Significant ULP Cases in 2007

By

Barry J. Kearney[1]

I have set forth below the significant ULP cases decided by the Board in 2007.

1. Lead Cases

a. The Guard Publishing Company d/b/a The Register-Guard, 351 NLRB No. 70.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting in part) found that the Employer did not violate Sec. 8(a)(1) of the Act by maintaining a policy prohibiting the use of the Employer's e-mail system for all "non-job-related solicitations," including Sec. 7 activity. In so finding, the Board relied on a long line of cases which held that employees had no statutory right to use employer-owned equipment – such as bulletin boards, telephones, and televisions – for Sec. 7 communications, as long as the restrictions were nondiscriminatory. The Board rejected the dissent's contention that employees' use of their employer's e-mail system should be analyzed under Republic Aviation, 324 U.S. 793 (1945), by balancing employees' Sec. 7 rights and the employer's interest in maintaining discipline, and that a broad ban on employee non-work-related e-mail communications should be presumptively unlawful absent a showing of special circumstances. Rather, the Board found the analytical framework of Republic Aviation inapplicable, because in that case the employer prohibited all solicitations at any time on the premises, whereas here the Employer's policy did not regulate traditional, face-to-face solicitation. While employees here had the full panoply of rights to engage in oral solicitation and to distribute literature on nonworking time, what they were seeking was the use of the Employer's communications equipment to engage in additional forms of communication beyond those that Republic Aviation found must be permitted. The majority stated that Sec. 7 protects organizational rights, rather than particular means by which employees may seek to communicate. Republic Aviation required the employer to yield its property interests to the extent necessary to ensure that employees would not be "entirely deprived" of the ability to engage in Sec. 7 communications; it did not require the most convenient or most effective means of conducting those communications, nor did it hold that employees have a statutory right to use an employer's equipment for Sec. 7 communications.

Regarding the issue of whether the Employer violated Sec. 8(a)(1) by discriminatorily enforcing the above policy against union-related e-mails while allowing some personal e-mails, the majority modified Board law concerning discriminatory enforcement. The Board adopted the 7th Circuit's analysis in Fleming Co., 349 F.3d

[1] Mr. Kearney is Associate General Counsel in the Division of Advice, National Labor Relations Board.

968 (2003), denying enf. 336 NLRB 192 (2001), and Guardian Industries, 49 F.3d 317 (1995), denying enf. 313 NLRB 1275 (1994), noting that in these cases the 7th Circuit distinguished between personal, non-work-related postings on a bulletin board, such as for-sale notices and wedding announcements, and "group" or "organizational" postings such as union materials. The Board found that the 7th Circuit's analysis, rather than existing Board precedent, better reflected the principle that discrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along Sec. 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Sec. 7-protected status. The majority overruled the Board's decisions in Fleming, Guardian, and other similar cases to the extent they were inconsistent with its decision here.

Applying its new standard, the Board noted that the Employer had permitted a variety of personal, non-work-related e-mails, but had not permitted e-mails to solicit support for any group or organization. Thus, the Employer's enforcement of its policy regarding an employee's two e-mails which solicited support for the Union did not discriminate along Sec. 7 lines, and thus did not violate Sec. 8(a)(1). As for the employee's third e-mail, which was not a solicitation but merely clarified the facts surrounding the Union rally the day before, the Employer's enforcement of its policy was discriminatory, since the Employer permitted a variety of non-work-related e-mails other than solicitations.

Members Liebman and Walsh, dissenting, stated that "given the unique characteristics of e-mail and the way it has transformed modern communications, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper." They stated that none of the "equipment" cases found analogous by the majority involved sophisticated networks designed to accommodate thousands of multiple, simultaneous, interactive exchanges, and thus such Board decisions finding no Sec. 7 right to use employer property were inapplicable. Rather, they would apply the analytical framework of Republic Aviation. In their view, where an employer had given employees access to e-mail in the workplace for their regular and routine use, as the Employer did here, a ban on "non-job-related solicitations" should be unlawful absent a showing of special circumstances.

Members Liebman and Walsh also dissented, "in the strongest possible terms," from the majority's overruling of bedrock Board precedent about the meaning of discrimination as applied to Sec. 8(a)(1). They stated that the Board has long held that an employer violates Sec. 8(a)(1) by allowing employees to use an employer's equipment or other resources for non-work-related purposes while prohibiting Sec. 7-related uses. In their view, the 7th Circuit's analysis adopted by the majority was drawn from First and Fourteenth Amendment and Age Discrimination in Employment cases, and was inappropriate in the context of the NLRA. They explained that unlike discrimination statutes, the NLRA does not merely give employees the right to be free from discrimination based on union activity, it also gives them the affirmative right to engage in concerted group action for mutual benefit or protection. In their view, the

essence of a discriminatory enforcement violation is interference with employees' Sec. 7 rights. Accordingly, they would find a Sec. 8(a)(1) violation here with respect to all 3 of the employee's e-mails.

b. BP Amoco Chemical-Chocolate Bayou, 351 NLRB No. 39.

The Board (Battista and Schaumber; Liebman, dissenting in part) found that the 37 alleged discriminatees waived their right to file charges with the Board—or have charges filed on their behalf—when they executed termination agreements in exchange for enhanced severance benefits. In similar circumstances, the Board had found that such agreements effectuate the policies of the Act by encouraging a mutually accepted settlement without litigation. In assessing the validity of the release, the Board applied Independent Stave, 287 NLRB 740 (1987), which is used to assess whether to give effect to a private non-Board settlement agreement. Applying Independent Stave, the Board finds, first, that although both the Charging Party Union and the General Counsel opposed the agreement, the alleged discriminatees voluntarily agreed to be bound; as the parties stipulated, the employees were aware of the content of the agreements, were advised of the meaning, and knew that they were waiving claims against the Employer. Second, the termination agreements were reasonable in light of the violations alleged and the litigation risks presented; when the agreements were signed, no charges had been filed, the prospect of litigation was not obvious, and there was significant risk that a charge alleging discriminatory selection would not be meritorious. Third, there was no evidence that the agreements were fraudulent, that they were signed under duress or coercion, or that the alleged discriminatees attempted to revoke them. Finally, the Employer did not have a history of violating the Act or of failing to comply with settlement agreements.

Member Liebman, dissenting in part, would find that the private severance agreements here should not foreclose the General Counsel from proceeding in the public interest with his complaint alleging discriminatory selection of employees for the reduction-in-force. In her view, the Independent Stave framework should not be applied where the allegations of the complaint were not yet the subject of an unfair labor practice charge when the settlement was executed. Rather, Independent Stave applies only to private agreements that purport to resolve existing disputes that have become the subject of unfair labor practice charges. Moreover, even assuming that Independent Stave applied here, application of those factors, on balance, does not support the majority's decision. Specifically, she noted that as to the first factor, the General Counsel and the Union opposed giving effect to the agreements, and that an employee's decision to sign the agreement was likely influenced by the sudden economic distress faced. As to the second factor, the fact that the agreements were entered into before the filing of any unfair labor practice charge militates against giving them preclusive effect. In sum, she stated that the majority decision "incorrectly shifts the focus of analysis away from the right of access to the Board and the responsibility of the Board to act in the public interest, even in the face of non-Board private agreements," quoting from her dissent in Septix Waste, 346 NLRB No. 50, 494, 497 (2006).

c. Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino, 351 NLRB No. 32.

The Board (Schaumber and Kirsanow; Battista, concurring; Liebman and Walsh, dissenting), on remand from the U.S. Court of Appeals for the Ninth Circuit, (Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB, 309 F.3d 578 (9th Cir. 2002)), ruled 3-2 that the Hacienda Resort Hotel and Casino and the Sahara Hotel and Casino did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after their collective-bargaining agreements with the Culinary Workers and the Bartenders Union expired.

The Board (Truesdale, Hurtgen, and Brame; Fox and Liebman, dissenting), in its initial decision, 331 NLRB 665, issued in July 2000, affirmed the ALJ's decision that the Employers had not violated the Act by unilaterally ceasing dues checkoff. The ALJ reasoned that the dues-checkoff provisions contained explicit language, which limited the Employers' dues-checkoff obligation to the duration of the agreements. Citing Bethlehem Steel Co., 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), and its progeny, the Board, however, relied on a different rationale based on well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation.

In vacating the Board's earlier Decision and Order, the Ninth Circuit found that Bethlehem Steel involved a contract with both a dues-checkoff provision and a union security clause and that the Board had failed to provide a reasoned explanation why it reached the same result in this case with contracts containing only a dues-checkoff provision. Unable to discern the Board's rationale for excluding dues checkoff from the unilateral change doctrine in the absence of a union security clause, the Ninth Circuit did not reach the question whether such a rule would be "rational and consistent" with the Act and therefore entitled to deference and it remanded the case to the Board with instructions to articulate a reasoned explanation for its decision, whether the Board decided to reaffirm its earlier decision or to adopt a different rule.

On remand, instead of the broader rationale adopted in its prior decision, the Board relied on the specific facts of the case, in which the dues-checkoff provisions in the parties' collective-bargaining agreements contained explicit language limiting the Employers' dues-checkoff obligation to the duration of the agreements. The Board found that by agreeing to the contract language, the Unions explicitly waived any right to the continuation of dues checkoff as a term and condition of employment after expiration of the agreements.

In a concurring opinion, Chairman Battista agreed with the Board's newly articulated rationale, i.e., that the language of the dues-checkoff provision specifically made clear that its duration was coterminous with that of the collective-bargaining agreement. He noted his view that this rationale is further supported by the alternate

rationale in the Third's Circuit's opinion enforcing the Board's decision in Bethlehem Steel. He wrote separately to convey his view that even if the parties, unlike here, fail to express this intention in their collective-bargaining agreement, he would include dues checkoff among the class of mandatory subjects that are excluded from the unilateral change doctrine under NLRB v. Katz, 369 U.S. 736 (1962), i.e., which do not survive contract expiration. He reasoned that dues checkoff is a form of economic weaponry, albeit milder than a lockout, whereby an employer cuts off the automatic flow of funds in order to persuade the union to agree with the employer on outstanding contract issues.

Members Liebman and Walsh dissenting, rejecting the majority's position for the reasons stated in the original dissent. They found that as a general matter, dues checkoff survives contract expiration, and that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to honor employees' dues-checkoff authorizations following expiration of the collective-bargaining agreements, notwithstanding the contract language relied on by the majority. The dissent rejected the majority's approach, stating that it would effectively drain the Katz doctrine of any force. The dissent also rejected Battista's economic weapon theory, stating that rather than justifying a principled exception to Katz, his logic would vitiate the policy altogether.

d. Jones Plastic and Engineering Company, 351 NLRB No. 11.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) found that the Employer lawfully declined to reinstate former economic strikers because it had hired permanent replacements for them, even though the replacements were hired on an at-will basis as permitted under Tennessee law (meaning that the employees could be discharged without cause and were not promised employment for any defined period of time). In so finding, the Board stated that at-will employment does not speak to whether a mutual understanding exists about job retention vis-à-vis returning strikers, and, as such, it does not detract from an Employer's otherwise valid showing that it has hired permanent replacements. The Board noted that the Employer was following its normal employment practices by offering the replacements employment on an at-will basis, since all its employees, strikers and replacements alike were employed on an at-will basis. Further, evidence showing that a mutual understanding existed regarding the replacements' permanent status included the Employer issuing forms to the replacements stating they were permanent replacements, the Employer telling the strikers that it had begun to hire permanent replacements, and the Employer's human resources manager telling one replacement he was a permanent employee. The Board overruled Target Rock Corp., 324 NLRB 373 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998), to the extent it suggests that at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status, contending that Target Rock was based on a misreading of controlling law and was inconsistent with the basic scheme of the Act. Rather, the Board found that the status of the replacements here is indistinguishable from that of probationary employees found to be permanent replacements in Kansas Milling Co., 97 NLRB 219 (1951), and its progeny.

Members Liebman and Walsh, dissenting, stated that Target Rock does not state that at-will employment precludes a finding of permanent replacement status, nor that such a proposition has ever been the law. Rather, the question is whether the Employer can establish that it and the replacements shared a mutual understanding that the replacements were permanent. Based on the facts of this case, the dissent would find that the evidence failed to support such a finding. Specifically, the replacements were required to sign a form stating that they were "permanent replacements," but also that they could be "terminated . . . at any time, with or without cause." Thus, the Employer's statements did not reflect any commitment to the replacements. Although the Employer used the phrase "permanent replacement," it then undercut that statement by failing to give the replacements any assurance that they had rights vis-à-vis the strikers.

e. Anheuser-Busch, Inc., 351 NLRB No. 40.

On remand from the D.C. Circuit (414 F.3d 36 (2005)), the Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) reaffirmed its earlier denial of a make-whole remedy to 16 employees disciplined by the Employer for misconduct observed by means of hidden surveillance cameras which were unlawfully installed without prior bargaining with the Union. The Board concluded that Section 10(c) of the Act precluded the Board from granting a make-whole remedy where discipline was "for cause," even if the Employer learned of the misconduct through unlawful means, such as in Weingarten cases where the Employer uncovered the misconduct through an unlawfully-conducted investigatory interview. The Board stated that the legislative history of Section 10(c) indicates that it was enacted to insure that an employee who engaged in misconduct was subject to discipline for that misconduct. The Board also cited the compelling policy consideration that employees who engage in misconduct, and receive the appropriate discipline, should not benefit through a windfall award of reinstatement and backpay. Finally, the Board overruled Tocco, Inc., 323 NLRB 480 (1997), and Great Western Produce, Inc., 299 NLRB 1004 (1990), to the extent that those decisions held that Section 10(c) does not preclude granting a make-whole remedy where an employee is disciplined for cause, but the cause is uncovered through unilaterally and unlawfully implemented means.

Members Liebman and Walsh, dissenting, stated that until this case, the Board had never drawn a distinction between employees disciplined as a result of a unilateral change and those disciplined as a result of a unilateral change in "detection methods." They contended that the reviewing court rejected the majority's reading of Section 10(c) as precluding a make-whole remedy, and disputed the majority's interpretation of the legislative history of Section 10(c). They further asserted that the Section 8(a)(1) Weingarten cases relied on by the majority represent a narrow exception, inapplicable here, to the Board's standard make-whole remedial policy. Finally, they viewed the majority decision as contrary to the Act's policies. Noting that restoring the status quo is the standard remedy for an 8(a)(5) unilateral change, they stated that discipline imposed pursuant to an unlawful unilateral change is doubly destructive: it damages both the affected employees and the union's status as bargaining representative. By

overruling Tocco and Great Western, the majority has ensured that the Board will not fully eliminate the effects of the type of 8(a)(5) violation involved here.

f. The Raymond F. Kravis Center for the Performing Arts, 351 NLRB No. 19.

The Board (Battista, Liebman, and Kirsanow) modified its standard for determining under what circumstances a union merger or affiliation may relieve an employer of its obligation to recognize and bargain with an incumbent union. Reversing precedent, the Board determined that an employer could not withdraw recognition after a merger or affiliation merely because the merger or affiliation was not conducted with adequate "due process." Rather, the Board held that an employer's obligation to recognize the union continues unless the merger or affiliation resulted in changes so significant as to alter the identity of the bargaining representative.

The Board affirmed the ALJ's finding that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition from the International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories and Canada, Local 623. Shortly before the hearing in this case began, Local 623 merged with five other locals to form Local 500. Applying existing Board law, the ALJ rejected the General Counsel's contention that Local 500 was the successor to Local 623, finding that the merger had occurred without due process because union members had not been provided the opportunity to vote on the merger. Accordingly, the ALJ found that the Employer had no obligation to recognize and bargain with Local 500, and that any bargaining obligation the Employer had with Local 623 terminated as of the date of the merger.

Traditionally, the Board has found that an employer's obligation to recognize and bargain with an incumbent union continues following a merger or affiliation unless either the union's members were not afforded an opportunity to vote, with adequate due process safeguards, on the merger or affiliation, or the organizational changes resulting from the action were so dramatic that the post-affiliation entity lacks substantial continuity with the pre-existing union. In abandoning its requirement that union members be given the opportunity to vote, with due process on mergers and affiliations, the Board noted that over 20 years ago the Supreme Court in NLRB v. Financial Institution Employees of America Local 1182 (Seattle-First), 475 U.S. 192 (1986), rejected the Board's requirement that nonunion employees be allowed to vote on affiliation questions. Thus, the Court held that the Board exceeded its authority under the Act by requiring that nonmember employees be allowed to vote regarding a union affiliation and/or merger before it would order an employer to bargain with the affiliated and/or merged union.

Although the Board determined that the rule held invalid by the Court in Seattle-First was not the precise rule at issue in the present case, the Board found, nonetheless, that the Court's reasoning was persuasive. Thus, the Court's rationale in Seattle-First was not based on the distinction between union members and nonmember unit employees voting on affiliation. Rather, the Court's essential holding was that the

Board cannot discontinue an employer's obligation to recognize a union based on the union's affiliating with another union unless the Board determines that the affiliation raises a question concerning representation. It is clear under the Act, as explained in Seattle-First that an employer's duty to recognize an incumbent union following affiliation cannot be discontinued on the basis that union members were not allowed to vote on the affiliation, unless the Board determines that depriving union members of an opportunity to vote raises a question concerning representation. The lack of a membership vote on union affiliation or merger is insufficient to raise a question concerning representation, that is, to make it unclear whether a majority of the employees continue to support the recognized union. Unlike antiunion petitions or other expressions of employee dissatisfaction with the union, the absence of a vote indicates nothing about employee sentiment regarding support for the incumbent union.

Having determined that the due process requirement was no longer viable in light of Seattle-First, the Board examined whether the merger resulted in such a dramatic change to the Union as to alter its identity as the bargaining representative of the Employer's employees. Upon the merger, members of Local 623 became members of Local 500 without having to pay any initiation or transfer fees. Referral fees remained the same as they had before the merger, and there was no change in members' status concerning their place on the work list, their date of hire, or their date of membership. The hiring hall/referral system was administered in the same manner as it had been before the merger. The former Local 623 business agent continued to serve in that role, which included negotiating contracts, handling grievances, and serving unit members. Both before and after the merger, the representative of the International Union in charge of Local 500's day-to-day operations assisted Local 623 with organizing and contract negotiations. Once the constitution and bylaws for Local 500 were approved by the president of the International Union, they would be subject to approval by a vote of the membership, and an election of officers would be held. Former officers of Local 623 became stewards after the merger. Finally, employers continued to make benefit contributions to the Union's vacation and pension benefit funds as they had before the merger. The Board concluded from this evidence that the merger did not result in such a dramatic change to the Union as to raise a question concerning representation, consequently it reversed the ALJ and found that Local 500 was the successor to Local 623, and that the Employer was therefore required to recognize and bargain with Local 500 as the representative of its employees after the merger.

The Board affirmed the ALJ's finding that the Employer violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment, including eliminating department head positions and refusing to use the Union's hiring hall, without complying with the requirements of Section 8(d)(3) and without having first lawfully bargained to impasse with respect to those terms and conditions. The Board also affirmed the ALJ's finding that the Employer violated Section 8(a)(5) and (1) by declaring impasse over a change in the scope of the bargaining unit.

g. BE & K Construction Company, 351 NLRB No. 29.

On remand from the Supreme Court (536 U.S. 516 (2002)), the Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit. In its prior decision in this proceeding (329 NLRB 717 (1999)), the Board found, pursuant to Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), that the Employer's unsuccessful lawsuit violated Section 8(a)(1) of the Act because it was filed to retaliate against the Union for engaging in protected concerted activity. The Supreme Court, however, rejected the Board's analysis on First Amendment grounds. Bill Johnson's had held that an ongoing, reasonably based lawsuit could not be enjoined as an unfair labor practice even if the lawsuit had a retaliatory motive, in order to safeguard the fundamental First Amendment right to petition. The Board applied a different standard to completed lawsuits, however, based on language in Bill Johnson's suggesting that if the employer lost the lawsuit or the lawsuit was withdrawn, the Board could proceed to adjudicate the unfair labor practice case and could find that the suit violated the Act if it was deemed retaliatory. The Supreme Court in BE & K, however, effectively disavowed this portion of Bill Johnson's as dicta and refused to be bound by it, and found that the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue; rather than reach this difficult constitutional question, however, the BE & K Court adopted a limiting construction of Section 8(a)(1) and refrained from deciding the issue. Thus, the Board found that as interpreted by the Supreme Court in BE & K, Bill Johnson's no longer warranted lesser protection for reasonably based but completed litigation. Accordingly, the Board found that, just as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice, stating that the "chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion." The Board further stated that in so finding, however, it was not holding that First Amendment interests must always predominate over Section 7 rights; rather, even under the standard just announced, a lawsuit that targets conduct protected by the Act can constitute an unfair labor practice if it lacks a reasonable basis and was brought with the requisite kind of retaliatory basis.

Members Liebman and Walsh, dissenting, stated that the Supreme Court in BE & K did not hold, as the majority now does, that all reasonably based lawsuits are immune from liability under the Act. In their view, such a holding goes too far in protecting potential First Amendment interests at the expense of the rights guaranteed by Federal labor law. They contended that if the BE & K Court intended the majority's holding, then it would have announced that rule, and not left open, as it did, the possibility that the Board could find unlawful some subset of unsuccessful, but reasonably based, lawsuits targeting conduct protected by the Act. Nor does it follow, in their view, that the Board is precluded from imposing any burden on the First Amendment right to petition in order to protect Section 7 rights. Rather, although the BE & K Court distanced itself from Bill Johnson's, it did not reject the basic principle that a balancing of First Amendment and Section 7 rights is required – and thus that, in at least some cases, the Board is

permitted to find unlawful an unmeritorious, retaliatory lawsuit that, because reasonably based, is constitutionally protected.

h. Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland, 351 NLRB No. 36.

Applying its decision in BE&K Construction Co., 351 NLRB No. 29 (2007), that a lawsuit that has a reasonable basis does not violate the Act, regardless of the motive for the lawsuit, the Board (Battista, Schaumber, and Kirsanow) found that a lawsuit filed by the Employer, a hospital, to block the Union that represented about 750 registered nurses from engaging in sympathy strikes was not shown to be baseless. Thus, the Board found that the Employer did not violate Section 8(a)(1) of the Act.

The Employer's lawsuit under Section 301 of the Labor Management Relations Act, seeking a permanent injunction, declaratory relief, and monetary damages, alleged that the Union had violated the terms of the no-strike clause in its collective-bargaining agreement. A federal district court granted the Union's motion for summary judgment and dismissed the Employer's lawsuit, finding that the Union had not "clearly and unmistakably" waived its right to engage in a sympathy strike under the general no-strike clause. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court.

In its lawsuit, the Employer contended that in determining whether the no-strike clause prohibited sympathy strikes, ordinary contract law principles should govern, rather than the "clear and unmistakable waiver standard," and that a union's waiver of its own right to promote sympathy strikes need not be clear and unmistakable. In support, the Employer cited Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998), in which the Supreme Court applied the "clear and unmistakable waiver" standard and found that a contract's general arbitration clause did not waive an employee's right to a judicial forum for a claim under the American with Disabilities Act. The Employer also cited Interstate Brands v. Bakery Drivers, 167 F. 3d 764 (2d Cir. 1999), in which the U.S. Court of Appeals for the Second Circuit found that the rule in Wright that a contractual waiver of employees' statutory right to a judicial forum will be given effect only if it is clear and unmistakable does not apply where the right at issue belongs to the employer.

The Board found that the Employer "could reasonably take the position, as it did, that under Wright and Interstate Brands, the Union's waiver of its own right to promote a sympathy strike need not be clear and unmistakable."

More broadly, the Board said that although it has adhered to the "clear and unmistakable waiver" analysis in interpreting disputed contract language, some courts have rejected that standard in favor of a contract coverage analysis, similar to that urged by the Employer. The Board also noted that some of its members have disagreed with the "clear and unmistakable waiver standard" and have expressed support for the contract coverage analysis. Noting that both the district court and the appeals court rejected the Employer's argument that the clear and unmistakable waiver analysis does

not apply, the Board found "that argument is consistent with the 'contract coverage' analysis and was not unreasonable."

The Employer also contended that the agreement's no-strike clause prohibited sympathy strikes even under a "clear and unmistakable waiver standard, " relying on the Board's decision in Indianapolis Power Co., 273 NLRB 1715 (1985), that if a contract contains a broad no-strike clause, the Board will read the clause plainly and literally to prohibit all strikes, including sympathy strikes. The union in Indianapolis Power appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit, which remanded it to the Board to determine whether the parties had intended a no-strike clause to cover sympathy strikes. On remand, the Board clarified its rule, 291 NLRB 1039, 1041 (1988), stating:

> [W]e continue to believe that a broad no-strike clause should properly be read to encompass sympathy strikes unless the contract as a whole or extrinsic evidence demonstrates that the parties intended otherwise. In deciding the issue whether sympathy strikes fall within a no-strike provision's scope, the parties' actual intent is to be given controlling weight and extrinsic evidence should be considered as an integral part of the analysis.

Noting that the Board employs a rebuttable presumption that a broad no-strike clause covers sympathy strikes, the Board said that at the time the Employer filed its suit, the Ninth Circuit precedent was not settled concerning this presumption. Thus, the hospital "could reasonably argue for application of that presumption in its Section 301 action," the Board found, and the Employer could reasonably believe, based on the information at its disposal, that the presumption had not been rebutted.

i. Ray Angelini, Inc., 351 NLRB No. 24.

The Board (Battista, Schaumber, and Kirsanow) found that the Employer's lawsuit alleging that the City of Philadelphia, the Union, and a Union contractor conspired to have the Employer disqualified from receiving a contract for electrical work at an airport was reasonably based, and therefore, under BE&K Construction Co., 351 NLRB No. 29 (2007), the filing and maintenance of the lawsuit did not violate the Act.

