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Summaries of Significant NLRB and Court Decisions and NLRB Proposed Rules

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A. Employer Objectionable Conduct

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The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's findings that 833 Central Owners Corp. violated Section 8(a)(1) of the Act by threatening an employee with discharge and unspecified reprisals in order to coerce him into refraining from Union activity and by impliedly promising benefits for the same purpose. The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3) and (1) by warning, suspending, and discharging the employee because of his Union activity.

2. *Onsite News,* 359 N.L.R.B. No. 99 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the Respondent violated Section 8(a)(1) by threatening employees with stricter enforcement of work rules if they supported the Union. In addition, the Board found that the Respondent's Section 8(a)(1) conduct also constituted objectionable conduct sufficient to set aside the election.

3. *Hartman and Tyner, Inc.,* 359 N.L.R.B. No. 100 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's findings that, during an organizing drive, the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees, threatening an employee with unspecified reprisals, threatening employees with arrest, and linking an employee's discharge to her protected activity. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging eight employees, including five employees who attempted to meet with the Respondent's chief operating officer as part of a delegation. In adopting the judge's finding that the Respondent unlawfully discharged two of the employees, the Board noted that the employees were discharged for engaging in the protected activity of requesting employee contact information in furtherance of organizing activity.

4. *Flamingo Las Vegas Operating Company, LLC,* 359 N.L.R.B. No. 98 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's findings of a number of Section 8(a)(1) violations by the employer, including threats and the creation of impressions of surveillance. The Board dismissed two Section 8(a)(1) allegations – the first that the Respondent had promulgated a work rule when a supervisor made a comment to an employee about following the chain-of-command, and the second that the Respondent had created an impression of surveillance when a supervisor made comments about an unnamed Union "instigator."

5. *Target Corp.,* 359 N.L.R.B. No. 103 (2013)

The Board (Chairman Pearce and Members Griffin and Block) affirmed the ALJ's decision in this consolidated unfair labor practice charge and representation case arising out of

the charging party Union's effort to organize the employer's Valley Stream, New York store. The Board found that the employer violated Section 8(a)(1) of the Act by maintaining and, in some instances, enforcing unlawful confidential information, no-solicitation/no-distribution, and off-duty access and dress code policies. The Board did, however, reverse the judge's ruling that the employer's parking lot policy was unlawful. The Board also adopted the judge's findings that the employer had engaged in campaign conduct that was in violation of Section 8(a)(1), including a threat to close the store, creating the impression of surveillance, improper interrogation, threats of discipline, and unspecified reprisals. In light of these violations, the Board concurred with the judge's decision to overturn the election results and to direct a new election. Further, the Board ordered, among other remedies, that the employer revise the unlawful policies as they applied to all stores nationwide.

6. *First Student, Inc.,* 359 N.L.R.B. No. 120 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's finding that the Respondent violated Section 8(a)(1) of the Act by withholding an annual wage increase during the critical period of the election and by informing employees that it was withholding the increase because of the election. The Board found this conduct objectionable and that it affected the results of the election. Therefore, the Board set aside the results of the first election and ordered that a new election be held.

7. *Sanitation Salvage,* 359 N.L.R.B. No. 130 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the hearing officer's findings that an employee was an agent of the employer and that the employer engaged in objectionable conduct by telling an employee that the employer would reduce employees' overtime if the Union won the election, threatening two employees with job loss in retaliation for support of the Union, and creating the impression that employees' union activities were under surveillance and that voting for the Union would be futile. Contrary to the hearing officer, however, the Board found that the objectionable conduct did not affect the outcome of the election because it reached too few employees.

8. *Garda CL Great Lakes, Inc.,* 359 N.L.R.B. No. 148 (2013)

The Board (Chairman Pearce and Members Griffin and Block) set aside the results of an election and directed a second election at the Respondent's armored truck facility in Columbus, Ohio. Immediately after an election petition was filed, the Respondent's management began to aggressively address and attempt to resolve employees' health and safety concerns, and provide new benefits, including water, truck repairs and cleaning of the facilities. Additionally, the Respondent's Director of Labor Relations urged employees to vote against Union representation. The Board found that the Respondent violated Section 8(a)(1) of the Act, and engaged in objectionable conduct, by granting benefits to unit employees prior to the election, and soliciting grievances and promising to remedy them, thus impairing employee free choice in the election.

9. *All Seasons Climate Control, Inc. v. N.L.R.B.,* 11-2184, 2013 WL 4564449 (6th Cir. Aug. 28, 2013)

The Court of Appeals for the 6th Circuit upheld the decision of an NLRB Administrative Law Judge who found that the employer had encouraged and assisted an employee in collecting signatures on two decertification petitions. On appeal, All Seasons argued that it did not engage in unfair labor practices, and challenged the portion of the Board's order requiring All Seasons to bargain with the union for a minimum of fifteen hours per week and to submit written bargaining progress reports every thirty days. Because the Board's findings were supported by substantial evidence, and the Employer failed to preserve an objection to the Board's bargaining remedy, the 6th Circuit enforced the Board's order.

10. *United Maintenance Company, Inc.* (13-RC-106926) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the employer's request for review of the Regional Director's decision and direction of election. The Board panel majority found that the Regional Director's determination that Teamsters' Local 727's collective-bargaining agreement with the employer does not operate as a bar to Petitioner SEIU Local 1's representation petition, because Local 727 effectively disclaimed interest in representing the employer's employees, is consistent with applicable precedent. In addition, the Board panel majority granted the employer's special permission to appeal from the Regional Director's determination to conduct the election by mail ballot, but denied the appeal on the merits. The majority found that the Regional Director did not abuse his discretion in deciding to conduct the election by mail ballot, and that he appropriately applied the test set forth in *San Diego Gas & Electric*, 325 NLRB 1143 (1998*).*

11. *FJC Security Services, Inc.,* 360 NLRB No. 6 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the Administrative Law Judge's findings that the Employer did not violate the Act by warning employees that approval of their benefit requests was contingent on their support for decertification of the Union, and adopted the ALJ's recommendation that the Charging Party/Intervenor's related objection to the election be rejected and a certification of results of election be issued. The Board reaffirmed the rule that an employer may make statements of opinion regarding one union over another, as long as the statements do not contain any sort of threats or promises that would rise to the level of interference, restraint, or coercion that would violate Section 8(a)(1) of the NLRA.

B. Union Objectionable Conduct

1. *Bellagio, LLC,* 359 N.L.R.B. No. 128 (2013)

The Board (Chairman Pearce and Members Griffin and Block) directed a second election. Contrary to the hearing officer, the Board found, under the totality of the circumstances, that employees in the petitioned-for unit would reasonably believe that a third party acted as an agent of the Union under the doctrine of apparent authority. The Board disagreed with the hearing officer that a finding of apparent authority necessarily required evidence that the third party spoke on behalf of the Union at a Union meeting. The Board also found that an adverse inference was warranted from the Union's failure to call the third party as a witness, because the record showed that the third-party was favorably disposed to the Union. Having found that the

third party's conduct was attributable to the Union, the Board further found that his comments, which threatened unspecified reprisal, affected a sufficient number of voters to have potentially affected the outcome of the election. Because the third party's comments warranted setting aside the election, the Board found it unnecessary to pass on the hearing officer's recommendations concerning other allegations of objectionable conduct.

2. *Community Options NY, Inc.*, 359 NLRB No. 165 (2013)

The Board (Chairman Pearce and Members Griffin and Block) reversed the hearing officer's report in this representation case and found that the Union did not, as alleged in the employer's election objection, commit objectionable conduct during the critical period prior to the decertification election by offering to waive dues for six months for all unit employees. During the critical period prior to the decertification election, a separate election was held among the unit employees on whether to ratify a collective-bargaining contract that had recently been negotiated. The dues waiver was offered on the day employees came to vote on contract ratification. The hearing officer found the waiver objectionable as a financial benefit intended to induce employees to vote for the Union in the decertification election.

