheld the judge’s findings, noting that the appropriate standard was that set forth in FES, and not that of Wright Line, 251 NLRB 1083 (1980), because the issue was whether the employer unlawfully refused to hire.

WorldMark by Wyndham, 356 NLRB No. 104 (2011)

In WorldMark by Wyndham, 28-CA-22680, the Board majority held that a sales representative’s individual protest of a change in dress code rules constituted concerted activity. The Board relied on Meyers Industries, 281 NLRB 882, 887 (1986) (Meyers II), enforced sub nom, Prill v NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), which held that concerted activity embraces both individual action taken to prepare for or induce group action and individual action to bring group grievances to the attention of management. Here, the employee questioned a supervisor on the sales floor regarding a new dress-code policy. The majority pointed to the findings related to the employee’s choice of where and when to address the issue, his use of the words “us” and “we” and the decision by a second employee to join in the discussion.

Parexel International, LLC, 356 NLRB No. 82 (2011)

In Parexel International, LLC, 5–CA–33245, the Board majority held that an employee’s termination for inquiring about the wages of other employees was unlawful. The majority found that the employer’s attempt to prevent employees from discussing wages was unlawful, even if the employees had not yet engaged in protected activity by discussing wages.

Security Walls, LLC, 356 NLRB No. 87 (2011)

In Security Walls, LLC, 28–CA–22483, three workers who protested the employer’s assignment of overtime hours to a part-time employee by refusing to work overtime were discharged. The Board held that the employees’ refusal to work voluntary overtime constituted
concerted protected activity. It also held that a phone call by one of the employees to the part-time employee, telling her to “lay off the overtime,” was connected to the overtime protest and, thus, was protected. Additionally, the Board upheld the administrative law judge’s determination that the employer’s confidentiality rule, which required employees who assisted in investigations of harassment or discrimination complaints to maintain confidentiality, was unlawful because it could be read to restrict Section 7 rights.

Hawaii Tribune-Herald, 356 NLRB No. 63 (2011)

In Hawaii Tribune-Herald, 37–CA–7043, the Board held that an employer violated the Act by interrogating employees, discriminatorily enforcing a security policy, discriminatorily prohibiting employees from wearing buttons in support of disciplined colleagues, prohibiting employees from making audio recordings of disciplinary conferences and disciplining employees in connection with these events. Finding that the audio recording at issue was made following protected concerted action by employees, and applying the test in Hacienda Hotel, Inc., 348 NLRB 854, 854 n.1 (2006), quoting Stanford Hotel, 344 NLRB 558, 558 (2005), the Board concluded that the tape recording was not “sufficiently egregious to remove it from the protection of the Act.” The Board also found that the post-discharge conduct of an employee (i.e., making disparaging comments about his former employer) did not toll back pay or prevent reinstatement. The Board clarified the standard to be applied in such situations, distinguishing NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), which concerned disparaging comments in the pre-discharge context. Instead, where the comments are made post-discharge, the Board is to apply the standard in O’Daniel Oldsmobile, Inc., 179 NLRB 398 (1969), which requires a finding that the post-discharge conduct rendered the employee “unfit for further service.”

Other violations found by the Board included the improper interrogation and discipline of an employee who allowed a union official into the building (it was found that the employer regularly tolerated other violations of the security policy); interrogation and discipline of several employees for their role in tape recording disciplinary conferences; discipline and suspension of a union representative for disrespectful conduct when he was acting in his capacity as steward; requiring a manager’s approval to bring a union official into the building, where such approval was not required for friends, family and other guests; and improper issuance of a memo prohibiting the wearing of buttons and armbands in support of a discharged employee.

Goya Foods, Inc., 356 NLRB No. 73 (2011)

In Goya Foods, Inc., 29–CA–29945, the Board held that an employer unlawfully interfered with an employee’s right to discuss union matters on the premises and unlawfully suspended him for refusing to stop the discussion. The employee, a former union member, intervened in a discussion in the employee cafeteria between a union representative and another employee, and two supervisors, noticing the discussion, ordered the employee to remove himself. The Board held that the employee had a right to discuss the benefits and disadvantages of union membership at the meeting, even though he was not a member of the bargaining unit. Furthermore, the employer, after having allowed the union to conduct meetings on the premises, was not entitled to “police” those meetings by prohibiting certain people from participating. Finally, applying the four-factor test from Atlantic Steel, 245 NLRB 814 (1979), the Board found
that the employee’s outburst -- “come and make me” -- to his supervisors did not justify his suspension.

Salon/Spa At Boro, Inc., 356 NLRB No. 69 (2010)

In Salon/Spa At Boro, Inc., 9–CA–45349, the Board upheld the administrative law judge’s findings that the employer engaged in unlawful interrogations, a threat of reprisal, and two unlawful discharges. The judge found, and the Board agreed, that the employer’s policy of “no negativity” was so vague as to prohibit protected concerted activity, including communicating grievances to management. The employees who raised grievances during a staff meeting and communicating complaints to each other were found to have engaged in protected concerted activity, although the latter approached the “outer limits” of the doctrine.

Covanta Bristol, Inc., 356 NLRB No. 46 (2010)

In Covanta Bristol, Inc., 34–CA–12339, the Board upheld the administrative law judge’s determination that an outburst by an officer of the employer in which he was found to have said, “You want intimidation? I’ll show you intimidation!,” during a discussion with a shop steward was unlawful. Analyzing the four factors in Atlantic Steel, 245 NLRB 814, 816 (1979), the judge found that the outburst was not justified by the steward’s prior use of profanity during a discussion over a workplace accident. That profanity was found to have included comments that the officer should “get his head out of his -ss” and stop “wiping the -sses of his supervisors.” The Board also agreed that the employer unlawfully terminated a probationary employee who had submitted accident reports that irritated supervisors and had asked a union steward to review his statement concerning one accident.

Manor Care of Easton, PA, LLC d/b/a ManorCare Health Services–Easton, 356 NLRB No. 39 (2010)

In ManorCare Health Services–Easton, 4–CA–36064, the Board upheld the administrative law judge’s determination that the employer violated the Act by confiscating a form letter from a nurse’s bag that had been stored in a common area used for employees’ personal items. The form letter was designed to allow patients and employees to express their concerns to state regulators about the employer’s pending sale to a private equity group. The Board found that the confiscation of the letter was a violation of the Act, even if the nurse’s distribution of the letter to patients would not have been protected activity. The Board also held that, even assuming that the nurse’s solicitation of residents was unprotected, the employer’s discipline was motivated by her other protected pro-union activities, and was not consistent with the employer’s normal disciplinary policies.