Although a federal district court ultimately dismissed the Employer's lawsuit, the Board stated that it must be inferred from the court's denial of the Union's motions to dismiss and for summary judgment that the Employer's complaint stated a claim upon which relief could be granted and that disputed issues of material fact existed. Thus, the Board could not say that the Employer could not have reasonably expected to succeed on the merits. Indeed, the Board noted that the Union was in effect urging the Board to readjudicate its motion for summary judgment, i.e. to have the Board find no factual dispute as to the existence of a conspiracy. However, the court found to the contrary, the Board said, declining the Union's invitation to second-guess the court.

j. Teamsters Local Union No. 579 (Chambers & Owen, Inc.), 350 NLRB No. 87.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) found that the Union violated its duty of fair representation by failing to provide Beck objectors with information relating to Union affiliate expenditures, at the objection stage and prior to receipt of a challenge, so the objectors could reasonably evaluate the propriety of the Union's reduced fee calculation before deciding whether to challenge that calculation. In so finding, the Board overruled Teamsters Local 166 (Dyncorp Support Services) (Dyncorp I), 327 NLRB 950 (1999), and Schreiber Foods, 329 NLRB 28, 31 fn. 10 (1999), insofar as they held to the contrary. The Board noted that in California Saw & Knife Works, 320 NLRB 224 (1995), the Board emphasized that the touchstone for determining the adequacy of a union's notice to nonmember employees was Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986), quoting the Court's statement that "basic considerations of fairness" require that potential objectors be given sufficient information to gauge the propriety of the union's fee. Subsequently, in Dyncorp I, the Board directly confronted the issue of whether Hudson required a union to provide information regarding union affiliate expenditures in advance of a challenge to the union's reduced fee calculation. It determined that Hudson did not, but, conceding that Hudson could be read to the contrary, sought to distinguish it on its facts. On appeal, the D.C. Circuit denied enforcement of Dyncorp I, and found Hudson to be dispositive in addressing a union's requirement to provide information to Beck objectors (Penrod v. NLRB, 203 F.3d 41 (2000)). Here, the Board, in agreement with Penrod, found Hudson to be controlling, and stated that Dyncorp I was fundamentally inconsistent with Supreme Court precedent. The Board also noted that, although it declined to engage in a balancing analysis, there was little reason to believe that the administrative burdens faced by unions in providing affiliate expenditure data would prove to be particularly onerous.

Members Liebman and Walsh, dissenting, would find that a union has a legal duty to inform Beck objectors of information relating to union affiliate expenditures only after a challenge has been filed to the union's reduced fee calculations. They stated that the three-step procedure for union disclosure of information to Beck objectors, announced in California Saw and applied in Dyncorp I, appropriately balanced the union's interest in administrative economy and efficiency and Beck objectors' need for information concerning the expenditures of affiliates. They would find that the burden on unions of retrieving information from affiliates is substantial, while the burden on objectors in obtaining this information – by writing a brief challenge letter – is exceedingly slight.

Members Liebman and Walsh also contended that the majority erred in relying so heavily on Hudson, noting that Hudson involved a public sector union and was decided under the First Amendment, not under duty of fair representation principles or the NLRA. They further suggested that there is a strong possibility that the Supreme Court might afford Chevron (467 U.S. 837 (1984)) deference to the Board's holding in Dyncorp I, and alter the view expressed in Hudson, particularly since Hudson was decided two years before Beck.

k. Teamsters Local 75 (Schreiber Foods), 349 NLRB No. 14.

The Board (Battista; Liebman and Schaumber, dissenting in part) affirmed the ALJ's supplemental decision to the extent that it holds under the facts of this case that the Respondent Union did not unlawfully charge the Charging Party objectors (bargaining unit employees who are nonmembers of the Respondent Union) for expenses incurred in organizing employees working in the public sector. The Board, with Member Liebman dissenting, reversed the ALJ and held that the Respondent Union violated Section 8(b)(1)(A) of the Act and its duty of fair representation by charging the Charging Parties for expenses incurred organizing the employees of other employers within the dairy and cheese processing industry, which is the competitive market of Schreiber Foods, or the Charging Parties' employer.

In its original decision, 329 NLRB 28 (1999), the Board (Truesdale, Fox, Liebman, and Hurtgen; Brame, concurring in part and dissenting in part) resolved several issues arising from the Board's seminal decisions in California Saw & Knife Works, 320 NLRB 224 (1995), enf. sub nom. Machinists v. NLRB, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. Strang v. NLRB, 525 U.S. 813 (1998), and Paperworkers Local 1033 (Weyerhaeuser Paper Co.), 320 NLRB 349 (1995), rev'd on other grounds sub nom. Buzenius v. NLRB, 124 F.3d 788 (6th Cir. 1997), vacated sub nom. United Paperworkers International Union v. Buzenius, 525 U.S. 979 (1998), in which the Board set forth the standards to be applied to protecting the rights of employees under the Supreme Court decisions in NLRB v. General Motors, 373 U.S. 734 (1963) and Communications Workers v. Beck, 487 U.S. 735 (1988). The Board, in relevant part, remanded to the ALJ issues related to the chargeability of the Respondent's extra-unit expenditures for consideration in light of the Board's decision in California Saw. In California Saw, which issued after the ALJ's decision, the Board rejected the General Counsel's position in that case—which mirrored the General Counsel's original position in this case—that "objecting nonmembers may lawfully be charged only for those expenses incurred in the performance of representational activities in the objector's individual bargaining unit." 320 NLRB at 237 (emphasis added). The Board instead adopted a case-by-case approach to determining whether extra-unit expenditures are germane to collective bargaining and inure to the benefit of the objector's unit. Id. at 239.

Subsequent to the Board's remand, and prior to the hearing on remand, several relevant events occurred. First, the Board issued Food & Commercial Workers Locals 951, 7, and 1036 (Meijer, Inc.), 329 NLRB 730 (1999), enf. denied in relevant part sub nom. Food & Commercial Workers v. NLRB, 284 F.3d 1099 (9th Cir. 2002), modified and superseded 307 F.3d 760 (2002), cert. denied 537 U.S. 1024 (2002), which held that, under the standard set forth in California Saw, the Beck objectors in Meijer were lawfully charged for organizing expenses within the retail grocery industry, the competitive market of their employers. 329 NLRB at 734. Second, the General Counsel filed a motion with the ALJ opposing the Board's remand of the issues of the chargeability of the Respondent Union's organizing and public sector expenses. The

General Counsel argued that a remand was not warranted because the theory of the complaint was not tied to specific expenses of the Respondent Union. Rather, the "sole complaint allegation" was that the objectors could not be charged for "any expenses outside their bargaining unit" (emphasis in original). Noting that this "exclusive theory of complaint" (emphasis in original) was rejected by the Board in its initial decision, the General Counsel urged that "[s]ince no litigable issues remain on remand, the record should be closed, and [the remaining] complaint [allegations] should be dismissed." The ALJ denied the motion, as did the Board, stating, inter alia, that there remained a "viable issue . . . as to whether certain nonunit expenses are nonchargeable." The Board specified the chargeability of organizing expenses as one of the viable issues. As to this issue, the Board noted that the General Counsel had established at the initial hearing that organizing expenses were being charged to the objectors. Thus, the Respondent had the "burden of going forward to show that these expenditures are properly chargeable under the California Saw standard." With respect to organizing expenditures, the Board further stated that the ALJ should consider the recent decision in Meijer.

At the reopened hearing, the Respondent Union sought to meet its evidentiary burden with respect to organizing expenses by presenting the testimony of the Respondent Union's expert witness, Professor Dale Belman of the Michigan State University School of Labor Relations. Professor Belman testified, in general terms, as to the relationship between the negotiated wages of represented employees and the expenditure of funds to organize employees of other employers. With respect to expenses incurred in representing public-sector bargaining units, the Respondent presented evidence to establish that dues collected from employees working in the public sector covered the Respondent's expenditures for representing those units, so that the objectors' dues and fees were not used for such purposes. In the post-hearing brief to the ALJ, the General Counsel renewed the argument that the remanded allegations should be dismissed on the basis previously mentioned, i.e., that the complaint alleged only that it was unlawful for the Respondent to charge the objectors for any extra-unit expenditures and that, the Board having rejected that theory, the litigation should end.

As an initial matter, the Board, Member Liebman dissenting, adhered to the Board's ruling denying the General Counsel's special appeal of the ALJ's order denying the General Counsel's motion to dismiss the remanded complaint allegations. The Board explained that once adjudication of a case has begun, the decision whether to grant the General Counsel's request to dismiss all or part of the complaint is left to the Board's discretion, and in this case, the Board exercised its discretion and denied the request. In reaching its decision, the Board found that the General Counsel's motion was untimely. In addition, the Board rejected the General Counsel's contention that the case was no longer viable because the Board's decision in California Saw was dispositive of the exclusive theory of the complaint, namely that all expenses outside the unit were not chargeable to objectors. Instead, the Board correctly found that the parties here had litigated, and the ALJ had considered, a lesser-included theory, i.e., whether certain expenses outside the unit were chargeable to objectors. This interim

order thus established the law of the case, which governs the future course of the proceedings. The General Counsel renewed the request to withdraw the complaint, which the Board denied.

The Board majority held, contrary to the ALJ, that the Respondent Union failed to present sufficient evidence to support a finding under Meijer that its organizing expenses are chargeable to objectors because they are germane to its role as collective-bargaining representative and ultimately inure to the benefit of the objectors' bargaining unit. In Meijer, the Board held that the evidence presented by the unions established that the expenses they incurred in organizing employees employed in the retail grocery business in the same metropolitan area as the bargaining unit employees were lawfully charged to objectors. In so holding, the Board found that the testimony of experts in the field of economics and the direct observations and experience of the union representatives, established a clear linkage between organizing in the retail grocery business in the same metropolitan area and wages for employees in the bargaining units at issue in Meijer. Thus, the Meijer Board focused on the nature of the employer's industry, the highly competitive retail grocery business located in the same metropolitan area, and emphasized that its holding was based not on generalized assumptions about the benefits of organizing, but on explicit evidence related to the localized industry and the units at issue in the case. The Meijer Board distinguished its finding that the respondent unions' organizing benefited unit employees from similar findings rejected in Ellis v. Railway Clerks, 466 U.S. 435 (1984).

The Board majority stated that in their view, Meijer permits a union to demonstrate, as the unions did in Meijer for the highly competitive retail grocery business located in the same metropolitan area, that there is a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market. If this same showing is made under analogous factual settings, then under Meijer the union may lawfully charge objectors for organizing expenditures. In the view of the Board majority, Meijer makes it clear that the union must produce specific evidence showing a positive correlation between wages and union density in the relevant market at issue. While the respondent unions in Meijer met the burden, the evidence advanced by the Respondent Union in the instant case did not. Professor Belman's evidence was based on generalized academic research and was not specific to the industry that the represented person is employed in. Indeed, Professor Belman stated, and the Respondent Union's counsel conceded, that Professor Belman was not acquainted with the markets or industries relevant to the objectors' unit; nor did he have any knowledge of or acquaintance with the Respondent's organizing efforts. Thus, no evidence was presented at the hearing on remand in this case similar to the focused and specific analysis of the retail food industry in the relevant metropolitan areas at issue in Meijer. The other evidence in the record relevant to the chargeability of the Respondent's organizing expenses was never developed beyond the purpose of the Respondent's organizing efforts to a discussion of the actual effects of those efforts. Unlike the "numerous examples," in Meijer, recounted by the senior officials of the respondent unions, which demonstrated the accuracy of the proposition that there was a direct,

positive relationship between the wage levels of union-represented employees and the level of organization, no witness provided any such examples in the instant case. Thus, the Board majority found that the Respondent failed to meet its burden under Meijer of establishing that its organizing expenditures are germane to its duties as a bargaining representative and ultimately inure to the benefit of the objectors' bargaining unit and were not chargeable to objectors.

Member Schaumber, dissenting in part, believes that Meijer was wrongly decided. In the absence of a Board majority to overrule Meijer, he recognizes it as controlling Board law and joined Chairman Battista in the application to this case. According to Schaumber, the Board failed to address the broader and recurring question, one specifically raised and briefed by the parties, namely, whether such expenses are ever properly chargeable to Beck objectors. He noted that the issue was previously considered and erroneously decided by a divided Board in Meijer, a decision repeatedly criticized by other Board members as utterly inconsistent with Supreme Court precedent. Member Schaumber believes his colleagues compounded the error by finding it unnecessary to pass on the ALJ's extension of Meijer in this case. He would reach and address both issues.

Member Liebman, in her partial dissent, found that the Union acted lawfully in charging the objectors their fair share of the Union's expenses in organizing employees of Schreiber's competitors. According to Liebman, the majority's decision is based on a theory that was not advanced, and indeed was affirmatively disavowed, by the General Counsel. She said that her colleagues, in finding to the contrary, hold in effect, that no matter how much theoretical and empirical evidence has been introduced showing that increased union organizing helps to increase and protect union wage rates, no union may charge Beck objectors for such expenses unless it hires a labor economist to prove that such a relationship exists in the particular industry in which the union is the objectors' bargaining agent. Member Liebman believes her colleagues reached their result despite controlling Board and court precedent to the contrary, and on a theory that is at odds with accepted economic theory, empirical evidence, practical experience, and common sense.

I. Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, 350 NLRB No. 86.

The Board (Battista and Schaumber; Walsh, dissenting in part) reversed the ALJ's finding that certain discriminatees in a backpay proceeding did not incur a willful loss of earnings by delaying their initial search for interim work until 4-8 weeks after their discharge. The Board noted that although discharged discriminatees are not required to look for new work immediately, the longest period of inactivity the Board has found permissible has been two weeks. Consistent with this precedent, the Board concluded that the discriminatees should have begun their initial search within the two-week period following their discharges; for those who failed to do so, the Board tolled their backpay until the date they commenced a proper job search. The Board recognized that the reasonableness of an interim job search depended on the circumstances of individual

discriminatees. Although many of the discriminatees here were elderly, with limited skills and education, the Board concluded that these circumstances did not justify a delay of more than two weeks. Further, the fact that virtually all the discriminatees found some employment once they commenced a search showed that work was available. Moreover, the discriminatees' picket line activity in support of a strike to regain their jobs did not relieve them of their obligation to make reasonable efforts to obtain interim work.

The Board also found that some discriminatees conducted inadequate job searches, as evidenced by the number of applications filed, the period of time between applications, and the delay in starting interim employment once a job was secured.

Member Walsh, dissenting in part, stated that the principles to be applied in evaluating efforts to obtain interim employment are well established: that the sufficiency of the effort is determined with respect to the backpay period as a whole, not isolated portions of it; that what is considered is what would be expected of a reasonable person in like circumstances; and that what is required is good-faith, reasonable diligence, not the highest diligence. He contended that the majority's decision constituted a radical departure from these principles, with the majority replacing these principles with mechanical rules of its own devise. Specifically, he noted that an object of the discriminatees' strike was getting their jobs back, and that they reasonably had hope of this occurring; that beginning a search for work immediately would have unreasonably required that they abandon the picket line; that many discriminatees had substantial years' worth of seniority and accrued benefits with the Employer, and were elderly; that the entire backpay period was 26 quarters – 6 ½ years – and that all but one discriminatee was employed within the first quarter, and all but one continued working for the entire period. He also argued that the cases cited by the majority did not support its "one size fits all" approach, let alone its two-week rule.

Member Walsh also would find that the discriminatees made adequate searches for interim employment, based on what would be expected of reasonable persons in like circumstances. He also faulted the majority for creating a new rule by requiring discriminatees to look for "interim" work while waiting for their new jobs to start.

m. Domsey Trading Corp., 351 NLRB No. 33.

This backpay case involved 202 discriminatees found to be entitled to a remedy under the Board's decision in Domsey Trading Corp., 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2d Cir. 1994). In that case, the Board found, inter alia, that, after the Union made an unconditional offer to return unfair labor practice strikers to work on August 10, 1990, the Employer unlawfully refused to reinstate them on August 13, 1990. Since the Employer did offer the former strikers reinstatement on August 20, 1991, the backpay period ran from August 13, 1990 to August 20, 1991. From August 13, 1990 through February 1, 1991, the Union paid the former strikers (i.e., the non-machinists) $12 a day for each day that the former strikers came to the site of the former picket line and signed in with the Union.

The Board (Battista and Schaumber; Member Walsh, dissenting in part), reversed the ALJ's finding that the strike benefits of certain discriminatees (i.e., the "non-machinists") were collateral benefits and found instead that they were interim earnings deductible from gross backpay. The Board found that there was a "nexus" between the payments and the services that the former strikers performed for the Union that evidenced that the payments were interim earnings. Thus, the Board found that the weight of the evidence demonstrated that the strike benefits received by the non-machinists were contingent upon the strikers' continuous presence at the picket line and more akin to compensation for services than collateral benefits, that the benefits here were directly proportional to the number of days the non-machinist strikers spent on the line, and that the Union kept close tabs on the picketers through sign-in sheets and vouchers. The non-machinist strikers generally testified that they understood that all benefits were received for showing up to demonstrate in support of the Union's organizing campaign by singing, marching and chanting on the picket line. Once the picketing ceased, so too did the payment of benefits.

Member Walsh, dissenting, would adopt the ALJ's finding that the strike benefits were collateral benefits. He disagreed with the majority's finding of a "nexus" between the strike benefits and the former strikers' services for the Union. In his view, the former strikers, many of whom were unskilled and foreign born, understood (erroneously) that the strike ended only when the benefits ended on February 1, 1991. Thus, while they assumed that they were obligated to spend time at the picket line in support of the Union after the strike ended in August 1990 in order to continue to receive benefits, he found the testimony embodying that assumption was in conflict with more reliable evidence and was otherwise unsupported. According to Walsh, what the facts showed, and what the ALJ found, was that after August 10, the former strikers were required only to appear at the former picket line and sign in in order to receive strike benefits. Accordingly, he found no evidence to support the majority's assertion that the Union kept track, in effect, of the hours that the former strikers spent at the site or that it required them to demonstrate in support of the Union's organizing campaign to receive benefits.

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

As to the individual discriminatees, the Board adopted the ALJ's findings of the backpay amounts owed to certain discriminatees and reversed his findings as to others. In the unique circumstances of this case, where the Employer made "piecemeal" offers of reinstatement to some of the discriminatees in the weeks after the Union made its August 10 unconditional offer to return the striking employees to work, the Board found that the discriminatees would have reasonably believed that the Employer would recall them in August or September. Thus, the Board found that the former strikers were not obligated to begin their search for work until the beginning of October. The Board found, however, if the discriminatees failed to commence a search for work even into October, then the delay could not be attributed to the Employer's piecemeal offers of reinstatement. In such cases, it found it would not be appropriate to grant discriminatees an initial period in which they could delay their search for work and it declined to do so. Further, if discriminatees were reinstated after this initial period, i.e., at a time when the "unique circumstances" discussed above no longer existed, and then were unlawfully discharged still within the backpay period, the Board stated it would apply the two-week period set out in its recent decision The Grosvenor Resort, 350 NLRB No. 86 (2007).

Consistent with his dissent in Grosvenor Resort, Walsh would not adopt a two-week rule—or any per se rule—that would require discriminatees to begin an initial search for work within any given period of time or risk losing backpay from the time of their employer's unlawful action until their search for work commences. Rather, consistent with prior law, he would consider each discriminatee's efforts over the entire backpay period in determining whether that individual satisfied the obligation to mitigate backpay.

As to certain other discriminatees, the Board, relying on compliance forms and other documentary evidence, reversed certain of the ALJ's findings based on credibility. In addressing what weight to accord to a compliance form, not when it is supplemented by testimony, but when it is contradicted by subsequent testimony, the Board found that compliance forms are more reliable than contradictory and self-serving testimony proffered years after the fact. The Board reasoned that although compliance forms are not "sworn affidavits," the information contained in them is recorded earlier in time to the events in question and is presumably more reliable than recollections offered years later. Therefore, contrary to the ALJ, the Board assigned greater weight to the information contained in the compliance forms than to certain discriminatees' subsequent and unsupported contradictory testimony. In addition, the Board also found that a bare denial of interim earnings should not trump the Social Security Administration's official records.

Walsh, in dissent, would adopt the ALJ's credibility-based findings regarding certain of the discriminatees. He agreed with the ALJ that one cannot rely on compliance forms as undisputed documentary testimony. Like the ALJ, he found that those forms are not intended to be an exhaustive account of every single place that an employee looked for work. Thus, they are just an administrative form that is used by the General Counsel for them to do their administrative investigation of a compliance

proceeding. Because the compliance forms are neither sworn affidavits nor journals containing exhaustive records of a search for work, Walsh believes that one should not read too much into them. Contrary to the majority, he also would not construe the social security record as undisputed documentary testimony that a discriminatee, in fact, worked for a certain interim employer. Instead, he would resolve the doubt arising from the social security report against an employer.

n. St. George Warehouse, 351 NLRB No. 42.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) reaffirmed that a respondent has the burden of persuasion when alleging that a discriminatee failed to mitigate damages by making a reasonable effort to find work, but modified the current procedure of placing the burden of production of evidence solely on the respondent. Instead, once a respondent has produced evidence that there were substantially equivalent jobs within the relevant geographic area, the General Counsel now has the burden of producing evidence concerning the discriminatee's job search. The Board noted that its former practice of placing this burden solely on the respondent had been met with a mixed reaction by the circuit courts. The Board emphasized that although the usual way for the General Counsel to meet this burden would be to produce the discriminatee to testify, the Board was not requiring the General Counsel to produce the discriminatee; rather, the General Counsel could also satisfy his burden by providing other competent evidence as to the discriminatee's job search. The Board listed several practical reasons supporting its shifting of the burden: (1) the information concerning the discriminatee's job search is within the General Counsel's and/or the discriminatee's knowledge, and the burden of going forward normally falls on the party having knowledge of the facts involved; specifically, the General Counsel requires the discriminatee to maintain records of his job search, and is more likely to know his whereabouts; (2) this change will not result in a greater burden on the General Counsel, since he already has contact with the discriminatee and requires records of his job search, and it is customary for the General Counsel to produce the discriminatee at backpay hearings; however, in those rare instances when the General Counsel does not present the discriminatee, he can no longer simply rely on the compliance specification, but will have to produce some competent evidence of the job search; and (3) this burden-shifting framework is consistent with the obligations already imposed on the General Counsel by the Board's Casehandling Manual.

Members Liebman and Walsh, dissenting, stated that in departing from 45 years of precedent, the majority has relieved wrongdoers from the general rule that a party asserting an affirmative defense has the burden of producing the evidence to support it. They asserted that the majority failed to provide any persuasive reasons for the change it made. Specifically, they stated that the weight of judicial authority supports the Board's former approach; that it cannot be presumed that the General Counsel will be fully informed of a discriminatee's job search and location; that a respondent is often just as likely, if not more so, to have access to a discriminatee; that requiring the General Counsel to produce evidence of potentially every discriminatee's mitigation efforts will create an undue burden; and that the Casehandling Manual represents only

nonbinding litigation advice embodying a set of optimal practices. They claimed that the majority's decision reduces the effectiveness of the Board's backpay and reinstatement remedies, making it less costly for employers to violate the Act.

o. Toering Electric Company, 351 NLRB No. 18.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) in a 3-2 decision, held that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with an employer in order to qualify as a Section 2(3) employee and thus be protected against hiring discrimination based on union affiliation or activity. The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with an employer.

The Board held that the presumption that any individual who submitted an application was entitled to protection was inconsistent with the text of the Act and its basic purposes. The Board explained that Section 8(a)(3) of the Act has been interpreted by the Supreme Court to apply only to individuals who are employees within the meaning of the Act. Because the definition of the term "employees" in Section 2(3) of the Act is not detailed, the Board explained that it must interpret the term in a manner that comports with the general policies and purposes of the Act. Only applicants who are statutory employees within the meaning of Section 2(3) are entitled to protection against hiring discrimination, and statutory employee status, in turn, requires the existence of at least a rudimentary economic relationship, actual or anticipated, between an employee and an employer. According to the Board, no such economic relationship is anticipated in the case of applicants with no genuine aspiration to work for an employer. Thus, job applicants without a genuine interest in an employment relationship are not employees within the meaning of Section 2(3). The Board explained that remedial provisions of the Act support this interpretation of the statute. Because there is no provision in the Act for "punitive remedies," Section 10(c) of the Act, which authorizes the Board to remedy unfair labor practices, reflects a policy against windfall and punitive backpay awards and that policy supports holding that only those job applicants who were actually deprived of employment opportunities by an employer's discrimination should be protected by the Act.

The Board explained that although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize co-workers on behalf of a union, other salts clearly have no such interest. According to the Board, submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interests between an employer's interest in doing business and the applicant's interest in disrupting or eliminating this business. Such conduct also collides with the employer's right, recognized by the Supreme Court, to insist on employee loyalty and on a cooperative employee-employer relationship.

For these reasons, the Board now imposes on the General Counsel in all hiring discrimination cases the burden of proving that the alleged discriminatee was genuinely interested in seeking to establish an employment relationship and was thereby qualified for protection as a Section 2(3) employee. The Board explained that this requirement embraces two components: (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf. As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. Once the General Counsel shows that an application was made, the Board explained that the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. The employer may also rely on evidence that an employment application was stale, or incomplete. Assuming that an employer produces such evidence, the General Counsel will be required as part of a prima facie case, to rebut the employer's evidence and to prove by a preponderance of the evidence that the individual in question was genuinely interested in an employment relationship with the employer.

The Board concluded that although some evidence suggested the alleged discriminatees' genuine interest in seeking employment, other evidence suggested the opposite. Under these circumstances, the Board remanded this case to the ALJ in order to apply the new analytical framework to the facts of this case.

