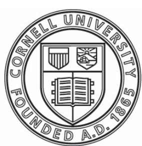
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Sixty-Ninth Annual Report Of The National Labor Relations Board For The Fiscal Year Ended September 30, 2004

Abstract

[Excerpt] The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only on those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—employees, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 2004, 31,787 cases were received by the Board.

Keywords
Key workplace documents, federal, ILR, NLRB, labor relations, law, Supreme Court, employee, employment, election, union, annual, report

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SIXTY-NINTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

2004

NATIONAL LABOR RELATIONS BOARD

Members of the Board

ROBERT J. BATTISTA, *Chairman*

WILMA B. LIEBMAN

PETER C. SCHAUMBER

DENNIS P. WALSH

RONALD MEISBURG[1]

Chief Counsels of Board Members

HAROLD J. DATZ

JOHN F. COLWELL

TERENCE F. FLYNN

GARY W. SHINNERS

PETER D. WINKLER

LESTER A. HELTZER, *Executive Secretary*
HENRY S. BREITENEICHER, *Acting Solicitor*
LAFE E. SOLOMON, *Director, Office of Representation Appeals*
ROBERT A. GIANNASI, *Chief Administrative Law Judge*
VACANT, *Director of Information*

Office of the General Counsel

ARTHUR F. ROSENFELD, *General Counsel*
JOHN E. HIGGINS JR., *Deputy General Counsel*

RICHARD A. SIEGEL
Associate General Counsel
Division of Operations Management

JOHN H. FERGUSON
Associate General Counsel
Division of Enforcement Litigation

BARRY J. KEARNEY
Associate General Counsel
Division of Advice

GLORIA J. JOSEPH
Director
Division of Administration

[1] Began service on January 12, 2004.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C. April 29, 2005

SIR: I submit the Sixty-Ninth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 2004.

Respectfully submitted,
ROBERT J. BATTISTA, *Chairman*

THE PRESIDENT OF THE UNITED STATES
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
Washington, D.C.

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I

Operations in Fiscal Year 2004

A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only on those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—employees, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 2004, 31,787 cases were received by the Board.

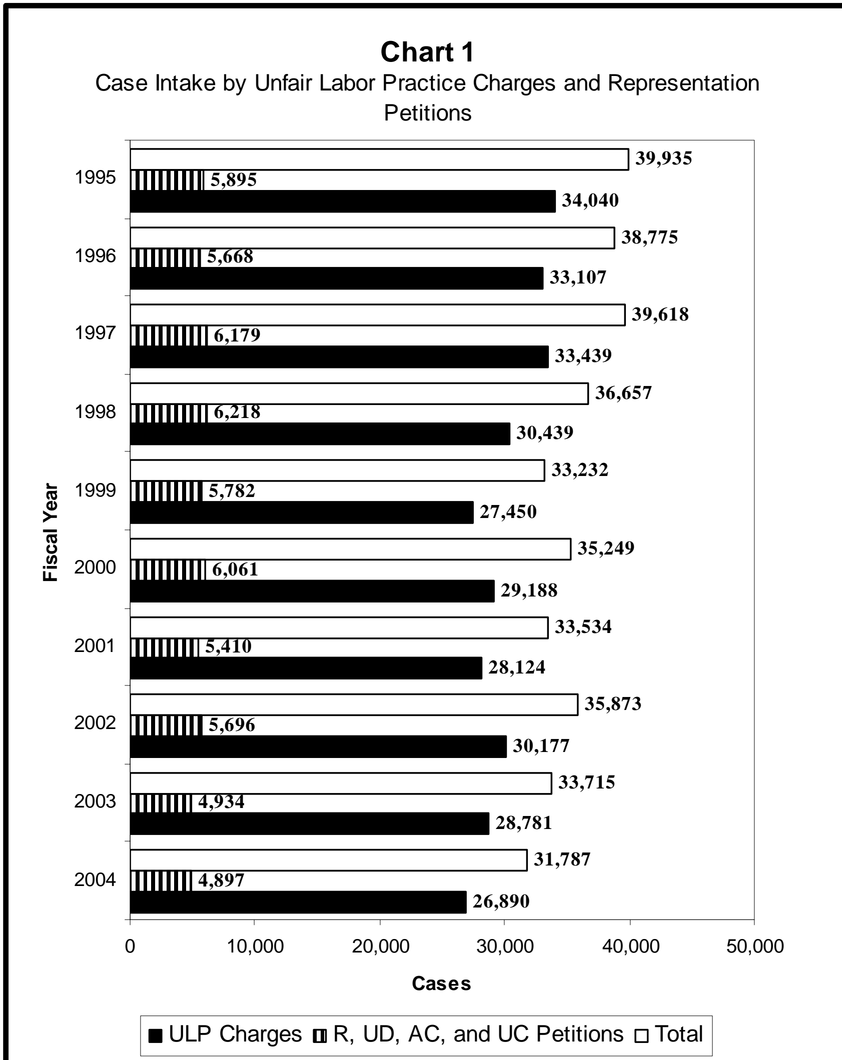
The public filed 26,890 charges alleging that business firms or labor organizations, or both, committed unfair labor practices, prohibited by the statute, which adversely affected employees. The NLRB during the year also received 4715 petitions to conduct secret-ballot elections in which workers in appropriate groups select or reject unions to represent them in collective bargaining with their employers. Also, the public filed 182 amendment to certification and unit clarification cases.

After the initial influx of charges and petitions, the flow narrows because the great majority of the newly filed cases are resolved in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

During fiscal year 2004, the five-member Board was composed of Chairman Robert J. Battista and Members Wilma B. Liebman, Peter C. Schaumber, Dennis P. Walsh, and Ronald Meisburg. Arthur F. Rosenfeld served as General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 2004 include:

- The NLRB conducted 2719 conclusive representation elections among some 160,424 employee voters, with workers choosing labor unions as their bargaining agents in 53.2 percent of the elections.
- Although the Agency closed 34,851 cases, 19,056 cases were pending in all stages of processing at the end of the fiscal year. The closings included 29,954 cases involving unfair labor practice charges and 4605 cases affecting employee representation and 292 related cases.
- Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 10,632.
- The amount of $207,129,282 in reimbursement to employees illegally discharged or otherwise discriminated against in violation of their organizational rights was obtained by the NLRB from employers and unions. This total was for lost earnings, fees, dues, and fines. The NLRB obtained 3496 offers of job reinstatements, with 2790 acceptances.
- Acting on the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, Regional Offices of the NLRB issued 1840 complaints, setting the cases for hearing.
- NLRB's corps of administrative law judges issued 345 decisions.



NLRB Administration

The National Labor Relations Board is an independent Federal agency created in 1935 by Congress to administer the basic law governing relations between labor unions and business enterprises engaged in interstate commerce. This statute, the National Labor Relations Act, came into being at a time when labor disputes could and did threaten the Nation's economy.

Declared constitutional by the Supreme Court in 1937, the Act was substantially amended in 1947, 1959, and 1974, each amendment increasing the scope of the NLRB's regulatory powers.

The purpose of the Nation's primary labor relations law is to serve the public interest by reducing interruptions in commerce caused by industrial strife. It seeks to do this by providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another. The overall job of the NLRB is to achieve this goal through administration, interpretation, and enforcement of the Act.

In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

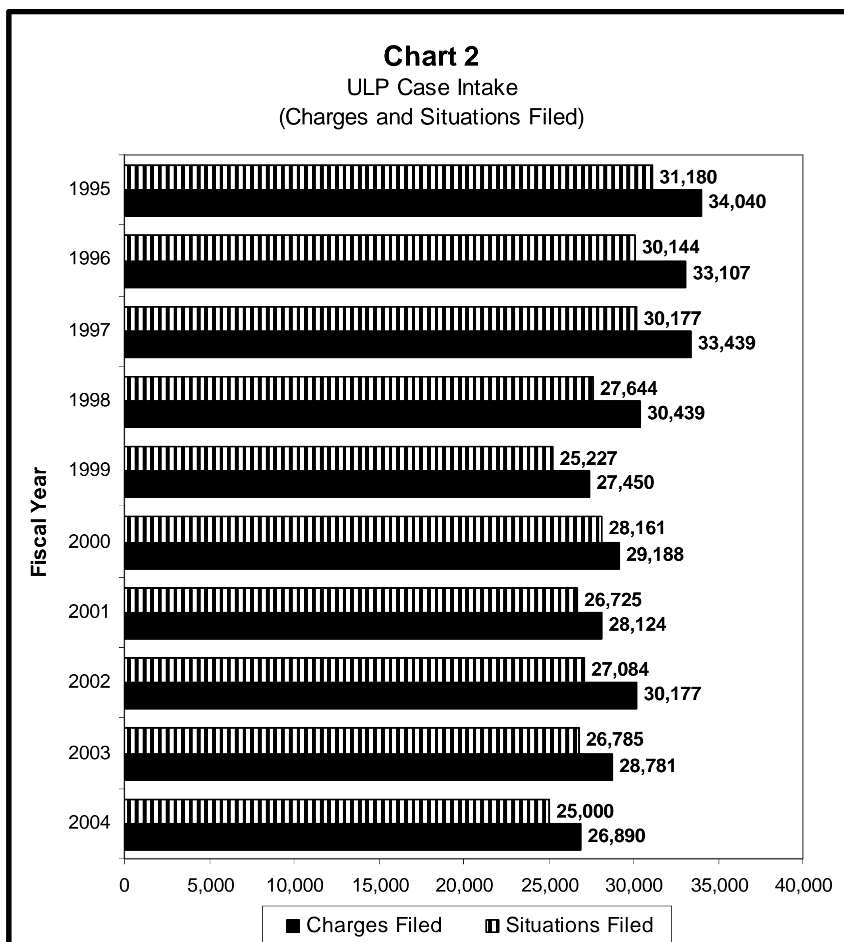
The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's Regional, Subregional, and Resident Offices, which numbered 52 during fiscal year 2004.

The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, including balloting to determine whether a union shall continue to have the right to make a union-shop contract with an employer.

In handling unfair labor practices and election petitions, the NLRB is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of secret-ballot employee elections.

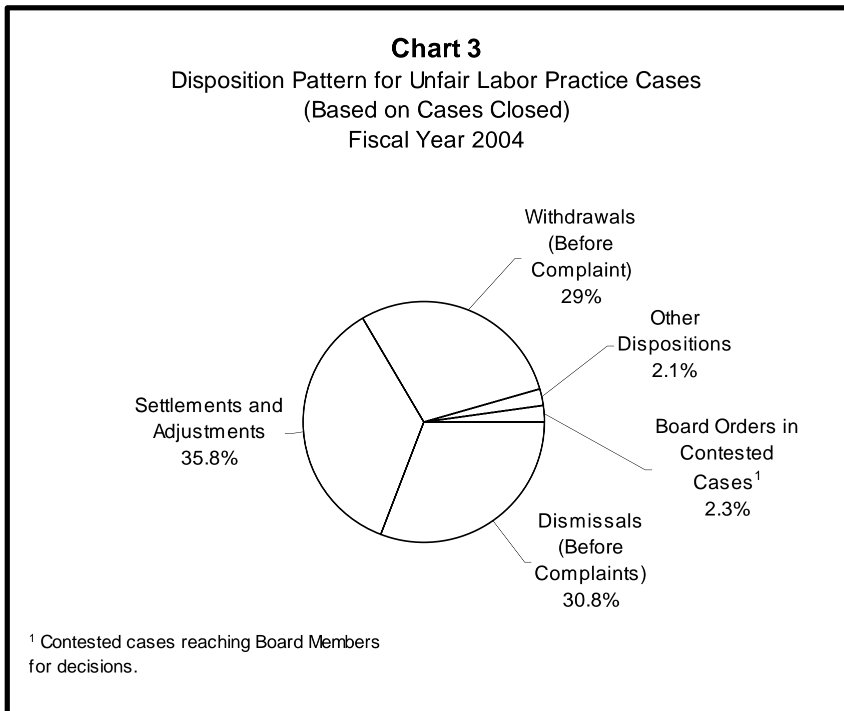
The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

NLRB authority is divided by law and by delegation. The five-member Board primarily acts as a quasi-judicial body in deciding cases on formal records. The General Counsel, who, like each Member of the Board, is appointed by the President, is responsible for the issuance and prosecution of formal complaints in cases leading to Board decision, and has general supervision of the NLRB's nationwide network of offices.



For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be appealed to the Board by the filing of exceptions. If no exceptions are taken, the administrative law judges' orders become orders of the Board.

All cases coming to the NLRB begin their processing in the Regional Offices. Regional Directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining purposes, to conduct elections, and to pass on objections to conduct of elections. There are provisions for appeal of representation and election questions to the Board.



B. Operational Highlights

1. Unfair Labor Practices

Charges that business firms, labor organizations, or both have committed unfair labor practices are filed with the National Labor Relations Board at its field offices nationwide by employees, unions, and employers. These cases provide a major segment of the NLRB workload.

Following their filing, charges are investigated by the Regional professional staff to determine whether there is reasonable cause to believe that the Act has been violated. If such cause is not found, the Regional Director dismisses the charge or it is withdrawn by the charging party. If the charge has merit, the Regional Director seeks voluntary settlement or adjustment by the parties to the case to remedy the apparent violation; however, if settlement efforts fail, the case goes to hearing before an NLRB administrative law judge and, lacking settlement at later stages, on to decision by the five-member Board.

In fiscal year 2004, 26,890 unfair labor practice charges were filed with the NLRB, a decrease of 7 percent from the 28,781 filed in fiscal year 2003. In situations in which related charges are counted as a single

unit, there was a decrease of 7 percent from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 19,946 cases, a decrease of 8 percent from the 21,765 of 2003. Charges against unions decreased about 1 percent to 6917 from 6989 in 2003.

There were 29 charges of violation of Section 8(e) of the Act, which bans hot-cargo agreements. (Tables 1A and 2.)

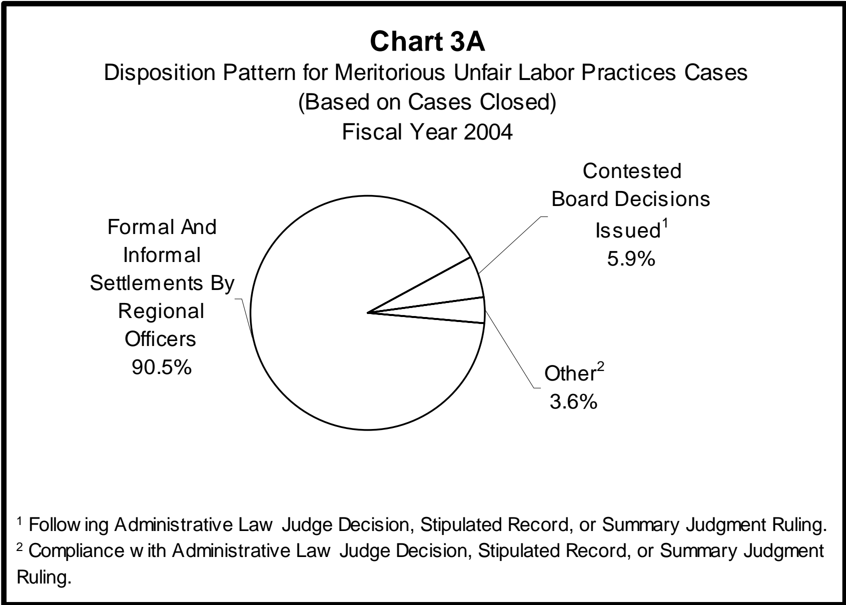
The majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 9294 such charges in 50 percent of the total charges that employers committed violations.