Allied Mechanical, 356 NLRB No. 35 (2010)

In Allied Mechanical, 31–CA–26605–R, on remand from the Ninth Circuit, the Board reversed its earlier holding that the employer had met its Wright Line burden to show that its firing of a worker was not based on anti-union animus. The worker was found to have reacted in rage after being told that he would not be getting as much overtime as he had in the past, yelling “suck my d--k” and storming out of a meeting. The Ninth Circuit remanded after finding that the Board had ignored the administrative law judge’s credibility determinations and re-characterized
the facts concerning whether the worker’s conduct would have resulted in firing without his pro-
union activities. The judge found that the outburst was directed at no one in particular and was
primarily an expression of frustration; the Board, accepting this characterization, had nonetheless
held that it would have resulted in his termination under the employer’s disciplinary policy. The
Ninth Circuit found this “totally opposite conclusion” incongruous with the judge’s findings.

Satellite Services, Inc., 356 NLRB No. 17 (2010)

In Satellite Services, Inc., 21-CA-38670, the Board upheld the administrative law judge’s
findings that the employer violated the Act by maintaining an overly broad no-solicitation, no-
distribution rule, which prevented employees from distributing union literature to other
employees whose regular lunch breaks did not take place in designated break areas, and by firing
an employee who violated it.

Pending “Social Media” Cases

On August 18, 2011, the Acting General Counsel issued a Report on his Office’s
disposition of unfair labor practice cases relating to social media. The Report summarized the
developments, to that point, in 14 such cases that had been referred to the Division of Advice.
The Report noted that in the nine cases involving employees’ use of Facebook or Twitter, Advice
found in five that the activity was not protected, but in four cases involving Facebook, Advice
decided that the employees’ actions qualified as “protected concerted activity” because they were
communicating about employment terms and conditions with co-workers. The Report also
discussed five cases in which the employer’s policies on social media were found to be
unlawfully overbroad. The remaining two cases involved an employer that Advice found had a
lawful policy regarding employees’ contact with the media, and a union that Advice found
violated the Act by videotaping interviews with non-unionized employees about their
immigration status and then posting an edited version on YouTube and a local union’s Facebook
page.

A few weeks later, in one of the Facebook cases summarized in the Report, Hispanics
United of Buffalo, JD-55-11, 3-CA-2782 (Sept. 2, 2011), the administrative law judge ruled that
the employer violated Section 8(a)(1) of the Act by firing five employees for posting Facebook
comments about work, and responses to those comments, that all concerned working conditions
such as work load and staffing issues. The employer has already appealed that decision, and it is
now pending before the Board.

D. Weingarten Rights

Miceli & Oldfield, Inc., 357 NLRB No. 49 (2011)

In Miceli & Oldfield, Inc., 7-CA-52862, the Board adopted the administrative law judge’s
recommended order and dismissed the complaint, which alleged that the employer denied an
employee’s request for union representation in violation of Section 8(a)(1) of the Act. The judge
found that the meeting between employee and the company’s president, wherein the employee
requested representation, was not a disciplinary interview entitling the employee to
representation. The judge further found that, even assuming the employee was entitled to
representation, the President stopped the meeting as soon as the employee requested him to do so
and did not resume until two union representatives were present. In concluding that the employer did not violate the Act, the Board stated that an employee has no Section 7 right to the presence of a union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary action.

**Mountainview Hosp., Inc., 356 NLRB No. 177 (2011)**

In *Mountainview Hosp., Inc.*, 28-CA-23061, the Board affirmed the administrative law judge’s findings that the employer did not violate Section 8(a)(1) of the Act in refusing an employee’s request for a union representative during a meeting or Sections 8(a)(3) and (5) by enforcing a policy against and discharging a pro-union supporter. Regarding the Section 8(a)(1) allegations, the judge concluded that the employer’s meeting with the employee was only to advise him of his rights under the employer’s dispute and resolution process, was not an interview, disciplinary meeting, or grievance meeting and, therefore, the employer did not violate the Act when it refused the employee’s request for union representation. The judge additionally noted that the employer gave the employee the option of attending the meeting.

With respect to the Section 8(a)(3) and (5) alleged violations, the judge concluded that the General Counsel failed (1) to make out a *prima facie* case under *Wright Line*, 251 NLRB 1083 (1980), because there was no evidence that the employer harbored anti-union animus, and (2) to meet its burden to show that the employer did not enforce the policy for which the employee was discharged before the union became the employees’ collective bargaining representative.

**E. Other Interference, Restraint or Coercion**

**Goodyear Tire & Rubber Co., 357 NLRB No. 38 (2011)**

In *Goodyear Tire & Rubber Co.*, 26-CA-23778, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act when a supervisor told one employee that he was prohibited from wearing a shirt stating “Union ‘til I retire, then scab in!” and threatened another employee with unspecified reprisals if he wore a shirt that read “When I retire I will not scab. I will go fishing.” The judge rejected the employer’s defenses that the shirts violated company policy that prohibited clothing with inappropriate or offensive slogans, that animosity left over from a strike created special circumstances that justified the ban, and that neither employee was actually disciplined for wearing the shirts. The judge found the messages reflected on the shirts were protected under Section 7 of the Act.

**Atlas Logistics Group Retail Servs. LLC, 357 NLRB No. 37 (2011)**

In *Atlas Logistics Group Retail Servs. LLC*, 28-CA-23178, the Board affirmed the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act when a supervisor told an employee, who was participating on behalf of the union in a workplace time study, that there would be problems if he did not return to work in ten minutes. The Board found that the employee reasonably believed that the supervisor threatened him with reprisal if he did not cease engaging in that union activity.
In The Continental Group, Inc., 12-CA-24045, the Board, on remand for further proceedings in light of New Process Steel, L. P. v. NLRB, 130 S.Ct. 2635 (2010), affirmed the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by promulgating an overbroad no-access rule, which provided that “employees are only permitted to be on property while on duty unless [they] are picking up a paycheck or otherwise advised by the property manager . . . .” The Board agreed with the judge that the rule was unlawful as it infringed on employee’s access rights under Tri-County Medical Center, 222 NLRB 1089 (1976).

However, the Board disagreed with the judge’s finding that the employer violated the Act by issuing a written warning to an employee for “frequenting the property” and “loitering on the property.” In so concluding, the Board clarified the scope of its decision in Double Eagle Hotel & Casino, 341 NLRB 112 (2004), and ruled that discipline imposed pursuant to an unlawfully overbroad rule is per se unlawful only when the conduct for which an employee is disciplined clearly falls under the protection of Section 7. In this case, the Board held that the warning was imposed because of the employer’s concerns that the employee was sleeping or living on the premises, and not because of activity protected under Section 7. Thus, after discussing the evidentiary burdens under the clarified rule, the Board found that the employer established that the employee’s conduct actually interfered with the employee’s own work or that of other employees or otherwise actually interfered with the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.