Members Liebman and Walsh, dissenting, would have retained without modifications the standard for litigating hiring discrimination cases set forth in FES*,* 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). In the dissent's view, the majority's new approach cannot be reconciled with the Act, its policies, or Supreme Court precedent. The dissent noted that Sections 2(3) and 8(a)(3) of the Act make clear that an employer's motive, and not the applicant's intentions, is the proper focus in cases like this one. The dissent further stated that the majority's new standard, even considered on its own terms, is critically flawed because it fails to provide clear guidance with respect to determining an applicant's genuine status. Moreover, they observe that the new standard places an unfair burden on the General Counsel by allowing an employer to first raise the genuineness issue during the unfair labor practice hearing. They argue it will both spawn and prolong the course of litigation by creating a new fact-intensive defense.

p. Cossentino Contracting Co., Inc., 351 NLRB No. 31.

The Board (Liebman and Walsh; Battista, dissenting in part) adopted the ALJ's findings that the Employer failed to consider for hire and failed to hire 9 out of 12 union applicants in violation of Section 8(a)(3) and (1) of the Act. The Board remanded to the ALJ the issue of whether the remaining three applicants were bona fide under the Board's modified framework set forth in Toering Electric Co., 351 NLRB No. 18 (2007) (holding that the General Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to establish that the applicant is an employee within the meaning of Section 2(3), if at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment).

In adopting the ALJ's findings, the Board applied the modified framework set forth in Toering Electric to determine whether the applicants were bona fide and determined that the General Counsel met his burden by proving that 9 of the 12 applicants were genuinely interested in working for the Employer. In rejecting the Employer's contention that none of the 12 applicants intended to work for the Employer because they were asked by the Union to apply and they applied "en masse," the Board found that the evidence showed that although the individuals went to the Employer's office as a group, their behavior was orderly, they attempted to submit applications in a manner consistent with the Employer's established procedures, they had relevant work experience, and there was no evidence suggesting that they were there for any reason other than to apply for work with the Employer.

As for two of the remaining applicants, the Board rejected the Employer's argument that they did not have a genuine interest in employment because they worked full-time for the Union and had not worked as operators for at least five years. Assuming arguendo that the Employer "put forth evidence reasonably calling into question" the two applicants' genuine interest in working for the Employer, the Board found that the General Counsel proved their genuine interest by a preponderance of the evidence. Thus, the credited testimony established that each would have accepted a position with the Employer if one had been offered. Although they may not have worked as operators recently, they were experienced and licensed heavy equipment operators. Further, it was possible for each to have fulfilled their obligations both to the Union and the Employer.

As for the remaining three applicants, the ALJ found that, contrary to their testimony, they could not continue to perform their duties for the Union while working for the Employer. The Board determined that this finding by the ALJ established that the Employer put forward evidence "reasonably calling into question" their genuine interest in working for the Employer. Accordingly, in order to afford all parties their due process rights, the Board found that the General Counsel and the Employer are entitled to an opportunity to adduce additional evidence relevant to the issue of whether these three alleged discriminatees are Section 2(3) employees. Accordingly, the Board remanded this issue to the ALJ for further factual development and consideration.

Chairman Battista, dissenting in part, finds that the discredited testimony of the remaining three applicants established that they would not have accepted a position with the Employer had one been offered. Contrary to his colleagues, he would not remand with respect to these three applicants because there is no “additional evidence” which the General Counsel could elicit on remand to prove that these salts had a genuine interest in seeking to establish an employment relationship with the Employer.

q. Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting in part) announced new evidentiary standards for determining the duration of the backpay period when the discriminatee is a "salt."

In "salting" cases, a union has sent members to seek employment from a non-union employer with the intent of obtaining employment and then organizing the employer’s employees. If the employer discharges or refuses to hire the salt because of his union affiliation or activity, the employer’s conduct is unlawful.

Prior to this decision, the remedy for an unlawful discharge or refusal to hire included the employer’s payment of backpay to the discriminatee from the date of the unlawful act until the employer made a valid offer of reinstatement or instatement, in the case of an unlawful refusal to hire. The Board applied a presumption that, if hired, the "salt" would have stayed on the job for an indefinite period. If the job was a construction job, the Board further presumed that the employer would have transferred the employee to other jobsites when the job from which he was discharged (or for which he should have been hired) ended.

In this decision, the Board held that the General Counsel can no longer rely on a presumption of indefinite employment, but instead will be required, "as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification."

The Board reasoned that permitting "the General Counsel to rely on a presumption of indefinite employment effectively requires the respondent employer to produce evidence that the discriminatee would not have worked for the entire backpay period claimed." It found that "[t]his procedure is appropriate as a matter of fact and policy in a refusal-to-hire case that does not involve salts because job applicants normally seek employment for an indefinite duration, the respondent employer is in the best position to demonstrate that a given job would have ended or a given employee would have been terminated at some date certain for nondiscriminatory reasons, and any uncertainty as to how long an applicant, if hired, would have worked for a respondent employer is primarily a product of the respondent's unlawful conduct."

However, the Board found that experience dictates that many salts only intend to remain with the employer as long as the union finds it useful for them to do so, and that the organizer and the union, not the employer, have the ability to prove how long the organizer, if hired, would have remained with the employer. "[R]ote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer," the board said. "In this context, the presumption has no validity and creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice, and that the Board's authority to command affirmative action is remedial, not punitive," the Board said.

In requiring the General Counsel to prove how long the salt would have worked for the employer, the Board said that the General Counsel could submit evidence regarding "the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns."

The Board held that its new rule "also affects the Board's presumption that the salt/discriminatee, if hired at the site where he applied, would have been transferred to other sites after the project at the original site was completed." It found that the General Counsel must prove that the salt would have accepted the transfer. In addition, the Board said that the same analysis will apply in cases where the salt has been unlawfully discharged or laid off. If the General Counsel fails to prove "that the backpay period should run indefinitely, then the salt/discriminatee is not entitled to instatement (or reinstatement in discharge and layoff cases)," the Board stated.

The Board noted that in NLRB v. Town and Country Electric, Inc., 516 U.S. 85 (1995), the Supreme Court held that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers, but that the court explicitly stated that "[t]his is not to say that the law treats paid union organizers like other company employees in every labor law context." Since the Supreme Court decision, the Board has continued to hold that salts are eligible for back pay. "We leave that principle undisturbed," the Board said.

However, it continued that "the temporary nature of many salts' employment warrants different treatment in calculating the amount of backpay due in salting cases." The Board stated that "a presumption of indefinite employment, which can result in backpay awards spanning several years, strains common sense in the context of salts and is inconsistent with the Supreme Court's instruction that the validity of administrative agency presumptions turns on ‘the rationality between what is proved and what is inferred.’" It also found that "application of the presumption of indefinite

employment to backpay determinations involving salts has resulted in backpay awards that are more punitive than remedial."

In dissent, Members Liebman and Walsh criticized the majority for overturning Board precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis. It found that the majority's approach violates the well-established principle of resolving remedial uncertainties against the wrongdoer, and "also treats salts as a uniquely disfavored class of discriminatees."

The dissent asserted that the majority failed to cite any evidence, scholarly articles, or other empirical data to support its assertion that salts do not seek employment for an indefinite time. They found that salting campaigns vary dramatically in duration, that some campaigns "last for years" and that sometimes "salts are simply assigned to work for an employer without any time frame or campaign commitment, to make what individual progress they can in generating union support or in connection with area standards picketing." The dissent also observed that the target of a salting campaign in the construction industry is the employer, not merely one of the employer's worksites.

It is the employer's unlawful conduct that creates uncertainty about how long the salt would remain employed, the dissent said. Because unions cannot know in advance how long salting campaigns will last, they "cannot know, let alone prove, how long a campaign would have lasted, or how long the salt would have stayed to participate in it, if the employer had not acted unlawfully," the dissent said. Allocating the burden of proof to employers is "a matter of equity," not a penalty, the dissent stated.

The dissent also asserted that the majority's new rule is "flawed" because it does not "provide clear guidance with respect to determining a discriminatee's status as a salt," fails "to recognize the difference between paid and unpaid salts," and reaches "beyond the issue of backpay for salts to the question of whether they must be instated or reinstated to the workplace."

2. Section 8(a)(1)

a. Threat to Sue

1. United States Postal Service, 350 NLRB No. 12, denying motion for reconsideration 351 NLRB No. 23.

The Board (Battista, Liebman, and Walsh) affirmed the ALJ's finding that the Employer violated Section 8(a)(1) of the Act by threatening an employee with a lawsuit and unspecified reprisals because he had filed an unfair labor practice charge with the Board. In its exceptions, the Employer contended, inter alia, that its threat to sue was privileged under the principles set forth in BE & K Construction v. NLRB, 536 U.S. 516 (2002).

In finding that the Employer's threat to sue violated Section 8(a)(1), the ALJ relied on Consolidated Edison Co., 286 NLRB 1031 (1987) and Carborundum Resistant Materials Corp., 286 NLRB 1321 (1987), in which the Board found that similar threats to sue violated Section 8(a)(1). In those cases, the Board distinguished between the threat to file a lawsuit and the actual filing of a lawsuit and found that whatever constitutional concerns might exist with respect to the filing of a lawsuit, they are not implicated when only a threat to file a lawsuit is at issue. The ALJ concluded here that the Employer's threats would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights, including the right to file an unfair labor practice charge with the Board.

For purposes of this decision only, the Board assumed arguendo, without deciding, that the principles of BE & K are to be applied to a situation where a threat to file a lawsuit is "incidental" to a lawsuit. The Board found, however, that where, as here, no actual lawsuit was filed, the threat was not "incidental" and, thus, the threat to sue the employee for filing an unfair labor practice charge violated Section 8(a)(1) of the Act. Because no lawsuit had been filed against the employee, the Board found that the threat to sue in this case was not preliminary to, or intertwined with, protected litigation or petitioning activity and was therefore not entitled to immunity. The Board affirmed the ALJ's finding that the threat to sue the employee for filing an unfair labor practice charge had the reasonable tendency to restrain employees in the exercise of their right to file charges under the Act and accordingly violated Section 8(a)(1).

Chairman Battista agreed that the remarks were a threat and were not simply statements incidental to a prospective lawsuit. However, he did not rely principally on the fact that the lawsuit was never filed. In his view, a respondent may lawfully state an intention to file a suit and yet never actually file the suit. He found, however, that under the facts of the case, the employee would reasonably perceive that the remarks were threats intended to chill his protected activity of charge-filing.

The Employer filed a motion for reconsideration of the Board's decision. The Employer claimed that McGuire Oil v. Mapco, 958 F.2d 1552 (11th Cir. 1992), compels a finding that a threat to sue, even when a suit is not actually filed, is "an incident of suit" and that a threat to sue is protected by the free speech clause of the First Amendment independent of the operation of the First Amendment's petition clause.

The Board rejected both of these contentions. It found McGuire Oil distinguishable because in that case, the threats were preliminary to a lawsuit that was actually filed, but here no suit was filed, and no related litigation was ongoing or anticipated. It also rejected the Employer's "free speech" argument, explaining that the free speech clause does not protect threats of reprisal. "Whereas here, the threat is coercive under Section 7, the threat is not speech that is protected by the First Amendment," the Board concluded.

In agreeing that the Employer's motion for reconsideration should be denied, Chairman Battista did so on the basis found by the Board in its original decision--that the threat to sue had the reasonable tendency to restrain employees in the exercise of their right to file charges under the Act.

b. Rules

1. P.S.K. Supermarkets, Inc., 349 NLRB No. 6.

The Board (Battista, Liebman, and Walsh) found, contrary to the ALJ, that the Employer violated Section 8(a)(1) of the Act by posting an overly broad rule that interfered with employees' right to wear union buttons, directing employees to wear union buttons inside their uniforms only, creating the impression of unlawful surveillance, and directing employees not to be seen speaking with union agents.

The Employer operates a grocery store and employs cashiers, clerks in the deli, bakery, meat, and produce departments, and stock clerks. These employees have significant contact with the store's customers and are required to wear company-issued uniforms. The parties stipulated that, on March 22, 2005, the Employer posted a memo on a company bulletin board. In the memo, the Employer prohibited employees from wearing buttons other than those issued by it. The memo said, in relevant part: "[w]e would like to remind you of a few dress code issues that we need to adhere to. The company expects all associates to follow our dress code policy. . . . No pins or buttons other than those issued by Foodtown to promote our programs such as Fresh Friendly, and Rewards, etc. . . . You may run the risk of being sent home for the day if you do not follow this policy. If the problem persists with the same associates, further disciplinary action could ensue." The memo remained posted on the bulletin board for approximately ten days, until April 1.

The Board explained that absent special circumstances, Section 7 entitles employees to wear union insignia, including union buttons, in the workplace and that the burden is on the employer to prove the existence of special circumstances that would justify a restriction. Special circumstances include situations where display of union insignia might jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition. Finally, the fact that the prohibition applies to all buttons, not solely union buttons, is not a special circumstance.

Here, the Board found that the Employer failed to satisfy its burden of proving that special circumstances justified its prohibition on the wearing of buttons. The

Employer appeared to argue that its button prohibition was justified because its employees have customer contact, they must wear uniforms, and the button prohibition is nondiscriminatory. Based on the foregoing precedent, however, these circumstances do not justify the Employer's complete ban on noncompany-issued buttons, which would encompass union buttons.

The Board also found that a manager's statements to two employees that they must wear union pins on the inside of their uniforms violated Section 8(a)(1) in two respects. First, the manager's oral directive that these employees wear pins only on the inside of their uniforms was unlawfully overbroad. As with the March 22 memo, discussed above, her directive restricted the employees' Section 7 right to wear union buttons at work and was not justified by special circumstances. Further, the Board found that the directive was facially discriminatory because it restricted the wearing of only union buttons. Although Chairman Battista agreed with his colleagues that the manager's directive was facially discriminatory and that it violated Section 8(a)(1), he would not and did not address whether the directive was also unlawfully overbroad.

3. Section 8(a)(2)

a. Syracuse University, 350 NLRB No. 63.

The Board (Battista and Schaumber; Liebman, dissenting) reversed the ALJ and found that the Employer's employee complaint procedure, the Staff Complaint Process (SCP), is not a labor organization within the meaning of Section 2(5) of the Act. Accordingly, it found that the Employer did not violate Section 8(a)(2) and (1) of the Act by establishing and maintaining the SCP nor Section 8(a)(1) by interfering with employee rights to refrain from supporting a labor organization. The complaint was dismissed.

In Electromation, Inc., 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir.1994), the Board established the standard for determining whether the entity that is the object of the employer's allegedly unlawful conduct is a labor organization within the meaning of the Act. The Board's inquiry is two-fold. First, the Board considers whether the entity that is involved is a labor organization under the Act. The Board will find that a committee is a labor organization under Section 2(5) if (1) employees participate; (2) the organization exists, at least in part, for the purpose of "dealing with" employers; (3) these dealings concern conditions of employment or other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment; and (4) if an "employee representation committee or plan" is involved, there is evidence that the committee is in some way representing the employees. Id. at 996. Second, if the organization satisfied that criteria, the Board considers whether the employer has engaged in any of the forms of conduct proscribed by Section 8(a)(2). Id. The term "dealing with" contemplates a "bilateral process involving employers and management in order to reach bilateral solutions on the basis of employee-initiated proposals." Id. at 997.

The Board concluded that the SCP is not a labor organization because it does not "deal with" the employer on terms and conditions of employment. Rather, the Board found that the SCP is limited to an adjudicative function, similar to the entities found not to be labor organizations in Mercy-Memorial Hospital, 231 NLRB 1108 (1977) (and John Ascuaga's Nugget, 230 NLRB 275 (1977), enfd. in pertinent part 623 F.2d 571 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981). Specifically, its purpose is to finally resolve the propriety of employer actions against an employee. It does not make proposals to management, and thus there are no management counterproposals. The panel simply renders a decision as to the propriety of the Employer's action. Although the SCP panel must submit its proposed decision to management for input before its decision is final, the SCP panel gives such input, if any, whatever weight it deems warranted and is not obligated to get back to management. While a management official sits on any three-member panel convened to consider a grievance filed by a non-supervisory employee, the majority of the panel consists of employees and there is no evidence that the management official deals with the two employees as if they were on opposing sides. Rather, it appears that the three persons simply consider the evidence and make a group decision. The limited opportunity of the Employer's human resources department to request reconsideration, in light of the prompt final decision that must follow, is sufficient to preclude the sort of back and forth that characterized the decision-making process in Keeler Brass Co., 317 NLRB 1110 (1995).

Member Liebman, dissenting, stated that the SCP is an integrated dispute resolution mechanism. Viewed in the entirety of its operation, she would find that the process fulfills the four characteristics of a Section 2(5) labor organization discussed in the majority opinion. Accordingly, she would also find the Section 8(a)(1) and (2) violations as alleged.

4. Section 8(a)(3)

a. Marshall Engineered Products Company, LLC, 351 NLRB No. 47.

The Board (Battista and Schaumber; Liebman, dissenting in part), applying a Burnup & Sims, 379 U.S. 21 (1964), analysis, reversed the ALJ's finding that the Employer's discharge of two employees for allegedly vandalizing a truck while on a picket-line was unlawful. The Board found that the ALJ erred in crediting the testimony of witness Warnell over that of witnesses Campbell and Brown. In so finding, the Board emphasized that the ALJ did not resolve the issue of credibility based primarily on demeanor. Although the ALJ's findings were partially demeanor-based, it was the substance of Warnell's testimony that was belied by other record evidence, and historically the Board has given less deference to the demeanor of a witness when an ALJ has ignored or given insufficient weight to critical evidence. The Board stated that a crucial portion of Warnell's testimony – that that the truck's passenger-side mirror fell off – was contradicted by physical evidence that it was the driver-side mirror. In contrast, Campbell's testimony was supported by the physical evidence, and another part of his testimony was corroborated by Brown. The Board also stated that Warnell's testimony was non-probative as to the issue of whether the employees rocked the truck.

Thus, the ALJ erred in finding that the employees did not pull the driver-side mirror off the truck and did not rock the truck, since those findings were based on testimony by Warnell that was belied by physical evidence as to the former misconduct and was non-probative as to the latter. Accordingly, the General Counsel did not meet his burden under Burnup & Sims of proving that the employees did not engage in the alleged misconduct.

Member Liebman, dissenting in part, stated that in overturning the ALJ's credibility resolutions, the majority countered the long-established principle that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. She stated that not only was the majority's position not supported by a clear preponderance of the evidence, it was flatly contradicted by the overwhelming weight of the testimony: the majority disregarded the statements of four eyewitnesses, including the credited account of a neutral witness, and relied solely on discredited testimony. She noted that the ALJ took into account Warnell's error in testifying that the passenger-side mirror fell off, but still found his testimony to be the most convincing of all the witnesses, and that the ALJ discredited Campbell's testimony in its entirety because Campbell was too frightened to remember the situation accurately and had conceded that he might be wrong about what he saw. Thus, she saw no reason for the majority to substitute its own judgment for that of the ALJ, especially since the testimonial evidence all but demanded the outcome reached by the ALJ.

b. The McBurney Corporation, 351 NLRB No. 49.

The Board (Liebman and Walsh; Battista, dissenting in part), in finding that the Employer unlawfully refused to hire union-affiliated applicants, rejected the Employer's argument that the General Counsel failed to establish that antiunion animus affected its hiring decisions and, alternatively, that it would not have hired the union-affiliated applicants in any event because its hiring decisions were based on a neutral application of its preferential hiring policy (which gave preference to current and former employees and to known applicants). The Board found that the Employer's reliance on its hiring policy was fatally undermined by the fact that, as the ALJ stated, it "used the priority hiring system selectively and systematically to avoid the hiring of union applicants." The Board found the instant case to be similar to Jesco, 347 NLRB No. 92 (2006), where the Board rejected the employer's hiring policy as a defense in light of the employer's substantial disregard of its policy – at least 40% of the nonunion applicants hired did not come within a priority hiring category – coupled with the employer's subterfuge of informing union applicants that it was not hiring when, in fact, it was. Here, the Employer "systematically" manipulated and disregarded its hiring policy to avoid hiring union applicants. Specifically, out of 105 total hiring decisions, on 57 occasions (54%) the Employer bypassed prior, qualified union applicants, including 7 priority applicants, in favor of nonunion applicants lacking any priority under its policy. Further, the Employer frequently misrepresented and misled the union applicants about its hiring plans, and its conduct resulted in no union applicants being hired. Thus, the Employer's manipulation of its hiring policy strongly implied antiunion animus, and, consequently,

under Jesco, that policy failed as a defense. The Board distinguished Zurn/N.E.P.C.O., 345 NLRB 12 (2005), because there the employer adhered to its hiring policy in the great majority of instances (deviating from its policy only 23 times out of 169 hiring decisions, a rate of 13.6%), and actually hired 17 known union applicants.

Chairman Battista, dissenting in part, would find that the Employer rebutted the General Counsel's prima facie case with regard to the hired nonunion applicants who enjoyed a higher preference under the Employer's hiring policy than the rejected union applicants. Chairman Battista stated that the instant case resembled Zurn in the important respect that the evidence here showed that the Employer did have a lawful preferential hiring policy, and applied it well in advance of the unfair labor practice allegations. In Jesco, by contrast, the employer did not prove that it actually had a preferential hiring policy, and, if there was such a policy, there was no evidence that it predated the alleged unfair labor practices.

5. Section 8(a)(5)

a. Refusal to Supply Information

1. Disneyland Park, 350 NLRB No. 88.

The Board (Battista and Schaumber; Liebman, dissenting) found that the Employer did not violate Sec. 8(a)(5) when it refused to supply the Union with requested information about subcontracting. Noting that information about subcontracting is not presumptively relevant, the Board found that the Union failed to adequately establish the relevance of the information sought, and that the information's relevance was not apparent from the surrounding circumstances. The parties' collective-bargaining agreement stated that the Employer agreed that it would not subcontract work for the purpose of evading its contractual obligations, but that it had the right to subcontract provided the subcontracting did not result in a termination, layoff, or a failure to recall unit employees from layoff. The Union did not claim that any employee had been terminated or laid off, or had not been recalled if previously laid off. Rather, the Union explained only that it had observed that there had been a number of subcontracts, that it believed there was an increase in subcontracts, that at least one unit employee had retired and had not been replaced, that no new steward had been hired at one facility, and that thus it was plain that the Employer was reducing its workforce and subcontracting additional work. The Board found these explanations insufficient to explain the relevance of the requested information, stating that the Union had not shown that it had a reasonable belief supported by objective evidence that the information sought was relevant. Further, although the Union's business agent testified that non-union people appeared to be doing unit work while unit members were idle, the Board found that this testimony did not establish that the subcontracting had an evasive purpose, nor explained how the requested information would be relevant to support an arguable contract violation. The Board explained that it was not suggesting that the Union, in order to acquire the information, must prove a breach of contract, but rather

that it must claim that a specific contract provision was being breached and must set forth at least some facts to support that claim.

Member Liebman, dissenting, stated that the Union invoked the contract's provision on subcontracting, and cited facts that prompted its concern that the contract was being violated. In her view, no more was required to trigger the Employer's duty to provide the requested information. She argued that the majority's approach would effectively require the Union to prove it had a meritorious grievance before receiving the information, which set the bar higher than Board precedent supports. She noted that a liberal, "discovery-type standard" governed information request cases, and that a union's asserted need to police compliance with a contract provision on subcontracting could establish the relevance of subcontracting information, apart from any showing that an actual grievance had merit. She further stated that tellingly, the majority relied on no case law that genuinely supported its position.

2. Raley's Supermarkets and Drug Centers, 349 NLRB No. 7.

The Board (Battista and Kirsanow; Liebman, dissenting) found that the Employer's failure to provide the Union with requested grievance-related information – specifically, a copy of the Employer's investigation reports, or a summary thereof – did not violate the Act. The Board stated that the Employer provided a sufficient response to the Union's request, since it was apparent from the Employer's response that it had found no merit to the grievances; specifically, it informed the Union that none of the employees it interviewed complained of improper treatment, and that this matter was thus closed. Moreover, it was clear also from the absence of any remedial action affecting the grievants that the Employer found the grievances to lack merit. The Board also noted that the record did not disclose the existence of any other information that the Employer possessed that would have been of real use to the Union. Thus, the Employer provided the Union with all of the relevant information in its possession, and accordingly did not violate the Act. To the extent the dissent argued that the Employer unlawfully failed to timely inform the Union that it had no reports, the Board responded that the complaint did not allege such a violation, but rather implicitly alleged that a report existed and that the Employer refused to furnish it. Even assuming arguendo that the allegation could be broadly construed to cover an untimely furnishing of the report, it would be unreasonable to convert this allegation into its opposite, i.e., that the report did not exist and that the Employer unlawfully failed to inform the Union of that fact.

Member Liebman, dissenting, stressed the importance of parties exchanging information concerning the processing of grievances. She stated that the Employer – while telling the Union that it had "taken the appropriate action" and "consider[ed] this matter closed" – revealed nothing of its investigation, its fact findings, its conclusions, or its purported "action," and provided no documents or information concerning its investigation or its results. Even if it were clear to the Union that the Employer found the grievances to have no merit, the Union still would have been entitled to know what "action" the Employer had taken, whether investigative reports existed, and, if so, the

content of those reports. She further asserted that in view of the Employer's cryptic reference to the "appropriate action" it had taken, it was not at all clear at the time that the Employer had denied the grievances. Nor did it suffice for the Employer to tell the Union that no employees other than the grievants had made similar complaints, since the issue was the mistreatment of the grievants themselves. She also argued that even assuming that no written reports existed, the Union had a right to know this in a timely manner, and the Employer's deliberately withholding this information for months was improper.

b. Repudiation of Agreement

1. Valley Central Emergency Veterinary Hospital, 349 NLRB No. 107.

The Board (Liebman and Walsh; Battista, dissenting in part) agreed with the ALJ that the Employer violated Section 8(a)(5) of the Act when it failed to abide by a Tentative Agreement negotiated with the Union that contained terms and conditions of employment and strike settlement terms.