The Board reversed on two grounds. First, Chairman Pearce and Member Griffin found that a dues waiver is not a financial benefit unless employees have an enforceable obligation to pay dues at the time that a waiver is offered. Because the employees here did not owe dues at the time that the waiver was offered, Chairman Pearce and Member Griffin found that the waiver did not constitute an objectionable financial benefit. Second, even assuming that the waiver could be viewed as a financial benefit, Member Block joined the Chairman and Member Griffin in finding the waiver unobjectionable because the Union established that the waiver had the permissible purpose of encouraging employees to vote for contract ratification, not to impermissibly induce them to vote for the Union in the decertification election. Accordingly, the Board overruled the employer's objection and certified the Union.

3. *Standard Drywall, Inc. v. N.L.R.B.*, 12-70047, 2013 WL 5511186 (9th Cir. Oct. 7, 2013)

The Ninth Circuit upheld a broad cease and desist order issued by the Board in response to the Operative Plasterers and Cement Masons Local 200's continued pursuit of work which the Board previously awarded to another Union. After Local 200 had asserted a claim for work covered by an agreement between Standard Drywall, Inc. ("SDI") and the Southwest Regional Council of Carpenters, the Carpenters threatened to strike if the work was reassigned to Local 200. SDI filed a charge against the Carpenters, the Board held a 10(k) jurisdictional-dispute proceeding, and the work was awarded to the Carpenters. However, Local 200 continued to demand work, the Carpenters once again threatened to strike, and SDI filed a second charge with the Board. At the Board's second 10(k) hearing, the Board (Chairman Pearce and Members Becker and Hayes) issued a broad award of work to the Carpenters, and SDI withdrew its 8(b)(4)(ii)(D) charges.

Local 200 continued to demand work and pursued lawsuits against the parties. The Board found that that Local 200's continued pursuit of the work in the face of the Board's 10(k) awards to the Carpenters violated Section 8(b)(4)(ii)(D), noting the well-settled law that a

union's pursuit of a lawsuit or arbitration to obtain work awarded by the Board to another union under Section 10(k) has an illegal objective under the Act.

4. *UNITE HERE Local 1* (Stefani's Pier Front, Inc. d/b/a Crystal Garden) 360 NLRB No. 42 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) adopted an ALJ's findings that the Respondent Union did not violate Sec. 8(b)(2) by causing the employer to discharge an employee without previously advising her about the consequences of nonpayment of the monetary amount in arrears of her periodic dues, the total amount that she owed, a monthly breakdown of the amount owed, and how the amount was calculated. The Board found that the Respondent satisfied the requirements of *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), *enfd. sub nom. NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963), and that the Charging Party willfully and deliberately determined not to satisfy her dues obligations to the Union. The Board noted that this conduct would have excused any failure by the Union to comply fully with the *Philadelphia Sheraton* requirements.

C. Procedures Relating to Challenged Ballots

1. *CCS Trucking*, 359 N.L.R.B. No. 67 (2013)

The Board (Chairman Pearce and Members Griffin and Block) reversed a hearing officer's determination and concluded that the Respondent substantially complied with its *Excelsior* requirements, because the Respondent did not act in bad faith and the percentage of voters omitted from the *Excelsior* list was relatively small and not outcome determinative. Accordingly, the Board certified the election results.

2. *Ozburn-Hessey Logistics, LLC*, 359 N.L.R.B. No. 109 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's findings that the Respondent violated Section 8(a)(3) of the Act by discharging an employee and disciplining an employee, and violated Section 8(a)(1) by unlawfully confiscating Union materials, urging Union supporters to quit, conducting surveillance of protected activity, creating an impression of surveillance, interrogating employees about their protected activity and threatening employees. In addition, the Board adopted the judge's recommendations to reject the employer's objections to an election which the Union won by a single vote, to uphold several of the Union's objections based on the employer's post-petition misconduct, and to count six outstanding challenged ballots. The Board, accordingly, directed the Regional Director to certify the Union if the revised tally of ballots showed that the Union retained its majority and, if not, to conduct a rerun election.

D. Decertification Petitions

1. *AEG Brooklyn Management, LLC* (29-UD-097113, 2013 WL 4855387) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) adopted the Acting Regional Director's overruling of objections to a de-authorization election, and

accordingly certified that a majority of the employees eligible to vote had not voted to withdraw the authority of Local 32BJ Service Employees International Union to require, under its agreement with the employer, that employees make certain lawful payments to that Union in order to retain their jobs in conformity with Section 8(a)(3) of the Act. The Board found that a certification of election results should be issued.

E. Appropriate Bargaining Units

1. *Guide Dogs for the Blind, Inc., 359 N.L.R.B. No. 151 (2013)*

The Board (Chairman Pearce and Members Griffin and Block) affirmed the Acting Regional Director's finding that the petitioned-for unit of canine welfare technicians and instructors was appropriate. Applying its decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which issued after the acting Regional Director's Decision and Direction of Election, the Board concluded that the employees in the petitioned-for unit were a readily identifiable group who shared a community of interest, and that the employer had not met its burden of demonstrating that employees in the other "dog handling" classifications it sought to include shared an overwhelming community of interest with the petitioned-for employees so as to require their inclusion in the unit.

2. *Kindred Nursing Centers E., LLC v. N.L.R.B.*, 727 F.3d 552, 554 (6th Cir. 2013) (Affirming *Specialty Healthcare and Rehabilitation of Mobile*, 357 NLRB No. 174)

The 6th Circuit agreed that the Board (Chairman Pearce and Members Becker and Hayes) properly certified a unit consisting exclusively of certified nursing assistants (CNAs) at a Mobile, Alabama nursing home and thus Specialty's refusal to bargain with the union violated Section 8(a)(5) and (1) of the Act. The Union had petitioned to represent a unit of 53 CNAs, but Specialty claimed that the smallest appropriate unit must include 86 other service and maintenance employees. The Regional Director found the unit appropriate, conducted the election, and the Union won. The Board granted review, asked the parties and public for their views on eight questions concerning community of interest unit determinations in the non-acute care healthcare industry, and ultimately issued a decision upholding the unit determination and the Union's election victory. In its decision, the Board overruled *Park Manor Care Center*, 305 NLRB 872 (1991), which applied a "pragmatic or empirical community of interests approach" to determining unit appropriateness in nursing homes. Instead, the Board ruled that it would apply the traditional test to evaluate unit appropriateness, which examines whether a proposed unit is readily identifiable and shares a community of interest distinct from other employees. Because the CNA-only unit was readily identifiable and shared a distinct community of interest, and because Specialty failed to show that the excluded service and maintenance employees shared an overwhelming community of interest with the CNAs, the Board certified the unit. Specialty refused to bargain, and this test of certification proceeding followed.

The Sixth Circuit affirmed the Board's order and its clarification of the community-of-interest test. The court held that the Board permissibly "adopted a community-of-interest test based on some of the Board's prior precedents, and . . . did explain its reasons for doing so." It also concluded that the Board acted within its discretion in requiring a party

claiming that the smallest appropriate unit must include additional employees to show that the excluded employees share an "overwhelming community of interest" with the proposed unit. The 6th Circuit agreed that the Board merely clarified existing law, overruled any inconsistent precedent, appropriately placed the burden of proving overwhelming community of interest on the employer, and explained its reasons for doing all of the above.

3. *The Pepsi-Cola Bottling Company of Winchester, Kentucky, A Division of G&J Pepsi-Cola Bottlers, Inc.* (09-RC-110313) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the employer's request for review of the Regional Director's decision and direction of election. Member Miscimarra did not reach the applicability of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *enfd. sub nom. Kindred Nursing Centers East v. NLRB*, 727 F.3d 552, 2013 WL 4105632 (6th Cir. Aug. 15, 2013), because, in this case, the Employer did not challenge its applicability, and even under the Board's pre–Specialty Healthcare traditional community-of-interest analysis, he would find that the petitioned-for unit of drivers is an appropriate unit, even though a unit including the excluded merchandisers would also be appropriate.

F. Public/Private Determination

1. *Pilsen Wellness Center*, 359 N.L.R.B. No. 72 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the employer, a private, nonprofit corporation that employs and provides teachers to a public charter school in Chicago, is not a political subdivision of the State of Illinois within the meaning of Section 2(2) of the National Labor Relations Act and therefore is not exempt from the Board's jurisdiction. The Board applied the test set out in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (*Hawkins County*), finding that the employer is not a political subdivision because it is not administered by individuals who are responsible to public officials or the general electorate. The case was remanded to the Regional Director for further processing.