In Dilling Mechanical Contractors, 25-CA-25094, the Board allowed withdrawal of the complaint allegation that the employer violated Section 8(a)(1) of the Act by filing and maintaining a state court lawsuit against the union. The Board held that, under BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002), and the Board’s supplemental decision in BE&K Construction, 351 NLRB 451 (2007), the General Counsel failed to properly assert that the lawsuit was unlawful. Nonetheless, the Board denied withdrawal of the complaint allegation that the employer violated Section 8(a)(1) of the Act during discovery in the lawsuit by requesting the names of employees who joined the union. The Board explained that the Supreme Court’s decision in BE&K did not alter the Board’s authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice.

In Acme Bus Corp., 357 NLRB No. 82 (2011), the Board adopted the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by interrogating employees about union activities, orally promulgating and maintaining a rule prohibiting employees from discussing the union at work, orally promulgating, maintaining, and disparately enforcing an overly broad solicitation/distribution rule, creating the impression of surveillance, and subjecting employees to closer scrutiny in retaliation for their support of the union and violated Section 8(a)(3) of the Act by discharging five employees. The Board also adopted the judge’s conclusions, but for different reasons, with respect to a finding that the employer violated
Section 8(a)(1) of the Act by interrogating an employee concerning his pretrial affidavit and Section 8(a)(3) of the Act by discharging another employee. With respect to the former, the Board rejected the judge’s conclusion that *Johnnie’s Poultry* assurances were violated or otherwise implicated because it found an employer categorically violates Section 8(a)(1) of the Act by inquiring about Board affidavits. With respect to the latter, the Board was more forceful in its finding of discriminatory discharge of employee Kuhhorn than the judge was, noting that the General Counsel had established a strong case of unlawful motivation.

**Flagstaff Med. Ctr., Inc., 357 NLRB No. 65 (2011)**

In *Flagstaff Med. Ctr., Inc.*, 28-CA-21548, the Board upheld the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by: (1) interrogating an employee about what a union could do for employees that the employer was not already doing; (2) interrogating that employee on a separate occasion about whether it was necessary to bring a union into the hospital; (3) implicitly threatening another employee with a layoff if the union was elected; and (4) interrogating that employee about whether anyone had talked to her about the union.

The Board further upheld the judge’s findings that the employer did not violate the Act by: (1) subcontracting the hospital’s patient-transport work because of union activities; (2) changing an employee’s scheduled lunch break; (3) changing an employee’s work schedule and denying her request for a vacation; (4) changing an employee’s work shift; (5) giving an employee a negative performance review because of her union activities; (6) placing an overboard restriction on union activity in an employee’s evaluation; (7) excluding an employee from the kitchen; (8) creating the impression of surveillance and disparaging the union; and (9) prohibiting employees from taking photographs of hospital patients or property. The Board also affirmed the judge’s dismissal of the complaint allegation that the employer and Sodexho constituted joint employers.

However, the Board rejected the judge’s findings that the employer did not violate Section 8(a)(1) of the Act by: (1) threatening employees that unionization would be futile; and (2) threatening employees that it would eliminate their scheduling flexibility if they unionized. The Board further rejected that the employer violated Section 8(a)(3) of the Act by: (1) discharging an employee because of his union activities; and (2) changing an employee’s schedule because of her union activities.

**Hyundai Am. Shipping Agency, Inc., 357 NLRB No. 80 (2011)**

In *Hyundai Am. Shipping Agency, Inc.*, 28-CA-22892, the Board adopted the administrative law judge’s findings that the employer violated Section 8(a)(1) of the Act by maintaining or enforcing the following rules in its handbook: (1) a provision stating that “employees should only disclose information or messages from these[] systems [including the employer’s email, instant messaging, and phone systems] to authorized persons”; (2) a provision stating that “[a]ny unauthorized disclosure of information from an employee’s personnel file is a ground for discipline, including discharge”; (3) a provision reading, “Voice your complaints directly to your immediate superior or to Human Resources through our ‘open door’ policy. Complaining to your fellow employees will not resolve problems. Constructive complaints
communicated through the appropriate channels may help improve the workplace for all”; and (4) a provision threatening employees with disciplinary action for “[p]erforming activities other than Company work during working hours.” The Board further upheld the judge’s (1) finding that the employer violated the Act by promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by human resources, and (2) dismissal of the allegation that the employer violated Section 8(a)(1) of the Act by discharging an employee because she would have been terminated even in the absence of her protected activity.

The Board overruled the judge’s findings that the employer violated Section 8(a)(1) of the Act by maintaining or enforcing handbook rules that threatened employees with discipline for (1) “indulging in harmful gossip,” and (2) “exhibiting a negative attitude toward or losing interest in your work assignment,” because it concluded the rules did not encompass protected activity.

Nova Southeastern Univ., 357 NLRB No. 74 (2011)

In Nova Southeastern Univ., 12-CA-25114, the Board considered whether the employer violated Section 8(a)(1) of the Act by prohibiting employees of its maintenance contractor UNICCO from engaging in organizational handbilling at their place of work, i.e., the employer’s campus. The Board upheld the administrative law judge’s finding that the prohibition violated the Act, relying on its decision in New York New York Hotel & Casino, 356 NLRB No. 119 (2011). The Board reasoned that the off-duty UNICCO employee, who was “regularly employed on the property in work integral to the employer’s business,” had a right to handbill in non-work areas open to the public, i.e., parking lots, on Nova’s property as part of an organizing campaign among UNICCO employees.

The Board further adopted the judge’s: (1) finding that the employer violated Section 8(a)(1) of the Act when the employer disciplined the UNICCO employee for handbilling and interrogated another UNICCO employee as to whether he had supported the union; and (2) dismissal of the allegation that the employer violated Section 8(a)(1) of the Act by issuing a separate warning to the UNICCO employee for leaving his work area without permission because the record did not demonstrate that the supervisor acted as the employer’s agent in issuing that discipline.

Holdings Acquisition Co., L.P., d/b/a Rivers Casino, 356 NLRB No. 142 (2011)

In Holdings Acquisition Co., L.P., 6–RC–12701, the Board found that the “[e]mployer’s imposition and enforcement of an overly broad no-distribution policy, surveillance of union activity, prohibition on union buttons, and grant of a benefit on the day of the election constituted objectionable conduct that warranted setting aside the election.” The Board found objectionable a supervisor’s stopping an employee from distributing t-shirts in a non-work area and standing “within hearing distance” as the employee discussed the union with other employees. The Board determined that the employer’s surveillance was coercive because the Board found that it was out of the ordinary, in close proximity to the employees, and immediately followed other objectionable employer conduct. Additionally, the Board found that the employer’s prohibition on wearing pro-union buttons, followed by its reversal of this policy, did not constitute a
repudiation under *Passavant* because the employer did not admit wrongdoing or include an assurance that it would not interfere with employee rights in the future. Finally, the Board found objectionable what it found to be the employer’s unprecedented grant of an additional short break for a short period “for any purpose” to one shift of workers on the day of election.