The Board found that the refusal by the Employer's board of directors to ratify the Tentative Agreement was based on the board's invalid objection to the Union's ratification process and thus did not excuse the Employer's compliance with the agreement. Employee ratification was not a condition precedent to the formation of a contract, the Board explained, and even if it were, the Employer lacked standing to challenge the Union's ratification process.

The Board also found that the Employer's bad faith was independently demonstrated by the totality of its conduct, including seizing upon asserted flaws in the process as justification for refusing to allow striking employees to return to work as agreed, unlawfully locking out striking employees, and unlawfully demanding that employees waive their Section 7 rights. The agreement would have gone into effect but for the Employer's improper challenge of the ratification process, the Board stated. Although the agreement specified that complete agreement was contingent on approval by the Employer's board of directors, the board's rejection of the agreement for an impermissible reason did not prevent the formation of a binding contract, the Board found.

The proper remedy for the Employer's failure to abide by the Tentative Agreement was to bind the Employer by the tentative agreement, as it would have been bound in the absence of the Employer's unlawful repudiation and refusal by the Employer's board of directors to ratify the agreement, the Board found. It pointed out that the strike settlement provision of the agreement, anticipating that employees would return to work 12 days before the board of directors met to vote on ratification, was not subject to the requirement that the board of directors ratify the agreement.

In dissent, Chairman Battista disagreed that a contract was formed when the Union agreed to accept the Employer's last offer. That acceptance created the

Tentative Agreement, he stated, noting that the Tentative Agreement was contingent on the approval of the complete agreement by the Employer's board of directors. "Thus, since there never was an approval by the Employer's board of directors, there never was a contract," Chairman Battista stated.

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c. Subcontracting

1. Finch, Pruyn & Company, Inc., 349 NLRB No. 28.

The Board (Battista and Schaumber; Walsh, dissenting in part) found that an Employer did not violate Section 8(a)(5) and (1) of the Act when it unilaterally subcontracted during an economic strike that began in June 2001 for the pulp needed for its papermaking operation. The Board agreed with the ALJ that the Employer's subcontracting was a lawful temporary measure to maintain its operations during the strike. Accordingly, the Board affirmed the ALJ's findings that the subcontracting did not convert the economic strike into an unfair labor practice strike and that the strikers remained economic strikers whom the Employer lawfully recalled in accordance with the parties' negotiated recall agreements.

The Board explained that the Employer tailored its purchases to the expected duration of the strike. It found that there was no evidence that the Employer made a fixed decision in July 2001 to permanently continue subcontracting for pulp, given that the Employer made periodic spot purchase orders, continuously monitored the fluctuating market price of pulp and the quality of its products, and did not enter into a long-term contract.

The Board also found lawful the Employer's continuation of its unilateral subcontracting to buy pulp after the strike ended, since the Union waived its right to bargain. As the strike was ending, the Employer informed the Union of the decision to continue buying pulp, but the Union never requested bargaining. The Board found that this change was not presented to the Union as a fait accompli, inasmuch as the Employer did not enter into new contracts until a full month after it gave the Union notice of its intentions, and it still did not enter into any long-term contracts, but continued to purchase pulp through individual spot contracts.

The Board rejected the Employer's contention that its decision to continue buying pulp was a management decision entirely exempt from bargaining under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The Board found, instead, that the subcontracting more closely resembled the subcontracting found to be a mandatory bargaining subject in Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964). The Board explained that labor costs were clearly a factor in the decision, the decision was of the type suitable for resolution within the collective-bargaining framework, the Employer maintained the pulp mill in a state ready for activation, the Employer continued to produce essentially the same products using its same machines, and the Employer reopened the pulp mill and recalled the majority of unit employees when the pulp price rose.

Member Walsh, dissenting in part, agreed that the Employer was not obliged to bargain with the Union over its initial decision to purchase enough pulp to maintain its operations during the strike. He would find, however, that the Employer violated Section 8(a)(5) and (1) by failing to bargain over its mid-strike decision to subcontract for pulp "for an indefinite period not to terminate at the expiration of the strike," that the violation converted the economic strike into an unfair labor practice strike, and that the Employer violated Section 8(a)(3) and (1) when it failed to immediately reinstate certain strikers at the end of the strike.

d. Subjects of Bargaining

1. Success Village Apartments, Inc., 350 NLRB No. 72.

The Board (Battista and Kirsanow; Liebman, dissenting in part) found that the Employer's new policy of precluding employees represented by the Union from purchasing apartments at its cooperative was neither a mandatory subject of bargaining nor a term or condition of employment, and thus the Employer's refusals to bargain over this policy and to allow a unit employee to purchase an apartment were not unlawful. The Board concluded that the Employer's policy did not impact working conditions, or the employment relationship, but rather impacted only housing. The Board distinguished "company housing" cases on the basis that in those cases, company housing was maintained to assure or promote the continuous availability of employees, typically when alternative housing was not easily available. Here, in contrast, the Employer offered housing to the general public, not company housing; employees typically paid market rate for the apartments; there was no evidence that the subject of employees residing at the cooperative was ever contained in a collective-bargaining agreement or was the subject of bargaining; and employees' actual job duties were unchanged under the new policy. The Board concluded that under these circumstances, housing and employment were wholly separate aspects of the Employer's mission, and the new housing policy did not impact employees' terms and conditions of employment. Although there may exist personal economic benefits and conveniences for employees in purchasing one of the cooperative's apartments, that does not make the ability to purchase the apartments an employment term.

Member Liebman, dissenting in part, would find that the Employer's unilateral change of its policy to prohibit union-represented employees from purchasing its apartments vitally impacted employees' terms and conditions of employment. She stated that the employees' ability to purchase the apartments directly impacted several emoluments of value that accrued to them based on their employment relationship with the Employer, such as commuting convenience and the enhanced ability to work overtime, and the ability to purchase apartments below market cost in comparison to other comparable housing near the workplace. She also stated that the parties' conduct in raising this issue during negotiations indicated that the parties viewed it as an established term and condition of employment. Finally, she stated that even assuming arguendo that the opportunity to purchase apartments was not otherwise a term or

condition of employment, the Employer's new policy made it such by conditioning the employees' ability to purchase an apartment on their resignation from employment with the Employer.

2. United Rentals, Inc., 350 NLRB No. 76.

The Board (Liebman, Schaumber, and Kirsanow) adopted all of the ALJ's unfair labor practice findings. There were multiple Section 8(a)(1) findings as well as Section 8(a)(3) and 8(a)(5) findings. The Employer engaged in these unfair labor practices during the Union's successful effort to organize approximately 15 employees working for the Employer.

The Board affirmed the ALJ's findings that the Employer violated Section 8(a)(3) by suspending annual performance evaluations and pay raises; by discontinuing its practice of permitting employees to rent equipment without charge; by imposing a stricter dress code; and by changing its practice of permitting employees to call in before a scheduled shift to advise that they would be late. In so doing, the Board clarified the applicable legal standard.

The Board also affirmed the ALJ's findings that the Employer violated Section 8(a)(5) as well as Section 8(a)(3) concerning the conduct at issue. In so doing, the Board rejected the Employer's contention that there was no material, substantial, and significant change with respect to the Employer's equipment rental, uniform and call-in policies. The loss of free equipment rentals, the Employer's enforcement of a more stringent uniform policy, and the Employer's imposition of discipline pursuant to the changed call-in policy clearly had a detrimental effect on employees. Where employees are subject to discipline for failing to comply with a unilaterally changed policy, such a change is material, substantial, and significant. Toledo Blade Co., 343 NLRB 385, 388 (2004). The Board rejected the Employer's contention that the changes merely brought this location into compliance with the Employer's written corporate policies. Thus, the Board has previously held that a unilateral change from lax enforcement is a matter that must be bargained over. Vanguard Fire & Security Systems, 345 NLRB 1016, 1017 (2005), enfd. 468 F.3d 952 (6th Cir. 2006).

Member Schaumber agreed with his colleagues and the ALJ that the Employer violated Section 8(a)(3) by withholding annual evaluations and pay raises, and by changing its equipment rental, uniform, and call-in policies. However, he found it unnecessary to pass on the ALJ's additional findings that the Employer's conduct also violated Section 8(a)(5) because the additional findings would not materially affect the remedy.

3. AG Communication Systems Corp. and Lucent Technologies, 350 NLRB No. 15.

The Board (Battista and Schaumber; Walsh, dissenting in part) found that an Employer's decision to integrate its unit of telephone equipment installers with a unit of installers at a company that the Employer acquired was a management decision exempt

from bargaining under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The Board found that the Employer's decision lay at the core of the Employer's entrepreneurial control and decision making. The Employer's decision had as its focus achieving economic profitability by streamlining operations and eliminating redundancies, the decision was not animated by desire to reduce labor costs, the integration process involved large-scale organizational restructuring, and requiring bargaining would have placed a significant burden on the Employer's achievement of its comprehensive business reorganization, the Board explained.

The Board found, however, that the Employer unlawfully failed to bargain with the Union representing the installers over the effects of that decision. The Employer's decision to close down part of its business is the type of management decision requiring an Employer to engage in effects bargaining upon the Union's request, and the Employer never responded to the Union's written request to bargain over the effects of the decision to merge installer units.

The Board found that a limited bargaining order and backpay remedy pursuant to Transmarine Navigation Corp.,170 NLRB 389 (1968), was not warranted. It reasoned that the former company's installers suffered no detriment from the Employer's failure to engage in effects bargaining and that there would be little or nothing over which to bargain. A Transmarine remedy is not awarded in every effects bargaining case, the Board explained, and there is no contention that the terms and conditions of employment received by the company's installers after the merger were inferior to those they had received before the merger. The installers formerly employed by the company still retain union representation albeit with a different labor organization. A backpay order would result only in a windfall to the company's installers, the Board stated.

Member Walsh, dissenting in part, found that the Board's core purpose to protect the process of collective bargaining compels the imposition of the traditional Transmarine Navigation remedy for an effects-bargaining violation. Member Walsh cited the fact that the Employer affirmatively concealed for months its integration decision from the Union that represented the company's installers and thus intentionally frustrated the Union's right to engage in meaningful effects bargaining on behalf of the affected employees. Member Walsh also stated that the results of the Employer's effects bargaining with the other labor organization are irrelevant because the Board does not sit in judgment upon the substantive terms of collective-bargaining agreements.

4. Supervalu, Inc., 351 NLRB No. 41.

The Board (Schaumber and Kirsanow; Walsh, dissenting) found that the Employer, a grocery store operator, that had purchased two grocery stores and signed recognition/successor agreements with the Union agreeing to be bound by the existing collective-bargaining agreements at those stores lawfully refused to conduct card checks at three of the Employer's non-Union stores to determine if the Union had obtained authorization cards from a majority of employees at those three stores.

Even though the collective-bargaining agreements covering the purchased stores contained an "additional stores" clause providing that the Employer recognizes the Union as the exclusive bargaining representative at all stores in the relevant geographic area, the Board found that the General Counsel failed to establish that the "additional stores" clause vitally affected the terms and conditions of unit employees at the two purchased stores. Thus, the Board found that the "additional stores" clause did not constitute a mandatory subject of bargaining, and the Employer's actions did not violate the Act.

The Board explained that the General Counsel failed to establish that the three additional stores would be included in an existing bargaining unit so that an analysis under Kroger Co., 219 NLRB 388 (1975), applies. The General Counsel also did not provide any evidence that employees at the two stores were concerned about the transfer of work from their stores under the work-transfer rationale of Pall Biomedical Products Corp., 331 NLRB 1674 (2000).

Member Walsh, in dissent, found it "beyond question that organized employees are vitally affected by the degree of organization at their employer's other facilities." He said that what vitally affects unit employees' terms and conditions of employment is not limited to situations where the additional stores' employees would be added to an existing unit or where there is a concern that the employer will transfer work to non-union stores. Accordingly, he would find that the "additional stores" clause constituted a mandatory subject of bargaining and that the Employer unlawfully refused the Union's request for card checks.

e. Surface Bargaining

1. St. George Warehouse, Inc., 349 NLRB No. 84.

The Board (Battista and Schaumber; Walsh, dissenting in part) found that the Employer's conduct at the bargaining table did not establish surface bargaining and that the Employer's misconduct away from the table was not sufficient to show overall bad faith or to taint the Employer's conduct at the table.

Regarding the conduct at the bargaining table, the Board found that a proposal by the Employer--after receiving an ALJ's decision in another case in which it had failed to bargain over the transfer of unit work--that would permit the Employer to transfer unit work to agency employees upon the departure of unit employees did not indicate bad faith because the Employer was seeking to fulfill its bargaining duty. The Board also found that statements by the Employer during a mediation session and in an October 2003 meeting were to settle pending charges as well as negotiating a contract and thus were not admissible under Federal Rule of Evidence 408. Even if such statements were admissible, the Board found no bad faith from the following: the Employer's offer to convert 23 agency employees to direct hires contingent on an election, the change from a 3-year to a 1-year contract, the statement that a starting wage of $8 was "too

rich," and the remark that the Union's filing of new charges would add 2 years to the proceedings.

The Board also found that the Employer's misconduct away from the table was not sufficient to show overall bad faith or to taint the Employer's conduct at the table. It explained that the actions of the Employer's executive vice president, general manager, and supervisor in allegedly assisting with a decertification petition are not evidence of overall bad-faith bargaining as their actions did not tend to show an intent to frustrate agreement. The Board also found that the Employer's implementation of a new health insurance plan during negotiations was not a material and substantial change in the status quo, and that even assuming that the E's conduct was not consistent with past practice, the record fails to show that the change affected bargaining.

Member Walsh would find that the totality of the Employer's conduct indicated its intent to frustrate agreement. He noted that factors suggesting good faith were outweighed by other evidence that the Employer lacked a sincere desire to reach agreement. In particular, he pointed out the fact that the Union was newly certified and struggling to negotiate an initial contract. He also noted that the Employer insisted on another Union election as a quid pro quo for a contract, that the Employer backed away from its $8-wage offer immediately after the Union agreed to it, and that the Employer's president indicated that she did not care if negotiations lasted another 7 years.

f. Unilateral Changes

1. Provena Hospitals, d/b/a Provena St. Joseph Medical Center, 350 NLRB No. 64.

The Board (Liebman and Walsh; Battista, dissenting) reaffirmed adherence to the "clear and unmistakable waiver" standard to decide whether an employer can make a unilateral change in terms and conditions of employment during the life of a collective-bargaining agreement. Applying this standard, the Board found that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a staff incentive policy, but dismissed another 8(a)(5) allegation with respect to the Employer's unilateral implementation of a new attendance and tardiness policy.

In reaffirming the "clear-and-unmistakable waiver" standard, and rejecting a "contract coverage" analysis, the Board explained that the waiver standard is based on the long-established proposition that the duty to bargain continues during the term of the agreement and requires the parties to unequivocally express a mutual intention to permit unilateral employer action. Switching to a contract coverage analysis would likely complicate the bargaining process, the Board stated, and increase the likelihood of disputes. The Board also explained that the waiver standard has been upheld by the Supreme Court and that the two federal courts of appeal that have used the contract coverage analysis are a distinct minority.

Applying the "clear and unmistakable waiver" test, the Board found that the Employer's unilateral implementation of its incentive policy was unlawful. The Board explained that the parties' collective-bargaining agreement did not contain an express provision regarding incentive pay, and there was no evidence that, during negotiations, the subject of incentive pay was consciously explored or that the Union intentionally relinquished its right to bargain over the topic. In the absence of either an explicit contractual disclaimer or clear evidence of an intentional waiver during bargaining, the Employer was not authorized to act unilaterally on an undisputed mandatory subject of bargaining, the Board concluded.

The Board reached the opposite conclusion as to the Employer's unilateral implementation of changes in the attendance and tardiness policy, finding that several provisions of the agreement's managements-rights clause explicitly authorized the Employer's unilateral action. The management-rights clause provided that the Employer had the right to change reporting practices and procedures and/or to introduce new or improved ones, to make and enforce rules of conduct, and to suspend, discipline, and discharge employees. By agreeing to that combination of provisions, the Union relinquished the right to demand bargaining over implementation of the attendance requirements and the consequences for failing to adhere to the requirements, the Board concluded.

In dissent, Chairman Battista embraced a "contract coverage" analysis, asserting that it would eliminate the conflict between the Board and certain courts as well as harmonize the Board's views with the grievance-arbitration process. He stated that under "contract coverage," where there is a clause relevant to the dispute within the collective-bargaining agreement, it can reasonably be said that the parties *have bargained* about the subject, not that there has been a refusal to bargain. Applied to the instant case, he found that the Employer acted lawfully in both matters because (1) the management-rights clause contained several provisions relevant to time and attendance and (2) a provision relating to "extraordinary pay" as well as language in the management-rights section arguably permitted the Employer to act unilaterally with respect to incentive pay.

2. Baptist Hospital of East Tennessee, 351 NLRB No. 12.

The Board (Battista and Schaumber; Liebman, dissenting), affirming the ALJ, found that the Employer, a hospital, did not violate Section 8(a)(5) and (1) of the Act when it unilaterally implemented a change concerning the scheduling of holiday shift work for unit employees assigned to the Employer's in-patient radiology unit.

The Employer had argued that, through the management-rights clause in the parties' collective-bargaining agreement, the Union waived its right to bargain over the scheduling change. The Board agreed with the Employer and the ALJ that the evidence showed a clear and unmistakable waiver. They found, in particular, that the language in the management-rights clause giving the employer the right "to determine and change starting times, quitting times and shifts," to "assign" employees, and to "change

methods and means by which its operations are to be carried on" privileged the Employer's change in the holiday-shift scheduling procedure, which change is simply an incident of the fundamental right to schedule employees.

In a footnote, Chairman Battista, citing his dissent in Provena St. Joseph Medical Center, 350 NLRB No. 64 (2007), stated that the same result would be reached under a "contract coverage" test. Member Schaumber agreed, citing his dissenting position in California Offset Printers, 349 NLRB No. 71 (2007).

Member Liebman, dissenting, would find the violation. In her view, the management-rights language relied on by the majority did not establish a clear and unmistakable waiver, because language in the collective-bargaining agreement separate from the management-rights clause appeared specifically to *prohibit* the Employer from making the scheduling change.

3. Gruma Corporation d/b/a Mission Foods, 350 NLRB No. 36.

The Board (Battista, Schaumber, and Walsh) found that the Employer's unilaterally changing its method for determining whether to grant an annual wage increase and unilaterally failing to grant a wage increase was unlawful. The Board concluded that the structural wage increase (an increase based on the Employer's assessment of the local job market) was an established term and condition of employment, citing Daily News of Los Angeles, 315 NLRB 1236 (1994). In this regard, the Board relied on the following: the Employer had granted a structural wage increase for at least the preceding 4 years; the timing of the increase was fixed for the first quarter of each year; the sole criterion for determining the amount of the increase was fixed (the local wage survey); and the majority of employees (at least 80%) received this annual first-quarter wage increase, and those increases fell within a narrow range. Thus, the Employer was obliged to maintain the fixed elements of the structural wage increase program – the local wage survey and its timing – and to negotiate with the Union over the discretionary element of the increase – the amount. The Employer failed on both counts, however. First, it unilaterally changed its established method for determining the wage increase, from a telephone survey of local companies to a statewide market survey; it changed the timing of the wage survey, from February/March to October; and, for the first time, it considered not only the wage survey, but also its recruitment and retention needs. Second, the Employer failed to give the Union notice and an opportunity to bargain regarding the amount of the increase, i.e., its determination that no structural wage increase would be given for that year.

4. 3-V, Inc., 350 NLRB No. 24.

The Board (Battista and Liebman; Walsh, dissenting) reversed the ALJ's finding that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its employees' annual wage increases and by failing to pay its employees a semi-annual safety bonus.

From at least 1995 until 2003, the Employer granted annual wage increases to hourly employees each summer. During this period, the Employer's practice was to conduct a wage survey of local employers in the spring and then forward the results and a recommendation regarding a wage increase to the board of directors. The board of directors would then make the final determination as to the amount of the wage increase. The increase was typically announced in late July or August and was made retroactive to July 1. The raises ranged in amount from two to three percent. In September 2004, approximately 70 employees signed a petition asking the Employer for an explanation as to why a wage increase had not been announced. The Employer informed its workforce in October 2004 that its access to a critical chemical compound, necessary for a substantial portion of its production, was substantially impaired. Due to this supply problem the Employer announced that wage increases would not be given until the problem was resolved. In December 2004, the Employer announced that step increases, which were separate from wage increases, would resume and that the January safety bonuses would be paid, but as a one-time only event. By the end of 2004 and early 2005, the Employer had succeeded in reacquiring an adequate supply of glacial acrylic acid, but at a cost that was twice what the Employer had previously paid. The Employer was unable to recoup the added costs by passing them on to its customers and lost some of its customers as a result of the small increase that it did impose. The Employer's financial problems affected both the employee wage rates and employer contribution levels to the employee profit-sharing plan. Also, the Employer lost approximately 25 percent of its work force during the period from October 2004 through June 2005 as a result of layoffs, resignations, and the elimination of some positions. The Union was certified as the bargaining representative of the Employer's employees in April 2005. At the time of the certification, the Employer's employees had not received a wage increase for almost two years.

The Board rejected the Employer's contention that the annual wage increase was discretionary and therefore not a term and condition of employment. The Board explained that such wage increases that are regular and established events constitute terms and conditions of employment, even though the amount of the increase may be discretionary. Similarly, the Board rejected the Employer's contention that the Union waived its right to bargain over the wage increase. The Board found that the Employer effectuated a change in its established past practices prior to the Union's selection as representative of the Employer's employees such that it was privileged to withhold the wage increase and safety bonus after the Union's certification. Thus, the Employer had changed the status quo prior to the Union's election and the status quo no longer included an annual wage increase or safety bonus. Therefore, the Employer did not violate the Act by failing to grant either the wage increase or the safety bonus in the summer of 2005. The complaint was dismissed.

Member Walsh, dissenting, would adopt the ALJ's finding that the Employer violated Section 8(a)(5) and (1) by unilaterally discontinuing the annual wage increase and semi-annual safety bonus. Contrary to the majority, he would find that the Employer did not depart from its established practice of conducting a wage survey and

recommending a wage increase. Rather, the Employer decided that the amount in that year would be zero. Accordingly, in his view, the Employer's wage program remained a term and condition of employment at the time the employees selected union representation. By failing to maintain the fixed element of its wage increase program and failing to bargain over the discretionary aspect, the Employer violated Section 8(a)(5) and (1). In addition, he would find that the Employer's failure to grant the safety bonus was a unilateral change to the employees' terms and conditions of employment.

5. Tribune Publishing Co., 351 NLRB No. 22.

The Board (Liebman, Schaumber, and Kirsanow) affirmed the ALJ's finding that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing the use of its direct-deposit system for the deduction of union dues.

After unilaterally ceasing dues checkoff upon the expiration of the parties' collective-bargaining agreement, the Employer reached a new agreement with the Union to allow employees to use its direct-deposit system for the deduction of their union dues. After conducting a full trial run of the system and implementing direct deposit for a full pay period, the Employer unilaterally terminated the use of direct deposit for union dues.

Even though the Employer was entitled to discontinue dues checkoff upon the expiration of the collective-bargaining agreement, the Board found that the direct deposit for the payment of union dues became "the new status quo, i.e., a new term and condition of employment." As direct deposit of payroll deductions is a mandatory subject of bargaining, the Employer was required to bargain with the Union to impasse or agreement before it could terminate that practice, the Board stated, and there is no dispute that no such bargaining occurred.

The Board also found that the Employer's reservation of rights in its employee handbook did not permit the Employer to unilaterally interpret and modify the direct-deposit system. The Employer did not modify or interpret the section of the handbook addressing the direct-deposit system, the Board explained, but simply discontinued one particular use of that system without telling the Union or the employees that it was acting pursuant to a reserved right to interpret or modify the handbook. Finally, the Board noted that the handbook, unilaterally promulgated by the Employer, could not even arguably waive the Union's bargaining rights.

g. Withdrawal of Recognition

1. Madison Industries, Inc., 349 NLRB No. 114.

The Board (Battista and Schaumber; Liebman, dissenting) found that the ambiguity in the parties' collective-bargaining agreement regarding whether the parties intended to be bound by a 9(a) or an 8(f) relationship precluded finding 9(a) status, and thus Sec. 8(f) governed the parties' relationship. Accordingly, the Employer lawfully

repudiated its relationship with, and lawfully refused to provide information to, the Union after the parties' contract expired. In finding that Sec. 9(a) did not apply, the Board relied on extant law requiring proof that an agreement "unequivocally demonstrates that the parties intended to be governed by 9(a)" before 9(a) status may be found on the basis of contractual language. Although the recognition clause in the parties' agreement stated that the Employer voluntarily recognized the Union as the majority collective-bargaining representative and that the Union had demonstrated that it was the majority representative, an examination of the entire agreement led the Board to conclude that the General Counsel failed to establish that the agreement reflected a 9(a) relationship. Specifically, the agreement contained a provision waiving the Employer's right to file a petition for an election with the Board during the term of the agreement. However, if the agreement was a 9(a) agreement, there would be no need for such a provision, since 9(a) bars an employer from filing a petition for an election during the term of the agreement. By contrast, a petition can be filed during the life of an 8(f) contract. In light of this ambiguity in the contractual language, the Board next sought to consider whether any extrinsic evidence revealed the parties' intent, but the parties stipulated that there was no extrinsic evidence bearing on the nature of their relationship. In the absence of an unequivocal showing that the parties intended a 9(a) relationship, the Board found that 8(f) applied.