II. Bargaining and Representation

A. Withdrawal of Recognition

1. *Belgrove Post Acute Care Center*, 359 N.L.R.B. No. 77 (2013)

The Board (Chairman Pearce and Members Griffin and Block) granted the Acting General Counsel's motion for summary judgment on the ground that the Respondent employer's refusal to recognize and bargain with the Union constituted a violation of the Act. The Respondent contested the Union's certification as bargaining representative in the underlying representation proceeding. The Union had requested verbally and by letter that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. The Board found that the Respondent failed and refused to recognize and bargain with the Union, and also found that all representation issues raised by the Respondent were or could have

been litigated in the prior representation hearing, and therefore were not properly litigable in this unfair labor practice proceeding.

2. *Heartland Human Services,* 359 N.L.R.B. No. 76 (2013)

The Board (Chairman Pearce and Members Griffin and Block) granted the Acting General Counsel's motion for summary judgment for refusal to bargain on the grounds that the Respondent admitted the central factual allegations of the complaint and based its defense solely on the Union's loss of a decertification election and its assertion that the Board erred in ordering a re-run of the election. The Board found that the Union's majority status did not present a genuine issue of fact because no final certification has issued in the decertification case. The Board found that the Respondent had litigated the issue of the Board's order to re-run the election, and did not allege any special circumstances that would warrant further litigation of the issue in the unfair labor practice proceeding. The Board ordered that the Respondent cease and desist from advising unit employees that it would not recognize the Union due to the results of the decertification election. The Board also ordered the Respondent to recognize and bargain with the Union, attend a scheduled labor-management meeting on request, schedule dates to bargain with the Union on request, and give the Union information requested for bargaining.

3. *Woodman's Food Market, Inc.*, 359 N.L.R.B. No. 114 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's conclusion that the Respondent violated Section 8(a)(5) of the Act when, through an employee acting as its agent under Section 2(13), it solicited employees to withdraw their support for the Union, and then withdrew recognition from and refused to bargain with the Union.

4. *American Medical Response of Connecticut, Inc.,* 359 N.L.R.B. No. 144 (2013)

The Board (Chairman Pearce and Members Griffin and Block) agreed with the ALJ that Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about a change to its start-of-shift procedures and violated Section 8(a)(1) of the Act by discharging a Union steward. The Board found that the Respondent unilaterally changed from non-enforcement to strict enforcement of its procedures without bargaining. With respect to the unlawful discharge allegation, the Board found that, under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the Acting General Counsel demonstrated that the Union steward did not engage in the alleged misconduct of initiating an unlawful work stoppage.

5. *Alamo Rent-A-Car,* 359 N.L.R.B. No. 149 (2013)

The Board (Chairman Pearce and Members Griffin and Block) agreed with the ALJ that the employer committed several unfair labor practices, including the elimination of benefits before it withdrew recognition of the Union, which tainted the decertification petition signed by a majority of the bargaining unit on which the employer based its withdrawal. The Board concluded that the employer's withdrawal of recognition from the Union was unlawful because its pre-withdrawal unlawful conduct was causally connected to the decertification petition and because it promoted the decertification petition by directing the employee to get more signatures. The Board accordingly found that the employer committed several unfair labor

practices after it withdrew recognition because it failed to bargain with the Union. The Board amended the remedy to provide that the employer must make employees whole for any loss caused by the elimination of benefits and to specify that it must pay dues owed the Union from its own funds with interest without recouping the amount from its employees.

B. Bad Faith Bargaining/ Remedies

1. *Corbel Installations, Inc. & Commc'ns Workers of Am., Afl-Cio & Local 1430, Int'l Bhd. of Elec. Workers, Afl-Cio, Party to the Contract,* 360 NLRB No. 3 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) granted the Union's request to extend the certification year by 10-months. The Respondent acquired Falcon Data Com, Inc., the predecessor employer, in September 2012, less than 2 months after the Board's July 31, 2012 certification of the Union as the exclusive bargaining representative for a unit of Falcon's employees. As the successor, the Respondent was obligated to recognize and bargain with the Union. Instead, the Respondent refused to bargain with the Union, unlawfully recognized and entered into a contract with a different union, and attempted to coerce employees into accepting the other union. It was not until 2-1/2 months before the initial certification year would expire--that the Respondent finally began to bargain in good faith with the Union. The Respondent's prior unlawful conduct, however, prevented bargaining and undermined the Union until almost 10 months into the certification year. The Board found that a 10-month extension, measured from the end of the original certification year, would allow the Union the 1-year period of good-faith bargaining to which it is entitled.

2. *New Jersey State Opera*, 360 NLRB No. 5 (September 30, 2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's Motion for Default Judgment pursuant to the noncompliance provisions of a settlement agreement. The Board found that the Respondent failed to comply with the terms of the settlement agreement by refusing to fully remit back wages owed to its unit employees and refusing to remit dues on behalf of its unit employees to the Union in violation of Section 8(a)(5) and (1). The Board ordered the Respondent to honor and comply with the terms and conditions of the collective-bargaining agreement with the Union by paying unit employees the unpaid contractual wages and to make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. In addition the Board ordered the Respondent to reimburse the unit employees in an amount equal to the differences in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them, and to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Further, the Board ordered the Respondent to remit contractual dues on behalf of its unit employees to the Union.

3. *Council 30, United Catering, Cafeteria and Vending Workers, RWDSU/UFCW (Awrey Bakeries, LLC)*, 360 NLRB No. 11 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(b)(1)(B) of the Act by restraining or coercing the Employer in the selection of its representatives by conditioning the grant of concessions in bargaining on the Employer's discharge of its director of human resources. The Board amended the judge's recommended remedy to remove the requirement that the Respondent file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and to specify that the backpay period ended 5 days after the date the Respondent sent a letter to the Employer withdrawing its objections to the employment of the discharged director of human resources.

4. *Kephart Trucking Co.*, 360 NLRB No. 22 (2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) granted the General Counsel's motion for a default judgment and found that the Respondent had violated Sections 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the effects of the Employer's closing its facility. The Board ordered the Respondent to bargain with the Union about the effects of that decision and, finding that a bargaining order alone was not an adequate remedy, also ordered the Respondent to pay backpay to unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

C. Unilateral Changes/ Mandatory Subjects of Bargaining

1. *The Sheraton Anchorage,* 359 N.L.R.B. No. 95 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the ALJ's findings that the employer violated the Act by changing unit employees' terms and conditions of employment after contract expiration without first providing at least 30 days' notice to the Federal Mediation & Conciliation Service, unilaterally implementing a new health benefit plan without first bargaining to impasse or agreement, disciplining nine off-duty employees for presenting a boycott petition to the employer in its hotel lobby, discharging four off-duty employees for distributing boycott handbills under the hotel's porte cochere, maintaining and or enforcing eight separate employee handbook rules, soliciting unit employees to sign a decertification petition, and withdrawing recognition from the Union. Reversing the judge, the Board found that the employer violated the Act by unilaterally implementing a performance incentive plan for unit employees. Additionally, the Board adopted the judge's dismissal of complaint allegations that the employer violated the Act by subcontracting certain bargaining-unit work and by denigrating the Union.

2. *Sprain Brook Manor Nursing Home, LLC,* 359 N.L.R.B. No. 105 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the employer violated the Act by threatening an employee with unspecified reprisals for seeking assistance from the Union and threatening that if the employee sought Union representation, she would not receive payments owed to her in connection with the compliance settlement in *Sprain Brook Manor, LLC*, 351 NLRB 1190 (2007). The Board also found that the employer violated Section 8(a)(3) and (1) of the Act by discharging that employee, but found it unnecessary to pass on whether the discharge also violated Section 8(a)(4) because finding that additional violation

would not materially affect the remedy. In addition, the Board found that the employer violated the Act by suspending and subsequently discharging another employee. The Board further found that the employer violated the Act by changing employees' terms and conditions of employment without giving the Union notice and an opportunity to bargain about the changes.