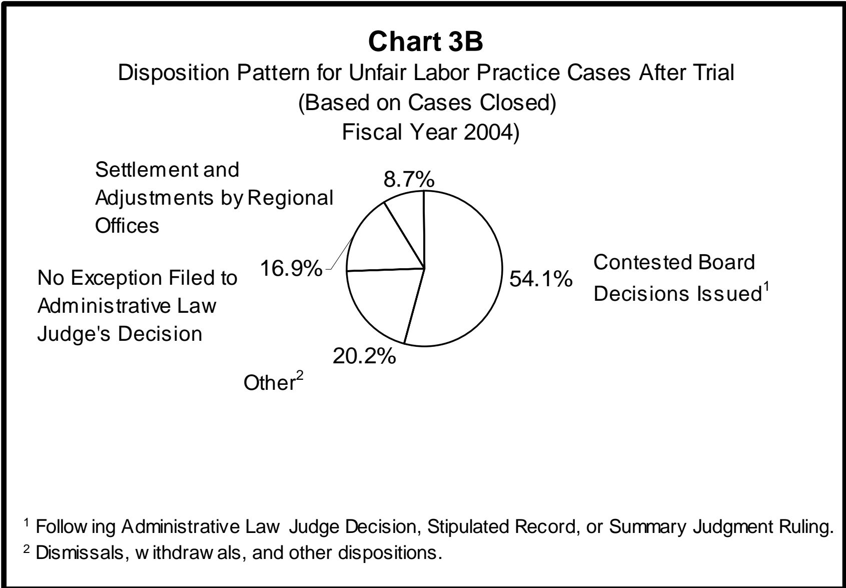
Refusal to bargain was the second largest category of allegations against employers, comprising 9130 charges, in about 50 percent of the total charges. (Table 2.)

Of charges against unions, the majority (5796) alleged illegal restraint and coercion of employees, 81 percent. There were 612 charges against unions for illegal secondary boycotts and jurisdictional disputes, a decrease of about 9 percent from the 687 of 2003.

There were 608 charges (about 9 percent) of illegal union discrimination against employees, an increase of about 6 percent from the 575 of 2003. There were 104 charges that unions picketed illegally for recognition or for organizational purposes, compared with 106 charges in 2003. (Table 2.)

In charges filed against employers, unions led with 74 percent of the total. Unions filed 14,795 charges and individuals filed 5103.





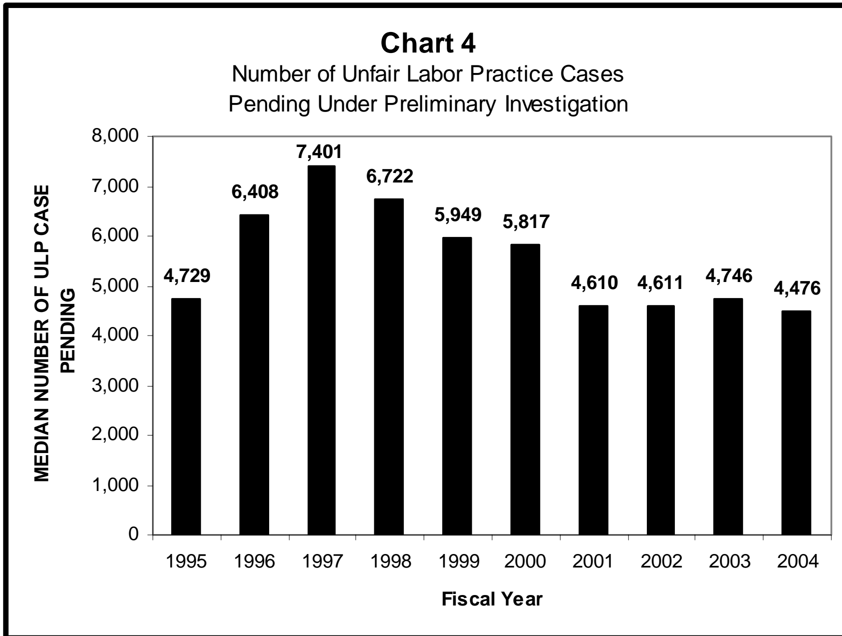
Concerning charges against unions, 5584 were filed by individuals, or 80 percent of the total of 6918. Employers filed 1281 and other unions filed the 116 remaining charges.

In fiscal year 2004, 29,954 unfair labor practice cases were closed. Some 96 percent were closed by NLRB Regional Offices, about the same

as the previous year. During the fiscal year, 35.8 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 29.0 percent were withdrawn before complaint, and 30.8 percent were administratively dismissed.

In evaluation of the Regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. In fiscal year 2004, 39.1 percent of the unfair labor practice cases were found to have merit.

When the Regional Offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal year 2004, precomplaint settlements and adjustments were achieved in 8494 cases, or 29.0 percent of the charges. In 2003, the percentage was 29.9. (Chart 5.)

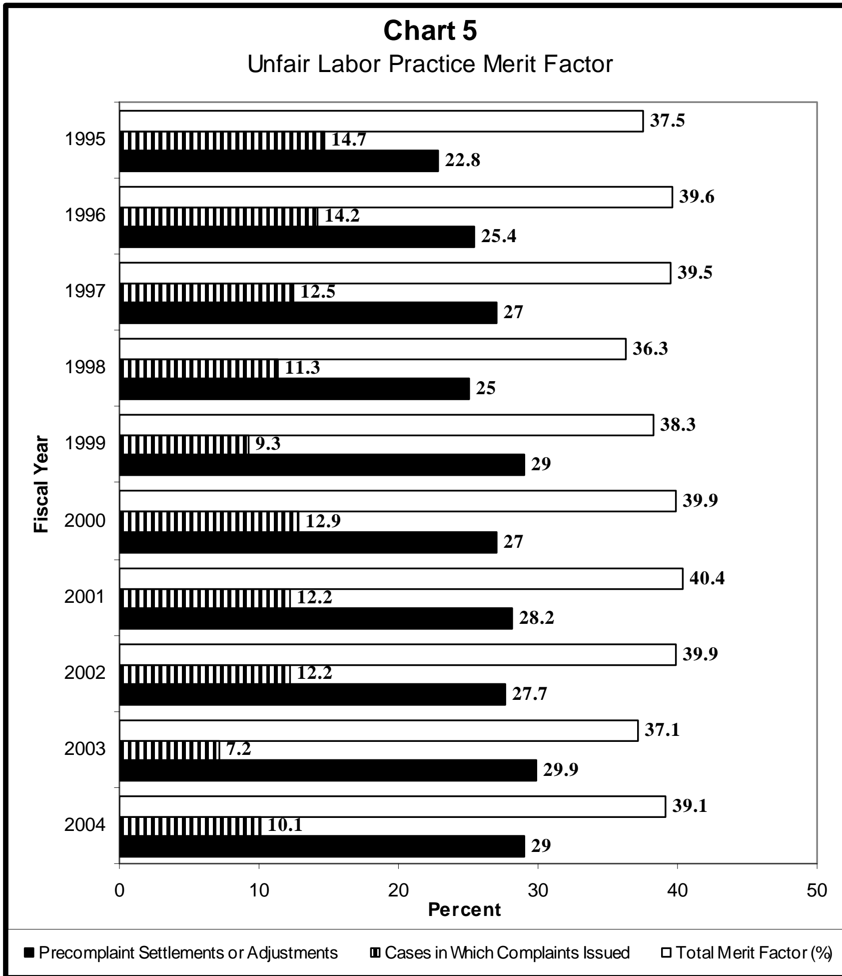


Cases of merit not settled by the Regional Offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 2004, 1840 complaints were issued, compared with 2067 in the preceding fiscal year. (Chart 6A.)

Of complaints issued, 88.5 percent were against employers and 9.7 percent against unions.

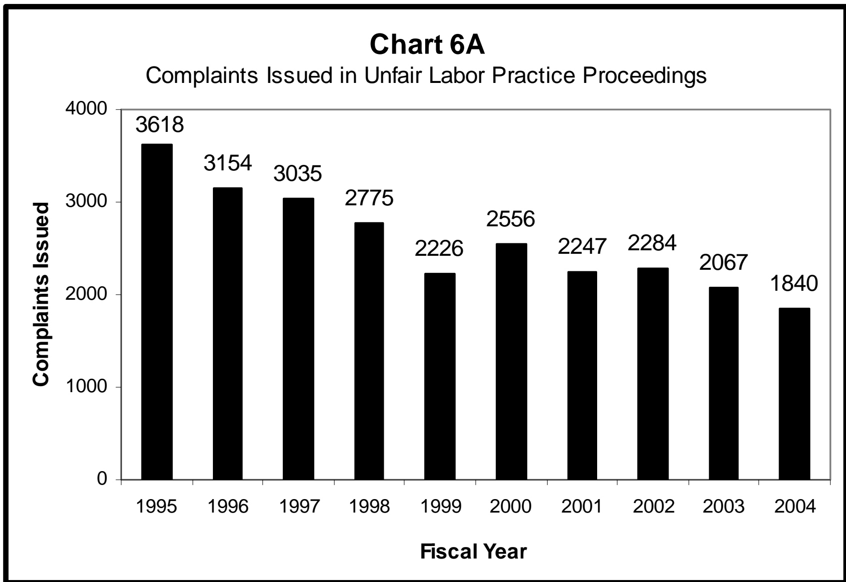
NLRB Regional Offices processed cases from filing of charges to issuance of complaints in a median of 87 days. The 87 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resorting to formal NLRB processes. (Chart 6B.)

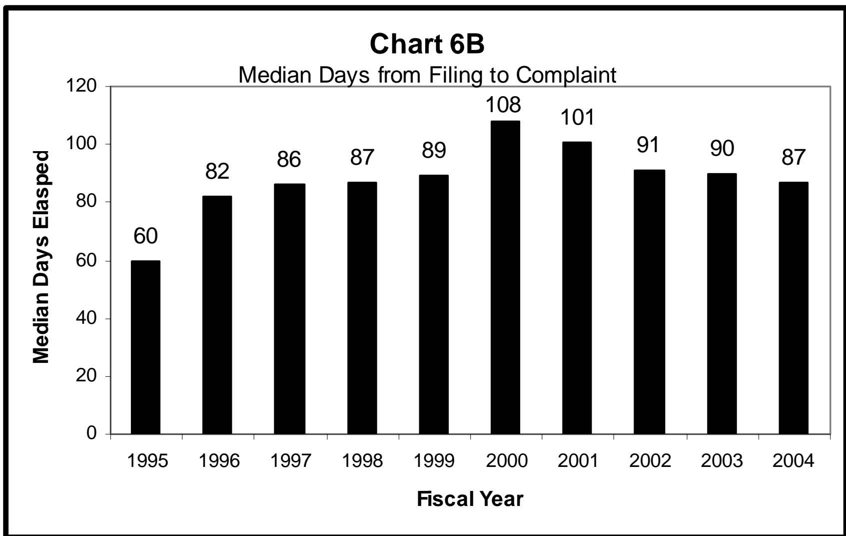
Additional settlements occur before, during, and after hearings before administrative law judges. The judges issued 345 decisions in 745 cases during 2004. They conducted 294 initial hearings, and 16 additional hearings in supplemental matters. (Chart 8 and Table 3A.)



By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the Board for final NLRB decision.

In fiscal year 2004, the Board issued 381 decisions in unfair labor practice cases contested as to the law or the facts—330 initial decisions, 14 backpay decisions, 8 determinations in jurisdictional work dispute cases, and 29 decisions on supplemental matters. Of the 330 initial decision cases, 309 involved charges filed against employers and 21 had union respondents.





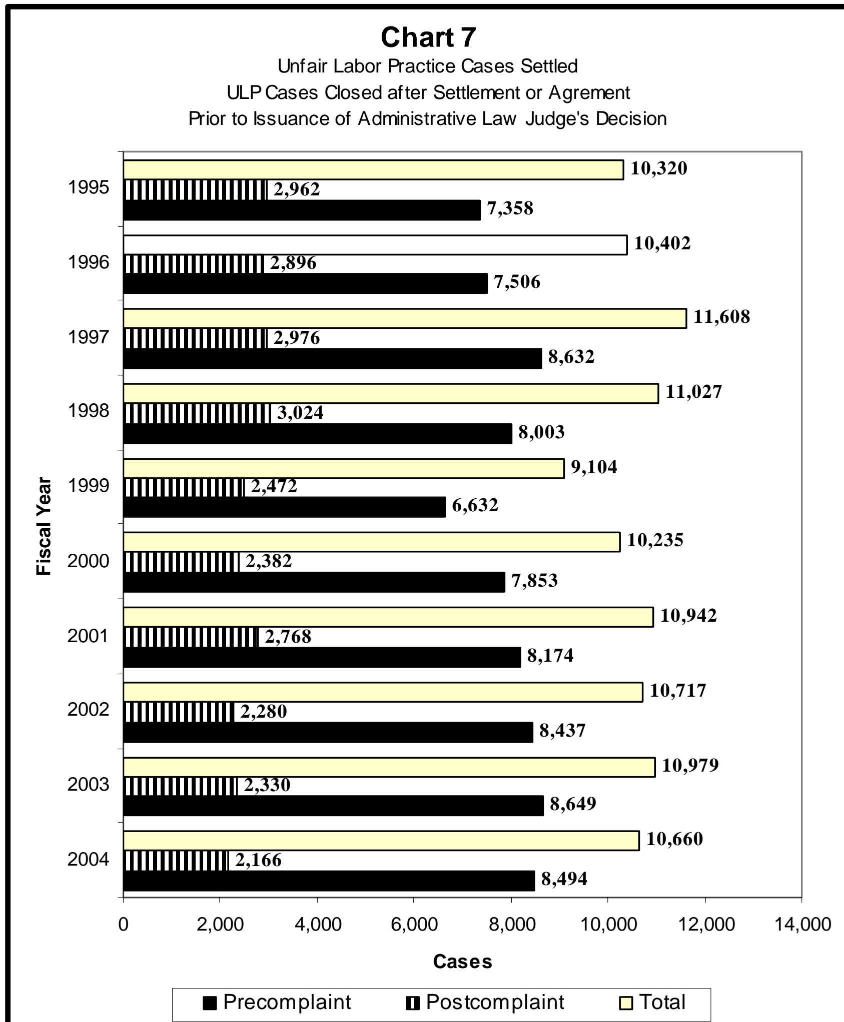
For the year, the NLRB awarded backpay of $205.7 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added about another $1,415,985. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. About 3496 employees were offered reinstatement, and 80 percent accepted.

At the end of fiscal 2004, there were 17,449 unfair labor practice cases being processed at all stages by the NLRB, compared to 20,513 cases pending at the beginning of the year.

2. Representation Cases

The NLRB received 4897 representation and related case petitions in fiscal 2004, compared to 4934 such petitions a year earlier.