Member Liebman, dissenting, would find that the recognition clause in the contract clearly reflected that the parties intended to enter into a 9(a) relationship, and thus the Employer's repudiation of the Union was unlawful. In her view, the recognition clause clearly addressed the 9(a) issue unambiguously, and the separate clause that only waived the Employer's right to file a Board petition simply did not negate or contradict the recognition clause in a manner that created a genuine ambiguity. She further stated that even if the recognition and waiver clauses were somehow read to be in conflict, the recognition clause would still prevail, since that was the clause intended to establish the relationship between the parties. She also noted that a contract must be interpreted, to the extent reasonably possible, in a manner that avoids inconsistency. For all these reasons, the majority's rationale for finding this contract "ambiguous" does not withstand scrutiny.

2. <u>Virginia Mason Medical Center</u>, 350 NLRB No. 73.

The Board (Battista and Kirsanow; Schaumber, dissenting) found that the Employer unlawfully withdrew recognition from the Union during the certification year, because the Employer failed to show that the Union engaged in inexcusable procrastination or otherwise manifested bad faith in delaying bargaining. Less than a month after the court of appeals enforced the Board's bargaining order pursuant to the Employer's test of certification, the Union requested information that it needed for bargaining. Within 2 months of receiving the information, the Union sought bargaining, and the Employer accepted the first bargaining date that the Union suggested. There was no evidence of bad faith on the Union's part, and the Employer did not complain about delay or request an earlier bargaining date. Four months passed from the court's order to the start of bargaining, but that delay was not inexcusably long to formulate

information requests, to assimilate the information received, to reestablish contact with unit employees, and to otherwise prepare for bargaining an initial contract.

Member Schaumber, dissenting, would find that the Employer did not unlawfully withdraw recognition, because the Union unduly delayed face-to-face bargaining. He noted that over 4 months elapsed between the court's order and the parties' first bargaining session, and none of that delay was attributable to the Employer. In the absence of any explanation from the Union as to why it took 4 months to commence bargaining, Member Schaumber would find that the undue delay in face-to-face bargaining was attributable to the Union, and thus that the Employer met its duty to bargain in good faith for the full certification year.

3. Champion Enterprises, Inc., d/b/a Champion Home Builders Co., 350 NLRB No. 62.

The Board (Battista and Schaumber; Walsh, concurring in part and dissenting in part) found that the Employer's withdrawal of recognition in response to a decertification petition signed by a majority of employees was lawful, and that the Employer's other unfair labor practices did not taint the petition. In determining whether a causal relationship existed between the unfair labor practices and the loss of union support, the Board applied the factors in Master Slack Corp., 271 NLRB 78 (1984) as follows. First, the unfair labor practices occurred 5 to 6 months before the petition, and thus were too remote in time to have caused the employees' disaffection with the Union. Second, the nature of the violations did not support a finding of taint, since they were mostly isolated events involving one employee each, with no evidence of dissemination. Third, there was no showing that the unlawful conduct had a tendency to cause employee disaffection. At the time of the withdrawal of recognition, the Employer had bargained with the Union on 16 occasions, with no allegation of bad-faith bargaining. Further, the violations occurred long before the petition and, except for the 1-day layoff, were isolated and/or unknown by most employees. As for the layoff, because it lasted only 1 day, and occurred 6 months before the petition, the Board found that it would not have a lasting and negative impact on employees' support for the Union. Finally, there was no evidence that the unlawful conduct had an effect on employee morale, organizational activity, or membership in the Union.

Member Walsh, dissenting in part, would find that the decertification petition was tainted because of the Employer's unfair labor practices, and thus that the withdrawal of recognition was unlawful. In this regard, Member Walsh noted that, unlike the majority, he would find an additional violation by the Employer in unlawfully soliciting employees to report the protected activities of other employees to management; that the majority failed to give the appropriate weight to the other unfair labor practices; and that the majority failed to properly apply the relevant factors under Master Slack. Contrary to the majority, he would find that the unfair labor practices were not too remote in time to have a causal connection to the petition, and that they were of a serious nature tending to have a lasting detrimental effect on employees and to diminish support for the Union.

4. Young Women's Christian Association of Western Massachusetts, 349 NLRB No. 78.

The Board (Liebman and Walsh; Battista, dissenting) found unlawful the Employer's refusal to execute an agreed-upon collective-bargaining agreement and its withdrawal of recognition from the Union, when the Employer received evidence that the Union had lost support from a majority of employees after the parties had reached a final agreement. The Union was still the majority representative of the employees at the time it accepted the Employer's final offer, thereby forming a binding agreement, even though the agreement had not yet been reduced to writing. Further, the Union was entitled to a conclusive presumption of majority status during the term of any collective-bargaining agreement, up to 3 years. The Board stated that this rule applied once a final agreement on the substantive terms of a contract had been reached, regardless of the agreement's status as a written instrument, even if the Employer had grounds for believing that the Union had subsequently lost its majority support. The Board rejected the Employer's and the dissent's argument that because, under Appalachian Shale, 121 NLRB 1160 (1958), an unwritten, unsigned agreement does not bar the Board from processing an employee decertification petition, such an agreement should not preclude an employer's unilateral withdrawal of recognition, based on evidence of the union's loss of majority status. The Board stated that this argument failed to recognize the crucial distinction between employees challenging a union's representational status by asking the Board to hold an election, and an employer withdrawing recognition from a union unilaterally. Here, the Employer was bound by the agreement it had reached with the Union, and would have been required to execute a written contract even if the employees had, in the interim, filed a decertification petition with the Board. To allow one party to back out of its agreement, based on events that took place after the fact, would be profoundly destabilizing to the collective-bargaining process.

Chairman Battista, dissenting, stated that the majority's decision permits an unsigned agreement to defeat the Sec. 7 rights of the employees, who freely expressed a desire not to be represented by the Union prior to the signing of the agreement. He stated that under Appalachian Shale, a document containing substantial terms and conditions of employment can serve as a contract bar only if it is written and signed by the parties, which was not the case here. Further, under Levitz Furniture, 333 NLRB 717 (2001), an employer can withdraw recognition based on the fact of loss of majority status – the only exception to this rule is the aforementioned principle that majority status cannot be challenged during the term of a signed contract, which was not applicable here.

5. American Golf Corporation d/b/a Badlands Gold Course, 350 NLRB No. 28.

The Board (Battista, Schaumber, and Kirsanow; Liebman and Walsh, dissenting) found lawful the Employer's withdrawal of recognition slightly more than 6 months after resuming bargaining pursuant to an earlier Board Order, which had found the Employer's previous withdrawal of recognition to be unlawful. The Board applied Lee

Lumber, 334 NLRB 399 (2001), which applied to situations in which an employer had been ordered by the Board to bargain, and which adopted an insulated 6-month period, from the date on which the Employer commenced bargaining, during which the union's majority could not be questioned. The Board in Lee Lumber further held that this 6-month period could be extended to as much as 1 year, depending on a weighing of 5 factors. Applying those factors, the Board acknowledged that 2 of the factors favored an extension of the insulated period: that the parties were bargaining for an initial contract, and that only one issue remained outstanding. However, the other factors favored not extending the insulated period. Specifically, the issues being negotiated were not complicated, and the bargaining process was not complex. Moreover, the parties did not start from scratch when they resumed bargaining pursuant to the Board's earlier order: prior to that remedial order, they had bargained for approximately 8 months until the Union "walked away" from bargaining. Adding that time to the time after the remedial order, the parties engaged in bargaining over the course of approximately 14 months. Thus, this factor overwhelmingly favored not extending the insulated period. Further, although only one issue remained unresolved at the time of withdrawal of recognition, the parties were "at loggerheads" on this issue, even after considerable time and effort, and thus giving the parties more time was not likely to enable them to reach an agreement.

In considering the parties' "pre-remedial" bargaining prior to the Board's earlier order, the Board disagreed with the dissent's view that under Lee Lumber, events occurring prior to the time when the employer commenced bargaining in good faith pursuant to a Board order should not be considered. The Board acknowledged that the time period being measured began with the employer's bargaining in good faith pursuant to the remedial order, but explained that the question was whether that time period was reasonable. In the Board's view, "reasonableness" depended on all relevant circumstances, and thus it was appropriate to consider the total amount of time spent bargaining. The Board explained that it was not saying that the "reasonable period" included pre-remedial bargaining, but only that the duration of pre-remedial bargaining was relevant to determining whether remedial bargaining had continued for a reasonable period.

Members Liebman and Walsh, dissenting, would find the Employer's withdrawal of recognition to be unlawful because a reasonable time for bargaining had not elapsed, given that the withdrawal occurred when the parties were not at impasse and after they had reached agreement on all but one minor issue for a first collective-bargaining agreement. The dissent argued that the majority misapplied Lee Lumber in the following ways. First, the majority grossly minimized the fact that the parties were bargaining for an initial contract. Second, by adding the period of pre-remedial bargaining to the post-remedial bargaining to satisfy the "passage of time" factor, the majority ignored the fact that Lee Lumber stated that the "reasonable time" for bargaining commenced when the employer resumed bargaining after the remedial order. Further, the majority's reliance on the pre-remedial bargaining disregarded one of the fundamental principles of Lee Lumber: that a withdrawal of recognition caused lasting damage to the parties' bargaining relationship. Thus, bargaining that occurred

before an unlawful withdrawal of recognition could not erase the taint from that violation. Finally, the dissent would find that the amount of progress in the negotiations and the proximity to agreement favored a finding that a reasonable time had not elapsed, particularly since the Employer had agreed to consider the Union's proposal on the one remaining issue.

6. Midwest Television, Inc., d/b/a KFMB Stations, 349 NLRB No. 38.

The Board (Schaumber and Kirsanow; Walsh, dissenting in part) reversed the ALJ in finding that the Employer did not engage in bad-faith bargaining, and that the Employer's withdrawal of recognition from the Union was lawful. Regarding the bad-faith bargaining allegation, the Board, contrary to the ALJ, found that the Employer's proposal to eliminate the union-security provision in the new collective-bargaining agreement did not constitute bad-faith bargaining. Although the parties' previous contracts included a union-security clause, the Board noted that the existence of a union-security clause in previous contracts does not by itself obligate the parties to include it in successive agreements. The Board found that the Employer asserted a valid reason for its proposal to eliminate the union-security provision, which was that it did not want to be forced to remove on-the-air talent for nonpayment of union dues. The Employer rejected the Union's counter-proposal on union-security, but its explanation for doing so was not unreasonable; thus, the Board found no basis for the ALJ's finding that the Employer's position was "specious" or that it failed to consider the Union's counter-proposal. The Board found that the totality of the Employer's conduct indicated hard but lawful bargaining, and, in light of the Board's finding that the Employer lawfully reduced an employee's wages, there was no away-from-the-table conduct suggesting bad-faith bargaining intent.

The Board also found that the Employer's withdrawal of recognition based on a decertification petition signed by a majority of employees was lawful. The Board had dismissed the unfair labor practices relied on by the ALJ in finding that the decertification petition was tainted, and the only unfair labor practices found by the Board involved conduct that occurred after the employees signed the petition and the Employer withdrew recognition. Thus, those actions could not have caused the employee disaffection on which the Employer relied in withdrawing recognition.

Member Walsh, dissenting in part, stated that, contrary to the majority, he would adopt the ALJ's findings that the Employer unlawfully reduced an employee's wages, and unlawfully referenced that reduction in a letter to employees. He would further find that this unlawful conduct tainted the employee decertification petition, and thus that the Employer's withdrawal of recognition was unlawful.

7. Shaw's Supermarkets, Inc., 350 NLRB No. 55.

The Board (Battista and Schaumber; Liebman, dissenting) found that the Employer lawfully withdrew recognition from the Food and Commercial Workers Local 1445 after the third year of a five-year contract because a majority of employees had

signed a petition stating that they no longer wanted union representation. The case was before the Board on competing motions for partial summary judgment on the recognition issue.

The Employer and the Union had a five-year contract covering about 1600 full-time and regular part-time employees at 12 of the Employer's stores in central Massachusetts. The agreement was effective from January 31, 1999, to January 31, 2004. On February 2, 2002, a bargaining unit employee filed a decertification petition with the Board. The petition was supported by slips signed by bargaining unit employees stating, "I do not want UFCW Local 1445 to continue to represent me as my collective bargaining agent with my employer, 'Shaw's Supermarkets, Inc.'" After filing the petition, the employee who filed it continued to collect additional signatures. On February 11 and 20, 2002, the employee provided those signed slips and photocopies of those previously submitted to the Board to the Employer. The Employer received more signed slips on February 26. An accounting firm hired by the Employer counted the slips and, on about February 27, submitted a report to the Employer stating that more than 900 signatures matched names on the list of bargaining unit employees provided by the Employer. Based on this tabulation, the Employer withdrew recognition on February 28, 2002.

The Board noted that the precise issue presented here, which seemed to be an issue of first impression, was whether an employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration. The Board found that it may do so for the following reasons. The Board explained that in Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), it rejected the view that an employer should only be allowed to withdraw recognition following a Board-conducted election. Levitz made clear, however, that the unilateral withdrawal of recognition from an incumbent union is unlawful unless that union has actually lost the support of a majority of the bargaining unit employees. The Employer's evidence satisfied that condition here, the Board found. Thus, before it withdrew recognition from the Union, the Employer was in possession of verified information indicating actual loss of majority support. Further, there was no contention that the loss of majority was tainted by any unfair labor practices, nor was there any contention that the Employer incited the petition or otherwise contributed to employee disaffection from the Union. Accordingly, the bona fides of the Employer's evidence of the Union's loss of majority support was unchallenged. Further, although Levitz involved withdrawal of recognition after contract expiration, the Board observed that the Board's distinction in that case between the showing required for a withdrawal of recognition and that required to obtain an RM election had, in its view, broader and more general significance. Simply put, the Board observed that an employer, like here, in possession of facts showing an actual loss of majority support for an incumbent union should have wider freedom of action than an employer lacking such knowledge.

The Board stated the challenge was to find an appropriate balance between employee free choice and the stability of union-management relations. In the present case, the Board found that both of these policy goals could be effectively

accommodated by permitting the Employer, which was in possession of untainted evidence of the Union's actual loss of majority support, to withdraw recognition from the Union after the third year of a contract of longer duration (in this case, a five-year contract). First, the Board noted that it agreed with the reasoning of board decisions adopting the three-year contract bar on election petitions, and rejecting a longer bar as being too heavily weighted in favor of industrial stability at the expense of employee choice. The Board also stated that the interest in preserving the stability of a bargaining relationship between the Employer and the Union here was "necessarily tempered" by the uncontested evidence that the Union lost the support of a majority of the 1,600 workers covered by its contract. The fact that employees had "the benefit of 3 years of undisturbed experience with the Union as their representative" before a majority rejected the Union indicated that the bargaining relationship already had been destabilized. The Union's loss of majority support here undercut the theoretical assumption that a collective-bargaining agreement evidenced stability in labor relations for the duration of the contract, the Board said. Finally, the evidence of actual loss of majority support also reflected that a majority of the unit employees had reconsidered the desirability of continued union representation and decided against it. The unit employees reached this decision not while the Union was still negotiating for a first contract or even during the first three years of the contract. Rather, the unit employees did so only after three years of experience under that contract, and in a context free of coercion or employer instigation. Thus, the Board noted that the protection of employees' statutory right to choose whether or not to be represented was clearly a compelling interest in this case. Stating that requiring an employer to recognize a union which had lost majority support "is as deleterious to employee rights as failing to recognize a union that enjoys majority support," the Board concluded that the Employer acted lawfully in withdrawing recognition from the Union.

Dissenting, Member Liebman stated that the majority's decision permits an employer to disregard its agreement and unilaterally withdraw recognition from the union during the agreement's term and it does so even though a valid employee-filed petition for an election was pending. Liebman observed that the Board had maintained for more than 40 years "a clear rule that a party to a collective-bargaining agreement may not repudiate its own contract or, in most instances, petition the Board for an election during the life of that contract." Thus, the Board's contract-bar rules are part and parcel of a statutory scheme that "provides for an election process where nonparties to the contract may question the union's continued majority status, while the integrity of the contract is preserved unless and until the Board certifies a contrary result pursuant to a valid election." She added that it would have been "more sensible" for the Board to have processed the decertification petition and conducted an election among the supermarket workers, while holding the Employer and the Union to their contract "unless and until" the results of an election told the Board that contractual stability "must give way" to employee choice. She argues that it is anomalous to permit the Employer to withdraw recognition at a time when it would not have been permitted to file an election petition, and that Hexton Furniture Co., 111 NLRB 342 (1955), stands for the principle that when an employer may not file an election petition, it is also prohibited from unilaterally withdrawing recognition. Liebman finds that the majority,

while purportedly striking an appropriate balance of interests, scuttles both the election process and the contract. She observes that "it is a peculiar form of balancing when neither interest is accommodated fairly."

8. Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50.

The Board (Battista and Kirsanow; Walsh, dissenting) found that the Employer's withdrawal of recognition from the Union was lawful. Applying Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), the Board found that the evidence on which the Employer relied – a petition signed by over 50 percent of employees seeking "a vote to remove the Union" – was sufficient to show the Union's actual loss of majority status. Although stating that the ALJ's view (that the word "vote" in the petition necessarily implied a choice and thus that the petition language did not show that a majority of employees had already decided against the Union) represented a possible interpretation, the Board found that a more reasonable reading of the petition was that the employees wished "to remove" the Union as their representative, noting that the phrase "to remove" is not at all neutral. The Board further stated that Levitz does not require that the evidence proving loss of majority be "unambiguous," but rather that it meet the preponderance of evidence standard. Here, a majority of employees signed the petition, and given the Board's view of the more reasonable interpretation of the petition language, they found it to be more probable than not that the employees rejected union representation.

Member Walsh, dissenting, observed that the majority conceded that the petition was susceptible of more than one reasonable interpretation. In light of that ambiguity, the Board could not say with confidence whether employees were merely petitioning for an election, or whether they were expressing their outright rejection of the Union. He agreed with the ALJ that the use of the term "vote" implied a choice. The use of the term "to remove" could have referred to what the vote was about, rather than representing an expression of the employees' sentiment against the Union. Further, there were no other documents or testimony that supported the majority's interpretation of the petition language. In his view, under Levitz and subsequent cases, an employer must provide unambiguous evidence that the union no longer enjoys the employees' support, and here the Employer failed to meet its burden of showing actual loss of majority support. Finally, an election could have been held to ascertain the employees' true sentiments, pursuant to either the RD petition or an RM petition filed by the Employer.

6. Section 8(b)(1)(B)

a. International Union of Elevator Constructors (Otis Elevator Company), 349 NLRB No. 55.

The Board (Liebman and Walsh; Battista, dissenting in part) concluded that the Respondent Union did not violate Sec. 8(b)(1)(B) of the Act by disciplining a supervisor

who was also a Union member, because he was not disciplined for engaging in either collective bargaining or grievance adjustment, as required under Sec. 8(b)(1)(B). Although the supervisor did, to a limited degree, engage in adjustment of minor grievances and contract interpretation, there was no evidence that his discipline was related to his performance of those duties. According to the Respondent's charge, the supervisor's offending conduct was working with a composite crew of members and nonmembers. The charge did not refer to the supervisor's exercise of any grievance-adjustment or collective-bargaining duties and, notably, the alleged offense was identical to that charged against a rank-and-file employee. Nor, during the incident referenced in the charge, did the supervisor engage in grievance adjustment or collective bargaining. At most, his conduct consisted of ordinary supervisory duties, which is insufficient to invoke Sec. 8(b)(1)(B). The Board, contrary to the ALJ, found that the evidence did not establish that the supervisor was disciplined because he interpreted the contract to permit the Employer to use a contractor employing nonmembers, noting that the Respondent's charge made no such reference, and, moreover, it was the Employer's superintendent who decided to hire an outside contractor.

Chairman Battista, dissenting in part, would find that the supervisor was disciplined for engaging in Sec. 8(b)(1)(B) activity when he was disciplined for his conduct regarding the use of a composite crew to assemble a gantry. Chairman Battista stated that the supervisor was the only management representative on the worksite, and in that capacity he initiated the chain of events that led to the Employer's use of the composite crew. The supervisor made the initial determination that the Employer's own equipment was inadequate, and he so advised the Employer's superintendent; thus, the decision to contract out the work, or at least the effective recommendation to do so, was made by the supervisor. Further, the supervisor ordered his crew to cease working while the outside contractor's nonmember workers assembled the gantry, and there was no evidence that the Employer's superintendent advised him to do so. The supervisor testified that, in his view, this was permissible under the contract. Thus, Chairman Battista would find that the supervisor was not merely carrying out a superior's orders, and that he was engaged in Sec. 8(b)(1)(B) activity. Further, even if the supervisor's conduct did not involve Sec. 8(b)(1)(B) activity, the Respondent's discipline of him would have an adverse impact on his future performance of contract interpretation and grievance adjustment, since it would cause him to "think twice" before doing anything which might raise the ire of the Respondent.

7. Section 8(e)

a. Glens Falls Building and Construction Trades Council, 350 NLRB No. 42.

The Board (Battista, Schaumber, and Kirsanow) concluded that the Respondent Unions violated Sec. 8(e) of the Act by entering into agreements with a company, Indeck, and its contractor, which prohibited the contractor from subcontracting or permitting subcontracting of any work involving the parties' construction of a power cogeneration facility to a company that was not itself a party to a project labor

agreement (PLA) with the Respondents and that did not agree to perform all work on the project under the terms of the PLA. Under Sec. 8(e), the subject provisions were unlawful secondary restrictions on doing business, unless they were exempt from the general prohibitions of Sec. 8(e) under the construction industry proviso to that section. The Board, applying the test for proviso coverage set forth in Connell Construction Co., 421 U.S. 616 (1975), found that the Respondents failed to prove the affirmative defense of proviso coverage because the subject agreements did not arise in the context of a collective-bargaining relationship between the Respondents and Indeck, and were not executed for the purpose of preventing conflict between union and nonunion labor on a common construction site.

b. Local 917, International Brotherhood of Teamsters (Peerless Importers), 349 NLRB No. 97.

The Board (Battista and Schaumber; Liebman, dissenting) held, contrary to the ALJ, that the Respondent Union violated Section 8(e) by grieving Peerless Importers, Inc.'s (Peerless) failure to assign unit employees certain work, by arbitrating that grievance, and by securing an arbitration award holding that the parties' collective-bargaining agreement prohibited Peerless from failing to assign the work to unit employees.

Peerless was engaged in the distribution of alcoholic beverages throughout the New York City (NYC) metropolitan area. The Respondent Union represented a unit of Peerless' drivers and helpers. The parties' collective-bargaining agreement required Peerless to use unit employees to transport beverages to and from its facility. Peerless purchased beverages from several suppliers, including Diageo North America Inc. (Diageo). On October 1, 2002, Peerless and Diageo entered into a Distribution Agreement, making Peerless the exclusive distributor of Diageo's beverages in the NYC metropolitan area. Previously, Peerless was one of two New York distributors of Diageo's beverages. Peerless' unit employees, who had transported beverages from Diageo's facilities to Peerless' facility for many years, continued to do so for the first six months of 2002 under the 2002 distribution agreement. While the agreement did not expressly address which party would transport the beverages from Diageo to Peerless, it gave Diageo authority to unilaterally change "Sales Terms," except for "remittance" terms. In April 2003, Diageo implemented a delivered pricing program and began using its employees to transport some of its brands to Peerless. Under the program, Diageo would transport certain brands to Peerless and charge Peerless for delivery in the purchase price of those brands. The Respondent Union filed a grievance in November 2003 alleging that Peerless breached the collective-bargaining agreement by failing to use unit employees to transport all of Diageo's beverages. In the arbitration, Peerless defended on the ground that it lacked the right to control the disputed work and that the Respondent Union was violating Section 8(e) by attempting to apply the collective-bargaining agreement to work that Peerless no longer controlled. In September 2004, an arbitrator issued an award finding that Peerless breached the collective-bargaining agreement by "permitting merchandise from Diageo North America to be delivered to the Company's [i.e., Peerless'] warehouse by non-bargaining unit personnel." The

arbitrator delayed issuing a remedy and instead permitted Peerless to file an unfair labor charge.

The Board found that the agreement between Peerless and the Union, as interpreted and applied by the arbitrator, impaired the business relationship between Peerless and Diageo. Thus, the agreement, as interpreted by the arbitrator, prohibited Peerless from doing business with Diageo as long as Diageo insisted upon delivering the product to Peerless. While the Board acknowledged that the unit employees had historically performed that work, it observed that the "work preservation" defense has a second prong. Citing to NLRB v. Pipefitters Local 638, 429 U.S. 507, 525-526 (1977), the Board stated that if the employer of the unit employees has lost control of the work, and such loss of control was not initiated by it or at its own volition, the work preservation defense is not a valid one. See also Electrical Workers Local 501 (Atlas Construction Co.), 216 NLRB 417, 417 (1975), enfd. 566 F.2d 348 (D.C. Cir. 1977) (right of control doctrine "presumes an employer to be 'neutral' if that employer, when faced with a coercive demand from its union, is powerless to accede to such a demand except by bringing some form of pressure on an independent third party.") The Board concluded that, under this test, Peerless did not have the right of control.

The distribution agreement by its terms gave Diageo the authority to unilaterally change "Sales Terms." The distribution agreement defined "Sales Terms" as "Prices and the terms and conditions of sale." The "terms and conditions" of the sale normally included the means by which the product would be delivered. Consistent with the usual understanding of the term, Peerless' president testified that the phrase "Sales Terms" included whether Diageo or Peerless would deliver the freight. Accordingly, the Board found that Diageo's contractual authority included the right to insist that it deliver the beverages to Peerless as a condition of sale and Peerless, by agreeing to those terms, lost the right to control the disputed work.

The Board observed that in April 2003, Diageo exercised its right of control by assigning to its own employees the work of delivering some of its products to Peerless. The Board found no evidence that Peerless initiated this change, which was announced by Diageo in March 2003. According to the Board, the most that could be said was that Peerless did not actively resist the change. However, given the contractual authority possessed by Diageo, the Board stated that it did not appear that Peerless had a legal leg on which to stand. Conceivably, the Board observed, Peerless could have refused to do business with Diageo under the Diageo dictate, but that could have involved a breach of contract suit, and, in any event, would have resulted in a loss of the unit work.