Because of the employer's demonstrated proclivity to violate the Act, the Board ordered that the remedial notice be read aloud to the employees by a management official or a Board agent in the presence of a management official. The Board also ordered the employer to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their rights under the Act. In addition, the Board granted tax compensation and Social Security reporting remedies.

3. *Heartland-Plymouth Court MI, LLC d/b/a Heartland Health Care Center-Plymouth Court*, 359 NLRB No. 155 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the Administrative Law Judge's finding that the employer violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with prior notice and an opportunity to bargain over the effects of its decision to reduce the scheduled hours of unit employees. The Board agreed with the judge that deferral to a related arbitral award was not appropriate. The Board modified the judge's recommended remedy to be similar to the remedy ordered in *Rochester Gas & Electric Corp.*, 355 NLRB 507, 507 (2010), *enfd. sub nom. Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), *petition for cert. filed*, 81 U.S.L.W. 3566 (U.S. Mar. 28, 2013) (No. 12-1178).

4. *Heartland Human Servs. & Am. Fed'n of State, Cnty. & Mun. Employees*, 360 NLRB No. 8 (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's motion for summary judgment, finding the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to give employees raises on their anniversary dates as required by its collective-bargaining agreement with the Union; changing its 401(k) plan and provider; and increasing the premium for family and dependent health insurance benefits, all without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. The Respondent claimed that its admitted conduct is not unlawful because of its reasonable belief that the Union did not enjoy the majority support of the employees in the collective-bargaining unit, based exclusively on the Union's loss of the June 4, 2012 representation election and the Board's erroneous direction to conduct a rerun election in Case 14-RD-063069.

Because the Respondent admitted the crucial factual allegations, the Board found no issues warranting a hearing, and the motion for summary judgment was granted.

5. *Mike-Sell's Potato Chip Co.*, 360 NLRB No. 28 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's finding that the Respondent violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing the terms of its final offers to two bargaining units without first bargaining with the Union to impasse. The Board noted that it would have reached the same

result even if it had not relied on the judge's finding that the Respondent set an arbitrary deadline for reaching a new agreement or on consideration of bargaining concessions offered by the Union after the Respondent's unilateral implementation of its final offer.

D. Failure to Furnish Information

1. *Bristol Manor Health Center*, 360 NLRB No. 7 (2013)

The Board (Members Miscimarra, Hirozawa and Schiffer) granted the Acting General Counsel's Motion for a Default Judgment pursuant to the noncompliance provisions of an informal settlement agreement. The Board noted that the Respondent's contentions that the information it had provided was "responsive" to the Union's request and that this information demonstrated its compliance with the collective-bargaining agreement failed to establish that it had fully complied with the settlement agreement and failed to raise any genuine issue of material fact warranting a hearing. The Board ordered the Respondent to cease and desist from failing to bargain in good faith by refusing to furnish the Union with requested information, and affirmatively ordered the Respondent to furnish the Union with the information it requested.

2. *Chapin Hill at Red Bank*, 360 NLRB No. 27 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) affirmed the Administrative Law Judge's conclusion that the Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to furnish the Union with requested information. The Board agreed with the judge's finding that the Union's request was not rendered moot by the resolution of a grievance the Union has filed on behalf of a unit employee. The Board found that the requested information has present and continuing relevance for the Union to administer the parties' collective-bargaining agreement. Citing longstanding precedent, the Board also affirmed the judge's finding that deferral to arbitration was inappropriate. Member Miscimarra found it unnecessary to decide whether it would be appropriate to defer to arbitration of a dispute about information requested solely in connection with a pending grievance.

3. *Endo Painting Service, Inc.*, 360 NLRB No. 61 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted an ALJ's findings that the Respondent violated Sections 8(a)(5) and (1) by failing and refusing to provide relevant information requested by the Union to aid its investigation of a pending grievance. The Board rejected the Respondent's argument that it was not required to provide the requested information because the pending grievance was not permitted under the parties' agreement, finding that it is well established that an employer is required to provide relevant requested information regardless of the potential merits of the grievance. The Board also adopted the judge's finding that the Respondent violated Sections 8(a)(5) and (1) by unreasonably delaying (for nearly three months) informing the Union that a requested organizational chart did not exist.

E. Representative Access

1. *Norquay Construction, Inc.*, 359 N.L.R.B. No. 93 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found, in the absence of exceptions, that the employer violated Section 8(a)(1) of the Act by interfering with the Union's contractual right to enter the construction project site to perform representative functions. The Board reversed the Administrative Law Judge's conclusion that the employer did not violate Section 8(a)(1) by physically ejecting a Union representative from an office trailer, finding that the physical assault did violate Section 8(a)(1) because it occurred while the Union representative was engaged in Section 7 protected area-standards activity. The Board ordered, among other remedies, that the charging party Union representative be made whole for any losses that he may have suffered from the unlawful assault, including lost wages and benefits and out-of-pocket medical expenses.

2. *Caterpillar, Inc.*, 359 NLRB No. 97 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) and (5) by denying access to the international Union's health and safety specialist to conduct a health and safety inspection after a fatal accident. The Board found that the judge properly applied *Holyoke Water Power Co.'s* (273 NLRB 1369) balancing test to conclude that the Respondent's property rights must yield to the employees' right to responsible representation. However, the Board amended the remedy, finding that the Respondent did not demonstrate a compelling confidentiality interest that would support the judge's conditioning of access upon execution of a confidentiality agreement.

3. *Wellington Industries, Inc.*, 360 NLRB No. 14 (2013)

The Board (Chairman Pearce and Members Miscimarra and Johnson) adopted the Administrative Law Judge's finding that the employer violated Sections 8(a)(5) and (1) of the Act by refusing to accept one union's officer as a representative of an independent union in a grievance-arbitration proceeding. The certified representative of the bargaining unit, a small union with limited means, sought help in the grievance process from an officer of a larger union with greater resources. The Board concluded that the independent union had a statutory right to designate an officer of another union as its representative. The Board reversed the ALJ's award of attorneys' fees and other litigation expenses to the General Counsel and independent union. In doing so, Members Miscimarra and Johnson did not reach whether the Board has the authority to grant such fees and expenses.

F. Successorship

1. *2 Sisters Food Group, Inc. and Fresh & Easy Neighborhood Market, Inc.*, 359 NLRB No. 158 (2013)

In this compliance case, the Board (Chairman Pearce and Members Griffin and Block) unanimously found that Respondent Fresh & Easy was a successor to Respondent 2 Sisters, and, therefore, requiring Respondent Fresh & Easy to remedy 2 Sisters' unfair labor practices does not violate its due process rights. The Board did not rely on the Administrative Law Judge's discussion of additional remedies requested by the Union, and instead ordered

Fresh & Easy to abide by the Board's order in the underlying unfair labor practice proceeding (357 NLRB No. 168).

III. Protected Concerted Activities

A. Discrimination/Discharge for Engaging in Protected Concerted Activities

1. *Weyerhaeuser Co.,* 359 N.L.R.B. No. 138 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the Administrative Law Judge's conclusion that the employer did not violate the Act by maintaining its electronic media use policy, which restricted employee use of its electronic media to "business purposes only." The Board also adopted the ALJ's conclusion that the employer did violate the Act by maintaining its Company informational notice, which prohibited employee Union representatives from using the employer's email system to send "protracted dissertations." The Board found that the Company informational notice was facially discriminatory and therefore unlawful, and therefore it also agreed with the ALJ that the employer violated the Act by disciplining an employee pursuant to that rule.

2. *Gaylord Hospital,* 359 N.L.R.B. No. 143 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) by issuing a written warning to an employee, but did not violate Section 8(a)(1) by suspending and discharging her. No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting the employee from discussing terms and conditions of employment.

3. *Mrs. Green's Natural Market,* 359 N.L.R.B. No. 145 (2013)

The Board (Chairman Pearce and Members Griffin and Block) affirmed the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging one employee, but reversed the judge and found that the Respondent also violated Section 8(a)(3) by discharging a second employee. The Board found that the second employee engaged in protected Union activity when he asked a Union representative to assist him in pursuing a scheduling complaint with management. The Board also found that circumstantial evidence supported the inference that the Respondent bore animus toward his protected activity and thatat the reasons given for discharge were pretextual.