**F. General Counsel Initiative on Deferral to Arbitration in Cases of Alleged Violation(s) of Section 8(a)(1) or 8(a)(3) or Both: GC Memorandum 11-05 (2011)**

In 2009, former General Counsel Ronald Meisburg issued a memo requesting referral to Advice of cases involving the NLRB’s “post-arbitral” deferral to arbitrators’ decisions and awards because “a new approach to cases involving arbitral deference may be warranted.” In January 2011, the Acting General Counsel followed up on that initiative in GC Memorandum 11-05, and announced that, based on the review of the cases referred in response to former General Counsel Meisburg’s request, he will urge the Board to modify its approach in cases alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act, and not defer to an arbitrator’s decision in a case unless the party urging deferral proves that the arbitrator adequately considered all statutory rights at issue in the case. The Acting General Counsel contended that this change in law was justified by the U.S. Supreme Court’s decisions in *Gilmer* and *Pyett* as well as multiple decisions by the U.S. Courts of Appeal. In a portion of the memo that might be of the greatest significance in the field, the Acting General Counsel instructed the Regional offices that for all pending and future charges alleging violations of Sections 8(a)(1) and 8(a)(3) that the Region defers to arbitration under *Collyer*, the Region must review the arbitration award when it is issued. The Regions were further instructed that in reviewing the award, they must determine “if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act.” After making that determination, the memo instructed, the Region should submit the case to Advice with its recommendation on whether to defer to the arbitral award.

**V. Miscellaneous**

**A. Duty of Fair Representation**

*International Bhd. of Elec. Workers, Local Union No. 34, AFL-CIO, CLC, 357 NLRB No. 45 (2011).*

In *International Bhd. of Elec. Workers, Local Union No. 34, AFL-CIO, CLC, 13-CB-18961*, the Board affirmed the administrative law judge’s finding that the union violated its duty of fair representation by maintaining and enforcing a requirement that non-member employees represented by the union renew annually their “Beck objections” filed under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). Relying on its recent decision in *L3 Communications, 355 NLRB No. 174* (2010), the Board found that the union had proffered no adequate justification for requiring annual renewals of objections, a requirement that imposes more than a *de minimis* burden on objectors.
The Board also found, contrary to the judge, that the international union was jointly liable for the violation because the international had, for years, been primarily responsible for establishing and implementing the *Beck* procedures, and locals, including the union in this case, relied on the international to satisfy their duties under *Beck* and were required to conform to the international’s procedures.

United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int’l Union, AFL-CIO, CLC (Cequent Towing Prods.), 357 NLRB No. 48 (2011)

In *Cequent Towing Prods.*, 25-CB-8891, the Board found, contrary to the administrative law judge, that the union violated its duty of fair representation when it required employees it represented, who were not union members, to assert their *Beck* objections, see *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), on an annual basis. The Board held the union’s requirement to be arbitrary under the duty of fair representation standard because it was “so far outside a wide range of reasonableness as to be irrational.” Specifically, the Board rejected the union’s proffered justifications for the requirement, including that (1) it provides objectors an opportunity to discontinue objecting based on any revised *Beck* data of which they are made aware annually (2) it gives “reasonable assurance that only employees who are moved . . . by an objection to providing financial support to activities not germane to collective bargaining will be entitled to pay a reduced fee.” The Board reasoned that the union had not presented any empirical evidence showing how many objectors changed their minds over time, or how many would confirm a change of mind by not renewing their objections. Finally, the Board rejected the union’s argument that the requirement provided some assurance that it was not making advance rebates to individuals who are no longer employed in a unit represented by the union because the union offered no evidence as to the frequency with which it might make such mistaken rebates but for the renewal requirement. Ultimately, the Board stated that the annual renewal requirement would impose only a modest burden on the employees, but that the union failed to establish a legitimate justification for that burden.

United Auto Workers Local 376 (Colt’s Manufacturing), 356 NLRB No. 164 (2011)

In *United Auto Workers Local 376*, 34–CB–2631, 34–CB–2632, and 34–CB–3025, the Board found that the union did not violate its duty of fair representation because its *Beck* procedures imposed a *de minimis* burden on objecting employees. Contrary to the procedures in *L-3 Communications*, the objectors received multiple notices throughout the course of the year that their objector status required annual renewal and they were permitted to file an objection at any time, rather than within a fixed window.

International Brotherhood of Electrical Workers, Local 24 (Mona Electric), 356 NLRB No. 89 (2011)

In *Mona Electric*, 5–CB–10616, the Board partially upheld the administrative law judge’s determination that certain hiring hall practices established by the union, which prohibited the copying of phone numbers from referral books, violated the union’s duty of fair representation.
B. Statute of Limitations

Continental Auto Parts, 357 NLRB No. 78 (2011)

In *Continental Auto Parts*, 22-CA-29125, the Board overruled the administrative law judge’s finding that the employer violated Section 8(a)(1) of the Act by threatening employees with a loss of benefits and violated Section 8(a)(3) of the Act by discharging an employee. The Board concluded that there was no unlawful threat because it was made outside of the six-month statute of limitations period under Section 10(b) of the Act and that the factual-nexus test of *Redd-I*, 290 NLRB 1115 (1988), was not met. The Board further held that the employer met its rebuttal burden of showing that it would have discharged the employee even absent his union activity.

C. Remedies

Mezonos Maven Bakery, Inc., 357 NLRB No. 47 (2011)

In *Mezonos Maven Bakery, Inc.*, 29-CA-25476, the Board found that the Supreme Court’s decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), precluded the Board from awarding back pay to undocumented workers, even where it is the employer, rather than the employee, who violated the Immigration Reform Control Act (IRCA).

Triple A Fire Protection, Inc., 357 NLRB No. 68 (2011)

In *Triple A Fire Protection, Inc.*, 15-CA-11498, the Board considered in a compliance proceeding the amounts of back pay and benefit fund contributions owed by an employer pursuant to a make-whole order issued by the Board. The underlying unfair labor practice proceeding involved a finding that the employer violated Section 8(a)(5) of the Act by unilaterally changing wage rates and ceasing benefit contributions after the expiration of a labor contract. The Board agreed with the administrative law judge’s conclusion that the employer owed benefit fund contributions, along with interest and liquidated damages on the delinquent contributions pursuant to the funds’ governing documents to which the employer had agreed to be bound in the underlying labor contract.

Tortilleria La Poblanita, 357 NLRB No. 22 (2011)

In *Tortilleria La Poblanita*, 2-CA-37935, the Board granted the Acting General Counsel’s motion for a default judgment because the employer ceased making payments in accordance with a settlement agreement. The Board issued a notice to show cause why the motion should not be granted, to which the employer did not respond. Accordingly, the Board accepted as true all of the allegations in the complaint and found that the employer engaged in several unfair labor practices. The Board ordered the employer to comply with the terms of the settlement agreement, including reinstating employees who presented appropriate immigration documentation and fulfilling its backpay obligations. The Board ruled that the employer waived improper immigration status of the discriminatees as a defense.