The last issue addressed by the Board was whether Peerless could be said to be an "unoffending employer" who merits the Act's protections. Plumbers Local 438 (George Koch Sons, Inc.), 201 NLRB 59, 64 (1973), enfd. sub nom. George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973). The Board noted that a coerced employer may forfeit neutral status if, by contracting away its right of control, it affirmatively engages in conduct "which the employer could reasonably conclude would conflict with his collective-bargaining obligations, coupled with the absence of any demand for such

conduct by an independent third party." Atlas Construction, supra, 216 NLRB at 417. In applying this test, the Board stated that the employer's actions at the time it negotiates away the right of control are a circumstance to be considered, but are not alone determinative. Instead, the Board also will consider whether, at the time of a union's demand for disputed work, the employer was powerless to assign it. Id. at 418.

The Board found that Peerless was not an offending employer. The Board stated that although the agreement negotiated in 2002 gave Diageo the authority to unilaterally change "Sales Terms," there was no evidence that the parties contemplated that this provision would result in the reassignment of delivery work. Indeed, the Board observed, the unit employees continued to perform the work for six months after the agreement. Under these circumstances, the Board found it could not say that Peerless "could reasonably conclude" that its acceptance of this agreement conflicted with its obligation under its collective-bargaining agreement to assign delivery work to unit employees. Further, even if Peerless understood that Diageo might one day take over the delivery function, that did not mean that Peerless was an offending employer. The Board observed that there was nothing to suggest that Peerless was the initiator of the agreement which gave Diageo that power. Thus, it would defy logic and common sense to say that Peerless was the initiator of a clause which gave Diageo certain rights. Finally, it was clearly Diageo, not Peerless, which made the decision at issue, viz. the decision to take over the delivery function. Thus, at the time the Respondent Union demanded the work in April 2003, by its effort to enforce the collective-bargaining agreement, Peerless was "powerless to assign" it to unit employees. Accordingly, the Board found it was an "unoffending employer" at all times material to this case.

Member Liebman, dissenting, found that Local 917-represented employees had a clear contractual claim to the work at issue, which they had historically performed, and that the Respondent Union asserted that claim through lawful, contractual channels against the contracting party, Peerless, and it prevailed. According to Liebman, a careful look at how Peerless came to be in the situation that precipitated this case demonstrated that Peerless was not an "unoffending employer" and that Local 917's objective was "truly work preservation." Liebman observed that the Union asserted that claim through lawful, contractual channels against the contracting party, Peerless (not Diageo), and it prevailed. Liebman stated that the majority's holding, then, meant not only that the Union had no legal means to rectify Peerless' breach of contract, but that the Union might be sanctioned under the National Labor Relations Act for even pursuing the matter. In short, Peerless' agreement with Diageo trumped Peerless' prior agreement with the Union. Liebman found that such a result had no firm support in federal labor law.

8. Section 8(g)

a. Correctional Medical Services, Inc., 349 NLRB No. 111.

The Board (Battista and Schaumber; Liebman, dissenting) found that the Employer did not violate the Act by firing five employees for picketing at the jail's main

entrance without providing the clinic with ten days of advance notice pursuant to Section 8(g) of the Act.

On April 1, 2002, the Employer began operating the medical clinic at the Albany County Correctional Facility, an 840-inmate facility in Albany, NY, under a three-year contract with the State of New York. In August 2002, the Union requested that the Employer recognize it as the representative of all clinic employees except the physician, the supervisors, and the office clerical. The Employer subsequently rejected the request. On September 12, under the direction of the Union and another Albany area labor organization, about 20 individuals, including five clinic employees undertook action in support of the Union's demand for recognition. Four of the employees had completed their shifts and were off duty; the fifth took part during his dinner break and returned to work afterwards. All were in uniform. The action lasted about 40 minutes, during which the 20 individuals continually walked in a circle across the jail's main entrance and exit.

The Board found that the conduct constituted picketing within the meaning of Section 8(g), that the Union failed to comply with the notice requirements of that section and, therefore the Union, under whose auspices the picketing was conducted, violated Section 8(g). The Board explained that Section 8(g) does not define "picketing," nor is it defined elsewhere in the Act; however, the Board has had little difficulty in similar cases in finding that the kind of conduct that occurred here amounted to picketing. Indeed, finding that the conduct constituted picketing is consonant with the legislative purpose behind Section 8(g), which was designed to assure continuity of patient care. To that end, Section 8(g) proscribes "any strike, picketing, or other concerted refusal to work at any health care institution" in the absence of the required advance notice. The Board stated that the conduct of the participating employees and other individuals had the potential to influence other employees to withhold their labor, or to deter suppliers or their employees from attempting to enter the clinic and that those potential consequences were sufficient to bring the Union's conduct within the ambit of Section 8(g). The Board found that the employees who engaged in the picketing were not protected by the Act and that the Employer did not violate the Act by discharging them. The Board explained that employees who engage in concerted action in a manner or for an end deemed inconsistent with the Act may be subject to discipline including discharge. The instant dispute is but one more example of this general principle. An employee who pickets in violation of Section 8(g) does not lose his status as an employee under the Act in contrast to an employee who strikes in violation of Section 8(g) or 8(d), where the striker does lose his status under the Act. The point is that the employee who pickets in violation of Section 8(g) is engaged in unprotected conduct, and is thus vulnerable to employer discipline. In short, the matter of status is not the same as the matter of protectedness.

Member Liebman, dissenting, found that the Act plainly forecloses the discharge of employees where the union has failed to provide an 8(g) notice of their picketing. She explained that in enacting the Health Care Amendments, which added Section 8(g) and amended Section 8(d) to incorporate the 8(g) notice period, Congress decided both

what conduct to proscribe and what sanctions would be applicable to which conduct. Unlike the Section 8(b) context, it did not leave the Board free to fashion its own rule with respect to sanctions. Rather, by restricting the loss-of-status provision in Section 8(d) to employees who strike in violation of Section 8(g)—and deliberately omitting picketing as a ground for loss of status—Congress clearly expressed its intention to preclude employers from taking action against individual picketing employees.

9. Lockout

a. Boehringer Ingelheim Vetmedica, Inc., 350 NLRB No. 60.

The Board (Schaumber and Kirsanow; Walsh, dissenting) found that the Employer lawfully locked out employees. The Board reversed the ALJ's finding that, although the lockout was initially lawful, the Employer's presentation of no-strike forms to individual employees constituted direct dealing and, from that time forward, the lockout violated Section 8(a)(1), (3), and (5) of the Act.

The Employer gave the Union two options for returning bargaining unit employees to work: (1) the Union could give the Employer a written no-strike assurance or (2) employees who wished to work could submit individually signed unconditional offers to return to work. The Union declined both options and reiterated its previously-rejected offer to indefinitely extend the collective-bargaining agreement. Employees reported for their normal shifts, as the Union had instructed them, and the Employer presented employees with no-strike forms, advising them that they would have to sign them if they wished to return to work. All of the regular employees declined to sign the form, and the Employer sent them home. The Employer advised employees to seek advice from the Union before deciding whether to sign the form.

The Board found that there was no dispute that the lockout was lawful at its outset and it was instituted in furtherance of the Employer's legitimate business objectives. Contrary to the ALJ, the Board majority found that the Employer did not engage in direct dealing. In the absence of direct dealing or any evidence of unlawful motive, the Board majority found that the lockout was lawful throughout its duration. Contrary to the ALJ, the Board majority found Dayton Newspapers, Inc., 339 NLRB 650 (2003) and C-E Natco, 272 NLRB 502 (1984), were distinguishable. Thus, unlike the employers in those cases, the Employer did not bypass the Union in violation of Section 8(a)(5). Rather, the Employer timely informed the Union of its intentions, giving it two very clear and specific options for ending the lockout. In the face of the Union's refusal to provide no-strike assurances, the Employer allowed employees the opportunity to return to work by providing individual assurances, as referred to in the second option given to the Union. In doing so, the Employer did nothing to derogate from the Union's representative status. Indeed, the Employer told a number of employees to talk to their union representatives before deciding whether to sign the no-strike assurances.

The Board majority also found that, unlike the employers in Dayton Newspapers and C-E Natco, the Employer did not offer employees different, more favorable terms

than previously offered to the Union and it did not reject any offer by the Union to return the employees to work on same terms it then agreed to with the individual employees. Here, the employees did not verbally inquire about returning to work, but they did so nonverbally by presenting themselves for work despite having been informed of the lockout and only then did the Employer offer the employees an opportunity to return to work. Although the Employer did not expressly confirm that employees would receive pre-lockout wages and benefits, it in no way suggested that it was offering different wages or benefits. The Employer's no-strike form simply was silent on that score. Under these circumstances, the Board majority found no direct dealing.

Dissenting, Member Walsh found that the Employer violated the Act by dealing directly with locked-out bargaining unit employees. He found that undisputed evidence supported the ALJ's finding that the Employer bypassed the Union and dealt directly with bargaining unit employees by requiring them to individually sign written no-strike assurances as a condition of working during the Employer's lockout and that the Employer's unlawful conduct converted its lockout, lawful at its inception, into an unlawful lockout.

b. University Moving & Storage Co., 350 NLRB No. 2.

The unfair labor practice allegations in this case arose from a lockout at the Employer's facility. The Board (Battista and Schaumber; Liebman, dissenting in part) found that the Employer's refusal to issue certification releases to locked-out employees so they could perform long-distance work for another company was lawful, but that the Employer's denial of accrued sick leave and vacation benefits to locked-out employees after the expiration of the collective-bargaining agreement was unlawful.

As to the long-distance driving certifications, the Board found that the Employer acted consistently with its past practice, which was to issue such releases only to employees who had terminated their employment. The Employer adhered to this policy before the lockout with no variation, the Board pointed out, and given that the Employer had never before experienced a lockout, it had no specific lockout policy, and it chose to apply its established policy governing certification releases to a new situation. There was "not a shred of evidence" to indicate that the Employer's policy somehow did not apply to lockout situations, the Board said. It also found that even if the Employer's initial reason for denying the releases (outstanding log entries) was erroneous, this does not establish that its real reason was pretextual.

As to the Employer's denial of accrued sick leave and vacation benefits to the locked-out employees, the Board agreed with the ALJ that such conduct was unlawful. Board precedent clearly establishes that an employer must continue to apply the provisions of an expired agreement until either a new agreement or impasse is reached, the Board explained. Here, bargaining was ongoing at the time of the agreement's expiration, and there is no claim of impasse.

Member Liebman, dissenting on the certification releases, would find that the Employer's asserted reasons for denying the releases were pretextual and that the releases were withheld, in violation of Section 8(a)(3), because the employees engaged in union activity.

10 Procedure

a. Wal-Mart Stores, Inc., 351 NLRB No. 17.

Granting the charging party Union's motion for reconsideration, the Board (Liebman and Walsh; Battista, dissenting in part) found that "manifest injustice" would result from the retroactive application of IBM Corp., 341 NLRB 1288 (2004), to a case in which a non-Union employee was discharged for refusing to participate in an investigatory interview without a witness. In IBM Corp., the Board reversed Epilepsy Foundation, 331 NLRB 676 (2000), and held that the Weingarten right applies only to union employees.

Applying SNE Enterprises, Inc., 344 NLRB 673 (2005), the Board found that the employee relied on Epilepsy Foundation, the Act permits both legal rules, and the Act's purposes could be frustrated by retroactive application of IBM because employees might be discouraged from exercising their rights and employers might be encouraged to violate the Act. A "particular injustice" would arise here, the Board found, because retroactive application would let the Employer punish the employee for relying on then-existing rights. Requiring reinstatement, however, does not prejudice any legitimate managerial interests, since the Employer violated the law in effect at the time, and there is no evidence that the employee engaged in misconduct. The Board held that its previous finding, without any analysis, that IBM controlled was a material error warranting reconsideration.

In dissent, Chairman Battista stated that the Board had found no "extraordinary circumstances" warranting reconsideration, but rather had simply changed its mind about retroactively applying IBM. The Chairman also stated that the Board's original decision was quite consistent with the Board's principles on retroactivity, particularly as applied in Epilepsy. The Chairman found that Epilepsy was indistinguishable from the instant case in that all the retroactivity factors favored retroactive application of IBM: there was no evidence that the employee had relied on pre-existing law; IBM is Board policy and failing to apply it frustrates the Board's effectuation of that policy; and discharging the employee under IBM is no more unjust than saddling the employer in Epilepsy with reinstatement and backpay after it had followed pre-existing law.

11. Protected Concerted Activity

a. Datwyler Rubber and Plastics, Inc., 350 NLRB No. 58.

The Board (Battista, Schaumber, and Walsh) affirmed the ALJ's finding that the Employer violated Section 8(a)(1) of the Act by threatening its employees with plant closure if a union were brought in, and by threatening its employees with termination for making statements at group meetings concerning terms and conditions of employment by telling an employee that she could turn in her badge and "flip burgers" if she did not like working the required seven-day workweek and that she should pray to God to find her another job since she believed in God so much.

The Board also affirmed the ALJ's finding that the Employer violated Section 8(a)(1) for discharging an employee for engaging in protected concerted activities by speaking at a group meeting on behalf of herself and her co-workers about their terms and conditions of employment and for telling the Employer's manager that he was a devil and that Jesus Christ would punish him and the Employer for requiring seven-day workweek. Applying the factors set forth in Atlantic Steel Company, 245 NLRB 814 (1979), a panel majority found that all four factors weighed in favor of the employee not losing the protection of the Act. The employee's outburst occurred during an employee meeting, where employees were free to raise workplace issues. Further, the meeting was held in the employees' break room, a location that would not disrupt the Employer's work process. The outburst occurred during a discussion of employee complaints about terms and conditions of employment, principally the seven-day workweek. The outburst did not contain profane language and was spontaneous, brief, and unaccompanied by physical contact or threat of physical harm, and it was provoked by the manager's unlawful threats of discharge.

In a personal footnote, the Chairman, noted that he was joining his colleagues in finding that the employee's outburst was not so opprobrious to lose the protection of the Act, but that he was doing so, however, only based on the factors of discussion, subject matter, and provocation. He found that assuming arguendo the third factor (the nature of the outburst) weighs against protection, it is outweighed by the other three Atlantic Steel factors.

b. Metro Transit LLC, d/b/a Metropolitan Transportation Services, Inc., 351 NLRB No. 43.

The Board (Schaumber and Kirsanow; Liebman, dissenting in part) found that the Employer's suspending 6 mechanics for walking out in protest of a supervisor's discharge was lawful because the walkout was not protected by the Act. Applying the test in NLRB v. Oakes Machine Corp., 897 F.2d 84, 89 (2d Cir. 1990), the Board concluded that the third part of the test – that there be a relationship between the supervisor and the employees' terms and conditions of employment – was not met. The record showed that the mechanics were concerned solely with the supervisor's employment situation; they made no mention whatsoever of their own. Although on the day before the supervisor's discharge, the mechanics had given him a list of grievances and asked that he deliver it to the Employer's president, the mechanics made no mention of this list when they walked out to protest the supervisor's discharge, and the Employer did not mention this list when notifying the mechanics of their suspension. In

these circumstances, the evidence failed to demonstrate that the supervisor's identity and capability as the mechanics' supervisor had a direct impact on the mechanics' own job interests.

Member Liebman, dissenting in part, would find that the mechanics' walkout protesting the supervisor's discharge was protected. She found a clear connection between the supervisor's discharge, the walkout, and the employees' presentation of grievances to management concerning their own terms and conditions of employment. Specifically, the employees told the supervisor that they were intimidated by the Employer's president and did not want to meet with him, but would give a list of grievances to the supervisor for him to take to the president. The president's response to receiving this list of grievances from the supervisor was to discharge him. Thus, there was a direct relationship between the presentation of the grievances, the discharge, the walkout, and the retaliation in response to the walkout, all of which were an interrelated single sequence of events. In her view, the discipline of employees in response to their walkout over the supervisor's discharge – after he acted as a conduit to present their grievances to management – chilled employees in the exercise of their protected right to present grievances to management. The supervisor's discharge was closely related to the mechanics' conditions of employment because his discharge effectively ended any likelihood of resolving their grievances, as well as any likelihood that they would feel free to air their grievances, and it removed from the workplace a person they evidently trusted to be a conduit to management. Moreover, having seen what happened to the supervisor when he presented their grievances, it was not surprising that the employees would not tell the Employer that they were walking out based on the grievances.

c. North Carolina Prisoner Legal Services, Inc., 351 NLRB No. 30.

The Board (Battista and Walsh; Schaumber, dissenting in part) found that the Employer, a nonprofit law firm that provides legal services to inmates violated the Act when it threatened employees, withheld a planned wage increase, eliminated its short-term disability plan, and eliminated reduced-hour work schedules after employees complained that the short-term disability policy was not applied to childbirth. The employees engaged in protected, concerted activity by, among other things, filing a charge with the Equal Employment Opportunity Commission and by submitting a petition to the Employer's board of directors, the Board found, and this protected activity was a motivating factor in the Employer's actions.

Regarding the elimination of the short-term disability policy, the Board noted that the decision occurred less than one week after the employees circulated their petition. The Employer did not show that it would have repealed the policy in the absence of the employees' protected activities, the Board found, despite the Employer's claim that the legality of the policy had been called into question. The Employer was aware of the alleged unlawfulness of the policy since at least early in the year, the Board pointed out, yet it took no action until 7 days after the employees' petition.

The Board also found unlawful the Employer's decision to withhold a planned wage increase. The minutes of the board of director's meeting state that the discussion of raises was deferred in light of staff benefit concerns and pending litigation, the Employer's fiscal officer told employees that it was wrong for them to have gone to the board of directors, and he recommended that the board defer the discussion of the wage increase. The Board also pointed out that the Employer's fiscal officer admitted that the Employer withdrew the plan to grant increases because of employee complaints and ongoing litigation. The Board found pretextual the Employer's asserted justifications of a pending office relocation, a deficit in hours it owed to the Department of Corrections, implementation of a new computer program, and pending litigation.

The Employer also violated the Act when it threatened to eliminate reduced-hours work schedules and then followed through with this threat, the Board found. It noted that the Employer's executive director told senior attorneys that he would announce a proposal that they would not like, proposed a mandatory 48-hour workweek, and then, after rescinding that proposal, said he could impose a 40-hour week. The Board explained that the director's statement that his proposal was in response to "factionalism" in the office referred to the employees' protected activities. The Board rejected as pretextual the Employer's assertion that it eliminated the reduced-hours schedule because it was concerned about a deficit in hours owed under the Department of Corrections contract.

Dissenting in part, Member Schaumber only agreed with his colleagues that the Employer illegally threatened certain reprisals. He found insufficient evidence that the "board of directors, the body solely responsible for the decisions in issue, harbored animus toward the concerted activities" of the employees. He also asserted that the temporary suspension of reduced-hour work schedules "was justified by compelling business needs."

d. <u>Five Star Transportation, Inc.</u>, 349 NLRB No. 8.

The Board (Battista and Schaumber; Liebman, concurring in part and dissenting in part) found that the Employer, which entered into a new contract to provide school bus transportation services to the Belchertown School District, violated Section 8(a)(1) of the Act by refusing to hire six of 11 bus drivers who worked for its predecessor First Student, Inc. and who sent individual letters to the Belchertown school committee urging the committee to retain First Student as the contract provider.

The Board agreed with the ALJ that all 11 drivers engaged in concerted activity by preparing and submitting individual letters to the school committee. Thus, the Board found that it was undisputed that the drivers held a meeting to discuss their group concerns about their employment situation, and that, at the meeting, the Union's business agent urged the drivers to write letters to the school committee. Thus, it followed that the resulting letter-writing campaign constituted concerted activity within the meaning of Section 7 of the Act. In analyzing the conduct of the drivers at issue, the Board found that the letters fell into the following three categories: (1) letters that

primarily raised the drivers' common employment-related concerns; (2) letters that failed to raise common employment-related concerns of the drivers as a group; (3) letters that essentially disparaged the Employer's business.

The Board found that only six of the drivers had engaged in protected activity because all their letters specifically referred to the drivers' common concerns about their employment conditions in conjunction with the awarding of the new bus services contract to the Employer. The Board noted that each driver expressed concerns about the Employer within the context of the drivers' common desire to retain their negotiated terms and conditions of employment. Further, to the extent that any of these drivers' letters contained statements criticizing the Employer, such statements were minor and occurred in the context of the drivers expressing their common employment concerns. As a result, the ALJ properly found that Employer violated Section 8(a)(1) of the Act by refusing to hire, or considering for hire, these six drivers.

The Board majority concluded that the remaining five drivers' conduct was unprotected. In the case of two of these five drivers, the Board majority found that the content of their letters was not sufficiently related to the drivers' terms and conditions of employment to constitute protected conduct. In their letters, the two drivers focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others. As the Board recently reiterated in Waters of Orchard Park*,* 341 NLRB 642 (2004), consistent with longstanding precedent, merely raising safety or quality of care concerns on behalf of non-employee third parties is not protected conduct under the Act. Further, the Board majority was not persuaded that these two letters should be interpreted as raising the drivers' common concerns simply because they were written as part of the drivers' letter-writing campaign. Instead, the Board will determine whether certain communications are protected by examining the communications themselves. In the case of the remaining three drivers, the Board majority found that their letters fell outside the realm of protected activity because the letters disparaged the Employer's business by bringing to the school committee's attention incidents that had occurred approximately seven years prior to the instant labor dispute and that, significantly, had no relation to the drivers' concern that the Employer would not maintain the terms and conditions of employment that the drivers had negotiated with First Student. Furthermore, these three drivers used inflammatory language—again, in the context of incidents not related to the drivers' group concerns—to describe the Employer in a manner that suggested that the drivers intended to damage the Employer's reputation. In response to the dissent's comment that the Employer did not distinguish between the five letter writers and the six, the Board majority stated that the General Counsel had the burden of establishing that the activity was protected, and that the Board had the obligation to decide whether he met that burden. Here, the Board majority concluded that the General Counsel had done so for the six and not for the five. Similarly, inasmuch as the discharges were based on the letters, the Board majority did not believe it was appropriate to analyze the content of each of the letters.

In light of the finding that only six of the drivers were unlawfully denied employment, the Board majority reversed the ALJ's findings that the Union had majority status among the Employer's drivers and that the Employer was a successor employer to First Student. Central to the ALJ's finding was his determination that, but for its unlawful refusal to hire the discriminatees, 11 of the Employer's 20 regular drivers and two of the Employer's three "spare" drivers (i.e., a total of 13 employees) would have been former First Student employees. In light of the Board majority's finding that only six drivers were unlawfully denied employment, it follows that, at most, only 10 former First Student drivers were employed by the Employer or unlawfully denied employment.

Member Liebman, concurring in part and dissenting in part, would find that the Employer unlawfully refused to hire all 11 driver-applicants. According to Liebman, viewing each discriminatee's letter in isolation was "a mistake." She noted that the letters were all part of a concerted letter-writing campaign arising out of a labor dispute and that the Employer concertedly acted against the driver-applicants on that general basis and not based on the particular content of the individual letters. Liebman stated that the Board majority also erred in its analysis of the five drivers' individual letters. The letters of two drivers raised safety concerns that necessarily implicated their own terms and conditions of employment. The letters of the remaining three drivers did not, in fact, amount to unprotected "disparagement." Contrary to her colleagues, she would find that 17 of Five Star's drivers (the eleven drivers at issue and the six who were hired) would have been former employees of First Student, a number sufficient to make Five Star a successor employer, required to recognize the Union and that the Employer violated Section 8(a)(5) by refusing to do so.

e. Fineberg Packing Company, Inc., 349 NLRB No. 29.

The Board (Battista and Schaumber; Liebman dissenting in part) reversed the ALJ's decision and dismissed the complaint alleging that the Employer violated Section 8(a)(1) of the Act by discharging 32 unit employees because of their participation in a work stoppage.

In the early morning of February 14, 2001, a group of employees, who were concerned about rumors of a reduction in their hours, left their work stations and walked out of the plant to wait for the plant manager. When the plant manager arrived, two employees informed him that the employees wanted to speak to him about the rumored work hour reduction. The plant manager responded that it would be unlawful for him to meet with the employees as a group, but that he could meet with them individually. He then ordered the employees to return to work or, alternatively, to leave the premises. In response to employee questions if they were fired, he assured them that he was not firing anyone, and told them to come back the next day. Some employees returned to work and others left the plant. The next morning several employees attempted to return to work, but were denied access to the Employer's premises. The following day, when the employees returned to the plant to pick up their paychecks, the plant manager gave them separation notices, which stated that the employees had "voluntarily quit."

The Board noted that the General Counsel expressly conceded that the work stoppage was unprotected and litigated the case consistent with that position. Thus, the Employer was neither put on notice that the nature of the work stoppage would be considered by the ALJ nor provided the opportunity to litigate the issue. The Board said it was not appropriate for the ALJ to make a finding that the work stoppage constituted protected concerted activity, and declined to adopt her finding in that regard. Having concluded that the parties did not dispute that the employee work stoppage was unprotected, the Board turned to the question of whether the Employer condoned the employees' conduct, and therefore could not subsequently rely on that conduct as a basis for the imposition of disciplinary action.

The Board explained that under well-established precedent, the doctrine of condonation applies where there is clear and convincing evidence that the employer agreed to forgive the misconduct, to wipe the slate clean and to resume or continue the employment relationship as though no misconduct occurred. Condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred. Applying these principles, the Board found that the evidence was insufficient to establish that the Employer intended to condone the employees' continuation of the work stoppage after the plant manager gave the employees the choice of returning to work or leaving. In their view, the plant manager's subsequent responses to employee questions—that he was not firing anyone, and that the employees should "come back tomorrow"—did not constitute clear and convincing evidence that the Employer intended to forgive a continuation of the work stoppage or to condone further misconduct. The Board, unlike the ALJ, was unwilling to infer from the plant manager's remarks a definitive intent to forgive the actions of those employees who opted to continue the work stoppage. At best, his statements were ambiguous.