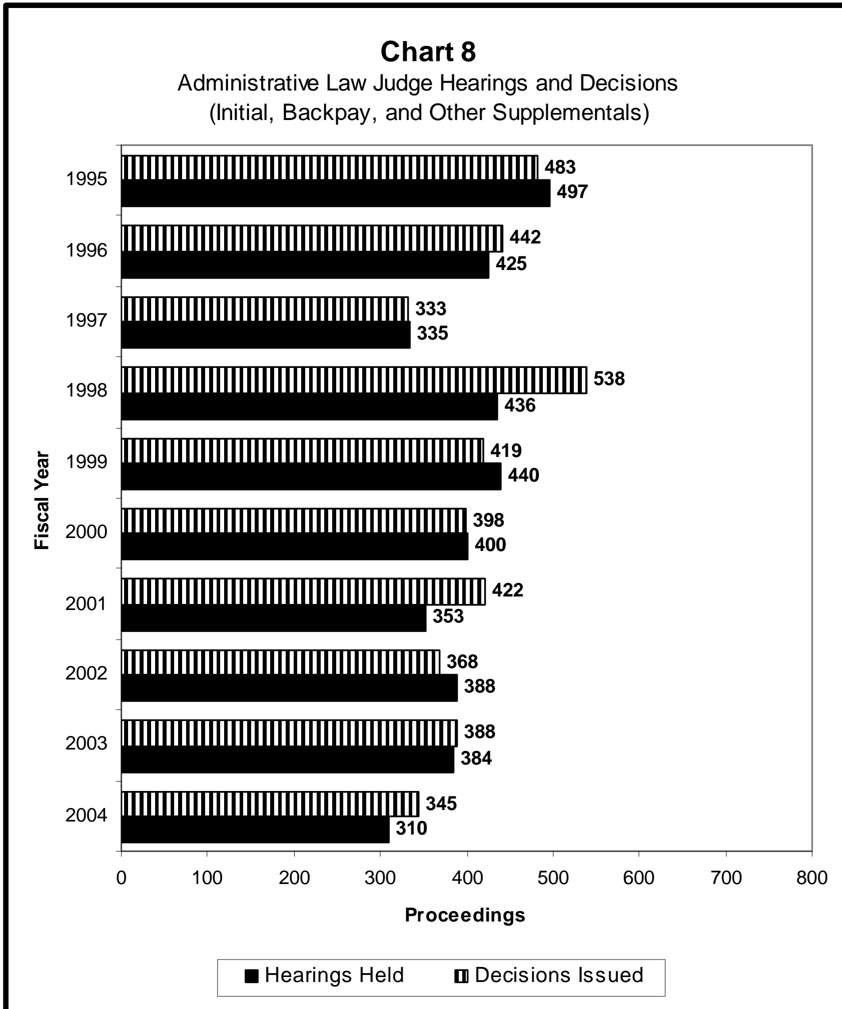
The 2004 total consisted of 3749 petitions that the NLRB conducted secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 839 petitions to decertify existing bargaining agents; 127 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 165 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 17 amendment of certification petitions were filed.



During the year, 4897 representation and related cases were closed, compared to 5148 in fiscal 2003. Cases closed included 3752 collective-bargaining election petitions; 853 decertification election petitions; 125 requests for deauthorization polls; and 167 petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such agreements are encouraged by the Agency. In 9.3 percent of representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. There were 159 cases where the

Board directed an election after transfer of a case from the Regional Office. (Table 10.) There was one case that resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

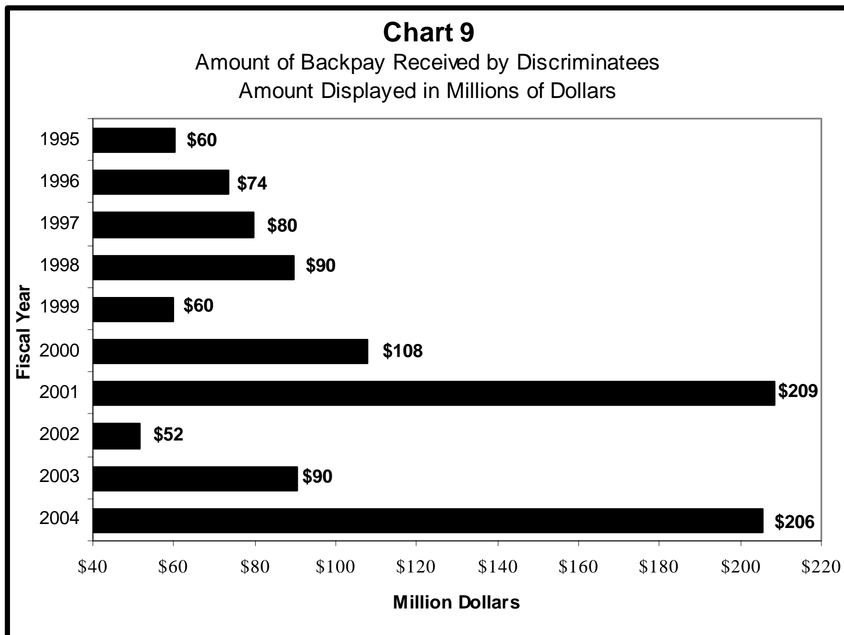


3. Elections

The NLRB conducted 2719 conclusive representation elections in cases closed in fiscal 2004, compared to the 2937 such elections a year earlier. Of 191,964 employees eligible to vote, 160,424 cast ballots, virtually 8 of every 10 eligible.

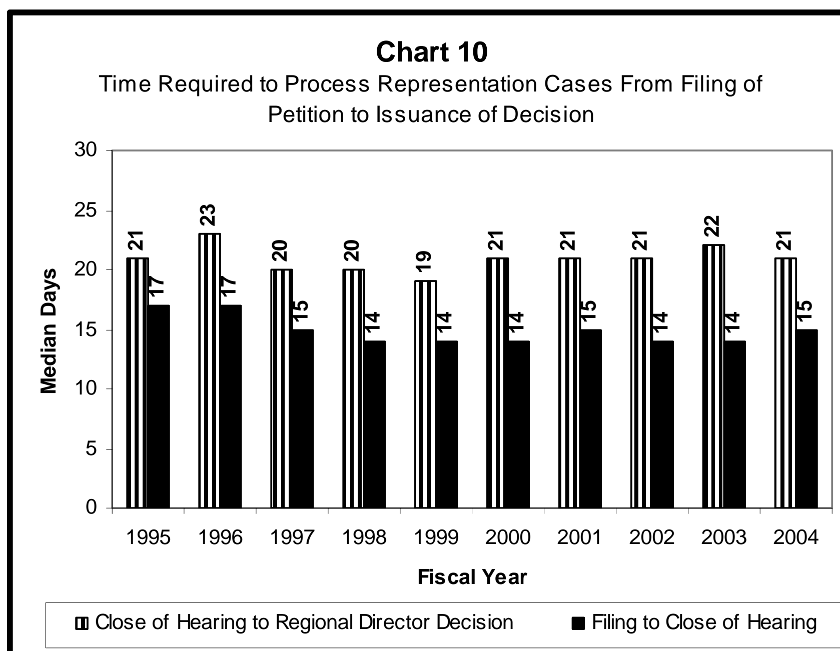
Unions won 1447 representation elections, or 53.2 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 94,565 workers. The employee vote over the course of the year was 84,138 for union representation and 76,286 against.

The representation elections were in two categories—the 2299 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 420 decertification elections determining whether incumbent unions would continue to represent employees.



There were 2565 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1327, or 51.7 percent. In these elections, 73,733 workers voted to have unions as their agents, while 74,103 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 81,664 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 154 multiunion elections, in which two or more labor organizations were on the ballot, as well as a choice for no representation. Employees voted to continue or to commence representation by one of the unions in 120 elections, or 77.9 percent.

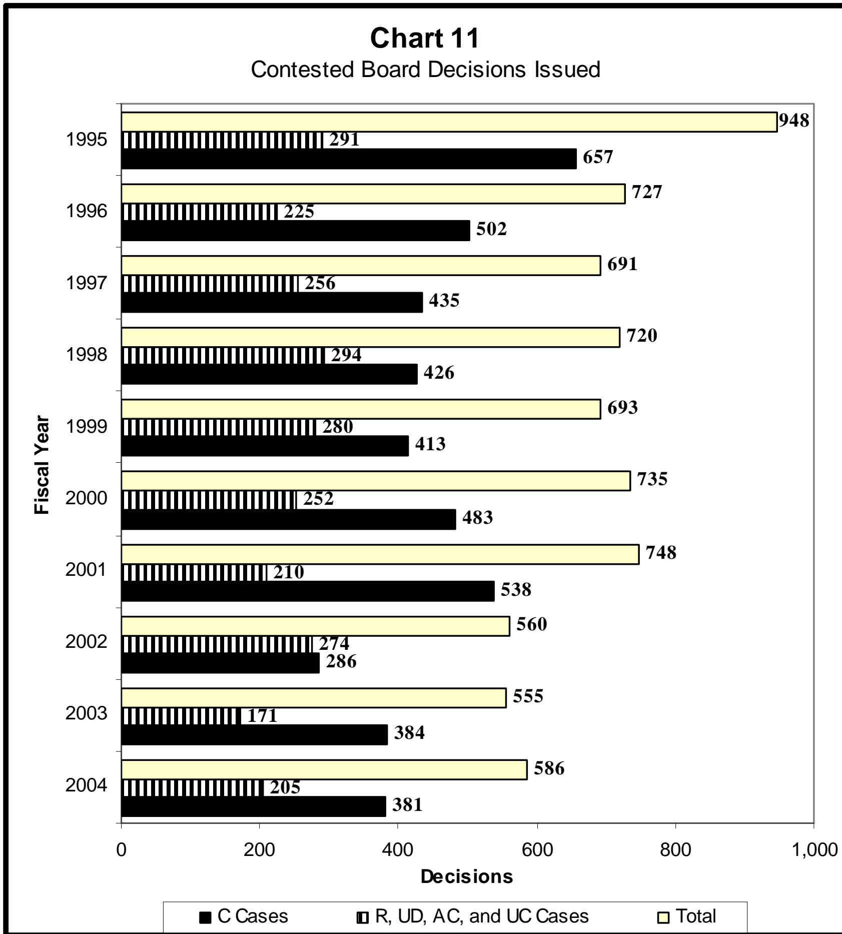


As in previous years, labor organization results brought continued representation by unions in 146 elections, or 34.8 percent, covering 14,849 employees. Unions lost representation rights for 13,636 employees in 274 elections, or 65.2 percent. Unions won in bargaining units averaging 102 employees, and lost in units averaging 50 employees. (Table 13.)

Besides the conclusive elections, there were 125 inconclusive representation elections during fiscal year 2004 which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

In deauthorization polls, labor organizations lost the right to make union-shop agreements in 30 referendums, or 44.8 percent, while they maintained the right in the other 37 polls which covered 3666 employees. (Table 12.)

For all types of elections in 2004, the average number of employees voting, per establishment, was 59, compared to 57 in 2003. About 71 percent of the collective bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)



4. Decisions Issued

a. The Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 826 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared to the 865 decisions rendered during fiscal year 2003.

A breakdown of Board decisions follows:

Total Board decisions..	**826**
Contested decisions	**586**

Unfair labor practice decisions 381
Initial (includes those based on

stipulated record)......................330
Supplemental 29
Backpay..14
Determinations in jurisdictional
disputes...............................8
Representation decisions 197
After transfer by Regional Directors
for initial decision 3
After review of Regional Director
decisions 52
On objections and/or challenges ...142
Other decisions 8
Clarification of bargaining unit.........5
Amendment to certification 2
Union-deauthorization 1
Noncontested decisions.. **240**
Unfair labor practice 140
Representation 96
Other 4

The majority (71 percent) of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

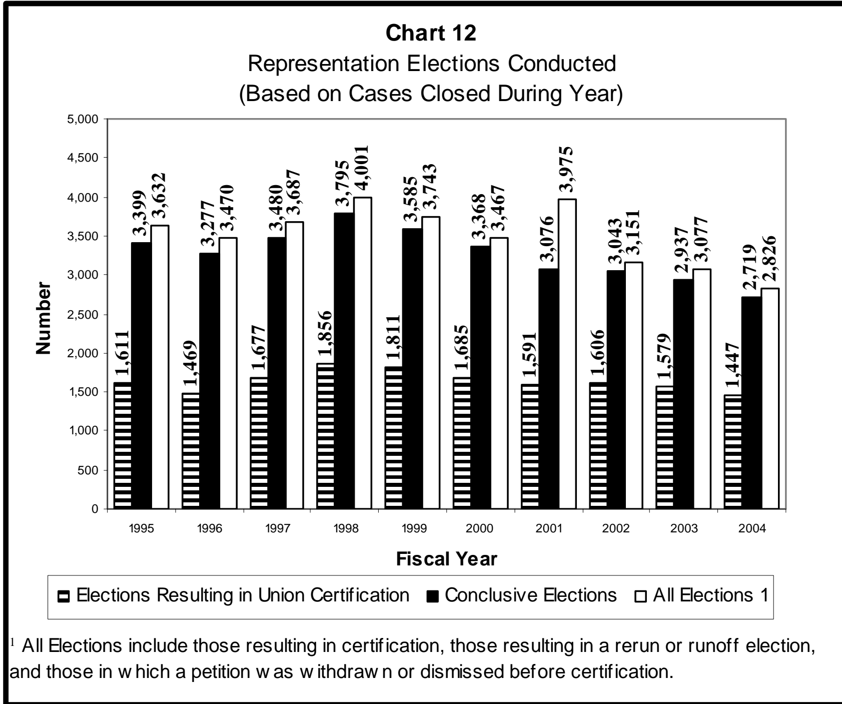
In fiscal 2004, about 6.0 percent of all meritorious charges and 54.1 percent of all cases in which a hearing was conducted reached the Board for decision. (Charts 3A and 3B.) Generally, unfair labor practice cases take about twice the time to process than representation cases.

b. Regional Directors

NLRB Regional Directors issued 675 decisions in fiscal 2004, compared to 802 in 2003. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

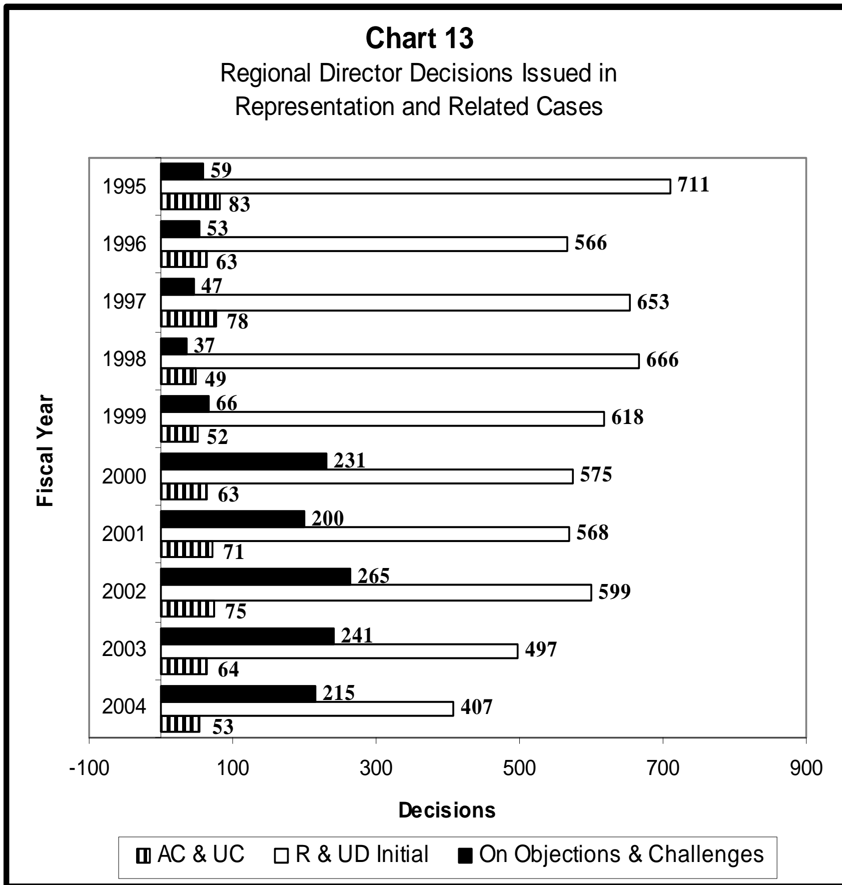
Administrative law judges issued 345 decisions and conducted 310 hearings. (Chart 8 and Table 3A.)