The Board reconsidered Goya Foods of Florida, 12-CA-23524, on remand from the United States Court of Appeals for the District of Columbia Circuit following the Supreme Court’s decision in New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010). As it initially decided as a two-member panel, the Board reaffirmed the administrative law judge’s rulings that the employer violated Section 8(a)(5) of the Act by making unilateral changes in health insurance plans. The Board modified the remedy on remand, however, holding that the employer must make whole bargaining unit employees regardless of whether the union requested rescission of the changes and restoration of the status quo plan. In so ruling, the Board overruled Brooklyn Hosp., 344 NLRB 404 (2005), in which the Board had held that a make-whole remedy would not apply if the union chose continuation of the employer’s unilaterally changed plan.

SRC Painting, LLC, 357 NLRB No. 5 (2011)

In SRC Painting, LLC, 30-CA-16577, the Board affirmed the administrative law judge’s ruling that the employer failed to establish facts that would reduce gross back pay during compliance hearings. The judge noted that the employer bears the burden of proof in showing that the discriminatee failed to mitigate his damages by not making a reasonable effort to find work. Specifically, the employer was required to show that there were substantially equivalent jobs within the relevant geographic area during the back pay period, which the judge found the employer in this case failed to do. Even if the employer had, the judge found that the General Counsel had shown that the discriminatee took reasonable steps to seek such jobs.

Kentucky River Medical Center, 356 NLRB No. 8 (2010)

In Kentucky River Medical Center, 9–CA–42249, the Board held that awards of back pay would henceforth be computed using interest compounded daily. In a unanimous opinion, the Board reviewed the incremental developments in its back pay jurisprudence -- first the decision to award interest on back pay (Isis Plumbing Co., 138 NLRB 716 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963)), then the move to adopt the IRS’ sliding interest rate scale, rather than a fixed interest rate (Florida Steel Corp., 231 NLRB 651 (1977), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978)), and finally the decision to adopt a rate change enacted by the IRS (New Horizons for the Retarded, 283 NLRB 1173 (1987)). The Board found that the move to compound interest was appropriate in large part because it found it to be the norm in many private and public sector commercial transactions, including the IRS’s assessment of underpaid taxes. The new policy will be applied retroactively.

In response to the Board’s ruling on compound interest, the Acting General Counsel issued a memorandum (GC Memorandum 11-08) instructing Regional offices on how to change the methods of calculating backpay and other monetary awards “in order to effectuate the change to daily compound interest.” Memo 11-08 also stated that the Board’s ruling justified a change in the policy that a discriminatee’s search-for-work and work-related expenses are not reimbursed in quarters in which the discriminatee had expenses but no earnings. Under the new policy announced in the Memo, “search-for-work and work-related expenses will be calculated separately from backpay and will be charged to Respondent regardless of whether the discriminatee received interim earnings during the period.” The Memo also announced that in
cases when a discriminatee will owe excess taxes due to receiving a lump-sum backpay award that covers more than one year of backpay, the Regional offices should seek reimbursement of that excess tax liability in the remedy. Also, to ensure that discriminatees are credited appropriately for Social Security, the memo instructed Regional offices that in cases involving backpay over more than one year, they should seek as a remedy an order that the Respondent be “required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.”

Picini Flooring, 356 NLRB No. 9 (2010)

In J. Picini Flooring, 28-CA-21229, the Board approved the posting of remedial notices by electronic means, in addition to standard employee bulletin-board postings, in cases where electronic communication is a “customary means of communicating with employees or members.” The Board held that “remedial notices are sufficiently important to be communicated in the manner deemed appropriate by the respondent for its own communications.”

General Counsel Initiatives on Remedies

In the past year, the Acting General Counsel has announced multiple types of unfair labor practice cases in which his Office will now seek additional remedies from both the Board and from the courts. The Acting General Counsel announced in GC Memorandum 10-07 that to combat “nip-in-the-bud” discriminatory discharges during initial union organizing campaigns, the Regions should expeditiously seek Section 10(j) injunctions ordering interim reinstatement of the discriminatee(s) while the organizing is still going on. The Memo recognized that unremedied illegal discharges discourage other employees from supporting the union effort, and also remove from a workplace one or more of the most active and vocal union supporters, who remain absent for months or longer while the case is proceeding. According to the Acting General Counsel, with this passage of time, it is unlikely that the discharged employees will accept reinstatement when it is finally ordered, or that the organizing activity will resume. The memo set forth an “optimal timeline” that should be followed for meritorious “nip-in-the-bud” discharge cases, including streamlined processes, when the cases are not settled, to petition federal district courts under Section 10(j) for orders of interim reinstatement of discriminatees while their unfair labor practice cases are being litigated. In a news release issued the same day as this memorandum, then NLRB Chairman Wilma Liebman stated that Board members, who must authorize petitions for Section 10(j) injunctions, had also expedited their procedures for approving such petitions. The news release further explained that the Board would post on its website the case names and updated status for all cases in which the Board authorizes a Section 10(j) petition to be filed. As promised, that information can now be accessed at the NLRB’s website through the link for “10(j) Injunction Activity.”

In a follow-up memorandum (GC 11-01) issued on December 20, 2010, the Acting General Counsel announced that in all “nip-in-the-bud” discriminatory discharge cases, Regional Directors should also seek, in the complaint and in the petition for a Section 10(j) injunction, a “notice reading” remedy for the discharge(s). The notice reading remedy, the Memo explained, would require the notice that describes the employer’s unlawful actions (and promises that such actions will not be repeated) to be read to assembled employees either by a “responsible management official” or (if the employer prefers) an NLRB agent in the presence of a
responsible management official. The memo added that in these “nip-in-the-bud” cases, Regional Directors should also consider seeking the notice reading remedy for any and all other serious unfair labor practices “such as threats, solicitation of grievances, promises or grants of benefits, interrogations and surveillance.” The Memo additionally directed that if the employer also illegally interfered with communications between employees, or between employees and the union, the Regional Director should seek (from the court and later from the Board) orders requiring the employer to permit union access to employer bulletin boards and to provide the union with an up-to-date list of employees’ names and addresses.