Member Liebman agreed with the majority that the ALJ's finding concerning the nature of the work stoppage should be reversed and that the General Counsel apparently conceded that the work stoppage was unprotected. However, she would affirm however the ALJ's finding that the Employer acted unlawfully in discharging the employees when they returned to work. Contrary to the majority's finding, she found that there was nothing ambiguous about the plant manager's statements, which clearly demonstrated an intent to overlook the employees' misconduct and to allow them to return to work.

f. <u>Northeast Beverage Corp.</u>, 349 NLRB No. 110.

The Board (Battista and Liebman; Schaumber, dissenting in part) found that the Employer's Union drivers were engaged in protected concerted activity when they left the Employer's facility to go to an effects-bargaining session at the union hall. Thus, the Board found that the Employer violated the Act when it threatened the drivers with discipline and discharge and when it suspended, discharged, refused to consider for rehire, and refused to hire the drivers because of that protected activity.

The Employer purchased two beverage distributorships, one was a unionized facility, and the other was non-union. The Employer subsequently decided to merge the facilities, and it engaged in effects bargaining with the Union. During one of these bargaining sessions, eight of the unionized drivers, six of whom were scheduled to drive that day, walked off the job and drove to the union hall to seek information about their job prospects. They were away from their jobs for more than 3 hours. The Employer suspended for the rest of that day the six drivers who were to be at work. It subsequently terminated five of them for their walkout, and it also refused to consider them for hire or to hire them for work at the non-union facility.

The Board found that the drivers' conduct was "mutual aid" directly related to a labor dispute--the anticipated closing of the drivers' work facility and the associated effects-bargaining. The Board found that the drivers left work to get definitive answers to their employment-related concerns. It noted that the drivers were not receiving answers to their questions regarding whether they would be retained, what their seniority status would be, and what their pay would be after the merger. They decided to attend the meeting to demonstrate their anxiety about these matters and to seek answers to their questions. Thus, the Board found, their attendance at the meeting was in furtherance of their "mutual aid" to obtain information about the most fundamental of concerns to any employees--whether they would continue to be employed and under what terms and conditions.

The Board also found that the drivers' 3-hour absence from work was not the sort of "indefensible" conduct that removed them from the protection of Section 7.

In dissent, Member Schaumber would find that the drivers' walkout was unprotected because the drivers walked off the job, leaving their customer delivery duties. He found that "Section 7 does not give the drivers the right to take an unauthorized 3-hour absence from work at anytime they so choose, to seek answers to their questions in this manner."

12. Remedies

a. Contractor Services, Inc., 351 NLRB No. 4.

The Board (Battista, Schaumber, and Kirsanow) found, contrary to the ALJ, that backpay claimant Tracy Landers, a paid union organizer and salt, was not entitled to any backpay. Discriminatee William Hunt, a volunteer union organizer, also was a salt. Pursuant to Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007), the General Counsel therefore had the burden of proving the duration of his backpay period. Accordingly, the Board remanded that portion of this case to the ALJ for further consideration of Hunt's backpay in light of Oil Capitol. The Board did not remand Landers' backpay claim, however, finding that he was not entitled to any backpay under established law. Wholly apart from the issues addressed in Oil Capitol concerning the length of the backpay period for salts, the Board found that the General Counsel had

failed to show that his backpay calculations as to Landers were reasonable. The Board found, in agreement with the ALJ, that Landers did not exercise reasonable diligence in searching for interim employment during his backpay period.

The General Counsel alleged that Landers' backpay period began on September 21, 1995, when he applied with the Employer, and ended approximately 46 months later when he accepted a position as the Union's business agent in July 1999. During the backpay period, Landers looked for nonunion jobs in newspaper advertisements, daily bid reports, and state agency job listing services, and also solicited job tips from fellow union members and local contractors. Through those efforts, Landers contacted approximately 36 nonunion employers in the geographic jurisdiction of the Union on at least 41 occasions during the backpay period, although he applied for work with only 23 of them. On his application with the Employer, Landers indicated that he lived in Wetumpka, Alabama, and was willing to travel—but only within the 24-county geographic jurisdiction of the Union. Other than settlement proceeds and two days of wages, Landers had no interim earnings during the backpay period.

The Region's compliance specification estimated the gross backpay due to Landers by using the "comparable employee" method. Based on Landers' assurances to the Region's compliance officer that he would have accepted job referrals from the Employer at any location for any duration, the compliance specification averaged the quarterly earnings of 12 allegedly comparable employees who had worked for the Employer most regularly in consecutive years to estimate what Landers would have earned absent the Employer's unlawful discrimination. The compliance specification also offset Landers' interim earnings during the backpay period against the gross backpay determination for him. Based on this methodology, the compliance specification sought backpay of $80,389.05 plus interest for Landers.

The ALJ made no findings concerning the gross backpay figure for Landers. Instead, he found that Landers incurred a willful loss of earnings because he "completely disregarded any opportunities to obtain work through out of work lists in the hiring hall of his own local union and of local unions in other jurisdictions." The ALJ further found that Landers apparently was satisfied with the pay he received from the Union as a paid union organizer, supplemented by awards from other discrimination cases. In these circumstances, the ALJ concluded that the amount of backpay sought by the General Counsel would be punitive and would represent an unwarranted windfall for Landers. For these reasons, the ALJ found that Landers was not entitled to backpay as set out in the compliance specification. Although the ALJ found that Landers failed to mitigate his damages, he went on to find that, because it was "axiomatic that some backpay is owing to Landers," a reasonable amount of backpay for Landers was the same amount of backpay due to Hunt. The ALJ accordingly found that Landers, like Hunt, was entitled to backpay in the amount of $11,738.03 plus interest.

The Board found that the allegedly comparable employees were those who worked most consistently for the Employer during the backpay period. The Board found, however, that the General Counsel had failed to establish that these individuals

were “representative of” Landers. Thus, the Board found no evidence that the allegedly comparable employees placed any limits on the referrals they would accept. A number of them accepted referrals to jobs in multiple states. Those jobs ranged in duration from one day to a month or more and included jobs in Kansas, Iowa, Texas, Colorado, and Nebraska. Landers, in contrast, stated on his application with the Employer that he was willing to travel only within the Union’s geographic jurisdiction in Alabama. There was no evidence that Landers informed the Employer, after applying, that his willingness to accept referrals differed from what he had indicated on his application. His responsibilities to the Union and his personal circumstances also indicated that he would not have traveled to distant jobs. Landers neither looked for nor accepted any employment outside of the Union’s geographic jurisdiction. He would not even accept instatement as part of a settlement agreement with an employer in Georgia—because that was not an area he “was interested in.” He also was not interested in working for contractors from out of the area for short-term jobs. Although Landers told the Region’s compliance officer that he would have accepted any job referrals from the Employer and repeated this claim in his testimony as well, the Board found that the ALJ made no credibility findings concerning this self-serving and uncorroborated testimony, which was inconsistent with the record as a whole. In these circumstances, the Board stated that this testimony was insufficient to meet the General Counsel’s burden of proof. The Board stated that the General Counsel failed to prove that Landers would have accepted referrals outside of the Union’s geographic jurisdiction, especially where the job was of short duration. The allegedly comparable employees, who accepted referrals outside of the Union’s geographic jurisdiction including short-term jobs, therefore were not “representative of” Landers. As such, the General Counsel did not establish that the gross backpay amount in the compliance specification for Landers was reasonable and not arbitrary.

The General Counsel filed exceptions to the ALJ’s analysis of Landers’ mitigation efforts and his finding that Landers unreasonably failed to mitigate his loss of earnings during the backpay period. The Board noted that it had previously found that the gross backpay amount advanced by the General Counsel was unreasonable as to Landers because the formula applied to him was not appropriate. Further, even had the General Counsel established an appropriate backpay formula as to Landers, and a resultant gross backpay figure, the Board stated that Landers had unreasonably failed to mitigate his loss of earnings during the backpay period, and was not entitled to backpay.

The Board noted that the Union limited Landers’ job search to nonunion employers. In addition, Landers did not seek employment on many short duration jobs because they did not offer any substantial organizing opportunity. By focusing his search exclusively on nonunion employers as required by the Union, and by ignoring nonunion jobs of short duration, Landers willfully ignored substantially equivalent employment opportunities during the backpay period. Indeed, Landers should have broadened the scope of his search efforts to include union employers after discovering that work with nonunion employers was not readily available to him. Landers’ job search eschewed a common and accessible source of replacement employment opportunities, the hiring hall. Thus, once it was apparent that the pool of nonunion

employers in the Union's jurisdiction was not a viable source of replacement employment, Landers should have turned to the hiring hall in his effort to mitigate his loss of earnings. This Landers failed to do, the Board stated. Indeed, he did not even expand his search to include all nonunion short-duration jobs. In saying that Landers should have broadened his job search, the Board observed that it did not mean to suggest that Landers should have abrogated his duties to his union employer. The Board's point was simply that where an organizer-discriminatee's loyalty to his union employer results in an unreasonably limited job search, that individual cannot avoid the usual consequences of such an insufficient search, i.e., a loss of backpay. In plain terms, the Board explained that Landers could not have his cake and eat it, too. The Board also observed that, during the backpay period, and despite his ongoing failure to obtain interim employment, Landers contacted, on average, less than one employer per month and actually applied with only 23 employers during the approximately 46-month backpay period. In seven quarters of the backpay period, Landers made no applications for work at all. Taken as a whole, the Board found these haphazard efforts to be insufficient especially when contrasted with the success in obtaining employment by Hunt and another discriminatee, who did not similarly limit their search efforts.

b. John T. Jones Construction Co., Inc., 349 NLRB No. 119.

The Board (Liebman and Walsh; Battista, dissenting in part) in a supplemental decision and order affirmed the ALJ's finding that contributions to benefit funds made by the interim employers on behalf of the discriminatees are not an appropriate offset against the discriminatees' gross backpay under Tualatin Electric, Inc., 331 NLRB 36 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001). At the time of their termination, the discriminatees were employed on a prevailing wage job, and the Employer paid them their wages and an additional amount in lieu of benefits. These additional moneys in lieu of benefits were included in determining the gross wages for the discriminatees. During the backpay period, the discriminatees worked for employers who paid wages and made contributions to a pension fund and health care plan on behalf of the discriminatees.

The Board explained that retirement benefits earned during interim employment that are equivalent to what would have been earned absent the discrimination are properly offset against gross retirement benefits. Citing to the NLRB Casehandling Manual, Part Three, Compliance Proceedings, Section 10535.3, the Board stated, however, that retirement benefits earned from interim employment are not deducted from gross wages, and wages earned from interim employment will not offset benefits that would have been earned absent the discrimination. Similarly, insurance or health plan benefits are not treated as fungible with wages for backpay purposes, whether the benefits are earned during the interim employment and the wages would have been earned absent the discrimination, or vice versa. The Board stated that the issue before it was whether the Employer met its burden of showing that interim benefits were equivalent in nature, and therefore appropriately offset, against those lost as a result of the discrimination. It did not do so here, the Board stated. Simply referring to wages as "wages in lieu of benefits" does not make those wages equivalent in nature to actual

benefits. Here, the Employer provided no benefits to employees, only wages; the interim benefits received by the discriminatees were not available as wages. In these circumstances, the Board found that the Employer failed to show that the wages it paid were equivalent in nature to the interim benefits received by the discriminatees.

In response to the dissent's contention that the employees would receive a windfall if interim fringe benefit contributions were not considered an offset against gross backpay, the Board explained that the Board's backpay policies attempt, as best as practicable, to award employees what they would have received absent the discrimination against them. Refusing to permit the Employer an offset for interim benefits when it itself offered no benefits did not amount to a windfall for the affected employees. Rather, as the ALJ in Tualatin Electric stated, "any fringe benefit payments [earned in this circumstance] must be likened to supplemental income, payment of which is not deductible as interim earnings. To require otherwise would be inimical to the policies and purposes of the Act." 331 NLRB at 42 (fn. omitted).

Dissenting, Chairman Battista found merit in the Employer's contention that the interim employers' fringe benefit contributions were an offset. He did not agree that Tualatin Electric constituted a compelling precedent on this issue, pointing out that the ALJ in that case said the fringe benefits paid by the interim employer were like supplementary income, and the ALJ therefore declined to offset such benefits from gross backpay. Chairman Battista found that the ALJ's finding that interim contributions were not an offset against gross backpay would result in a "windfall" to the discriminatees.

c. JHP & Associates, LLC d/b/a Metta Electric, 349 NLRB No. 101.

The Board (Liebman, Schaumber, and Kirsanow) affirmed the ALJ's findings that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union, and by refusing to furnish, and delaying in furnishing, requested information that was necessary and relevant to the Union's performance of its duties as exclusive collective-bargaining representative of the unit employees. In finding that the Employer unlawfully refused to meet and bargain with the Union, the ALJ found, inter alia, that the parties had not reached a valid impasse in negotiations privileging the Employer's refusal. Members Liebman and Kirsanow agreed that the parties had not reached a valid impasse, both for the reasons stated by the ALJ and because the Employer's unlawful failure to furnish requested relevant information precluded the reaching of a lawful impasse. Member Schaumber agreed that the evidence was insufficient to establish a valid impasse, but found it unnecessary to rely on the failure to provide relevant information.

A Board majority (Schaumber and Kirsanow) substituted a narrow cease-and-desist order for the ALJ's recommended broad order. The ALJ, noting that this is the second case against the Employer, see Metta Electric, 338 NLRB 1059 (2003) (Metta I), enfd. 360 F.3d 904 (8th Cir. 2004), found that a broad order was warranted under Hickmott Foods, 242 NLRB 1357 (1979), based on the Employer's proclivity to violate

the Act. The Board majority found the Employer's recidivism here, standing alone, was insufficient to warrant a broad order under the Hickmott standard. In finding a broad order unwarranted here, the Board majority noted the extent to which the Board's narrow order in Metta I succeeded in restraining the Employer from committing recidivist violations. Thus, the Employer was found in Metta I to have violated Section 8(a)(1), (3), and (5) in numerous ways that were not repeated here. Therefore, the narrowing scope of violations from Metta I to this case militated against a finding that the Employer had a proclivity to violate the Act or a general disregard for employees' fundamental statutory rights. The Board majority also noted that the Union's information requests did not pertain to grievance investigations, where the withholding of information had the potential to hide other misconduct; and there was no background of continuing and widespread violations of a like kind. Member Liebman would grant a broad order "based on the Employer's many violations of the Act in a relatively short period of time." She would also order the Employer to read to its employees the Notice to Employees, as requested by the General Counsel.

Another Board majority (Liebman and Kirsanow) adopted the ALJ's recommendation and extended the Union's certification year for 12 months pursuant to Mar-Jac Poultry, 136 NLRB 785 (1962). The Board majority noted that the Board ordered a 12-month Mar-Jac extension in Metta I; that the Eighth Circuit enforced the order; and that the Employer subsequently refused the Union's request for information and refused to bargain, furnished some of the information eight months later, bargained with the Union three times over two months and then invalidly declared impasse and refused to bargain any further. The Board majority observed that the Union had yet to secure a single minute of bargaining uncompromised by the Employer's unlawful conduct. Member Schaumber would extend the certification year for six months, finding several factors militated against a full-year extension. He noted that the unlawful conduct consisted of information request violations and a refusal to meet with the Union at reasonable times for bargaining, not a withdrawal of recognition or coercive conduct directed to employees; and that more than seven years had passed since the certification. Although he acknowledged his colleagues' position that the parties only bargained three times before the Employer declared impasse, he emphasized that during those sessions, the Union was unwilling to back down from its objective that the Employer accept the Union's area agreement with National Electrical Contractors Association. He added that the Union presented no real counterproposals.

d. Aero Ambulance Service, Inc., 349 NLRB No. 115.

The Board (Battista and Schaumber; Liebman, dissenting in part) ordered the Employer to pay discriminatee Guy Greene the sum of $19,793.13 and discriminatee Michael Goldblatt the sum of $23,821.99 to satisfy its obligations as found in the underlying unfair labor practice decision reported at 327 NLRB 639 (1999), enfd. mem. 203 F.3d 816 (3d Cir. 1999).

The General Counsel argued, and the ALJ agreed, that Goldblatt's backpay period began with his October 6, 1995 discharge and continued until January 31, 2000,

when it terminated based on the Employer's valid offer of reinstatement to Goldblatt. The ALJ found that Goldblatt mitigated his damages from the fourth quarter of 1995 through the end of the second quarter of 1998. During that period of time, Goldblatt increased his hours at Pathmark (where he worked while also working for the Employer), leaving Pathmark in July 1997. He also obtained full-time employment in January 1997 as an EMT (the position from which he was unlawfully discharged) at Life Support Ambulance, where he worked until February 14, 1998. Thereafter, he looked for jobs as a bartender and film extra. Other than the second quarter of 1998, Goldblatt reported interim earnings in every quarter during that period. These earnings ranged from a low amount of less than $300 to a high amount of almost $7000. Indeed, Goldblatt's interim earnings were high enough to yield no net backpay for the second and third quarters of 1997, and only a token payment for the fourth quarter of that year. In 1999 and 2000, Goldblatt worked as a bartender and a film extra and the ALJ deducted those earnings but indicated that the Employer owed the difference between those earnings and what Goldblatt would have earned with the Employer. In July 1998, Goldblatt applied for social security disability insurance (SDDI) benefits and began receiving them in November 1998, with retroactive payments for August and September. Goldblatt was not employed at all during the third and fourth quarters of 1998, and the ALJ tolled backpay for those periods. On this record, the ALJ found that Goldblatt's SSDI benefits constituted interim earnings and that, during the period up through January 31, 2000, when Goldblatt received an offer of reinstatement from the Employer, he never earned enough to meet the Social Security Administration's (SSA) threshold for termination of benefits. Based on these facts, the ALJ determined Goldblatt's backpay award to be $44,358.65.

On July 20, 1998, Goldblatt provided a sworn statement to the SSA, in connection with his "Application for Disability Insurance Benefits," which stated: "I became unable to work because of my disabling condition on February 9, 1998." In his "Disability Report," provided to the SSA on the same day, Goldblatt stated that he was unable to hold a full-time job because of problems related to his use of a prosthetic leg. He attested that he could not stand on the prosthesis and sometimes could not even attach it because of swelling and pain. In addition, the record shows that at least two physicians examined Goldblatt in connection with his SSDI benefits application. The first found that Goldblatt appeared to have advanced arthritis in his right knee and needed a new prosthesis. The second found that Goldblatt needed to have his physical condition stabilized with pain management and a new prosthesis, and that psychotherapy was indicated. Further, at the supplemental hearing, Goldblatt testified that when his full-time employment as an EMT ended on February 14, 1998, he did not "want to do" EMT work because he decided "this kind of work is not for me anymore . . . I just figured I would not do EMT for a while."

The Board agreed with the ALJ that Goldblatt's backpay commenced with his discharge and continued during his interim employment as an EMT—during which interim employment period Goldblatt properly mitigated his damages. However, the Board concluded, contrary to the ALJ, that Goldblatt's backpay period tolled on February 9, 1998, finding that the evidence established that after that date, Goldblatt

was unable or unwilling to perform work substantially equivalent to his EMT duties for the Employer. In addition to Goldblatt's representations to the SSA concerning his physical and emotional health, the Board noted that two physicians provided objective assessments of Goldblatt's circumstances that led to the SSA's granting, without the necessity of a hearing, his application for disability benefits. Finally, Goldblatt himself testified that he decided to leave the EMT field. Goldblatt admitted that he did not want to do EMT work anymore and he was determined to do some other type of work. The Board observed that there was nothing in Goldblatt's statement to suggest that he distinguished between EMT work for one employer and EMT work for another employer. Thus, the Board concluded that it was reasonable to infer that, if he had not been discharged from his EMT job with the Employer, he would nonetheless have resigned from that EMT job in February 1998. In addition, the statement showed that Goldblatt was no longer searching for EMT work. Thus, the Board recognized that Goldblatt testified at the supplemental hearing that he was able to work and that he might have exaggerated his infirmities in connection with his application for disability benefits. The Board found this evidence was insufficient to outweigh the substantial record evidence that Goldblatt was unable or unwilling to continue work as an EMT.

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) (holding that receiving SSDI benefits did not estop an employee from pursuing an Americans with Disabilities Act (ADA) claim, reasoning that an ADA suit claiming that an employee could perform job duties with reasonable accommodation is not inconsistent with an SSDI claim that the employee could not perform the job without an accommodation), does not require a different result, the Board observed. By contrast, the inquiry under the Act is simply whether the employee can perform substantially equivalent work, not whether he could do so if the employer were to make job accommodations for him. The Board further recognized that a claim for disability benefits, taken alone, is not prima facie proof that an employee is no longer in the labor market. Here, however, the Board found that Goldblatt's assertions to the SSA that he could not work, his testimony that he was unwilling to continue working as an EMT because of his mental state, and the evidence of the doctors who examined him constituted substantial evidence that Goldblatt was not able to perform EMT duties or substantially equivalent work after February 9. Accordingly, the Board tolled Goldblatt's backpay as of February 9, and found that the Employer owed Goldblatt the reduced sum of $23,821.11 in backpay, plus interest, and not $44,358.65, as found by the ALJ.

Member Liebman, dissenting in part, would affirm the ALJ's finding that Goldblatt's backpay period commenced with his discharge on October 6, 1995 and continued until January 31, 2000, when it terminated based on the Employer's valid offer of reinstatement and thus, the Employer owed Goldblatt $44,358.65. She noted that the Board majority mistakenly discounted evidence that Goldblatt could, and did work after February 1998; and that Goldblatt's physical condition was largely based on his having used a worn-out prosthesis, whose replacement he could not afford, after being unlawfully discharged. According to Liebman, the actual evidence was that Goldblatt could and did work after applying for disability benefits and obtaining a new prosthesis for his leg. Liebman found that the record did not establish that Goldblatt

was unable to work, nor would she engage in speculation on that point. The sole question, then, was whether Goldblatt's efforts to find interim employment were sufficient. She agreed with the ALJ's finding that they were.

e. Aluminum Casting & Engineering Co., Inc., 349 NLRB No. 18.

The Board (Battista and Schaumber; Walsh, dissenting in part) agreed with the ALJ that the backpay due to employees, who were not granted a wage increase in 1995 as a result of the Employer's misconduct, should be limited to 1995.

The Board (Liebman, Hurtgen, and Brame) found, in a prior decision, 328 NLRB 8 (1999), that the Employer violated Section 8(a)(3) and (1) of the Act by withholding an annual across-the-board wage increase in 1995 because employees voted for the Electrical Workers (UE) as their collective-bargaining representative. The Board ordered the Employer to make whole the unit employees who were employed in 1995 for the annual wage increases they would have received in "1995 to date." On appeal to the Seventh Circuit, the Employer argued that the Board's Order was overbroad because the Board did not have before it the question of any wage increases for years following 1995 and that backpay should be limited to 1995, the year that the wage increases were unlawfully withheld. In enforcing the Board's Order in relevant part, the court in NLRB v. Aluminum Casting & Engineering Co., 230 F.3d 286, 295 (7th Cir. 2000), acknowledged that the Employer's argument could have merit, if the Employer established requisite facts to support limiting the remedy in compliance.

After a compliance investigation, the General Counsel found that the Employer had abandoned across-the-board wage increases as a compensation tool in 1996, in favor of other formulae for wage increases, and that its liability was limited to making employees whole for its withholding of the across-the-board wage increase for 1995. The Board agreed with the ALJ that the General Counsel properly relied on a three-year representative period in calculating the across-the-board wage increase for 1995, that the Employer could not rely on a wage survey conducted in 2003 to determine whether an increase would have been granted in 1995, and that the unlawfully withheld 1995 wage increase was 25-cent-per hour. Further, in ordering the Employer to pay backpay and interest to the 1995 employees, the ALJ limited the period of backpay to calendar year 1995. The ALJ rejected the General Counsel's argument that the 1995 increase should be built into the 1995 employees' base wages for subsequent years, so that they would receive 25 cents for every hour worked from the beginning of the backpay period until their employment ended or the backpay period was concluded. Instead, the ALJ limited the Employer's backpay liability to making the employees whole for the wage increase withheld in 1995, without factoring that increase into the employees' subsequent base pay.

In exceptions, the General Counsel argued, inter alia, that the "ripple effect" of incorporating the 25-cent-per-hour increase into the 1995 unit employees' base pay in each subsequent year did not unjustly enrich the 1995 employees at the expense of later hires, best effectuated the remedial policies of the Act, and was consistent with

Board law. Under the circumstances of this case, the Board disagreed. The Board, in agreement with the ALJ, found that "carrying forward" the 1995 increase into the base pay of the 1995 employees in subsequent years did more than compensate for the unlawful conduct of 1995. The Board reasoned it would provide the 1995 employees with a windfall at the expense of later hired unit employees, which was inconsistent with Board law and the Act's remedial purposes. The Board found that the Employer showed that the 25-cent increase would not have continued into 1996 and beyond because in 1996 the Employer lawfully changed from an across-the-board system to a merit pay system that was based upon individual performance.

Dissenting, Member Walsh found, in agreement with the General Counsel and the Charging Party, that to make the employees whole the Employer must pay them 25 cents each hour worked since the Employer unlawfully withheld the wage increase. According to Walsh, the rationales offered by the ALJ and the Board majority were premised on the conclusion that, in 1996, the Employer implemented new merit-based wage rates, as opposed to merely implementing a new system of merit-based wage increases. He found this conclusion was erroneous; indeed, it was pure fiction.

13. Single Employer/Alter Ego

a. Summit Express, Inc., 350 NLRB No. 51.

The Board (Battista and Schaumber; Liebman, dissenting in part) reversing the ALJ, found that a single Employer, Summit/Great Lakes, which sold drywall to commercial customers was not the alter ego of another company, SG Construction, with which the Employer contracted to take over its drywall-delivery operations.