5. Court Litigation

a. Appellate Courts

In fiscal year 2004, 62 cases involving the NLRB were decided by the United States courts of appeals compared to 120 in fiscal year 2003. Of these, 79.0 percent were won by NLRB in whole or in part compared to 85.8 percent in fiscal year 2003; 4.8 percent were remanded entirely compared to 7.5 percent in fiscal year 2003; and 16.1 percent were entire losses compared to 6.7 percent in fiscal year 2003.



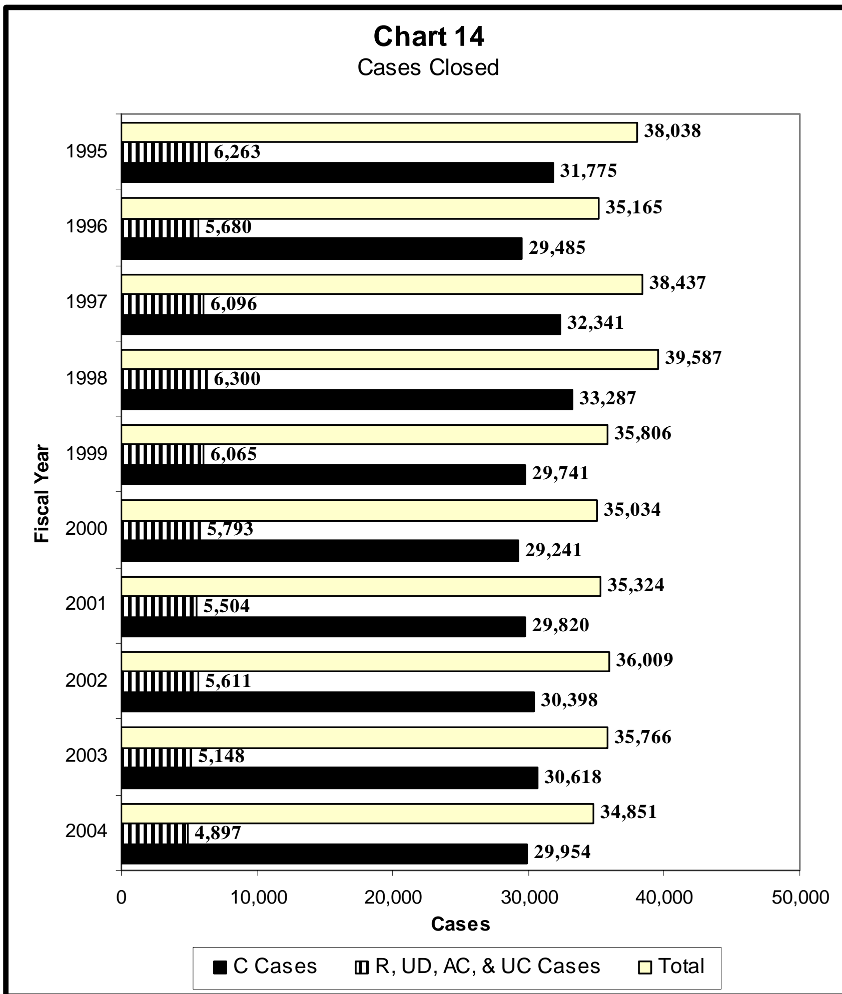
b. The Supreme Court

In fiscal 2004, the Supreme Court did not decide any Board cases. The Board did not participate as amicus in any cases in fiscal 2004.

c. Contempt Actions

In fiscal 2004, 445 cases were referred to the Contempt Litigation and Compliance Branch for consideration of contempt or other compliance actions. Twelve civil contempt or equivalent proceedings were instituted and 29 ancillary proceedings were instituted in Federal District Courts or Bankruptcy Courts. Seven civil contempt or equivalent adjudications were awarded in favor of the Board during the fiscal year. The Branch also obtained 2 protective restraining orders and 32 other substantive orders in ancillary proceedings. There were four cases in which the court directed compliance without adjudication; and there were four cases in

which the courts either denied the Board's petition or the proceedings were discontinued at the CLCB's request.



d. Miscellaneous Litigation

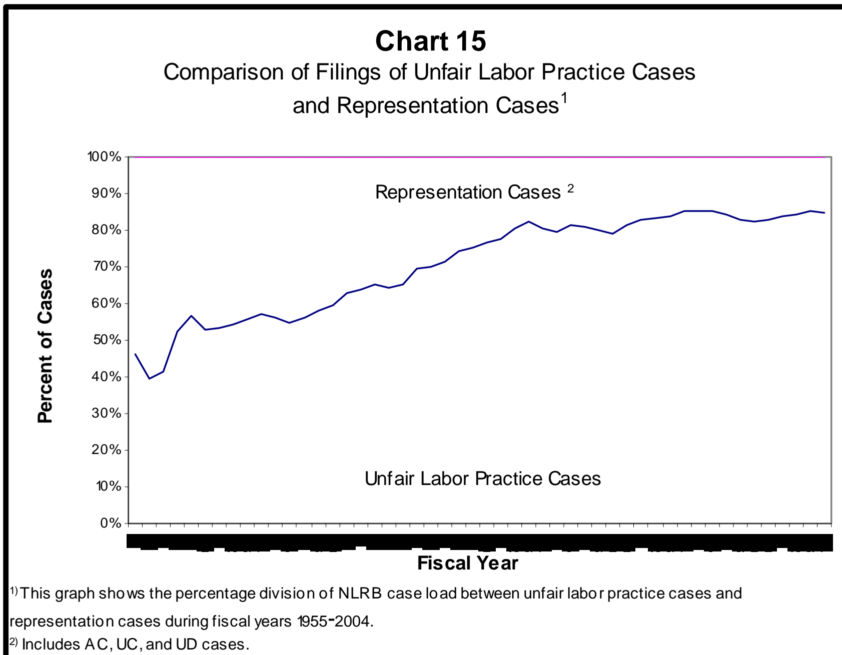
There were 12 additional cases involving miscellaneous litigation decided by appellate, district, and bankruptcy courts. The NLRB's position was upheld in 9 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 17 petitions filed with the U.S. district courts, compared to 20 in fiscal year 2003. (Table 20.) Injunctions were granted in 12, or 86 percent, of the 14 cases litigated to final order.

NLRB injunction activity in district courts in 2004:

Granted……	12
Denied……	2
Withdrawn……	1
Settled or placed on court's inactive lists……	5
Awaiting action at end of fiscal year……	1



C. Decisional Highlights

In the course of the Board's administration of the Act during the report period, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II on "NLRB Jurisdiction," Chapter III on "Board Procedure," Chapter IV on "Representation Proceedings," and Chapter V on "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the report period. The following summarizes briefly some of the decisions establishing or reexamining basic principles in significant areas.

1. Indian Owned and Operated Commercial Enterprises Including Enterprises Operated on Indian Reservations

In *San Manuel Indian Bingo and Casino*,[1] the Board majority reversed precedent and asserted jurisdiction over a casino owned by an Indian tribe and located on its reservation, establishing a new standard for determining the circumstances under which the Board will assert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe. The majority abandoned the premise established in *Fort Apache Timber Co.*,[2] and *Southern Indian,*[3] that location of the enterprise—whether on a reservation or not—is the determinative factor in assessing whether a tribal enterprise is excluded from the Act's jurisdiction.

Instead, the Board will look to whether or not Federal Indian policy requires that the Board decline to assert jurisdiction. It will first apply the test articulated in *Donovan v. Coeur d'Alene Tribal Farm*,[4] which was derived from the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*.[5] Finally, the Board will assess whether an assertion of jurisdiction furthers the purpose of the Act.

The majority first found that the respondent was an employer pursuant to Section 2(2) of the Act, since Section 2(2) does not expressly exclude Indian tribes from the Act's jurisdiction. Then, applying the *Tuscarora-Coeur d'Alene* analysis to determine whether, under Federal Indian policy, the assertion of Board jurisdiction is permitted, the majority found that none of the *Tuscarora-Coeur d'Alene* exceptions applied. Thus, the majority concluded that it was not precluded from asserting jurisdiction.

The majority then considered "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction," in order "to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture."[6] The majority concluded that policy considerations favored the assertion of the Board's jurisdiction, relying on the fact that the casino is a typical commercial enterprise, employing and catering to non-Indians; that the Act would not unduly interfere with the tribe's autonomy because the Act would not broadly and completely define the relationship between the respondent and its

[1] 341 NLRB No. 138 (Chairman Battista and Members Liebman and Walsh; Member Schaumber dissenting).
[2] 226 NLRB 503 (1976).
[3] 290 NLRB 436 (1988).
[4] 751 F.2d 1113 (9th Cir. 1985).
[5] 362 U.S. 99 (1960).
[6] 341 NLRB No. 138, slip op. at 8.

employees; and that the Act's effects would not extend to intramural matters.

Member Schaumber, dissenting, argued that Congress had not authorized the Board to assert jurisdiction over tribal enterprises located on reservations. He disputed the majority's interpretation of the Supreme Court's *Tuscarora* decision, alleging that the majority was relying on distinguishable dicta, which the Court has subsequently abandoned. Thus, he concluded that absent express Congressional authorization or a clear Supreme Court mandate, the Board may not interfere with the sovereignty of Indian tribes.

In a companion case, *Yukon Kuskokwim Health Corp.*,[7] the Board declined to assert jurisdiction over a tribally owned and operated health services program for Native Alaskans. Applying the new standard set forth in *San Manuel Indian Bingo and Casino*, the Board concluded that policy considerations weighed against the Board asserting its discretionary jurisdiction.

2. Bars to an Election: Alleged Employer Unfair Labor Practices

In *Saint Gobain Abrasives, Inc.*,[8] the Board majority concluded that a hearing must be held to determine if there is a causal connection between alleged unfair labor practices and employee disaffection with a union, overruling *Priority One Services*.[9] The Regional Director had dismissed a decertification petition, concluding, without a hearing, that the alleged unilateral change in health insurance *caused* employees to reject the union. The majority concluded that such a factual determination of causal nexus should not be made without an evidentiary hearing. The majority noted that under *Master Slack*,[10] the Board resolves "the issue of causation" under a multifactor test. Here, those factors would include, at a minimum, such issues as: how many employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the union prior to the change.

The majority noted that the alleged unfair labor practice was a single unilateral change on a single subject and that there were significant factual issues as to the impact of that change. In such circumstances, the

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[7] 341 NLRB No. 139 (Chairman Battista and Members Liebman and Walsh; Member Schaumber concurring).

[8] 342 NLRB No. 39 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).

[9] 331 NLRB 1527 (2000).

[10] 271 NLRB 78 (1984).

majority concluded that it was not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate, the majority held, would be to deny employees their Section 7 rights.

Members Liebman and Walsh, dissenting, agreed with the Regional Director that the employer's alleged unilateral change was of the type that would tend to cause employee disaffection with the union by undermining the union's perceived authority as the employees' bargaining representative, and to interfere with the employees' free choice in an election. They concluded that due to the inherent tendency of such a change to undercut the union's support, a hearing was unnecessary. The dissenters further noted that a hearing might be unnecessary here because an administrative law judge had dismissed the allegation that the alleged unilateral change was unlawful, and, if the Board upheld this finding, the decertification petition would be reinstated.

3. Employee Status of Graduate Student Assistants

In *Brown University*,[11] the Board majority overruled *New York University*,[12] and found that graduate student assistants are not "employees" within the meaning of Section 2(3) of the Act. In overruling *NYU*, the majority returned to the pre-*NYU* principle of *Leland Stanford University*,[13] that graduate student assistants are not statutory employees because they are "primarily students and have a primarily educational, not economic, relationship with their university."[14] The majority found that *Leland Stanford* was "wholly consistent with the overall purpose and aim of the Act," which "is designed to cover economic relationships,"[15] and interpreted Section 2(3) in light of this "underlying fundamental premise of the Act."[16] The majority concluded: "The Board's longstanding rule that it will not assert jurisdiction over relationships that are 'primarily educational' is consistent with these principles."[17] The majority also found that even if the graduate student assistants were statutory employees, there are policy reasons for declining to extend collective-bargaining rights to such persons, stating that: "Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration."[18]

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[11] 342 NLRB No. 42 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).
[12] 332 NLRB 1205 (2000).
[13] 214 NLRB 621 (1974).
[14] 342 NLRB No. 42, slip op. at 5.
[15] Id., slip op. at 5–6.
[16] Id., slip op. at 6.
[17] Id.
[18] Id., slip op. at 8.

The majority expressed no opinion regarding the Board's decision in *Boston Medical Center*,[19] relied on heavily in the *NYU* decision, in which a Board majority found that interns, residents, and house staff at teaching hospitals are employees within the meaning of Section 2(3) of the Act.

Members Liebman and Walsh, dissenting, stated that they would adhere to the Board's decision in *NYU*. Emphasizing the broad definition of "employee' under Section 2(3) of the Act, they stated that the Board is not free to create an exclusion from the Act's coverage absent compelling indications of Congressional intent. In addition, they characterized the majority's approach as "woefully out of touch with contemporary academic reality" and based on an image of the university that "was already outdated" when *Leland Stanford* was issued in the 1970s.[20] They asserted that today, the university "is also a workplace for many graduate students, and disputes over work-related issues are common. As a result, the policies of the Act . . . apply in the university context."[21]

4. Employee Status of Disabled Workers

In *Brevard Achievement Center, Inc.,*[22] the Board majority concluded that disabled workers who are in a primarily rehabilitative relationship with their putative employer are not statutory employees within the meaning of the Act. Consistent with its recent decision in *Brown University*,[23] the majority again set forth its interpretation of Section 2(3) of the Act, concluding that the Act was intended by Congress to cover primarily economic relationships between employer and employee. Finding the Board's longstanding rule that it will not assert jurisdiction over relationships that are "primarily rehabilitative" to be consistent with this statutory interpretation, the majority reaffirmed the "primarily rehabilitative" standard as the test for assessing the "employee" status of disabled workers in rehabilitative programs.

The majority then applied the primarily rehabilitative standard to the facts of this case:

> Although the disabled clients work the same hours, receive the same wages and benefits, and perform the same tasks under the same supervision as the nondisabled employees, they work at

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[19] 330 NLRB 152 (1999) (Chairman Truesdale and Members Fox and Liebman; Members Hurtgen and Brame dissenting).
[20] 342 NLRB No. 42, slip op. at 12.
[21] Id., slip op. at 15.
[22] 342 NLRB No. 101 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).
[23] 342 NLRB No. 42 (finding that graduate student assistants are not statutory employees because their relationship with their employer is "primarily educational").