In March 2011, the Acting General Counsel addressed another aspect of remediating discriminatory discharges by focusing on backpay mitigation in GC Memorandum 11-07. That Memo directed Regional Directors to identify and bring cases aimed at reversing the NLRB’s 2007 rulings in *The Grosvenor Resort*, 350 NLRB 1197, and *St. George Warehouse*, 351 NLRB 964, which, respectively, required terminated discriminatees to begin their search for a new job within two weeks of discharge to be eligible for backpay, and shifted from the employer to the General Counsel the burden of showing whether the discriminatee adequately searched for work during the backpay period. The Memo additionally instructed Regional Directors that in cases in which the discriminatee had received unemployment compensation, the Regional Director should contend that receipt of those benefits is sufficient to establish a *prima facie* case that the discriminatee reasonably searched for work, because all states require such a search to qualify for benefits. Accordingly, the Memo stated, an employer cannot reduce backpay based on an inadequate search for work unless the employer “produces persuasive evidence” that the discriminatee failed to comply with the state’s search requirements or that, due to “particular circumstances” in the case, the discriminatee’s job search was not reasonable even though it met state requirements. The memo asserted that treating receipt of unemployment benefits as such strong evidence on the mitigation issue was justified because compliance with state requirements for benefits is a “well-grounded proxy” for the “reasonable job search” that is required to avoid reduction of backpay.

Building on an initiative begun by predecessor General Counsel Meisburg, the Acting General Counsel in February 2011 issued GC Memorandum 11-06 to authorize Regional offices, without referral to the Division of Advice, to add notice-reading and other remedies in some cases where a party committed one or more unfair labor practices during bargaining for a “first contract” between the employer and the union. In memos issued in 2006 and 2007, then General Counsel Meisburg directed Regional offices handling first-contract cases to consider remedies beyond notices and standard bargaining orders, including notice-reading, extension of the union’s certification year, and orders requiring negotiations to be conducted on a specific bargaining schedule. Until February 2011, Regions could not seek those remedies without approval from Advice, but the Acting General Counsel explained in Memo 11-06 that five years of experience had demonstrated that such remedies were consistently sought and approved in first-contract cases with particular fact situations, including where an employer refused to bargain with the union or withdrew recognition, or committed other specific violations of Section 8(a)(5) listed in the Memo. When those fact situations are present in a first contract bargaining case, Regions should seek notice-reading, certification-extension, and bargaining-schedule remedies without submitting the case to Advice. However, in first contract bargaining cases where the Regions wish to seek the remedies of reimbursement of the union’s bargaining expenses and/or litigation expenses, the Regions must still submit those cases to Advice.
D. Union Jurisdiction

Glaziers Dist. Council 16, 357 NLRB No. 58 (2011)

In Glaziers Dist. Council, 20-CD-752, the Board considered whether the Glaziers violated Section 8(b)(4)(D) of the Act in a jurisdictional dispute proceeding under Section 10(k) of the Act. The Glaziers posted pickets at the disputed work site reading, “Service West, Inc. -- Unfair to District Council 16 -- Does Not Meet Area Wages and Fringe Benefits -- Not an Effort to Organize Workers” and “Picket Sanctioned by SF Building & Construction Trades Council” in protest of the employer’s assignment of work to the Carpenters. In deciding the dispute, the Board ruled that the Carpenters were entitled to continue performing the disputed work based on the factors of bargaining agreements, employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations. Although the employer argued that the award should encompass all of its future projects in the San Francisco Bay Area, the Board held that the two prerequisites for issuing a broad award, i.e., evidence (1) that the disputed work had been a continuous source of controversy in the relevant geographic area and that similar disputes may recur and (2) demonstrating the offending union’s proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute, were not met because it had not been shown that the Glaziers had a proclivity to engage in further unlawful conduct. The Glaziers had engaged in unlawful conduct elsewhere, but it had done so before the Board issued an earlier award granting the work to the Carpenters, and thus the Board reasoned that the Glaziers had not yet been ordered to cease the unlawful conduct at the time of the unlawful conduct in the instant case.

Glaziers District Council 16 and San Francisco Building Trades Council (Service West), 356 NLRB No. 105 (2011)

In Service West, 20–CD–750, the Board affirmed the hearing officer’s decision to award disputed work to the Carpenters 46 Northern California Conference Board, and not the Glaziers District Council 16. 20-CD-750. Applying a five-factor test to resolve the dispute between the unions -- the interpretation of the CBAs; employer preference; current assignment and past practice; area practice; relative skills and training; and economy and efficiency of operations, the Board agreed that all five factors weighed in favor of the Carpenters. Id. at 5.

International Ass’n of Machinists and Aerospace Workers, District Lodge 160 (SSA Marine, Inc.), 357 NLRB No. 24 (2011)

In SSA Marine, Inc., 19-CD-000502, the Board held that members of the International Longshore and Warehouse Union (“ILWU”) were entitled to perform repair work on SSA Marine’s stevedoring and terminal service power equipment while present at Terminal 91 in Seattle. It further held that the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 289 (“IAM”), was not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force SSA Marine to assign the work to its members. The Board issued its ruling in light of its decision reported at 355 NLRB No. 3 (2010), in which it found the factors of employer preference and economic and efficiency of operations favored ILWU-represented workers.
Laborers’ District Council of Ohio, Local 265, 356 NLRB No. 57 (2010)

In Laborers’ District Council of Ohio, 9–CD–500, the Board affirmed the hearing officer’s decision to resolve a dispute between two unions over horizontal drilling work in favor of the Laborers’ District Council of Ohio. The Board weighed six factors: 1) the two CBAs (the Laborers’ contract contained more specific references to the work in dispute); 2) employer preference (Laborers, and there was no evidence of coercion); 3) past practice (favored neither party); 4) area practice (favored neither party); 5) relative expertise (favored neither party); and 6) efficiency of operations (employer personnel testified that Laborers did better and faster work). Accordingly, the Board upheld the award of the work to the Laborers.

E. Unlawful Assistance

DaNite Sign Company, 356 NLRB No. 124 (2011)

In DaNite Sign Company, the Board held that the employer violated Section 8(a)(2) of the Act by setting up a “moving forward team” immediately after what the Board found to be an unlawful withdrawal of recognition from the union. Although the “moving forward team” only met three times, the Board found the employer sought input from it regarding merit wage increases, health insurance, and compensation. Thus, because the Board concluded that the employer intended to deal with the committee on statutory terms and conditions of employment, the Board held that the committee constituted a “labor organization” and, therefore, the employer’s conduct was unlawful.

Garner/Morrison, LLC, 356 NLRB No. 163 (2011)

In Garner/Morrison, LLC, 28–CA–21311, the Board found that the employer violated Sections 8(a)(1) and (2) of the Act by calling a meeting for employees, with its supervisors in the room, and then allowed its preferred union to solicit employees to abandon their current union. The Board found significant the presence of supervisors in the room during the union’s solicitation of employees, the employer’s orchestration of the meeting two weeks after another union secured majority authorization, and a part-owner’s statement at the meeting that one union was “the better choice” and “the way to go.” The Board also rejected the claim that prior agreements between the employer and its preferred union established that a Section 9(a) relationship existed. Id. at 6.

Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural–CIO, 356 NLRB No. 49 (2010)

In Dana Corporation, 7–CA–46965, the Board majority held that a Letter of Agreement (LOA) between Dana Corporation and the UAW, which established ground rules for organizing and “principles” that “would inform future bargaining on particular topics,” before the UAW had demonstrated majority status, did not violate Section 8(a)(2) of the Act. The majority distinguished Majestic Weaving Co., 147 NLRB 859 (1964), enf. denied 355 F.2d 854 (2d Cir. 1966), explaining that in that case, the employer had orally agreed to recognize the union, then negotiated the entire contract, leaving only the “ministerial” act of signing it after majority status was demonstrated. The majority noted that the workers in the Dana case had circulated an anti-
union petition after learning of the LOA, which indicated that the LOA had not given the UAW a “deceptive cloak of authority.”

F. Union Unlawful Restraint, Coercion, or Discrimination


In *International Bhd. of Elec. Workers, Local 429 (Elec-Tech Elec. Servs.),* 26-CB-4240, the Board originally found that the union and the Nashville Electrical Joint Apprenticeship Training Committee (JATC) violated Sections 8(b)(1)(A) and (2) of the Act by attempting to rotate an employee to a different employer and by disciplining him because he was delinquent in his dues and his expressed antipathy toward the union. In so finding, the Board determined that the JATC was an agent of the union because JATC was created by a collective bargaining agreement between the union and the employer association. The Sixth Circuit Court of Appeals remanded with instructions to “articulate and apply recognized principles of agency law before it may assert jurisdiction over an entity it concludes acts as an agent of the union” because, the Court noted, the Board had not articulated a factual and legal basis to support its determination of agency.

On remand, the Board reaffirmed its agency determination, but not because of the collective bargaining agreement. Rather, the Board found agency based on the union’s and the JATC’s actual conduct. Specifically, the Board found that the JATC’s actions against the employee were directed by union officials and agents, and that the union-appointed members of the JATC acted in their capacity as union officials to advance union interests.

G. Secondary Activity

Laborers District Council of Minn. and N.D. (Lake Area Fence, Inc.), 357 NLRB No. 29 (2011)

In *Laborer’s District Council of Minn. and N.D.,* 18-CC-1485, the Board affirmed the administrative law judge’s findings that the union violated Section 8(b)(4)(ii)(B) of the Act when it refused the employer’s request to enter into a Section 8(f) collective bargaining agreement as an attempt to force the employer to cease doing business with a company with which the union was having a labor dispute.

International Brotherhood of Teamsters, Local 251 (Material Sand & Stone Corp.), 356 NLRB No. 135 (2011)

In *International Brotherhood of Teamsters, Local 251,* 1–CC–2678, the Board struck down an agreement between a union and employer under which the employer agreed not to use certain non-union trucking services. The Board found the agreement unlawful because its purpose was not to preserve work for bargaining-unit members, but rather was “tactically calculated to satisfy union objectives elsewhere.” Accordingly, where the employees struck to compel the employer to adhere to the agreement, they violated Section 8(b)(4) of the Act. The Board rejected the union’s Section 10(b) defense because the union had reaffirmed the
agreement when it struck to demand that the employer cease doing business with the other trucking companies.

H. Attorneys’ Fees

Raley’s, 357 NLRB No. 81 (2011)

In Raley’s, 20-CA-24973, the Board rejected the judge’s denial of the union’s requests for fees and expenses under the Equal Access to Justice Act (“EAJA”). The Board concluded that after the General Counsel finished presenting his case-in-chief at trial, he was no longer substantially justified in pursuing the case against the union. Thus, the Board held the union was entitled to fees that it incurred after that point, subject to further reduction by the judge on remand.

I. Settlement Agreements

Insulation Maintenance and Contracting, LLC, 357 NLRB No. 50 (2011)

In Insulation Maintenance and Contracting, LLC, 28-CA-23198, the Board entered default judgment against the employer pursuant to the terms of an informal settlement agreement concerning threats, overly broad work rules, interrogations, surveillance, and discharges allegedly in violation of Sections 8(a)(1) and (3) of the Act. The settlement agreement contained “default language” enabling the Regional Director, upon non-compliance, to reissue the underlying complaint, allowing the General Counsel to file a motion for summary judgment on the allegations of the complaint, and requiring the employer to admit the allegations of the complaint. The employer failed to post a notice, remit the agreed-upon back pay, and expunge material from its files regarding the discipline -- all in violation of the terms of the settlement agreement. Upon a motion for summary judgment from the Acting General Counsel, the Board entered summary judgment against the employer on the complaint, concluding that the employer violated Sections 8(a)(1) and (3) of the Act by the above-referenced conduct.

Peregrine Co., Inc., 356 NLRB No. 179 (2011)

In Peregrine Co. Inc., 28-CA-22469, the Board entered default judgment against the employer pursuant to the terms of an informal settlement agreement concerning a discharge allegedly in violation of Section 8(a)(3) of the Act. The settlement agreement contained “default language” enabling the Regional Director, upon non-compliance, to reissue the underlying complaint, allowing the General Counsel to file a motion for summary judgment on the allegations of the complaint, and requiring the employer to admit the allegations of the complaint. The employer failed to post a notice, remit the agreed-upon back pay, and expunge material from its files regarding the discipline -- all in violation of the terms of the settlement agreement. Upon a motion for summary judgment from the Acting General Counsel, the employer admitted it had defaulted and argued its financial condition prohibited it from complying with the settlement agreement. The Board found the defense inadequate and entered summary judgment against the employer on the complaint, concluding that the employer violated Section 8(a)(3) by discharging the employee.
Metro Mayaguez, Inc. d/b/a Hospital Perea, 356 NLRB No. 150 (2011)

In *Metro Mayaguez, Inc.*, reversing the administrative law judge, the Board approved the parties’ pre-hearing non-Board settlement of a dispute arising from the employer’s unilateral discontinuance of a New Year’s Eve bonus. Applying the *Independent Stave Co* test, the Board found that (1) the employer’s subsequent payment in full of the bonus substantially remedied the unfair labor practice; (2) there was no evidence of fraud, coercion, or duress in reaching settlement; and (3) no parties or employees opposed enforcement of the settlement.

**Acting General Counsel Requires Default Language for Settlements of Unfair Labor Practice Cases**

In two memoranda issued in the first three months of 2011 (GC Memoranda 11-04 and 11-10), the Acting General Counsel instructed the Regional offices to routinely include in all informal settlement agreements and all compliance settlement agreements default language that provides that, if the Charged Party fails to comply with any of the terms of the settlement agreement, the General Counsel may file a motion for default judgment with the Board. The default language, which varies somewhat depending on whether the informal settlement is agreed to pre-Complaint or post-Complaint, also provides that the Charged Party will not be entitled to a hearing on the allegations in the charge and that the only issue that may be raised to the Board (and which the Board may decide “without necessity of trial or any other proceeding”) is whether the Charged Party defaulted on one or more terms of the settlement agreement. The default language additionally states that if the Board issues an order and remedy, the parties agree that a judgment of a federal court of appeals may be sought and entered *ex parte* after service upon the Charged Party/Respondent is made or attempted at the last address provided to the General Counsel.