The Board noted that the General Counsel had the burden of proving the existence of the alter-ego relationship, but presented no direct evidence that Summit/Great Lakes and SG Construction shared common ownership or that Summit/Great Lakes substantially controlled SG Construction. Although the Board acknowledged that Summit/Great Lakes may have had an unlawful motive for contracting with SG Construction, it found that did not establish an alter-ego relationship. The record shows that SG Construction was independently owned, the Board stated and that Summit/Great Lakes had no financial interest in it.

The Board found that American Pacific Concrete Pipe Co., 262 NLRB 1223 (1982), relied on by the ALJ, was distinguishable. Here, unlike in that case, the ALJ's findings contradict any suggestion that SG Construction was controlled by Summit/Great Lakes, and the ALJ expressly rejected the General Counsel's evidence of continuing supervision by Summit/Great Lakes over SG Construction's employees. The Board also found that the fact that the owner of Summit/Great Lakes told SG Construction's employees that they were hired does not mean that he made the hiring decision.

In dissent, Member Liebman would find that there was overwhelming evidence of unlawful motive as well as evidence that Summit/Great Lakes exercised substantial control over SG Construction. In her view, "overwhelming favorable" contract terms allowed Summit/Great Lakes to control SG Construction's hiring and the terms and conditions of its employees. Further, she would also find that because Summit/Great Lakes was SG Construction's sole customer, it could economically dominate SG Construction.

b. U.S. Reinforcing, Inc., 350 NLRB No. 41.

The Board (Battista and Schaumber; Walsh, dissenting in part), reversed the ALJ's finding that a non-union rebar company, U.S. Steelworkers, was the alter ego of a unionized rebar company, US Reinforcing. The Board thus found that U.S. Steelworkers, which was started and owned by the girlfriend of US Reinforcing's owner, was not bound by the collective-bargaining agreement previously entered into by US Reinforcing.

The Board found that the lack of substantially identical common ownership precludes a finding of alter-ego status. It noted that although the Board frequently infers substantially identical ownership where people in a close familial relationship are owners of the alleged alter egos, such an inference is not warranted here. Although the owners of the two companies lived together and testified that they were a committed couple, the Board stated that they had not taken the step of entering into the legal arrangement of a marriage, with the familial connection and attendant presumption of commonality of finances that such a legal arrangement may imply. The Board noted that it has never applied this inference in the context of unmarried cohabitating couples. It also found no evidence of any shared financial arrangements between the two owners and no claim by the General Counsel that their personal arrangement was that of a common-law marriage.

The Board also found that the evidence does not show that the owner of US Reinforcing retained financial control over the operations of U.S. Steelworkers such that their relationship warrants application of the "close familial" exception. The owner of U.S. Steelworkers independently incorporated and capitalized her company, and she was the only person authorized to conduct business on its behalf. Although the owner of US Reinforcing was a key employee of U.S. Steelworkers, the Board noted that he was not an owner or financial controller, and he was not shown to participate in its profits. The Board also pointed out that the General Counsel did not show that U.S. Steelworkers went into business with an anti-union motive or that it was created to evade US Reinforcing's contractual and statutory obligations.

In dissent, Member Walsh found that the facts and the law overwhelmingly support the ALJ's finding that U.S. Steelworkers is an alter ego of the unionized company. He stated:

A unionized company is unable to meet its obligations under a collective-bargaining agreement and goes out of business. With no hiatus in operations, a nonunion company comes into existence at the same address to perform the same work, operating out of the same office, with essentially the same employees, supervisors, managers, equipment, and customers. The new company is ostensibly owned and operated by an individual who has absolutely no relevant business experience, but who lives with the owner of the unionized company, with whom she shares a close personal relationship. The owner of the unionized company confesses to the union that 'he was having a little financial problem,' that 'he was more or less thinking of going nonunion,' and that 'he wanted to go with his girlfriend [who] was going to start another company.'

c. Bolivar-Tees, Inc., 349 NLRB No. 70.

The Board (Liebman, Kirsanow, and Walsh), agreed with the ALJ that four corporate Employers--two American corporations and two Mexican corporations---constitute a single employer and are therefore jointly and severally liable for remedying underlying unfair labor practices arising from the unlawful discharge of five employees.

The Board found that two American corporations, Bolivar-Tees, Inc. and Screen Creations Ltd., are a single employer, that Allan Heller is personally liable for the backpay obligation to the five discriminatees, and that two Mexican corporations, Screen Creations de Mexico and Screen Creations de Celaya, constitute a single employer with the American corporations. The Board explained that Heller owns100 percent of Bolivar-Tees and 60 percent of Screen Creations and has controlling ownership of the two Mexican corporations: 50 percent of Screen Creations de Mexico (with the remaining ownership shared with his two partners) and 65 percent of Screen Creations de Celaya.

The Board stated that it looks at four factors in making a finding of single employer status: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. Here, three of the four criteria were met: common ownership and management and substantial interrelation of operations with a repeated lack of arm's-length dealings. The Board explained that Heller had controlling ownership of all the corporations. There were repeated lack of arm's-length dealings, the Board stated, noting that when equipment was transferred from Bolivar-Tees to Screen Creations de Mexico, the title was transferred to the American Screen Creations, ostensibly in exchange for $225,000, but no money was exchanged, there were no transfer documents, Screen Creations insured the equipment for twice the purported exchange price, and Screen Creations de Mexico never compensated either American corporation.

It is inappropriate in this case to accord substantial importance to the factor of centralized control of labor relations, the Board explained. By the time the Mexican businesses were fully up and running, the American businesses no longer produced anything, and there were no employees, other than Heller, to "centrally control."

14. Strikers

a. Church Homes, Inc. d/b/a Avery Heights, 350 NLRB No. 21.

On remand from the U.S. Court of Appeals for the Second Circuit, 448 F.3d 189 (2d Cir. 2006), the Board (Battista, Schaumber, and Walsh), found that under the terms of the court's remand, which constitutes the law of the case, the Employer violated Section 8(a)(3) and (1) of the Act by failing to reinstate permanently replaced economic strikers upon their unconditional offer to return to work.

The Employer had kept secret from the Union its hiring of permanent replacements for striking employees, while hiring as many permanent replacements as it could before the Union caught on. The court found that the logical implication of the Employer's secrecy was that it had acted with an unlawful motive to break the Union by secretly hiring permanent replacements.

On remand, the Board found that the record was insufficient to refute the inference that the Employer's secret hiring of the permanent replacements had an illicit motive. The Board affirmed the ALJ's discrediting of the testimony of the Employer's administrator that the Employer's secrecy was motivated by a fear of violence.

The Employer had urged the court to consider additional evidence in support of its claim that it had no unlawful motive in hiring the permanent replacements. The Board found that this evidence: (1) that the Employer continued bargaining in good faith with the Union; (2) that it agreed to the mayor's request to stop hiring additional permanent replacements while he mediated the parties' labor dispute; and (3) that it solicited and followed the Union's advice on how best to recall strikers who had not been permanently replaced was insufficient to refute the court's finding that the logical inference from the Employer's secrecy was an illicit motive.

In a footnote, Chairman Battista and Member Schaumber respectfully disagreed with the court's apparent placing on the Employer of the burden of establishing a lawful motive for maintaining secrecy in the hiring of replacements. In their view, the court's decision suggests that unlawful motive may be inferred solely from an employer's secrecy in hiring permanent replacements, and such inference effectively relieves the General Counsel of the burden of establishing unlawful motive and improperly shifts the burden of proof to the employer to establish that it acted with a lawful motive. Chairman Battista and Member Schaumber stated that there can be a number of valid reasons for secrecy, that the employer is in the best position to present any such reasons, and that the employer has the duty to go forward with any such reasons. However, they did not agree that the burden of persuasion shifts away from the General Counsel.

15. Supervisors

a. Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel, 350 NLRB No. 84.

The Board (Battista and Schaumber; Walsh, dissenting) reversed the ALJ's finding that Employer violated Section 8(a)(3) and (1) of the Act by discharging Front Desk Supervisor, Kevin Grace, for his refusal to remove a union button from his shirt. The Board found that the discharge was lawful because Grace was a supervisor under Section 2(11) and therefore excluded from coverage under the Act. The supervisory finding was based on Grace's authority to effectively recommend discipline and to effectively recommend against hiring applicants, as well as secondary indicia. The complaint was dismissed in its entirety.

In finding that Grace possessed supervisory authority to effectively recommend discipline, the Board discussed how he initiated disciplinary action through "coach-and-counsel" sessions and made a recommendation that an employee be harshly disciplined after Grace had repeatedly coached that employee about treating hotel guests rudely. Management followed Grace's recommendation without evidence of an independent investigation. In finding that Grace possessed supervisory authority to effectively recommend discipline, the Board relied on Progressive Transportation Services, 340 NLRB 1044 (2003) and Mountaineer Park, Inc., 343 NLRB 1473 (2004), cases where supervisors similarly made recommendations to discipline employees and such recommendations were typically accepted by upper management without further investigation.

In finding that that Grace possessed supervisory authority to effectively recommend against hiring, the Board relied on the testimony of the Employer's director of rooms, who testified that Grace's hiring recommendations were "very, very key," and that if a recommendation was made that a candidate not be hired, that "would be fatal." The Board cited Berger Transfer & Storage, 253 NLRB 5, 10 (1980), enfd. 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986) and HS Lordships, 274 NLRB 1167, 1173 (1985), for the proposition that the authority to effectively recommend against hiring a candidate establishes supervisory authority. Although the Employer's director of rooms did not discuss specific examples of Grace giving a negative hiring recommendation, the Board noted that Section 2(11) requires only possession of supervisor authority and not its actual exercise citing NLRB v. Southern Seating Co., 468 F.2d 1345, 1347 (4th Cir. 1972).

Finally, the Board noted the evidence of secondary indicia supporting Grace's supervisory status. Grace regularly served as the manager on duty, his title was "front desk supervisor," and his name tag said "supervisor." Grace had an e-mail account with the Employer, a privilege exclusive to members of management. Grace was paid more than the employees he supervised. He attended management meetings, received management memos, and signed documents when he began working as a front desk supervisor that were only given to members of management. Thus, the Employer treated and held Grace out to others as a supervisor. Having found that Grace

possessed supervisory authority with regard to discipline and hiring, the Board concluded that this evidence corroborated the determination of his 2(11) status.

Member Walsh, dissenting, argued that Grace was the sort of "minor supervisory employee" whom Congress intended the Act to protect. He agreed with the ALJ that the Employer violated Section 8(a)(3) and (1) of the Act by discharging Grace for refusing to remove a union button. According to Walsh, the Board majority ignored the strongly worded, on-point decision in Jochims v. NLRB, 480 F.3d 1161 (D.C. Cir. 2007), reversing Wilshire at Lakewood, 345 NLRB 1050 (2005). There, the court found that the Board had deviated from well-established precedent when it found that a nurse who issued writeups, which were then reviewed by managers and occasionally resulted in discipline, possessed authority to initiate discipline. Walsh found that Grace's couch-and-counsel duties were merely reportorial. He also found that the one example of Grace's recommendation to discipline an employee was insufficient to establish supervisory authority. In his view, the recommendation was vague, and there was no showing that management disciplined the employee as a result of Grace's recommendation. As for Grace's authority to effectively recommend against hiring, Member Walsh found the evidence was insufficient because it consisted of the director of rooms' conclusory testimony alone.

b. I.H.S. Acquisition No. 114, Inc. d/b/a Lynwood Manor, 350 NLRB No. 44.

The Board (Schaumber, Kirsanow, and Walsh) found that E's registered nurses (RNs) and licensed practical nurses (LPNs) were not statutory supervisors. Applying Oakwood Healthcare, 348 NLRB No. 37 (2006), the Board found that although RNs and LPNs had authority to assign duties to certified nursing assistants (CNAs), they did not exercise independent judgment in making those assignments. The Employer argued that RNs/LPNs used independent judgment because they had to determine the acuity needs of residents, which could differ from shift to shift and day to day, and they had to determine changes in the staffing schedule required by those differences, weighing various factors to determine staff assignments beyond merely equalizing the quantity of work. The Board found, however, that the Employer adduced little evidence regarding the factors weighed or balanced by RNs/LPNs in determining staffing needs. Although an LPN testified that she had to determine staffing needs based on her assessment of patient acuity and reports of prior shifts, such purely conclusory evidence is not sufficient to establish that RNs/LPNs exercised independent judgment. Further, the Employer failed to establish that the reassignment of CNAs from an overstaffed nursing unit to an understaffed unit involved anything more than the "mere equalization of workloads," which does not require the exercise of independent judgment. Also, there was no evidence that indicated that RNs/LPNs exercised judgment that involved a degree of discretion rising above the routine or clerical.

Similarly, applying Oakwood, the Board found that although RNs/LPNs had the authority to direct the work of CNAs, the Employer failed to establish that they were held accountable for their actions in directing CNAs. The Employer presented testimony from the Director of Nursing and from an LPN stating that RNs/LPNs were accountable

for the care on their floor, but the Employer failed to refer to any specific evidence that they could be disciplined, receive a poor performance rating, or suffer any adverse consequences due to a failure in a CNA's performance of assigned duties.

c. Shaw, Inc., 350 NLRB No. 37.

The Board (Battista, Liebman, and Kirsanow) concluded that the Employer's foremen were not statutory supervisors because the General Counsel failed to establish that the foremen exercised independent judgment in the performance of their putatively supervisory duties. Citing Oakwood Healthcare, 348 NLRB No. 37, slip op. at 8 (2006), the Board noted that to exercise independent judgment, "an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data," and that the judgment must not be dictated by detailed instructions. The Board found that in directing and assigning work to employees, the foremen performed essentially as jobsite lead persons, overseeing routine functions and following established prescribed practices. Most of the Employer's projects involved tasks which were recurrent and predictable, and were carried out in conformance with supervisors' specifications and oversight. The foremen's designation of which crewmembers would perform particular functions was often based on an employee's trade or known skills, and thus was essentially self-evident. While foremen would rotate workers to perform less skilled tasks in order to vary their work and equalize their burdens, rotating essentially unskilled and routine duties among available crewmembers does not involve the use of independent judgment. Regarding the foremen's direction of work, it was given in accordance with the Employer's prior instructions, and much of the work performed by employees was routine and repetitive, requiring only minimal guidance. Further, such direction as the foremen did exercise was subject to close scrutiny by higher management. The record also failed to show that the foremen exercised independent judgment in recommending discipline or rewards for employees, and their discretion in permitting employees to leave work early was sharply restricted.

16. Section 10(b)

a. The Carney Hospital, 350 NLRB No. 56.

The Board (Battista, Schaumber, and Walsh) set forth new guidelines in applying the test set forth in Redd-I, Inc., 290 NLRB 1115 (1988), for determining whether unfair labor practice allegations that are otherwise time-barred by the six-month limitations period in Section 10(b) may be litigated. The Board in Redd-I held that otherwise untimely allegations may be litigated if they were "closely related" to allegations in a prior timely filed charge. Under the Redd-I test, the Board (1) considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to

both the untimely and timely charge allegations. The Board's focus in Carney Hospital centered on whether the second prong of the Redd-I test was met. The ALJ, relying on the Board's decision in Ross Stores, Inc., 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001), found that this prong was met because the conduct alleged in the timely and otherwise untimely charges all arose out of an antiunion campaign carried on by the Employer.

In response to judicial criticism, the Board overruled its decision in Ross Stores and stated that it would no longer "find that the second prong of the Redd-I test is satisfied merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign. The Board set forth the following new test: where the two sets of allegations 'demonstrate similar conduct, usually during the same time period with a similar object,' or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, the Board will find that the second prong of the Redd-I test has been satisfied.

A unit employee who openly supported the Union during the organizing campaign was scheduled to testify on behalf of the Union at a June 14 hearing. On June 9, however, the Employer suspended him for three days, purportedly because of a report that the employee had threatened another employee with physical harm one week earlier. The Union filed a timely charge on June 29, 2000, alleging that the suspension violated Section 8(a)(3). Ten months later, on April 29, 2001, the Union amended the charge to further allege that, prior to the April 2000 election, the Employer violated Section 8(a)(1) and (3) by, among other things, interrogating employees, threatening them with job loss and loss of employment benefits, surveilling their union activities, and implying that collective bargaining would be a futile process. The Union again amended the charge on May 8, 2001, to add allegations that, during the previous 12 months, the Employer maintained rules in its employee handbook pertaining to solicitation of patients, distribution of literature, and disclosure of confidential information, all in violation of Section 8(a)(1) and (3). The General Counsel issued a complaint alleging that the conduct set forth in the initial charge and both of the amended charges violated the Act. In its answer to the complaint, and at the hearing, the Employer asserted that the Section 8(a)(1) complaint allegations were time-barred by Section 10(b) because the amended charges containing those allegations were filed in April and May 2001, more than six months after April 2000, when the Section 8(a)(1) conduct allegedly occurred.

Applying the principles stated above, the Board found that the amended charge alleging the 8(a)(1) violations was not closely related to the timely charge alleging the 8(a)(3) unlawful suspension. Accordingly, because those allegations were time-barred under Section 10(b) and should not have been considered by the ALJ, the Board reversed his findings that the Employer violated Section 8(a)(1). Contrary to the ALJ's finding, the Board found that the untimely allegations were not factually closely related on any basis to the allegations in the timely charge alleging that the Employer unlawfully suspended an employee in violation of Section 8(a)(3) and (1). First, the untimely

8(a)(1) allegations and the employee's timely charged suspension did not involve similar conduct. Second, there was no indication that the incidents were part of a chain or progression of events. The employee was not alleged to have been subjected to any of the interrogations, threats of job loss, surveillance, or threats that collective bargaining would be futile alleged in the untimely charge. Although the employee was subjected to an untimely alleged threat of loss of benefits, this threat was made in April by his immediate supervisor who was not involved in his suspension, six weeks later, purportedly for threatening another employee. Thus, the alleged threat of loss of benefits is not factually related to the timely charged suspension either. Finally, although the events occurred during the same organizational campaign and the same general time period, the Board held that a chronological relationship without more is insufficient to support a finding of factual relatedness. Further, there was no showing here that the two sets of allegations involved events that were "part of an organized plan to resist union organization." The record did not disclose that the alleged 8(a)(1) violations and the employee's suspension were any more than separate actions carried out independently by several different officials of the Employer.

Having determined that the second prong of the Redd-I test had not been established, the Board stated that the final inquiry was whether the untimely 8(a)(1) allegations could nonetheless survive a Section 10(b) time-bar defense if the first prong, i.e., the common legal theory prong, of Redd-I had been met. The Board found that they could not. Thus, allegations which were related by mere legal theory were not 'closely related' for purposes of Section 10(b).

b. SKC Electric, Inc., 350 NLRB No. 70.

The Board (Schaumber, Kirsanow, and Walsh) reversed the findings of the ALJ that certain untimely 8(a)(1) complaint allegations were "closely related" to a timely filed 8(a)(3) charge.

On February 5, 1998, the Union filed the original unfair labor practice charge alleging the following violations of Section 8(a)(1) and (3): (1) within the past six months, the Employer refused to hire or consider for hire three individuals because of their union or protected concerted activities; (2) within the past six months, the Employer denied employees training because of their union or protected concerted activities; and (3) about November 3, 1997, the Employer laid off two employees (and refused to recall one of those employees) because of their union or protected concerted activities. On April 22, 1998, the Union filed an amended charge, and for the first time alleged that certain conduct in September 1997 violated Section 8(a)(1). This amended charge was filed more than six months after the alleged September 1997 unfair labor practices occurred. Specifically, the amended charge repeated the original charge allegations concerning the denial of training and the refusal to hire two employees (the third was omitted). The amended charge also deleted the allegations concerning the layoffs of the two employees and the refusal to recall one of them, and added the following Section 8(a)(1) unfair labor practice allegations: (1) on September 12, 1997, the Employer threatened employees with job loss if they engaged in a strike or other

protected concerted activities; (2) about September 24, 1997, the Employer informed employees that it would be futile to select the Union as their collective-bargaining representative; and (3) in late September 1997, the Employer interrogated employees about their union activities and sympathies. These three Section 8(a)(1) allegations were incorporated into the consolidated complaint that issued on April 23, 1998.

In reversing the ALJ's finding that the timely and untimely allegations were "closely related," the Board applied Carney Hospital, 350 NLRB No. 56 (2007), in which it overruled Ross Stores, Inc., 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001), to the extent that it held that "the requisite factual relationship under the 'closely related' test may be based on acts that arise out of the same antiunion campaign." As stated in Carney, 350 NLRB No. 56, slip op. at 4 (footnote and internal quotations deleted), the Board "will not find that the second prong [of Redd-I, Inc., 290 NLRB 1115 (1988)] is satisfied merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign. But where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, [the Board] will find that the second prong of the Redd-I test has been satisfied."

Applying Carney to the facts of the instant case, the Board concluded, for the following reasons, that the untimely allegation concerning the interrogation was closely related to the timely filed allegations, but that the untimely job loss threat and futility statement allegations were not. The Board found that the untimely interrogation allegation and the timely allegation that an employee was unlawfully denied training because of union activities had a close factual link. Thus, both sets of allegations targeted one employee and occurred close in time. The Employer questioned the employee to determine if he would participate in a strike because the Employer did not want to offer the training to anyone who might do so. There was therefore a "causal nexus" between the allegations, in that the interrogation provided the information that directly led to the denial of training. Thus, the allegations were part of a "chain or progression of events." In Carney, the Board stated that such a factual relationship would be sufficient to satisfy the second prong of the Redd-I test. Accordingly, the Board found that the two allegations arose from "the same factual situation or sequence of events" within the meaning of Redd-I.

Unlike the interrogation allegation, however, the Board found that the job loss threat and the statement of futility alleged in the untimely amended charge and the complaint lacked a close factual relationship to the discriminatory conduct alleged in the timely charge. The Board found that the two sets of allegations did not involve similar conduct during the same time period with a similar object, nor was there a causal nexus between the allegations. Thus, the Board found there was no showing that the alleged September 12, 1997 threat of job loss or the alleged September 24, 1997 statement to employees that it would be futile to select the Union as their collective-bargaining representative were part of a chain or progression of events related to the refusals to

hire, denial of training, layoffs or refusal to recall asserted in the timely filed charge. The alleged job loss threat was not directed specifically at any of the employees mentioned in that charge, but rather appeared in a letter sent to all unit employees concerning what could happen in the event of a strike. There also was no showing that the alleged job loss threat led to any of the discriminatory conduct alleged in the timely filed charge. Similarly, although the alleged futility statement was made to a named discriminatee in the timely filed charge, there was no showing that the futility statement led up to or caused any of the alleged discriminatory acts against him. Nor was it shown that these discrete unfair labor practice allegations were part of an overall organized employer plan to undermine the Union. The 8(a)(1) allegations in the amended charge and the complaint and the 8(a)(3) allegations in the initial charge were not shown to be any more than separate actions carried out independently by several different officials of the Employer. Although the events occurred during the same organizational campaign and the same general time period, under Carney, "a chronological relationship without more is insufficient to support a finding of factual relatedness."

Having determined that the second prong of the Redd-I test had not been established with respect to these two allegations, the Board explained that the final inquiry was whether the untimely Section 8(a)(1) allegations could nonetheless survive a 10(b) time-bar defense even if, as found by the ALJ, the first prong, i.e., the common legal theory prong, of Redd-I had been met. As in Carney, the Board found that they could not. Thus, even assuming that the allegations were related by legal theory, the Board would not find them closely related in the absence of sufficient factual relatedness.

c. Trim Corporation of America, Inc., 349 NLRB No. 56.

The Board (Liebman and Walsh; Battista, dissenting in part) found that although the Sec. 8(a)(1) coercive statement allegation was first asserted in the General Counsel's posthearing brief, it was sufficiently related to the timely-alleged Sec. 8(a)(5) withdrawal-of-recognition allegation to be considered timely under Sec. 10(b) of the Act. Applying the three-part "closely related" test set forth in Redd-I, Inc., 290 NLRB 1115 (1988), the Board found that the first two Redd-I factors – that the untimely allegations involve the same legal theory and arise from the same factual situation as the timely charge – were met. Specifically, the 8(a)(1) allegation was based on the premise that the Employer's supervisor coerced employees by telling them that they needed to choose between union representation and their jobs. The 8(a)(5) allegation, in turn, was based on the premise that those same coercive statements caused a majority of employees to renounce the Union, which led to the Employer's withdrawal of recognition. Thus, both allegations turned on the issue of whether the Employer's supervisor made the alleged coercive statements. For essentially the same reason, the third Redd-I factor – whether a respondent would raise the same or similar defenses to both allegations – was satisfied. The Employer's principal defense to both allegations was that the supervisor did not make the alleged coercive statements. The majority rejected the dissent's contention that the third factor was not met because there were possible defenses to the 8(a)(1) allegation that had little in common with defenses to the

8(a)(5) allegation, noting that the issue was not what defenses were hypothetically available, but whether a respondent would raise the same or similar defenses to both allegations.

Chairman Battista, dissenting in part, would not find the 8(a)(1) allegation to be closely related to the 8(a)(5) allegation. He stated that the first Redd-I factor, that the allegations involve the same legal theory, was not met, because the 8(a)(5) withdrawal of recognition theory was fundamentally different from the 8(a)(1) coercive statement theory. He contended that the majority was confusing the concept of causality with the Redd-I concept of "same legal theory," and argued that although there was a causal connection between the alleged coercive statements and the loss of majority, that did not mean that the two violations were based on the same legal theory. He also stated that the third Redd-I factor was not met, because there could have been defenses to the 8(a)(1) allegation that would not have been relevant to the 8(a)(5) charge. He noted that in the absence of a timely raised 8(a)(1) allegation, there was no way to know what defenses the Employer may have raised to that allegation.