> their own pace, and performance problems are dealt with through additional training rather than discipline. These policies support a determination that the relationship between BAC and its clients is primarily rehabilitative, not motivated principally by economic considerations.[24]

Noting the factual similarities between this case and the Board's prior decisions in *Goodwill Industries of Tidewater*[25] and *Goodwill Industries of Denver*,[26] the majority concluded that BAC's disabled workers are not statutory employees. The majority voiced its concern that the imposition of collective bargaining on a primarily rehabilitative relationship would run the risk of interfering with the rehabilitative process. The majority also noted that Congress has not deemed it appropriate to change the Board's longstanding doctrine to refrain from exercising jurisdiction over those relationships.

Members Liebman and Walsh, dissenting, observed that this case "presents the Board with the perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the last 15 years,"[27] and stated that they would abandon doctrines which were based on outdated notions about the place of the disabled in society. In their view, the majority's decision relegates disabled workers "to the economic sidelines, making them second-class citizens both in society and in their own workplaces."[28]

The dissent contended that disabled workers are statutory employees, as they come within the common-law meaning of the term "employee" and are not specifically exempted from the Act's coverage. Contrary to the majority's position that the employment relationship must be primarily economic, the dissent asserted that "economic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship."[29]

5. *Weingarten* Rights

In *IBM Corp.*,[30] the Board majority concluded that employees who work in a nonunion workplace are not entitled, under Section 7 of the Act, to have a coworker accompany them to an interview with their

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[24] 342 NLRB No. 101, slip op. at 6.
[25] 304 NLRB 767 (1991).
[26] 304 NLRB 764 (1991).
[27] 342 NLRB No. 101, slip op. at 8–9.
[28] Id., slip op. at 15.
[29] Id., slip op. at 11.
[30] 341 NLRB No. 148 (Chairman Battista and Member Meisburg; Member Schaumber concurring; Members Walsh and Liebman dissenting).

employer, even if the affected employee reasonably believes that the interview might result in discipline. The majority overruled *Epilepsy Foundation of Northeast Ohio*,[31] which extended to unrepresented employees a right to have a coworker present during investigatory interviews, and returned to pre-*Epilepsy* Board precedent holding that *Weingarten*[32] rights apply only to unionized employees.

The majority stated that policy considerations favored overruling *Epilepsy*, noting that in recent years there has been a rise in the need for investigatory interviews, both in response to new statutes governing the workplace, and in response to new security concerns raised by terrorism and workplace violence. The majority asserted that in a nonunion workplace, coworkers do not represent the interests of the entire work force; coworkers have no official status as does a union representative, and thus cannot redress the imbalance of power between employers and employees; coworkers do not have the same skills as a union representative and thus are not as effective in facilitating workplace interviews; and the presence of a coworker, instead of a union representative, may compromise the confidentiality of a workplace investigation. For these reasons, the majority concluded that a nonunion employer has the right to conduct prompt, efficient, thorough, and confidential workplace investigations without the presence of a coworker.

Member Schaumber, concurring, would find that the right to the presence of a witness in a predisciplinary investigatory interview is unique to a workplace in which employees are represented by a union and is distinctly derived from the statute, and that the language of the statute does not provide such a right to nonrepresented employees.

Members Liebman and Walsh, dissenting, find no persuasive basis for the majority's "abruptly overruling" *Epilepsy*, a decision upheld on appeal as "both clear and reasonable."[33] Members Liebman and Walsh concluded that a statutory foundation for coworker representation exists under Section 7 even in the absence of a union, and that due process considerations supported such representation. They asserted that the majority has neither demonstrated that *Epilepsy* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 2004, are as follows:

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[31] 331 NLRB 676 (2000).
[32] *NLRB v. J. Weingarten,* 420 U.S. 251 (1975).
[33] *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001).

Personnel compensation	$154,875,528
Personnel benefits	34,244,999
Benefits for former personnel	38,211
Travel and transportation of persons	1,770,712
Transportation of things	169,783
Rent, communications, and utilities	31,429,543
Printing and reproduction	209,366
Other services	15,689,854
Supplies and materials	2,140,644
Equipment	1,471,601
Insurance claims and indemnities	486,160
Total obligations	$242,526,401

II

NLRB Jurisdiction

The Board's jurisdiction under the Act, regarding both representation proceedings and unfair labor practices, extends to all enterprises whose operations "affect" interstate or foreign commerce.[1] However, Congress and the courts[2] have recognized the Board's discretion to limit the exercise of its broad statutory jurisdiction to enterprises whose effect on commerce is, in the Board's opinion, substantial-such discretion being subject only to the statutory limitation[3] that jurisdiction may not be declined when it would have been asserted under the Board's self-imposed jurisdictional standards prevailing on August 1, 1959.[4] Accordingly, before the Board takes cognizance of a case, it must first be established that it had legal or statutory jurisdiction, i.e., that the business operations involved "affect" commerce within the meaning of the Act. It must also appear that the business operations meet the Board's applicable jurisdictional standards.[5]

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[1] See Secs. 9(c) and 10(a) of the Act and also the definitions of "commerce" and "affecting commerce" set forth in Sec. 2(6) and (7), respectively. Under Sec. 2(2) the term "employer" does not include the United States or any wholly owned Government corporation, any Federal Reserve Bank, any State or political subdivision, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer. The exclusion of nonprofit hospitals from the definition of employer was deleted by the health care amendments to the Act (Pub. L. 93–360, 88 Stat. 395, effective Aug. 25, 1974). Nonprofit hospitals, as well as convalescent hospitals, health maintenance organizations, health clinics, nursing homes, extended care facilities, and other institutions "devoted to the care of sick, infirm, or aged person[s]," are now included in the definition of "health care institutions" under the new Sec. 2(14) of the Act. "Agricultural laborers" and others excluded from the term "employee" as defined by Sec. 2(3) of the Act are discussed, inter alia, at 29 NLRB Ann. Rep. 52–55 (1964), and 31 NLRB Ann. Rep. 36 (1966).

[2] See 25 NLRB Ann. Rep. 18 (1960).

[3] See Sec. 14(c)(1) of the Act.

[4] These self-imposed standards are primarily expressed in terms of the gross dollar volume of business in question: 23 NLRB Ann. Rep. 18 (1958). See also *Floridan Hotel* of *Tampa,* 124 NLRB 261 (1959), for hotel and motel standards.

[5] Although a mere showing that the Board's gross dollar volume standards are met is ordinarily insufficient to establish legal or statutory jurisdiction, no further proof of legal or statutory jurisdiction is necessary when it is shown that the Board's "outflow-inflow" standards are met. 25 NLRB Ann. Rep. 19–20 (1960). But see *Sioux Valley Empire Electric Assn.,* 122 NLRB 92 (1958), concerning the treatment of local public utilities.

A. Indian Owned and Operated Commercial Enterprises Including Enterprises Operated on Indian Reservations

In *San Manuel Indian Bingo and Casino*,[6] the Board reversed precedent and asserted jurisdiction over a casino owned by an Indian tribe and located on its reservation. The Board majority of Chairman Battista and Members Liebman and Walsh established a new standard for determining the circumstances under which the Board will assert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe. The Board abandoned the premise it established in *Fort Apache Timber Co.*,[7] and *Southern Indian,*[8] that location of the enterprise—whether on a reservation or not—is the determinative factor in assessing whether a tribal enterprise is excluded from the Act's jurisdiction.

Instead, the Board held that it will look to whether or not Federal Indian policy requires that the Board decline to assert jurisdiction. It will first apply the test articulated by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*,[9] which was derived from the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*.[10] Then, Board will assess whether an assertion of jurisdiction furthers the purpose of the Act.

The respondent operates a casino on its reservation in San Bernardino, California. Most of the casino's employees are not Indians and the casino caters to patrons from outside the reservation. The Hotel Employees & Restaurant Employees International (HERE) filed an unfair labor practice charge, alleging that the respondent rendered assistance and support to the Communications Workers International Union by allowing its agents access to the respondent's facility for organizing activities, while denying HERE organizers the same access. The respondent filed a motion to dismiss the complaint, contending that it was not subject to the Board's jurisdiction.

The Board dismissed the motion, finding that the respondent was an employer pursuant to Section 2(2). First, the Board noted that Section 2(2) does not expressly exclude Indian tribes from the Act's jurisdiction. Citing a number of decisions in which Federal courts of appeals have applied the *Tuscarora-Coeur d'Alene* analysis, the majority adopted that analysis to determine whether, under Federal Indian policy, the assertion

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[6] 341 NLRB No. 138 (Chairman Battista and Members Liebman and Walsh; Member Schaumber dissenting).
[7] 226 NLRB 503 (1976).
[8] 290 NLRB 436 (1988).
[9] 751 F.2d 1113 (1985).
[10] 362 U.S. 99 (1960).

of Board jurisdiction is permitted. Here, the Board found that none of the *Tuscarora-Coeur d'Alene* exceptions applied. Thus, the Board concluded that it was not precluded from asserting jurisdiction.

The majority established that the final step in the Board's new approach to its jurisdiction over tribal enterprises was to determine "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." The purpose of this last step, the majority asserted, was "to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." The Board concluded that policy considerations favored the assertion of the Board's jurisdiction. In so concluding, the Board relied upon the fact that the casino is a typical commercial enterprise, employing and catering to non-Indians; that the Act would not unduly interfere with the tribe's autonomy because "the Act would not broadly and completely define the relationship between the Respondent and its employees;" and that the Act's effects would not extend to intramural matters.

Dissenting, Member Schaumber argued that Congress had not authorized the Board to assert jurisdiction over tribal enterprises located on reservations. He disputed the majority's interpretation of the Supreme Court's *Tuscarora* decision, alleging that the majority was relying on distinguishable dicta, which the Court has subsequently abandoned. Thus, Member Schaumber concluded that absent express Congressional authorization or a clear Supreme Court mandate, the Board may not interfere with the sovereignty of Indian tribes.

In *Yukon Kuskokwim Health Corp.*,[11] the Board overruled its previous decision and declined to assert jurisdiction over a tribally owned and operated health services program for Native Alaskans. The Board reconsidered its previous decision in light of its decision in *San Manuel Indian Bingo and Casino*, which it issued as a companion to this case. In *San Manuel Indian Bingo and Casino*, the Board established a new standard for determining the circumstances under which it will assert jurisdiction over a commercial enterprise owned and operated by an Indian tribe. Applying the new standard, the Board concluded that policy considerations weighed against the Board asserting its discretionary jurisdiction.

The respondent is a regional nonprofit corporation that provides a comprehensive health services program for Native Alaskans in Southwestern Alaska. The management of the program is made up

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[11] 341 NLRB No. 139 (Chairman Battista and Members Liebman and Walsh; Member Schaumber concurring).

entirely of members of the 58 Alaskan Native tribes located in the area. Although only 1–2 members of the proposed bargaining unit are Native Alaskans, 95 percent of the program's patients are Native Alaskans. The program is funded pursuant to the Indian Self-Determination Act (ISDA) and provides its services free of charge to Native Alaskans. In 1999, following *Southern Indian Health Council*,[12] the Board asserted its jurisdiction and found that the respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the union, which had won a Board election. On December 19, 2000, the U.S. Court of Appeals for the District of Columbia denied enforcement of the Board's order and remanded the case to the Board for further consideration of the respondent's argument that it was entitled to exemption from the Act's jurisdiction because the ISDA authorizes it to act as an arm of the Federal government.

The Board decided on remand that the respondent was not exempt under the Section 2(2) exemption for the Federal government. The Board noted that the most recent amendments to the ISDA emphasize the government-to-government relationship between the tribes and the Federal government. The Board found that such an emphasis demonstrates that the tribes operating under the ISDA are separate from the Federal government.

For reasons set forth in *San Manuel Bingo and Casino*, the Board majority of Chairman Battista and Members Liebman and Walsh concluded that the Board was not precluded from asserting jurisdiction over the respondent. The Board majority reasserted that the Act does not expressly exclude Indian tribes, including Native Alaskan tribes. In addition, the Board majority found that the respondent did not meet any of the *Tuscarora-Coeur d'Alene* exceptions.

Finally, the Board majority found "policy considerations weigh against the Board asserting its discretionary jurisdiction." The Board majority relied upon the fact that the respondent was fulfilling the Federal government's trust responsibility to provide free health care to Indians; that the respondent's impact on interstate commerce is minimal; and the respondent does not compete with other hospitals within the purview of the Act. Thus, the Board concluded that "the character of the respondent's enterprise and its principal patient base militate against the Board's assertion of jurisdiction."

Member Schaumber concurred in the Board's dismissal of the complaint. Because he did not agree with the majority's rationale, he wrote separately. Applying the analysis set forth in his dissent in *San*

[12] 290 NLRB 436 (1988).

Manuel Indian Bingo and Casino, Member Schaumber concluded that the Board is precluded from asserting jurisdiction over the respondent because it lacks clear authority to do so from Congress or the Supreme Court.

B. Employer Providing Fueling Services to Air Carriers

In *Aircraft Service International*,[13] the Board found that the employer was engaged in interstate air common carriage so as to bring it within the jurisdiction of the National Mediation Board pursuant to Section 201 of Title II of the Railway Labor Act, and thus not within the jurisdiction of the NLRB. Accordingly, the Board dismissed a petition seeking an amendment of a certification of representative previously issued to A.S.I.G. Employees Association, to reflect a vote by the bargaining unit to affiliate with Operating Engineers Local 324.

The employer provides fueling services at Detroit Metropolitan Airport for Northwest Airlines and its affiliated carriers. Most of the unit employees are fuelers. The rest are mechanics and quality control employees. The parties stipulated that the work done by ASIG employees is the type of work traditionally performed by employees of air carriers.

On December 10, 2003, the Board requested that the National Mediation Board (NMB) study the record and determine the applicability of the Railway Labor Act to the employer. The NMB issued an opinion stating its view that the employer and its Detroit employees are subject to the Railway Labor Act. The NMB uses a two-pronged jurisdictional analysis: (1) whether the work is traditionally performed by employees of air and rail carriers; and (2) whether a common carrier exercises direct or indirect ownership or control. Both prongs of the test must be met, and the NMB concluded that they were in this case.

As noted above, the parties stipulated that the work done by ASIG employees is the type of work traditionally performed by employees of air carriers. With respect to the ownership or control issue, the record showed, inter alia, that: the carriers, with which the employer has a cost-plus contract, are the employer's only customers in Detroit; they own almost all of the equipment used by the employer, whom they reimburse for the rental costs of its Detroit facilities; the carriers' schedules dictate the staffing levels and hours for the employer's employees; and, that carrier personnel direct unit employees.

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[13] 342 NLRB No. 99 (Chairman Battista and Members Schaumber and Meisburg).

The Board (NLRB), having considered the facts of the case in light of the opinion issued by the NMB, agreed that the employer is within the NMB's jurisdiction and dismissed the petition.

III

Board Procedure

A. Failure to Produce Subpoenaed Documents

In *McAllister Towing & Transportation Co.,*[1] the Board: (1) held that the administrative law judge did not abuse her discretion in imposing limited sanctions against the respondent for failing to timely produce subpoenaed documents; and (2) announced that allegations of misconduct by a party or attorney should be submitted directly to the investigating officer pursuant to Section 102.177 of the Board's Rules and Regulations.

The case arose out of the respondent's alleged unfair labor practices during an organizing campaign among its tugboat workers. Prior to the hearing, the General Counsel timely served the respondent with subpoenas seeking documents related to the complaint allegations. The respondent petitioned to revoke the subpoenas, arguing, among other things, that the subpoenas were burdensome and sought irrelevant documents.