4. *Encino Hospital Medical Center,* 360 NLRB No. 52 (2014)

The Board (Chairman Pearce and Members Miscimarra and Schiffer) unanimously adopted an ALJ's finding that Respondent Employer did not violate Sections 8(a)(3) and (1) of the Act by discharging an employee who had made false statements to a human resources representative. The Board found that the discharged employee's deliberately deceptive conduct was not protected, even assuming that certain related conduct was protected union activity, because the deceptive conduct was neither an integral nor a necessary part of the putative protected activity. The Board affirmed its rule that, in certain circumstances, an employee may lose the protections of the Act by engaging in conduct that is deliberately

deceptive or maliciously false where there is no necessary link between the deception or falsification and the protected conduct.

B. Work Stoppages

1. *CG's Lawn & Janitorial Service, LLC,* 359 N.L.R.B. No. 64 (2013)

The Board (Chairman Pearce and Members Griffin and Block) ordered the Respondent to cease and desist, having found that the Respondent had engaged in unfair labor practices by disciplining employees and terminating an employee for engaging in a concerted work stoppage, assisting the Union, and engaging in other concerted activity. The Respondent was ordered to remove from its files all references to the unlawful discipline of the employees, and notify each of them in writing that this had been done and that it would not be used against them in any way.

C. Employer Interference or Coercion

1. *DirecTV U.S. DirecTV Holdings, LLC,* 359 N.L.R.B. No. 54 (2013)

The Board (Chairman Pearce and Members Griffin and Block) affirmed an Administrative Law Judge's finding that the Respondent violated Sections 8(a)(1) and (3) of the Act by maintaining four unlawful work rules and for discharging an employee for his Union activities. The Respondent's rules included restrictions on employee communications with the media, requirements that employees notify the Respondent's security department whenever contacted by law enforcement, and two overlapping prohibitions on releasing information about jobs and employee records. The Board found that employees would reasonably construe each of these rules as prohibiting lawful Section 7 activity in violation of the *Lutheran Heritage Village—Livonia,* 343 N.L.R.B. 646 (2004) test. Although the Respondent claimed that it repudiated the unlawful rules, the Board found that the alleged repudiation did not satisfy the *Passavant Mem'l Area Hosp.*, 237 N.L.R.B. 138 (1978) standard because it was not timely and the Respondent did not admit wrongdoing. The Board also upheld the judge's determination that the Respondent unlawfully discharged an employee because of his Union activity in violation of Sections 8(a)(1) and (3).

2. *Soaring Eagle Casino and Resort,* 359 N.L.R.B. No. 92 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the employer, an on-reservation, tribally owned and operated casino complex, violated the Act by suspending and discharging an employee for supporting the Union, maintaining an overly broad no-solicitation rule, and telling employees they may not talk to one another about the Union in the employee hallway.

3. *Bettie Page Clothing,* 359 N.L.R.B. No. 96 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the employer violated the Act by maintaining a Wage and Salary Disclosure rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee. Member Block further found that an additional handbook rule, the Confidential Information

Security rule, not alleged in the complaint to be unlawful, also violated the Act. In addition, the Board found that the employer violated the Act by discharging three employees for engaging in protected concerted activity related to their Facebook postings. The Board also granted tax compensation and Social Security reporting remedies, and ordered a company-wide notice posting for the handbook rule violation.

4. *Relco Locomotives, Inc.*, 359 N.L.R.B. No. 133 (2013)

The Board (Chairman Pearce and Members Griffin and Block) affirmed the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) of the Act by coercively questioning two employees about their Union activities, instructing employees not to distribute Union authorization cards on company time, soliciting employee grievances with the implied promise of remedying those complaints, and maintaining a distribution and solicitation policy requiring employees to seek authorization from management before engaging in any distribution or solicitation during non-work time and in non-work areas. The Board also affirmed the ALJ's findings that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging two employees because they engaged in Union activities. Because this was the third case in two years in which the Board found that the Respondent had committed several violations of the Act, the Board amended the ALJ's remedy and issued a broad cease-and-desist order that required the Respondent to cease and desist from violating the Act "in any other manner." In addition, the Board found that the Respondent's violations of the Act were "sufficiently serious and pervasive" to require either a management official of the Respondent, or a Board agent in the presence of a management official, to read aloud to its employees the attached notice to the Board's Order.

5. *Sodexho America LLC*, 359 N.L.R.B. No. 135 (2013)

The Board (Chairman Pearce and Members Griffin and Block) affirmed the Administrative Law Judge's decision on remand, which found that Respondent Keck Hospital of USC violated Section 8(a)(1) of the Act by disciplining four employees who violated an unlawfully broad work rule when they entered the hospital to engage in activities implicating the concerns underlying Section 7 of the Act. The Board further rejected the hospital's request for a stay pursuant to a stay ordered by the Court of the Appeals on review of the underlying case (358 NLRB No. 79, finding that the Respondents maintained an unlawfully broad work rule and remanding a discipline issue to the ALJ), finding that the Board retained jurisdiction over the allegations remanded to the ALJ.

6. *Quicken Loans, Inc.*, 359 N.L.R.B. No. 141 (2013)

The Board (Chairman Pearce and Members Griffin and Block) found that the employer violated Section 8(a)(1) of the Act by maintaining an unlawful non-disparagement handbook rule, as well as a proprietary/confidential information handbook rule to the extent that it unlawfully prohibited disclosure of certain personnel information.

7. *Kaiser Permanente, Kaiser Foundation Hospitals; Southern California Permanente Group: The Permanente* (31-CA-089178) (2013)

The Board (Chairman Pearce and Members Johnson and Schiffer) found that the Respondent had engaged in an unfair labor practice by threatening an employee with discipline for engaging in concerted, protected activity and coercing her in her exercise of her Section 7 rights. Specifically, a supervisor was found to have violated Section 8(a)(1) of the Act by threatening discipline and asking an employee to refrain from discussing overtime assignments and safety concerns at pre-work employee-supervisor huddles. The Respondent was ordered to cease and desist from committing these unfair labor practices and post a notice, both physically and electronically.

8. *International Foam Packaging, LLC,* 360 NLRB No. 9 (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's Motion for Default Judgment on the ground that the Respondent has withdrawn its answer to the complaint. Accordingly, the Board found that the Respondent violated Section 8(a)(1) of the Act by discharging two employees, requiring them to reapply for their former positions, and refusing to reinstate one of the employees, due to the employees' protected concerted activities.

9. *N.L.R.B. v. Allied Mech. Servs., Inc.,* 734 F.3d 486 (6th Cir. 2013)

The Sixth Circuit overturned a decision by the Board and held that an Employer's lawsuit against the Union was not filed to retaliate against the Union. This case arose out of a federal district court lawsuit that Allied Mechanical filed claiming, among other things, that Local 357 of the Plumbers & Pipefitters and its international union engaged in unlawful secondary action. The federal district court dismissed Allied's complaint, and the Sixth Circuit affirmed. The union then filed unfair labor practice charges, asserting that Allied's suit constituted unlawful retaliation under Section 8(a)(1) of the Act.

The Board applied a test for retaliatory litigation as explained by the Supreme Court in *BE&K Construction v. NLRB,* 536 U.S. 516 (2002). The Board finds a violation "only when the challenged legal action was (1) objectively baseless, and (2) subjectively baseless, (meaning that it was intended to retaliate against the union for its protected activity). The Board (Chairman Pearce and Member Beck, Member Hayes dissenting), applying this test, concluded that Allied's lawsuit was retaliatory.

Refusing to give the Board its ordinary deference since the First Amendment is an area outside the Board's expertise, the court held that under the circumstances, Allied could have reasonably believed it would win on the merits and there was no evidence "that Allied's motive was specifically to punish the unions through litigation costs. Rather, the record indicates that the retaliatory motive, if any, related to the 'ill will [that] is not uncommon in litigation.'"

10. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 349 (5th Cir. 2013)

The Board (Chairman Pearce and Members Becker and Hayes) found that by requiring only individual arbitration of employment-related claims and excluding access to any forum for collective claims, the employer interfered with employees' Section 7 right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Board found the employer's mandatory arbitration agreement unlawful because it contained an explicit restriction on protected activity, and because employees could reasonably construe it to prohibit filing charges with the Board. Furthermore, the Board found that this did not present a conflict between the NLRA and the Federal Arbitration Act's ("FAA") policy favoring the enforcement of arbitration agreements because the FAA was not intended to disturb substantive rights.

The Fifth Circuit, in a 2-1 decision, denied enforcement of the Board's decision, holding that under the FAA, arbitration agreements must be enforced as written unless they would be void under grounds sufficient to void any other contract, or if Congress has issued a "contrary congressional command." Agreeing with three other Circuit courts that had refused to defer to the Board's decision in *D.R. Horton* (*Richards v. Ernst & Young, LLP* (9th Cir.), *Sutherland v. Ernst & Young LLP* (2d Cir.), and *Owen v. Bristol Care, Inc*. (8th Cir.)), the court rejected the argument that class action waivers in employment arbitration agreements violate the NLRA. Further, the court found that there is no Congressional command, either in the NLRA's text or legislative history, against the application of the FAA to employment disputes, and that no Congressional command can be inferred from an inherent conflict between the FAA's and the NLRA's purpose, particularly because the statutes have worked in tandem in the past.

The Fifth Circuit subsequently granted the Board's unopposed motion to recall the mandate, and agreed to afford the Board 45 days to decide whether to petition for a rehearing of the court's ruling. On March 13, 2014, the Board filed a petition for rehearing en banc.

11. *Pittsburgh Athletic Association*, 360 NLRB No. 18 (2013)

The Board (Chairman Pearce and Members Johnson and Schiffer) granted the General Counsel's motion for a default judgment in the absence of an answer to the consolidated complaint, and granted his motion to correct the motion for a default judgment.

The Board found that the Respondent violated Sections 8(a)(5) and (1) of the Act by failing to continue in effect the terms and conditions of the collective bargaining agreement, failing to remit to the Union dues and fees that had been deducted from the employees' wages, and unreasonably delaying furnishing the Union with the information it had requested. The Board ordered the Respondent to remit to the Union all withheld dues and fees that were deducted from the employees' wages, with interest.

12. *Phillips 66*, 360 NLRB No. 26 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) of the Act when a supervisor: (1) unlawfully threatened a lead operator by telling him that the Respondent probably would make the lead position salaried, effectively curtailing his and other leads' pay if the Union came in; (2) unlawfully asked an employee: "[w]hat's your opinion of this union thing?" and (3) unlawfully denied the Union use of the Respondent's property to hold an organizing event. With respect to the unlawful denial of access, the ALJ and the Board found that the Respondent had routinely permitted the Union, which represented a small unit of crane operators, and at least four other "in-house" unions that represented existing units, to hold their

monthly membership meetings in a building on the Respondent's property. The Respondent objected only when the Union sought to use the property for an organizing event for some of the Respondent's unrepresented employees.

13. *K-Air Corporation*, 360 NLRB No. 30 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's findings that the Respondent's president violated Section 8(a)(1) of the Act by interrogating employees on whether they were union members, and violated Section 8(a)(3) by discharging an employee for his former union membership. In addition, the Board found that the Respondent's president unlawfully threatened employees who were union members in violation of Section 8(a)(1) by telling them that he "had no interest in having" or "did not want" union members as employees. The Board deferred to the compliance stage whether the unlawfully discharged employee was disqualified from reinstatement due to an alleged prior conviction and related misrepresentation on his employment application, and whether his remedial backpay period was tolled as of the date the Respondent completed the project on which the employee was hired.

14. *Edifice Restoration Contractors, Inc.*, 360 NLRB No. 29 (2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) of the Act by unlawfully directing the Charging Party not to discuss his pay rate, and agreed with the judge that it was unnecessary to reach two additional allegations of pay-related comments. The Board also adopted the judge's dismissal of the allegation that the Respondent unlawfully discharged the Charging Party, but did not rely on the judge's discussion of the test to be applied under *Wright Line*, reasoning that, even assuming the Acting General Counsel met his initial burden of proving discriminatory motivation, the Respondent successfully rebutted it by establishing that it would have discharged the Charging Party in the absence of his protected activity.

15. *William Beaumont Hospital* (07-CA-093885) (2014)

An Administrative Law Judge held that that two work rules contained the Hospital's Code of Conduct were overbroad and could "reasonably chill" the exercise of workers' rights under Section 7 of the Act. The judge held that rules that banned comments or gestures "that exceed the bounds of fair criticism," or that forbid behavior "counter to promoting teamwork" could reasonably be interpreted as prohibiting lawful discussions or complaints that are protected by Section 7 of the Act. Despite finding the rule to be unlawful, the judge declined to accept the General Counsel's challenge to the discipline of employees who were allegedly discharged as a result of the rules. The judge noted that both workers' behavior would have led to their termination regardless of the Code.

16. *Unite Here Local 355 v. Mulhall*, 133 S.Ct. 970 (2013)

A two-judge majority of the 11th Circuit ruled that while employers and Unions may set "ground rules" for an organizing campaign through a neutrality agreement, some agreements could violate §302 of the LMRA. The court held that while "innocuous ground rules

can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer[,] . . . . an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment."

The Eleventh Circuit majority remanded the case to determine whether the memorandum of understanding between the employer and the union had a corrupting intent. Local 355 petitioned the Supreme Court for certiorari, which the Court granted in June 2013. On December 13, 2013, the Supreme Court dismissed the writ of certiorari as "improvidently granted." On January 31, 2014, Local 355 voluntarily dismissed its suit to compel arbitration, and Mulhall voluntarily dismissed his suit.

IV. Miscellaneous

A. Notice-Posting

1. *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947 (D.C. Cir. 2013)

The Court of Appeals for the D.C. Circuit held that the Board exceeded its authority under the NLRA and violated plaintiffs' First Amendment rights when it promulgated its notice-posting rule. In this case, several employers that would have been required to post notices under the rule brought an action alleging that the NLRB, by promulgating the final rule entitled "Notification of Employee Rights Under the National Labor Relations Act," exceeded its authority under the NLRA in violation of Administrative Procedure Act (APA), and violated plaintiffs' First Amendment rights to refrain from speaking. The court found that Section 8(c) of the Act, like the freedom of speech guaranteed in the First Amendment, protects the right of employers to refrain from speaking, and that the rule violated the statutory bar against finding non-coercive employer speech to be an unfair labor practice or evidence of such. The court also held that the tolling provision of the NLRB rule exceeded the NLRB's authority under *Chevron.*

Subsequently, in *Nat'l Ass'n of Manufacturers v. N.L.R.B.*, 12-5068, 2013 WL 5610810 (D.C. Cir. Sept. 4, 2013), the D.C. Circuit denied the NLRB's petition for rehearing of the court's decision in this case.

2. *Chamber of Commerce of U.S. v. N.L.R.B.*, 721 F.3d 152, 163 (4th Cir. 2013)

The Court of Appeals for the Fourth Circuit held that the Board exceeded its authority in promulgating the notice-posting rule. In this case, the Chambers of Commerce sought review of the notice posting rule, and the United States District Court for the District of South Carolina determined that the Board had exceeded its authority in promulgating the rule. The court in this case relied on its view that the Board's core functions are reactive ones, in contrast to other agencies that have promulgated notice-posting requirements, such as the EEOC and DOL.

B. Remedies

1. *Lee's Industries, Inc.*, 359 N.L.R.B. No. 69 (2013)

The Board (Chairman Pearce and Members Griffin and Block) granted the Acting General Counsel's motion for a default judgment awarding backpay to an individual discriminatee in this supplemental decision and order. Although the Board recently adopted two new backpay remedies in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board in *Lee's Industries* did not order those remedies in this case because the underlying order had already been enforced by the Court of Appeals, and the Board lacked jurisdiction to modify it. The Board also noted, however, that nothing in *Latino Express* prevents the Acting General Counsel from requesting that the Board modify a previously issued order in a pending case to include an applicable remedy where the Board still has jurisdiction to do so.