The Acting General Counsel explained in the Memo 11-04 that default settlement language similar to this had been recommended in 2002 and refined in 2005 for cases in which the General Counsel determined it was substantially likely that the charged party/respondent would “be unwilling or unable to fulfill its settlement obligations.” Memo 11-04 then explained that the Acting General Counsel had decided to recommend the language for all informal and compliance settlements because, in the past several years, the Board has “routinely” enforced the provisions when a party has breached the settlement agreement and counsel for the General Counsel moves for summary judgment to enforce the agreement. (Memo 11-10 clarified that Regional Directors must seek clearance from their Assistant General Counsel or Deputy to approve a settlement agreement without this default language, and must have a “substantial basis” for doing so). Memo 11-04 also noted that a recent survey had found that Regions that consistently propose, or even insist upon, the default language in settlement agreements achieved settlements rates above or close to the 95% settlement “goal,” and achieved win rates comparable to the national win rate.

**J. Preemption of State Law**

In February 2011, the Board notified four states (Arizona, South Carolina, South Dakota and Utah), that state constitutional amendments approved by their voters in November 2010, which provided that union representation can be chosen by employees only in secret ballot
elections, conflict with the National Labor Relations Act and therefore are preempted by federal law. According to the Board, the conflict arises because the Act authorizes two means by which a union may be selected to represent employees: by secret ballot election or by voluntary recognition by an employer. If the state amendments preclude the voluntary recognition option in all situations, then they are preempted by the Act. The Board also authorized the Acting General Counsel to file lawsuits in federal court, if necessary, to enjoin enforcement of these new state laws. On May 6, 2011, the agency filed suit in the U.S. District Court for the District of Arizona seeking a declaratory judgment that Arizona’s “secret ballot” state constitutional amendment was preempted by the National Labor Relations Act and the Supremacy Clause of the U.S. Constitution. The case is now pending before U.S. District Judge Frederick Martone.

K. NLRB Rules and Proposed Rules

Rule Requiring Employers to Post Notice of NLRA Rights

On August 30, 2011, the Board by a 3-1 vote (with Member Hayes dissenting) issued a rule, to go into effect on November 14, 2011, requiring that employers within the NLRB’s jurisdiction must post a notice (a copy of which appears on the NLRB’s website) that informs employees of their rights under the National Labor Relations Act. The notice, which must be at least 11 inches by 17 inches in size, must be posted in conspicuous workplace locations where notices to employees are typically posted. If the employer customarily communicates with employees about personnel policies and rules on an internet or intranet site, then the employer must also post the notice (or a link to the notice on the NLRB website) on that site.

On September 14, the NLRB announced that the notice was available for free download from the NLRB’s website at www.nlrb.gov/poster, and would soon be available without charge from any NLRB Regional office.

This notice must be posted in English and also in another language if at least 20% of employees are not proficient in English and speak the other language. If an employer’s workforce has two or more groups, each comprising at least 20% of the workforce, who speak different languages, the employer must provide the notice in each such language. The NLRB will provide translations of the notice, and of the required link to the Board’s website, in the appropriate languages.

As of press time, three separate lawsuits had been filed in September 2011, to block the NLRB’s notice rule, two in the U.S. District Court for the District of Columbia (both assigned to Judge Amy Berman Jackson) and one in the U.S. District Court for South Carolina. Plaintiffs in the suits include the National Association of Manufacturers, the National Federation of Independent Business, the U.S. Chamber of Commerce, and the National Right to Work Legal Defense and Education Foundation.

NLRB Proposed Rule to Revise Rules and Procedures for Representation Elections

The Board by a 3-1 vote (Member Hayes dissenting) on June 22, 2011, proposed a rule to revise existing procedures that are followed prior to and after representation elections. In its Notice of Proposed Rulemaking, the Board majority explained that the purposes of the proposed changes included to “remove unnecessary barriers to the fair and expeditious resolution” of
representation cases, to simplify procedures in such cases, and to “eliminate unnecessary litigation.”

The Board proposed that, for the first time, election petitions could be filed electronically, though copies of the petition would still need to be served on all interested parties. After the petition is filed and served, the proposed changes would authorize communications by electronic means between the Regional offices and the parties, and electronic transmission of notices and voter lists.

The proposed rules would also shorten time periods for many pre-election filings and procedures. The petitioner would be required to submit the showing of interest along with the petition, within 48 hours of its filing. If the Region determines that the petition is properly supported, the Regional Director is to serve the parties with a notice of hearing that, absent special circumstances, will begin within seven days after service of the notice. All parties will be required to state their positions on any issues to be raised at the hearing no later than the start of the hearing and before any evidence is presented. The non-petitioning party also would be required to provide, by the start of the hearing, a preliminary voter list that includes unit employees’ names, work locations, shifts, and classifications.

The proposed rules would postpone until after the election some procedures that are now often litigated in the pre-election period. For example, the issue of whether certain employees are eligible to vote, if the total number of such employees comprises less than 20% of the unit, would be deferred to post-election. In addition, parties would no longer be permitted to request Board review of Regional Director pre-election rulings before the election.

If an election is directed, then the Regional Director will issue a notice of election specifying the date, which is to be the “earliest date practicable consistent with [these] rules,” the time, and the place of the election. Within two days of the direction of the election, an employer would be required to provide to the union the final list of eligible voters, including (in addition to the names and home addresses required under current procedures) phone numbers, and email addresses, when available.

Under the proposed rules, after completion of the election and tally of ballots, the parties will have seven days to file objections with the Regional Director, and those objections and any “outcome-determinative” challenges to ballots based on voter ineligibility or other accepted reasons will be litigated at a hearing to commence within 14 days of the tally of ballots. The Regional Director will resolve the issues litigated at this hearing. Any party may request review by the Board of these rulings and of pre-election rulings that have not been rendered moot by the election results or other developments.

The NLRB held two days of public hearings on the proposed rule on July 18 and July 19, in which strong views for and against the proposal were expressed. By the time the comment period on the proposed rule ended on September 6, more than 30,000 comments and 20,000 replies to comments had been filed.
L. Access to NLRB Documents

General Counsel Memorandum 11-12 (April 29, 2011)

In this Memo issued at the end of April, the Acting General Counsel announced that the Agency’s website would be updated to allow public access to “all final dismissal letters issued by regional offices and letters from the Office of Appeals denying appeals in dismissal actions.” Such letters, if issued on or after June 1, 2011, are now or soon will be available on the NLRB’s website. Before these letters are posted, names of individuals and “other personal information that could be used to identify the individuals” (e.g. phone numbers, Social Security numbers, addresses, etc.) are redacted.