The day before the hearing, the judge advised the respondent's counsel that she would rule on the respondent's petition the following morning. The respondent had not yet supplied the General Counsel with any of the subpoenaed documents. The judge instructed counsel that the respondent should be ready to "substantially comply" the following morning. The judge specifically rejected counsel's argument that the respondent was not obliged to gather and produce subpoenaed documents until the judge ruled on its petition to revoke, and that the respondent then would be entitled to a "reasonable time" to comply.

On the morning of the hearing, the judge granted in part and denied in part the respondent's petition to revoke. She then expressly ordered the respondent to comply. Counsel said he would "consult" with his client and would advise the judge how promptly the respondent would comply. Counsel did not offer any documents, offer any assurances that the respondent had begun collecting any documents, or give any specific timetable about when the respondent would produce the subpoenaed documents.

On motion by the General Counsel, and after hearing argument from all the parties, the judge imposed limited sanctions against the

[1] 341 NLRB No. 48 (Members Liebman and Walsh; Member Schaumber dissenting in part).

respondent under *Bannon Mills.*[2] The judge granted the General Counsel's request to prove by secondary evidence those matters where there was noncompliance with the subpoenas, and she precluded the respondent from rebutting that evidence. The judge, however, denied the General Counsel's request to limit the respondent's right of cross-examination. The judge also refused to automatically draw adverse inferences on the relevant issues, explaining that she would draw such inferences only where otherwise appropriate.

On review, the Board majority of Members Liebman and Walsh found no merit in the respondent's exceptions to the judge's imposition of sanctions. The majority declared that the applicable standard of review was the "abuse of discretion" standard, and found that the judge did not abuse her discretion.

The majority explained, "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." The issue was whether the record established, with sufficient clarity, that this is what the respondent did. The majority found that the judge reasonably concluded, on the record before her, that *Bannon Mills* sanctions were indeed warranted.

The majority found it significant that: (1) the respondent did not comply with the subpoenas upon receiving them, even with respect to items that clearly were relevant and available; and (2) the respondent did not begin compliance upon the judge's disposition of its petitions to revoke, despite the judge's express instructions the prior day and despite the judge's express order. The majority found insufficient counsel-for-the-respondent's answer that he would "consult" with the respondent and his vague assurance that he would advise the parties how promptly the respondent would comply.

The majority also relied on the fact that the respondent's noncompliance was likely to prejudice the General Counsel's case and the overall proceeding. The majority observed that the General Counsel likely would have been forced to alter, or even delay, the presentation of her case over the ensuing hearing dates depending on the respondent's conception of a "reasonable time" and what documents the respondent happened to produce or not produce. The majority noted that the situation was exacerbated by the difficulty the parties already were experiencing in getting subpoenaed witnesses to appear when scheduled because they were aboard vessels at various times. The respondent's failure to timely produce subpoenaed documents could have meant that the General Counsel would have been forced to recall previously

[2] 146 NLRB 611 (1964).

examined witnesses, as well, which would have further disrupted and prolonged the hearing.

For these reasons, the majority found that the judge did not abuse her discretion in imposing limited sanctions against the respondent.

Member Schaumber dissented on the Bannon Mills sanctions because, in his view, the record did not establish that the respondent's failure to timely produce the subpoenaed documents constituted deliberate defiance or abuse of the Board's subpoena procedures sufficient to impugn the integrity of the hearing process. Specifically, Member Schaumber argued that the judge erred by imposing sanctions without making specific findings as to the scope of the respondent's prehearing compliance efforts and without attempting to ascertain how long it would take for respondent to comply fully with her rulings on the petition to revoke.

Last, the judge had recommended that the Board warn counsel based on his allegedly frivolous answer to the complaint, and other incidents arising during the hearing. The Board did not pass on the recommendation. The Board announced that allegations of misconduct must be submitted to the investigating officer under Section 102.177 of the Board's Rules and Regulations. The Board reasoned that Section 102.177(e) ensures that "[a]ll allegations of misconduct" will be handled according to established procedures with appropriate due process safeguards. Accordingly, the Board transmitted the judge's recommendation to the investigating officer.

B. Limitation of Section 10(b)

In *Broadway Volkswagen*,[3] the Board reversed the administrative law judge's finding that the allegations of unlawful unilateral wage increases (excluding one employee's wage increase), promotions, and direct dealing were time barred, and found that the respondent violated the Act as alleged. In addition, the Board reversed the judge's findings that the respondent lawfully withdrew recognition from the union and failed to provide relevant information. Finally, the Board found that an affirmative bargaining order was warranted as a remedy for the respondent's unlawful withdrawal of recognition.

The respondent sells and services new and used cars. The union was certified as the collective-bargaining representative of the respondent's 16 service and parts employees in December of 1997. The parties met for negotiations on several occasions between January of 1998 and November of 1999 but did not reach agreement on a contract. The

[3] 342 NLRB No. 128 (Members Liebman, Walsh, and Meisburg).

respondent unilaterally granted wage increases to six employees and promoted five of them during the period of April through January of 1999. The respondent never informed the union about any of the promotions or wage increases.

Although the respondent called five of the employees as witnesses, none of them testified about their specific job duties either before or after their wage increases and promotions. One of respondent's owners, Mike Murphy, testified that he, himself, had not been aware of the wage increases received by three of the employees until the respondent received the union's unfair labor practice charges, and that lower-level supervisors had made the decisions to grant the increases. Murphy also testified that the respondent did not have official job titles or job descriptions. After the November bargaining session, the parties suspended bargaining until after the holidays.

In February of 1999, the respondent received a petition signed by 11 of the 16 unit employees stating that they no longer wanted to be represented by the union. Thereafter, the respondent informed the union that it was withdrawing its recognition. A few months later, the union requested that the respondent furnish it with information, including a list of current employees and their classifications. The respondent did not furnish this information to the union.

The judge found that the respondent unlawfully unilaterally granted a wage increase, promoted and created a new job classification with respect to one of the employees, but dismissed the remaining complaint allegations. With regard to the unilateral change allegations involving four of the employees and the direct dealing allegation as to one of those employees, the judge found that the charges were time barred, because they were filed more than 6 months after the union knew or should have known about those changes. The judge further found that the respondent did not violate the Act by withdrawing recognition from the union and refusing to provide information requested by the union.

In reversing the judge, the Board reasoned that there was no evidence that the union had actual notice with regard to the changes affecting the four employees. The Board further observed that it would not impute constructive knowledge to the union because, contrary to the judge's finding, the respondent's implementation of the changes, and the circumstances in which they were implemented, did not provide the union with clear and unequivocal notice. With regard to the wage increases, the Board explained that there was no evidence of any open or obvious action, indication, or sign of the changes. As to the promotions, it noted that the respondent presented little or no record evidence describing the duties of the employees either before or after the

promotions. Thus, the Board reasoned that there was no basis for finding that the union was on notice that the employees' duties had changed. The Board also found that the record did not support the judge's finding that the union failed to exercise due diligence with respect to investigating any other possible wage increase or change in working conditions, noting that the union maintained contact with employees and actively represented them in bargaining.

In addition, the Board found that the respondent unlawfully withdrew recognition from the union. Relying on *Penn Tank Lines, Inc.*,[4] it explained that the respondent's unfair labor practices resulted in a sufficient number of tainted signatures on the employee petition, so that the respondent could not properly rely on the petition to support a good-faith doubt of majority support for the union. Because the Board found that the respondent unlawfully withdrew recognition, it found that the respondent's refusal to provide the requested relevant information was also unlawful. Finally, for the reasons set forth in *Caterair International*,[5] the Board found that an affirmative bargaining order was warranted as a remedy for the respondent's unlawful withdrawal of recognition.

C. Referral to the Contractual Grievance-Arbitration Procedure

In *Wonder Bread*,[6] the Board panel deferred, pending arbitration, an allegation that an employer had failed and refused to bargain with a union before unilaterally requiring its Route Sales Representatives (RSRs) to submit to physical examinations, including possible drug testing, pursuant to regulations of the United States Department of Transportation (DOT).

The parties' contract contained a multistep grievance and arbitration process which provided for final and binding arbitration of "any difference [ ] between the Company and the Union as to the interpretation or application of any provision of this Agreement." The contract also contained a provision governing the employer's rights as to "the management of the plant, the methods of operation, and the direction of the workforce"

The Board panel stated that, under *United Technologies Corp.*,[7] deferral was appropriate because the parties had a bargaining relationship dating back several decades, the employer expressed a willingness to

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[4] 336 NLRB 1066, 1067 (2001).
[5] 322 NLRB 64 (1996).
[6] 343 NLRB No. 14 (Chairman Battista and Members Schaumber and Walsh).
[7] 268 NLRB 557, 558 (1984).

utilize the grievance-arbitration process to resolve the instant dispute, and the union, by filing a grievance, indicated that the subject of the grievance is amenable to the grievance-arbitration process. See *E. I. du Pont & Co*.[8] Moreover, there was no contention that the employer had been hostile to the exercise of its employees' protected statutory rights.

The Board panel rejected the General Counsel's contention that the matter was not appropriate for deferral because the issue of whether the employer's conduct violated its statutory obligation to bargain did not turn on a dispute over an interpretation of the agreement's terms, and therefore the dispute was not cognizable under the contract's grievance-arbitration provision. Observing that the question of the reasonable interpretation of the collective-bargaining agreement was one for the arbitrator, the Board panel found that the contract's grievance-arbitration provision was extremely broad, in that a grievance could be filed with respect "to any difference [ ] between the Company and the Union as to the interpretation" of the agreement and any grievance could be brought to arbitration. Where the interpretation of the agreement has been implicated, and the subject matter of grievances that could be filed and pursued to arbitration has not been restricted, the Board will defer. See, e.g., *Roy Robinson Chevrolet*.[9] Thus, the Board panel observed that *Collyer*[10] prearbitral deferral of unfair labor practice charges challenging unilateral changes is appropriate even where no specific contractual provision's meaning is in dispute.[11] Here, however, the employer's reliance on the management-rights clause created a dispute as to the interpretation of the agreement. Under such circumstances, deferral was appropriate regardless of whether the Board would interpret the management-rights clause as justifying the unilateral change at issue. See generally *Roy Robinson,* supra. Because the Board retained jurisdiction pending issuance of the arbitrator's decision, which had not yet been rendered, the Board panel concluded that the Board's processes could always be reinvoked if the arbitral award was not susceptible to an

[8] 293 NLRB 896, 897 (1989).

[9] 228 NLRB 828, 830 (1977) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–583 (1960)).

[10] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[11] See, e.g., *Inland Container Corp.*, 298 NLRB 715 (1990) (unilateral imposition of drug-testing program); *E. I. du Pont & Co.*, 275 NLRB 693 (1985) (unilateral changes in certain work schedules); *Standard Oil Co. (Ohio)*, 254 NLRB 32, 34 (1981) (fact that examination "is not pinpointed in the agreements as a conceded management prerogative is not medical reason enough for disregarding the proof, if there be any, that the parties did intend to permit [employer] to give such tests when appropriate").

interpretation consistent with the Act or if it was inconsistent with the standards of *Spielberg Mfg. Co.*[12]

[12] 112 NLRB 1080 (1955). Contrary to the General Counsel's position, the Board has deferred to arbitrators' decisions finding that language in a general management-rights clause authorizes an employer's unilateral changes in terms and conditions of employment. See, e.g., *Hoover Co.*, 307 NLRB 524 (1992); *Dennison National Co.*, 296 NLRB 169 (1989).

IV
Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of its employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections. The Board may conduct such an election after a petition has been filed by or on behalf of a group of employees or by an employer confronted with a claim for recognition from an individual or a labor organization.

Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining and to formally certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents that have been previously certified or that are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

This chapter concerns some of the Board's decisions during the past fiscal year in which the general rules governing the determination of bargaining representative were adapted to novel situations or reexamined in the light of changed circumstances.

A. Bars to an Election

Alleged Employer Unfair Labor Practices

In *Saint Gobain Abrasives, Inc.*,[1] a Board majority concluded that a hearing must be held to determine if there is a causal connection between alleged unfair labor practices and employee disaffection with a union, overruling *Priority One Services*.[2] The union had filed unfair labor

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[1] 342 NLRB No. 39 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).

[2] 331 NLRB 1527 (2000).

practice charges against the employer, alleging that the employer refused to bargain in good faith by unilaterally implementing an interim health insurance program. The Regional Director subsequently issued a complaint in the case. The petitioner then filed the petition, seeking to decertify the union.

The Regional Director dismissed the petition, concluding that the alleged unilateral change *caused* employees to reject the union. The Regional Director's finding of causal nexus was made without a hearing. The Board majority concluded that such a factual determination of causal nexus should not be made without an evidentiary hearing. The majority noted that under *Master Slack*,[3] the Board resolves "the issue of causation" under a multifactor test. Here, those factors would include, at a minimum, such issues as: how many employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the union prior to the change.

The majority noted that the alleged unfair labor practice was a single unilateral change on a single subject and that there were significant factual issues as to the impact of that change. In such circumstances, the majority concluded that it was not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate, the majority held, would be to deny employees their Section 7 rights.

In dissent, Members Liebman and Walsh agreed with the Regional Director that the employer's alleged unilateral change was of the type that would tend to cause employee disaffection with the union by undermining the union's perceived authority as the employees' bargaining representative and to interfere with the employees' free choice in an election. They concluded that due to the inherent tendency of such a change to undercut the union's support, a hearing was unnecessary. The dissenters further noted that a hearing might otherwise be unnecessary because an administrative law judge had dismissed the allegation that the health insurance change at issue violated Section 8(a)(5) of the Act. The dissent noted that if the Board upheld this finding, the decertification petition would be reinstated. Thus, the dissenters argued that expeditious action on the unfair labor practice case by the Board could make a hearing in the representation case unnecessary.

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[3] 271 NLRB 78 (1984).

B. Appropriate Unit Issues

1. Multifacility Unit

In *Laboratory Corporation of America*[4] the Board found the petitioned-for multifacility unit to be an inappropriate unit. Food & Commercial Workers Local 1358 petitioned for a unit of employees employed by the employer at seven Patient Service Centers (PSCs), located in southeastern New Jersey under the supervision of Phlebotomist Supervisor Lana Gray, contending that these employees shared a separate and identifiable community of interest and therefore constituted an appropriate unit. The employer, on the other hand, contended that the petitioned-for unit was inappropriate and that the unit must include the other 22 PSCs comprising its Southern New Jersey Region. The Regional Director found the petitioned-for unit to be an appropriate unit.

The Board disagreed. Applying the traditional community-of-interest analysis, the Board noted that the seven PSCs do not comport with any of the employer's administrative divisional or regional groupings and that the supervisory responsibility of Gray was not stable enough to form the basis of a finding that the 7–PSC unit was appropriate. Additionally, the Board found that management of all of the Southern New Jersey PSCs was relatively centralized and that there were limitations on Gray's supervisory authority. Finally, the Board found that there was regular interchange between the petitioned-for PSCs and the excluded Hammonton PSC. It was undisputed that the employees at the 29 southern New Jersey PSCs had identical skills, duties, and functions and worked under identical terms and conditions of employment. The Board concluded that: "Although it is clear that the employees in the petitioned-for unit share a community of interest, we find that the evidence fails to establish that it is separate and distinct from the community of interest they share with other employees of the Employer's Southern New Jersey Region."

2. Geographic Residual Units in Construction Industry

In *Premier Plastering, Inc.*,[5] the Board held that the petitioned-for five county unit of the employer's plasterers was inappropriate and found that the only appropriate unit would be a geographic residual unit excluding only those areas covered by current Section 9(a) agreements.