2. *Santa Barbara News-Press*, 359 N.L.R.B. No. 127 (2013)

The Board (Chairman Pearce and Members Griffin and Block) denied Respondent's motion for reconsideration of the Board's decision in *Santa Barbara News-Press*, 358 NLRB No. 141 (2012) (*Santa Barbara II*). The motion sought reconsideration of the Board's order requiring Respondent to reimburse the Union for its bargaining expenses to remedy the Respondent's unlawful bad-faith bargaining conduct. The Respondent argued that this remedy was not appropriate because neither the Acting General Counsel nor the Union requested it from the judge at the hearing, and the judge did not provide for the remedy. The Respondent also argued in its motion that the Board lacked a quorum to issue its Santa Barbara II decision because the President's recess appointments are constitutionally invalid. The Board unanimously denied the motion.

Subsequent to the filing of the Respondent's motion, the United States Court of Appeals for the District of Columbia Circuit issued a decision vacating the Board's decision in *Santa Barbara News-Press*, 357 NLRB No. 51 (2011)(Santa Barbara I). *Santa Barbara News-Press* v. *NLRB*, 702 F.3d 51 (D.C. Cir. 2012). In denying the Respondent's motion, the Board found, *sua sponte*, that the bad-faith bargaining violations found in Santa Barbara II were not affected by the court's decision, and the several special remedies ordered in its Santa Barbara II decision remained appropriate. The Board modified its Order, however, to accord with *Latino Express*, 359 NLRB No. 44 (2012), which issued after its decision.

3. *Bud Antle, Inc.*, 359 N.L.R.B. No. 140 (2013)

The Board (Chairman Pearce and Members Griffin and Block) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish information requested by the Union regarding subcontracting. The Board affirmed the ALJ's order that the notices be mailed, because the posting alone would fail to adequately communicate the notice to employees. Further, the Board granted the Union's request that the notice be read to employees at the reading of the seniority list at each harvesting location due to the mobile and widespread nature of the workforce.

4. *N.L.R.B. v. Atl. Veal & Lamb, Inc.*, 12-3485-AG, 2013 WL 6439356 (2d Cir. Dec. 10, 2013)

The Board (Chairman Pearce and Members Griffin and Hayes) found that the employer unlawfully discharged a 14-year employee for engaging in protected union activity and ordered the employer to reinstate the employee with backpay. The employer disputed the Region's backpay calculations, and a compliance proceeding ensued. After a hearing and decision before an Administrative Law Judge, the Board issued two orders. In the first Supplemental Decision and Order, it directed the employer to pay the employee a specific amount of backpay. In the second, the Board concluded that the employee diligently searched for work and rejected the employer's argument that the employee was not entitled to backpay because he willfully concealed earnings from the Board.

The Second Circuit enforced the Board's first supplemental decision and order, which was not challenged. As to the second supplemental decision and order, the court agreed that the employee diligently searched for work during the period in question. The court applied Board law holding that, "'the backpay claimant should receive the benefit of any doubt rather than the [respondent], the wrongdoer'" and enforced that portion of the Board's order. The court disagreed with the Board, however, on whether the employee willfully concealed earnings and refused to award backpay during the disputed quarters.

5. *California Nurses Association, National Nurses Organizing Committee (Henry Mayo Newhall Memorial Hospital)*, 360 NLRB No. 21 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) granted the Respondent Union's motion for reconsideration of its July 2, 2013 Decision and Order, 359 NLRB No. 150, to remove the "like or related manner" language from its Order in light of the Board's finding that the respondent only violated Section 8(b)(3), and did not violate Section 8(b)(1)(A). The Board granted the motion because the Board's general injunctive language for Section 8(b)(1)(A) violations--ordering a party to cease and desist from "[i]n any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act"--is not appropriate where a party has only violated Section 8(b)(3).

6. *Interstate Bakeries Corp.* 360 NLRB No. 23 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) issued a supplemental decision and order in this compliance proceeding, directing the Respondent Employer and Union to, jointly and severally, make whole a discriminatee by paying him $46,360.45 plus interest, minus tax withholdings required by Federal and State laws. The majority reversed the Administrative Law Judge's requirement that the Respondents pay the discriminatee for the prepaid mortgage interest and hazard insurance incurred by him in the purchase of a new home.

C. Supervisory Status

1. *Wackenhut Corp.*, 359 N.L.R.B. No. 101 (2013)

The Board (Chairman Pearce and Members Griffin and Block), in this supplemental decision, adopted the ALJ's findings that the Respondent violated the Act by discharging two employees because of their concerted protected activity and by suspending each

employee before it discharged him. In the underlying decision, the Board had reversed the judge's findings that the two employees were statutory supervisors and remanded the case to the judge to determine whether, given that their status as statutory employees, their discharges violated the Act.

2. *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014)

The Board (Chairman Pearce and Members Hirozawa and Miscimarra) granted the Employer's request for review as to whether Acting Regional Director correctly found that the Shift and Unit Supervisors ("Supervisors") working at the Employer's Logan Hall facility did not possess the authority to "responsibly direct" the Employer's Operations and Unit Counselors ("Counselors"), and therefore should be excluded from voting as supervisors within the meaning of the Act. The Board majority (Chairman Pearce and Member Hirozawa) found that, contrary to the Acting Regional Director, the Supervisors did possess the authority to take corrective action regarding a Counselor's deficient performance. The majority, however, affirmed the Acting Regional Director's overall finding that the Supervisors did not "responsibly direct" the Counselors because the Employer did not satisfy its burden of demonstrating that the Supervisors exercised this authority utilizing independent judgment. Accordingly, the majority found the employees were not statutory supervisors.

D. Board Quorum and Authority

1. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 506 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861 (U.S. 2013)

The Court of Appeals for the D.C. Circuit held that the National Labor Relations Board did not have authority to act due to lack of a valid quorum, as three members of the five-member Board were never validly appointed under the Recess Appointments Clause of the Constitution.

Petitioner asserted that the Board lacked authority to act for want of a quorum because three members of the five-member Board took office when the Senate was not in recess. The Board contended that the President validly made the appointments under the "Recess Appointments Clause," which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The court held that a valid "Recess" appointment could only be made during intersession recesses, and found that the President made his appointments to the Board on January 3, 2012, after Congress had begun a new session, rendering the appointments invalid. Because the Board must have a quorum in order to lawfully take action, the court held that the Board lacked the authority to act when it issued its earlier decision, and vacated the Board's order in the underlying unfair labor practice charge.

The NLRB petitioned for a writ of certiorari, which the U.S. Supreme Court granted on June 24, 2013. Oral arguments were heard on January 13, 2014, and a decision is expected by the end of the Court's term in June, 2014. In addition to addressing the issues decided by the D.C. Circuit, (*i.e.* (1) whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to

recesses that occur between sessions of the Senate; and (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess), the Court asked the parties to brief and argue the question of whether the President's recess-appointment power may be exercised when the Senate is convening every three days in a pro-forma session.

2. *N.L.R.B. v. New Vista Nursing & Rehab*., 719 F.3d 203 (3d Cir. 2013)

The Court of Appeals for the Third Circuit held that the Board lacked jurisdiction to issue an order because the appointment of Board member Becker violated the Recess Appointments Clause of the Constitution. In this case, the employer had petitioned for review of the order of a three-member Board, which included member Becker, and the Board petitioned for enforcement of its order. The court held that the term "Recess of the Senate" refers only to intersession, not intra-session, breaks. Because it concluded that Member Becker's appointment to the Board was constitutionally invalid, and it vacated the Board's order. Judge Greenaway dissented.

3. *N.L.R.B. v. Enter. Leasing Co. Se.*, LLC, 722 F.3d 609 (4th Cir. 2013)

The Court of Appeals, agreeing with the *Noel Canning* and *New Vista Nursing* courts, held that President Obama's recess appointments to the Board were invalid.

4. *Gestamp S. Carolina, L.L.C. v. N.L.R.B.*, 11-2362, 2013 WL 5630054 (4th Cir. Oct. 16, 2013) (Petition for Certiorari Filed March 13, 2014)

In an unpublished decision, the Court of Appeals for the Fourth Circuit denied enforcement of a Board decision and held that the President's recess appointment of Board Member Becker was constitutionally invalid. In December 2011, the Board (Chairman Pearce and Members Becker and Hayes) found that the employer unlawfully threatened, disciplined and discharged two employees who attempted to organize a union. The employer filed a petition for review, raising substantial evidence challenges to the Board's order.