This case was yet another in a long line of cases arising from the unique and long-running dispute between the Bricklayers and the

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[4] 341 NLRB No. 140 (Chairman Battista and Members Walsh and Meisburg).

[5] 342 NLRB No. 111 (Chairman Battista and Members Schaumber and Walsh).

Operative Plasterers unions. Here, the petitioner (Operative Plasterers Local 80) sought to represent a unit of the employer's plasterers working in five counties in northeastern Ohio. The employer and the petitioner were parties to an 8(f) agreement covering Cuyahoga County. The employer and the intervening Bricklayers Local 16 were parties to a 9(a) agreement covering bricklaying and cement masonry work in Ashtabula, Lake, and Geauga Counties. The employer was also party to two other collective-bargaining agreements with other Operative Plasterers locals covering limited geographic areas in Ohio—an 8(f) agreement covering Carroll, Holmes, Medina, Portage, Stark, Summit, Tuscarawas, and Wayne Counties and a 9(a) agreement covering Trumbull, Mahoning, and Columbiana Counties. The Regional Director found the petitioned-for five county unit appropriate.

The Board reversed the Regional Director's finding and found that the geographically limited five-county unit was inappropriate because there was no evidence that the plasterers performing work in those five counties had a community of interest different from when they performed work in other areas. Instead, the Board followed its recent decision in *G.L. Milliken Plastering,*[6] and directed the Regional Director to craft a residual unit excluding only those areas covered by the current 9(a) agreement.

3. RNs Employed in Off-Campus Facilities

In *Stormont-Vail Healthcare, Inc.,*[7] the Regional Director found that a unit of approximately 700 registered nurses (RNs) employed by the employer at its hospital complex and at about seven other buildings located within six blocks of the hospital complex (the main campus) in Topeka, Kansas, was appropriate for bargaining. Pursuant to the stipulation of the parties, the Regional Director also included about 11 RNs that worked for LifeStar, a helicopter ambulance service owned and operated by the employer, based in three locations outside of the main campus (10 miles, 25 to 30 miles, and 70 miles away). The Regional Director excluded other non-main campus RNs employed by the employer in Topeka and in surrounding towns, especially those RNs at the *Stormont-Vail* psychiatric facility, outlying clinics, and community nursing centers. Contrary to the Regional Director, the Board concluded that RNs in the employer's off-campus psychiatric facility, outlying clinics, and two community nursing centers must be included in the otherwise employer-wide multifacility unit found appropriate.

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[6] 340 NLRB No. 138 (2003).

[7] 340 NLRB No. 143 (Members Liebman, Schaumber, and Walsh).

In about February 2001, the employer moved its inpatient acute care psychiatric department from the hospital complex to a facility about two miles from the main campus called Stormont-Vail West, and continued to provide inpatient psychiatric services at the senior diagnostic unit, which remained in the hospital complex. The Stormont-Vail West facility operated one unit for adults and another for adolescents and children, while the older, “fragile” patients were placed in the senior diagnostic unit.

The Board found that the RNs at the Stormont-Vail West psychiatric facility did not have a distinct community of interest from the psychiatric RNs at the senior diagnostic unit or other RNs included in the unit found appropriate. The RNs at Stormont-Vail West worked at the hospital complex prior to the relocation of the inpatient acute care psychiatric department. The Board relied on evidence of some interchange between the RNs at Stormont-Vail West and the senior diagnostic unit, and the similarity of the work performed by the RNs in both of these inpatient operations. The Board also noted the supervisory/managerial interchange between Stormont-Vail West and the senior diagnostic unit. Finally, the RNs at Stormont-Vail West used the cafeteria and fitness center located at the main campus, and attended common meetings, classes, and social events with included RNs.

In 1995, the employer acquired a group of physicians’ clinics, located in about 17 locations in Topeka and surrounding towns, with distances ranging from 3 to 60 miles away from the main campus. In including these clinics, the Board reasoned that the skills and functions of the RNs in the outlying clinics were similar to those of RNs included in the unit. Further, the geographic proximity of the outlying clinics to the hospital complex and main campus was similar to other included locations. Moreover, the unit included RNs who worked at clinics that were located in the hospital complex and main campus, and some of these groupings were part of the same administrative grouping as the outlying clinics and shared common oversight. Further, the outlying clinics were well-integrated with the rest of the employer’s centralized system.

Finally, the Board found that the exclusion of the RNs in the community nursing centers from the unit found appropriate was arbitrary. The Board reasoned that the clinics were geographically proximate to the included locations, with one clinic located only six blocks from the hospital complex, and the other located in a suburb of Topeka. Further, these centers shared a common administrative grouping with other included clinics, and were well-integrated with the rest of the employer’s centralized system.

4. Employee Status of Graduate Student Assistants

In *Brown University*,[8] the Board majority overruled *New York University*,[9] and found that graduate student assistants are not "employees" within the meaning of Section 2(3) of the Act. The petitioner sought a unit of teaching assistants, research assistants, and proctors. Relying on *NYU*, the Regional Director found that the petitioned-for individuals are statutory employees. In *NYU*, the Board found that graduate student assistants were statutory employees because they met the test establishing a conventional master-servant relationship with the university.[10] The Board granted the employer's request for review of the Regional Director's Decision.

In overruling *NYU*, the Board majority returned to the pre-*NYU* principle of *Leland Stanford University*,[11] that graduate student assistants are not statutory employees because they are "primarily students and have a primarily educational, not economic, relationship with their university."[12] The Board found that *Leland Stanford* was "wholly consistent with the overall purpose and aim of the Act," which "is designed to cover economic relationships."[13] The Board majority interpreted Section 2(3) in light of this "underlying fundamental premise of the Act."[14] The Board therefore concluded: "The Board's longstanding rule that it will not assert jurisdiction over relationships that are 'primarily educational' is consistent with these principles."[15]

The Board majority also found that even if the graduate student assistants were statutory employees, there are policy reasons for declining to extend collective-bargaining rights to such persons. The majority stated: "Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration."[16] The majority concluded that "it simply does not effectuate national labor policy to accord [such persons] collective bargaining rights because they are primarily students."[17]

The Board majority expressed no opinion regarding the Board's decision in *Boston Medical Center*,[18] relied on heavily in the *NYU*

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[8] 342 NLRB No. 42 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).
[9] 332 NLRB 1205 (2000).
[10] 332 NLRB at 1206.
[11] 214 NLRB 621 (1974)
[12] 342 NLRB No. 42, slip op. at 5.
[13] 342 NLRB No. 42, slip op. at 5–6.
[14] Id.
[15] Id.
[16] Id., slip op. at 8.
[17] Id., slip op. at 10.
[18] 330 NLRB 152 (1999).

decision, in which a Board majority found that interns, residents, and house staff at teaching hospitals are employees within the meaning of Section 2(3) of the Act.[19]

Members Liebman and Walsh dissented, stating: "We would adhere to the Board's decision in *NYU* and thus affirm the Regional Director's decision."[20] Emphasizing the broad definition of "employee" under Section 2(3) of the Act, they pointed out that the Board is not free to create an exclusion from the Act's coverage absent compelling indications of Congressional intent.[21] In addition, they characterized the majority's approach as "woefully out of touch with contemporary academic reality" and based on an image of the university that "was already outdated" when *Leland Stanford* was issued in the 1970s.[22] They pointed out that today, the university "is also a workplace for many graduate students, and disputes over work-related issues are common. As a result, the policies of the Act . . . apply in the university context."[23]

5. Employee Status of Disabled Workers

In *Brevard Achievement Center, Inc.,*[24] Chairman Battista and Members Schaumber and Meisburg concluded that disabled workers who are in a primarily rehabilitative relationship with their putative employer are not statutory employees within the meaning of the National Labor Relations Act. The majority emphasized that the Board has never asserted jurisdiction over relationships that are primarily rehabilitative in nature. Members Liebman and Walsh dissented.

Consistent with its recent decision in *Brown University,*[25] (finding that graduate student assistants are not statutory employees because their relationship with their employer is "primarily educational"), the Board again set forth its interpretation of Section 2(3) of the Act. Reading that section in context with the other sections of the statute, the Board concluded that the Act was intended by Congress to cover primarily economic relationships between employer and employee. "The imposition of collective bargaining on relationships that are not primarily economic does not further the policies of the Act," it stated. Finding its longstanding rule that it will not assert jurisdiction over relationships that are "primarily rehabilitative" to be consistent with this statutory

[19] Id., slip op. at 1 fn. 4.
[20] 342 NLRB No. 42, slip op. at 12.
[21] Id., slip op. at 14.
[22] Id., slip op. at 12.
[23] Id., slip op. at 15.
[24] 342 NLRB No. 101 (Chairman Battista and members Schaumber and Meisburg; Members Liebman and Walsh dissented).
[25] 342 NLRB No. 42.

interpretation, the Board reaffirmed its "primarily rehabilitative" standard as the test for assessing the "employee" status of disabled workers in rehabilitative programs.

The Board thereafter applied the primarily rehabilitative standard to the facts of the case:

> Although the disabled clients work the same hours, receive the same wages and benefits, and perform the same tasks under the same supervision as the nondisabled employees, they work at their own pace, and performance problems are dealt with through additional training rather than discipline. These policies support a determination that the relationship between BAC and its clients is primarily rehabilitative, not motivated principally by economic considerations.

Noting the factual similarities between the case and the Board's prior decisions in *Goodwill Industries of Tidewater,*[26] and *Goodwill Industries of Denver,*[27] the Board concluded that Brevard's disabled workers are not statutory employees.

The majority voiced its concern that the imposition of collective bargaining on a primarily rehabilitative relationship would run the risk of interfering with the rehabilitative process. The majority also noted that Congress has not deemed it appropriate to change the Board's longstanding doctrine to refrain from exercising jurisdiction over those relationships.

In dissent, Members Liebman and Walsh observed that this case "presents the Board with the perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the last 15 years." They stated that they would abandon doctrines which, they argued, were based on outdated notions about the place of the disabled in society.

In the dissent's view, the disabled workers are statutory employees, as they come within the common-law meaning of the term "employee" and they are not specifically exempted from the Act's coverage. Contrary to the majority's position that the employment relationship must be primarily economic, the dissent concluded, "economic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship."

The dissenting Members asserted that the majority's decision "ignores the plain language of the Act, invades the legislative arena, and contravenes contemporary federal policy." They contended the majority

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[26] 304 NLRB 767 (1991).

[27] 304 NLRB 764 (1991).

"relegates the Employer's disabled janitors and all similarly-situated workers to the economic sidelines, making them second-class citizens both in society and in their own workplaces."

6. Public Utility Presumption

In *Verizon Wireless*,[28] the Board held that the preference for system-wide units in the public utility industry does not apply to retail employees working in a utility's retail stores because retail store employees "are so divorced from the operation of the Employer's wireless network."

The union petitioned for a unit of sales representatives and assistant-sales representatives working at three retail facilities in Bakersfield, California. The employer argued that as a wireless telephone service provider it was a "public utility" and, accordingly, only a system-wide unit consisting of either 69 retail outlets in its Northern California/Nevada Region or 311 retail outlets in its West area was appropriate.

The Board rejected the employer's arguments and found the petitioned-for unit to be an appropriate unit. First, the Board explained that the system-wide presumption represents a balance of "employees' Section 7 rights to bargain collectively through representatives of their own choosing against the public's interest in the unbroken provision of necessary services." Assuming *arguendo* that a wireless telephone company is a public utility, the Board balanced "the negligible potential for an interruption in the provision of services of a public utility against the employees' right to freely organize" and found that the system-wide presumption did not apply to retail store employees. Applying its traditional community-of-interest test, the Board found that the petitioned-for three-facility unit was an appropriate unit for bargaining.

7. Employee Relative of Nonowner Manager

In *Peirce-Phelps, Inc.,*[29] the Board majority overruled a challenge to the ballot of 16-year-old employee Michael Panara Jr., rejecting the union's contention that Panara Jr. should be excluded from the stipulated bargaining unit based on his family relationship to a supervisor of unit employees. The majority reasoned that because Panara Jr. enjoyed no special status by virtue of his family relationship with the supervisor, there was no basis to exclude him from the unit. In dissent, Member Walsh stated that the evidence supported a finding of special status. He

[28] 341 NLRB No. 63 (Members Schaumber, Walsh, and Meisburg).
[29] 341 NLRB No. 78 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

also noted that the majority's implicit limitation of special status to "special status *on the job*" did not follow from Board precedent.

In August 2003, a representation election was held, pursuant to a Stipulated Election Agreement, among all full-time and seasonal warehousemen at the employer's Decatur Road facility. At that time, Panara Jr. was a seasonal warehouseman at Decatur Road. Panara Jr. had worked for the employer from the age of 14, during various breaks in his high school academic year, but mainly over the summer. He served under the supervision of his father, Michael Panara Sr., who was the Decatur Road warehouse manager. Panara Sr. had no ownership interest in the employer.

Under applicable state law, Panara Jr. was not of age to operate heavy lifting equipment within the warehouse. He was, however, able to perform other warehousing functions. Panara Sr. created a schedule for Panara Jr. from week-to-week to ensure that he was occupied with these other warehousing functions and was not in the warehouse when the work required the operation of heavy lifting equipment.

Citing *Bell Convalescent Hospital*[30] and *McFarling Foods*,[31] the majority stated that it would give effect to the parties' intent, as reflected in the Stipulated Election Agreement, to include seasonal warehousemen such as Panara Jr. in the proposed bargaining unit, unless a statutory provision or Board policy counseled otherwise. The majority stated, moreover, that relevant Board policy counsels exclusion of an employee who is related to a nonowner manager only if the employee enjoys "specific special privileges or benefits" by virtue of his or her relationship with the nonowner manager.

The majority found that Panara Jr. enjoyed no such special privileges or benefits by virtue of his relationship to Panara Sr. According to the majority, Panara Jr. worked under the same conditions and the same policies as other seasonal warehousemen, performing similar tasks and earning a comparable wage. Where his duties differed from those of the other warehousemen, the difference was mandated by state law and did not follow from Panara Jr.'s relationship to Panara Sr. Similarly, the majority stated, fluctuations in Panara Jr.'s schedule were a consequence of his "legal impediment" (i.e., his inability to operate heavy lifting equipment) and not a special benefit flowing from his relationship with Panara Sr.

Responding to the dissent's argument that Panara Jr. would not have been hired at the early age of 14 but for his relationship to Panara Sr., the

[30] 337 NLRB 191 (2001).
[31] 336 NLRB 1140 (2001).

majority stressed that regardless of the circumstances surrounding Panara Jr.'s hiring, he enjoyed no special treatment "*on the job*," citing *Cumberland Farms*.[32] Contrary to the dissent, the majority also asserted that the fact that Panara Jr. lives with and is financially dependent on Panara Sr. is irrelevant given the absence of other indicia of special status.

Member Walsh, in dissent, maintained that Panara Jr. received special treatment with regard to his schedule, which was tailored to accommodate his school commitments and his legal incapacity to perform important job functions (i.e., those involving heavy lifting equipment). Member Walsh also noted that Panara Jr. was hired at an exceptionally early age, despite the legal incapacity noted above. Contrary to the majority, Member Walsh asserted that the circumstances of Panara Jr.'s hiring are probative of special status even though they do not relate strictly to conditions "on the job." The majority's narrow focus on Panara Jr.'s status "on the job," he said, was not compelled by *Cumberland Farms*. "In *Cumberland Farms*, the Board held that being related to and living with a nonowner supervisor, *without more*, is insufficient to exclude the employee-relative from the unit. From this holding, it does not follow that where there *is* something more, the Board is precluded from considering all relevant circumstances in determining special status."[33] Noting the presence of "much more" in this case (e.g., the special treatment in scheduling), Member Walsh concluded that the circumstances of Panara Jr.'s hiring are relevant to the finding of special status.