Following argument, the employer submitted a series of letters contending for the first time that the Board's order was invalid because Member Becker's appointment was infirm. It relied on the D.C. Circuit's opinion in *Noel Canning, Inc. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (Jun. 24, 2013), and the Fourth's Circuit's subsequent decision in *NLRB v. Enterprise Leasing S.E.*, 722 F.3d 609 (4th Cir. 2013). The Board argued that the employer's belated arguments were waived. The court, without explicitly addressing the waiver argument, concluded that Board Member Becker's appointment was invalid and the Board lacked a quorum when it issued its decision in this case, and remanded the case to the Board for further proceedings.

5. *Ambassador Servs., Inc. v. N.L.R.B.*, 12-15124, 2013 WL 6037134 (11th Cir. Nov. 15, 2013) (Petition for Certiorari Filed February 11, 2014)

An Administrative Law Judge previously found that the employer violated the Act by maintaining an unlawfully broad solicitation rule and by failing and refusing to recognize

and bargain with the Union. In a 2012 Decision and Order, the Board affirmed the ALJ's findings, and found additional violations of the Act.

On appeal to the Eleventh Circuit, the employer asserted that the Board lacked a quorum and the authority to issue its order. The court rejected the employer's argument based upon its prior decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), in which the court upheld President George W. Bush's intrasession appointment of a judge to the Eleventh Circuit based upon the Constitution's Recess Appointments Clause. The court also found that there was substantial evidence to support the Board's determinations as to employer's commission of various unfair labor practices. Based upon its findings, the Eleventh Circuit denied the employer's petition for review and granted the Board's cross-petition for enforcement of its order in full.

E. Procedure

1. *Random Acquisitions, LLC* (07-CA-052473) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the Acting General Counsel's motion for a default judgment despite the Respondent's failure to file an answer to the amended compliance specification. While the Board explained that Section 102.56(c) of the Board's Rules and Regulations grants the Board the authority to grant motions for default judgment when the Respondent fails to file an answer to a specification within the prescribed 21 day time frame, applying the *Kolin Plumbing Corp.*, 337 NLRB 234, 235 (2001) reasoning, the Board excused the Respondent from filing an amended answer when the amended answer would have been unchanged from its initial answer.

2. *The Ardit Company*, 360 NLRB No. 15 (2013)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) granted the Acting General Counsel's motion for summary judgment on the basis that the Respondent's answer admitted the crucial factual allegations of the complaint, and that the Respondent's argument that the Acting General Counsel lacked the authority to issue the complaint lacked merit. The Board ordered the Respondent to bargain with the Union concerning terms and conditions of employment and, if an understanding was reached, embody the understanding in a signed agreement.

3. *NY-FV, Inc. d/b/a Hassel Volvo of Glen Cove*, 360 NLRB No. 36 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the General Counsel's motion for summary judgment in this test-of-certification case on the ground that the Respondent did not raise any issues that were not, or could not have been, litigated in the underlying representation case in which the union was certified as the bargaining representative.

F. Proposed Regulations Regarding NLRB Election Procedures

On December 22, 2011, the National Labor Relations Board adopted a Final Rule on Election Procedures, which took effect on April 30, 2012. Two weeks after the Rules'

effective date, the U.S. District Court for the District of Columbia temporarily suspended their implementation in *Chamber of Commerce v. NLRB* (11-cv-2262). While not ruling on the merits of the substantive arguments that were raised, the court held that because Member Hayes had not participated in the final vote on the Rules, the Board lacked a quorum when it approved them.

The court reached this conclusion even though a three- member quorum of the Board had voted twice on the Rules: first, three members voted to proceed to draft, circulate and publish the Rules and second, after circulating the draft of the preamble and final Rules, three members voted to publish them. The second vote was expressly designed to be "the final action of the Board in this matter." In response to the court's ruling, the Board temporarily suspended the implementation of the Rules.

On February 6, 2014, The Board again proposed to amend its rules governing representation case procedures. These proposed procedures are identical to those that originally took effect in April 2012.

The proposed election rules streamline the processes governing representation elections by removing some of the delays inherent in the Board's procedures and minimizing the possibility of frivolous litigation. The Board explained when issuing the proposed rules that these modifications would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of Regional directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it promptly by conducting a secret ballot election.

The changes primarily affect the relatively few elections — about 10% — in which parties cannot agree on the issues surrounding the election, such as the appropriateness of the voting unit and the eligibility of voters. In these cases, because pre-election hearings are held and often delayed, the election occurs an average of 124 days after the petition is filed— far longer than the overall median election target of 38 days. By limiting opportunities for unnecessary delay and improving the efficiency of the election process in these cases, the election rules represent a modest but meaningful step in protecting employees' right to choose to be represented by a union.

The Board is now inviting comments on the proposed rules, which must be submitted by April 7, 2014. Reply comments must be submitted by April 14, 2014. The Board will hold a public hearing on the proposed procedures during the week of April 7, 2014.

Current procedures	**Proposed procedures**
Parties or the Board cannot electronically file or transmit important representation case documents, including election petitions.	Election petitions, election notices, and voter lists could be transmitted electronically. NLRB regional offices could deliver notices and documents electronically rather than by mail, and could directly notify employees by email, when addresses

	are available.
The parties receive little compliance assistance.	Along with a copy of the petition, parties would receive a description of NLRB representation case procedures, with rights and obligations, as well as a 'statement of position form', which will help parties to identify the issues they may want to raise at the pre-election hearing. The Regional Director may permit parties to complete the form at the hearing with the assistance of the hearing officer.
The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.	The Regional Director would set a pre-election hearing to begin seven days after a hearing notice is served (absent special circumstances) and a post-election hearing 14 days after the tally of ballots (or as soon thereafter as practicable.)
In contrast to federal court rules, the Board's current procedures have no mechanism for quickly identifying what issues are in dispute to avoid wasteful litigation and encourage agreements.	The parties would be required to state their positions no later than the start of the hearing, before any other evidence is accepted. The proposed amendments would ensure that hearings are limited to resolving genuine disputes.
Encourages pre-election litigation over voter-eligibility issues that need not be resolved in order to determine if an election is necessary and that may not affect the outcome of the election and thus ultimately may not need to be resolved.	The parties could choose not to raise such issues at the pre-election hearing but rather via the challenge procedure during the election. Litigation of eligibility issues raised by the parties involving less than 20 per cent of the bargaining unit would be deferred until after the election.
A list of voters is not provided until after an election has been directed, making it difficult to identify and resolve eligibility issues at the hearing and before the election.	The non-petitioning party would produce a preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.
The parties may request Board review of the Regional Director's pre-election rulings before the election, and they waive their right to seek review if they do not do so.	The parties would be permitted to seek review of all Regional Director rulings through a single, post-election request.
Elections routinely are delayed 25-30 days to allow parties to seek Board review of Regional Director rulings even though such requests are rarely filed, even more rarely granted, and almost never result in a stay of the election.	The pre-election request for review would be eliminated, along with the unnecessary delay.
The Board itself is required to decide most	The Board would have discretion to deny review of

post-election disputes.	post-election rulings -- the same discretion now exercised concerning pre-election rulings -- permitting career Regional Directors to make prompt and final decision in most cases.
The final voter list available to all parties contains only names and home addresses, which does not permit all parties to utilize modern technology to communicate with voters.	Phone numbers and email addresses (when available) would be included on the final voter list.
Deadlines are based on outdated technology, for example, allowing seven days after the direction of election for the employer to prepare and file a paper list of eligible voters.	The final voter list would be produced in electronic form when possible, and the deadline would be shortened to two work days.
Representation case procedures are described in three different parts of the regulations, leading to redundancy and potential confusion.	Representation case procedures are consolidated into a single part of the regulations.

Source: http://www.nlrb.gov/news-outreach/fact-sheets/amendments-nlrb-election-rules-and-regulations-fact-sheet