C. Objections to Conduct Affecting the Election

1. Union's Use of Employee Photographs and Quotations in Campaign Materials

In *BFI Waste Service, LLC*,[34] the Board adopted the hearing officer's findings that the petitioner's use of employee photographs and quotations in its campaign materials was not objectionable because it obtained consent for such use and because its use of those pictures or quotes was not misrepresentation warranting overturning the election under *Midland National Life Insurance Co.*,[35] or *Van Dorn Plastic Machinery, Inc. v. NLRB*.[36]

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[32] 272 NLRB 336 fn. 2 (1984).
[33] 341 NLRB No. 78, slip op. at 4 (internal citation omitted).
[34] 343 NLRB No. 35 (Chairman Battista and Member Liebman; Member Meisburg concurring).
[35] 263 NLRB 127 (1982).
[36] 736 F.2d 343, 348 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985).

In March 2004, agents of the petitioner conducted meetings during which employees were asked to sign release forms allowing the petitioner to use the employees' likenesses and names in its campaign publications. Pictures were taken of employees signing release forms. In addition, employees were asked for statements in support of the union, for use in campaign literature. Employees who did not make statements were told that the petitioner's organizing department might develop statements that would be attributed to them. Employee photographs and statements (or attributed statements) were included in a flyer entitled "A Shop for Change" and a poster entitled "We're Voting Teamsters Yes!"

The employer objected, and later argued in exceptions, that the petitioner did not obtain informed employee consent to include their pictures in its campaign materials. It also argued that the petitioner painted a false portrait of employee support through its inclusion in the poster entitled "We're Voting Teamsters Yes!" of the likenesses of employees who either did not vote or did not vote "yes." It also argues that the petitioner misrepresented employee sentiments through its attribution of statements in support of the union to employees in that poster and the "A Shop for Change" flyer.

Finding no merit to those exceptions, and adopting the hearing officer's findings, the Board found "under the circumstances of this case, that the Petitioner's conduct does not warrant overturning the election." Although the Board warned that it does not "condone the creation and attribution of quotes to employees, at least where the union makes no pre-publication effort to verify that the quotes fairly represent the views of the quoted employees," the Board reasoned that the alleged misrepresentations in this case were neither "pervasive" nor "artfully deceptive" under *Midland National Life* and *Van Dorn.* The Board found that the alleged misrepresentations were not "pervasive" because "at most, the views of only two employees were arguably misrepresented." It also rejected that the "artful deception" of employees had occurred because "the employees directly involved were told that a quote would be prepared for them, and the accuracy of those quotations could have been verified by other employees."

2. Employer's Use of Ride-Alongs

In *Frito Lay, Inc.*,[37] the Board found that the employer's use of ride-alongs with its truckdrivers as a campaign tactic did not constitute objectionable conduct.

During the decertification campaign, the employer used "ride-alongs," in which management accompanied the unit truckdrivers on their routes,

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[37] 341 NLRB No. 65 (Chairman Battista and Member Schaumber; Member Liebman concurring).

as an opportunity to answer any questions the drivers had concerning the election. The routes averaged 10 to 12 hours, and most drivers had about three ride-alongs during the 6-week campaign.

The Regional Director examined the factors considered by the Board in related contexts, such as seat-of-power interviews and employer home visits, and concluded that, based on the circumstances, the ride-alongs were an oppressive and unfair tactic that tainted the legitimacy of the election. Consequently, the Regional Director set aside the decertification election and ordered a new election.

Citing *Noah's New York Bagels*,[38] the Board reversed the Regional Director, set aside the second election, and certified the results of the first election.

The Board majority held that the use of ride-alongs to communicate an employer's position on union representation to its truckdrivers is not, in itself, coercive. Rather, an employer's use of ride-alongs to communicate with its employees during an election campaign is only objectionable if, under all of the circumstances, the use of ride-alongs interferes with the employees' right to freely choose a bargaining representative. The majority listed the following factors to be considered in deciding whether an employer's use of ride-alongs amounts to objectionable conduct: (1) whether the use and conduct of ride-alongs is reasonably tailored to meet the employer's need to communicate with its employees in light of the availability and effectiveness of alternate means of communication; (2) the atmosphere prevalent during the ride-alongs and the tenor of the conversation between the drivers and the employer's representatives; (3) whether the employer effectively permitted the employees to decline ride-alongs; (4) the frequency of the ride-alongs, both during and prior to the election campaign; (5) the positions held by the ride-along guests; (6) whether the ride-alongs were scheduled in a discriminatory manner; and (7) whether the ride-alongs took place in a context otherwise free of objectionable conduct.

Applying these factors in the instant case, the Board majority found that the employer's use of ride-alongs was not coercive. The majority noted that the employer had a limited opportunity to meet with the drivers on company time, and the ride-alongs permitted relaxed meetings on company time without interfering with the drivers' work schedules. There was no indication that the employer intentionally made the ride-alongs unnecessarily burdensome and unpleasant for the truckdrivers; the length of the trips was dictated by the length of the drivers' routes. The tenor of the conversations during the ride-alongs was casual, amicable,

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[38] 324 NLRB 266 (1997).

and nonthreatening, and there was no pressure from management to discuss the election. The drivers were free to decline ride-alongs and there was no pressure placed on the drivers to accept ride-alongs. Ride-alongs for other purposes were not uncommon before the election campaign, and the employer did not schedule excessive preelection ride-alongs for each driver. Many of the ride-along guests were fellow drivers from other facilities. Finally, the majority found that the ride-alongs were not used in a discriminatory manner and took place in the context of a campaign free from coercive or objectionable conduct.

Member Liebman concurred with the result, finding it compelled by the Board's decision in *Noah's New York Bagels*. However, Member Liebman noted that there are good reasons to reconsider the multifactor approach of *Noah's New York Bagels* and consider adopting a bright-line rule prohibiting campaign-related ride-alongs altogether.

3. Collection of Mail Ballots

In *Fessler & Bowman, Inc.*,[39] the Board held that a party engages in objectionable conduct when it collects or otherwise handles an employee's mail ballot. The Board also held that a party does not engage in objectionable conduct when it solicits employees' mail ballots.

Fessler & Bowman, Inc., involved a mail ballot runoff election between two unions. During the ballot period, the incumbent union asked employees to give their mail ballots to union agents who would forward them to the Board. The union actually collected two employees' mail ballots. A tally of the ballots showed that the union defeated the petitioner by four votes. The petitioner filed objections alleging that the union tainted the election by both soliciting and collecting employees' mail ballots.

The Board first noted the fundamental importance of maintaining the secrecy and integrity of its election processes. The Board found that a party "casts doubt on the integrity of the election process and undermines election secrecy" when it collects employees' mail ballots. Therefore, the Board held that mail-ballot collection is objectionable. The Board members disagreed, however, whether it was per se objectionable if timely objections were filed. Members Liebman and Walsh found that the collection of the ballots would be a basis for setting aside an election where a determinative number of ballots were affected. Chairman Battista and Member Schaumber would find that such a collection warrants a new election, if objections are filed, even if it could not be shown that this objectionable conduct was outcome determinative. In

[39] 341 NLRB No. 122 (Members Liebman and Walsh; Chairman Battista and Member Schaumber concurring in part and dissenting in part. Member Meisburg was recused.)

their view, a bright-line rule that elections be set aside if such collections occur is necessary to restore the integrity of the balloting process.

Members Liebman and Walsh, on the other hand, found that soliciting employees' mail ballots is not objectionable because solicitation "d[oes] not create an opportunity for ballot tampering or for a breach of secrecy." Chairman Battista and Member Schaumber disagreed. They would find that ballot solicitation is objectionable because it forces an employee to either accede to the request or decline the request and be viewed as a dissenter. They additionally found that prohibiting solicitation would help to uncover otherwise undetectable ballot collection. However, in the absence of a Board majority to prohibit ballot solicitation, Chairman Battista and Member Schaumber agreed with their colleagues to remand the case to the Regional Director to resolve the challenged ballots to determine whether the Union's ballot collection could have affected the election result.

4. Anonymous Telephone Threats

In *Cedars-Sinai Medical Center,*[40] the Board unanimously found that anonymous telephone threats to an antiunion employee a few weeks before the election tended to interfere with employee free choice and warranted setting aside the election.

Petitioner California Nurses Association filed a representation petition on October 30, 2002, seeking to represent a unit of registered nurses (RNs) at employer Cedars-Sinai Medical Center. The election was conducted on December 11 through 13, 2002. The tally of ballots showed 695 for and 627 against the petitioner, with 10 challenged ballots, an insufficient number to affect the results of the election.

The employer filed 19 timely objections to the conduct of the election, alleging, inter alia, that, in the time leading up to the election, the petitioner, by its agent and supporters, made a series of anonymous telephone threats to known antiunion employees.

Two such employees were emergency room nurses Christine Foxon and Scott Barnes. Foxon and Barnes, who were among the most active opponents of the petitioner's organizing efforts, recruited nurses who also opposed these efforts to attend meetings; they also distributed antiunion flyers and cofounded an antiunion organization called "One Voice, Our Voice."

Beginning sometime in August and spanning through October or November, Foxon began to receive a series of threatening phone calls. The first three calls essentially warned Foxon to "back off" her opposition to the petitioner and that she "needed to be careful" about

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[40] 342 NLRB No. 58 (Chairman Battista and Members Schaumber and Walsh)

opposing the petitioner. After receiving the third call, Foxon pressed "*69" and the individual who answered the phone said "California Nurses." During the fourth and final call, the caller told Foxon that he or she knew that Foxon had two little girls and that she needed to think about her family and her girls and back off.

In November, Barnes also began to receive threatening phone calls. Barnes, who was a pet owner and animal lover, received a total of seven to ten calls in which the callers variously told him to "stop fucking with the [Petitioner]," that little kittens look good in frying pans, that they would stab his dogs, and that wouldn't it be terrible if his Corgis (the breed of dogs he owned) were run over. These calls stopped at the end of November, 2 weeks before the election.

Barnes testified that he discussed these threats with Foxon and other coworkers; he also told 20 to 30 other nurses of the threats at a meeting of the emergency room department.

The administrative law judge, in recommending that the employer's objections be overruled in their entirety, found, inter alia, that the threats to Foxon and Barnes did not rise to the level of objectionable conduct. Applying the Board's standard for party conduct,[41] the judge found that the threats—though likely disseminated to a determinative number of unit employees—did not have the tendency to interfere with voting employees' freedom of choice. The judge reasoned that the threats were made to only two unit employees, and they were less intimidating because they were made anonymously; and, she reasoned that employees who had heard about the threats would not have reason to believe that the callers had the power to effectuate violence on unit employees. She further posited that, because the threatening calls had ended 2 weeks before the election, it was reasonable to assume that the cessation of the threats had been disseminated and that the threats did not persist in the minds of unit employees as they were casting their votes.

The employer subsequently filed timely exceptions with the Board to the judge's recommendation to overrule its objections, including those pertaining to the threats to Foxon and Barnes.

Reversing the judge, the Board found that the threats to Barnes constituted objectionable conduct that warranted setting aside the election. In doing so, the Board found that the employer had failed to show that any of the threatening calls to Foxon took place in the "critical period" between the filing of the petition and the election. However, the Board found that, given the similarities between these threats and the

[41] A party's preelection conduct is objectionable if it objectively has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995).

threats to Barnes, it was appropriate to consider the prepetition threats to Foxon "only to the extent that they add[ed] meaning and dimension" to the postpetition threats to Barnes. See *Dresser Industries.*[42]

Turning then to the threats to Barnes, the Board, applying the standard for party conduct,[43] found that these threats had a tendency to interfere with voting employees' freedom of choice in the election. Specifically, the Board found that the judge erred in finding that the anonymous threats to Barnes were less serious than direct threats. The Board reasoned that "the anonymous threats were potentially even *more* menacing than a direct threat might have been" because the callers "knew specific details about Barnes' life," and he "could not take definitive measures to protect himself and his pets against individuals whose identities he did not know."

The Board noted that "[t]hreats such as these are certainly quite severe; and where, as here, they are tied to an employee's antiunion stance or activities, the threats are reasonably calculated to interfere with his freedom of choice." The Board stated that the threats to Barnes were such that they would tend to cause other unit employees who had heard about them to "reasonably assume that the Petitioner was willing to physically harm any employee—or the loved ones of any employee—who opposed it or voted against it in the election." The Board found that these threats were even more disturbing when viewed in the context of the prepetition threats of bodily harm to Foxon and her daughters.

The Board further pointed out that a shift of only 34 votes—out of over 1,300 cast—could have changed the results of the election; and, it found that more than this number of employees had likely heard about the threats to Barnes, as there was evidence that these threats had been widely discussed throughout the unit between the time of their cessation and the time of the election. Thus, the Board, contrary to the judge, concluded that, given the serious nature of the threats, "they would tend to linger in the minds of employees who had heard about them for weeks after the threats had ended."

For the reasons described above, the Board found that the threats to Barnes constituted objectionable conduct that warranted setting aside the election. The Board therefore directed that a second election be held. In view of this disposition, the Board found it unnecessary to pass on the

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[42] 242 NLRB 74, 74 (1979).

[43] Even though the record did not reflect who made these threats, the Board applied the standard for party conduct because there were no exceptions to the judge's application of that standard.

employer's exceptions to the judge's recommendations to overrule its remaining objections.[44]

5. Threats of Reprisals

In *Manhattan Crowne Plaza*,[45] a Board majority found that a memorandum sent by the employer to its employees did not threaten the employees with a loss of benefits and wages and thus did not interfere with the employees' free choice in the election. The majority noted that it is well settled that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"[46] Here, the employer provided a recent, concrete example of a negative outcome for employees who were represented by the same union that sought to represent the employer's employees. The memorandum described a series of events at hotels—a year of negotiations followed by the union's rejection of an employer's final offer—that resulted in the employees there losing their jobs. The union had rejected the employer's offer, and that rejection prompted the events, which followed.

Further, the memorandum did not say that these same incidents were going to happen if the employer's employees voted in favor of union representation. On the contrary, it noted, "each set of negotiations is different." The Board majority further noted that the employer made no predictions. It said, "each set of negotiations is different." In sum, the employer simply described what *could* happen; it was not predicting what *would* happen. The Board majority therefore found that the employer's memorandum did not, under all these circumstances, convey a threat of reprisal if the employees selected the union as their collective-bargaining representative but rather that it comes within the range of permissible campaign conduct.

In dissent, Member Walsh concluded that the Regional Director correctly found that the employer interfered with the election by threatening employees, in a memorandum sent a week before the election, that unionization would result in the loss of their jobs and benefits. Member Walsh would find that the memorandum was a clear attempt to communicate the message that unionization at two other hotels caused those employees to lose their jobs and benefits, and that unionization would likewise cause the employer's employees to lose

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[44] Chairman Battista, however, would have found that the vandalism of the cars of three antiunion nonunit employees was also objectionable when coupled with the other conduct found to be objectionable.
[45] 341 NLRB No. 90 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[46] Id., slip op. at 1, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

their jobs and benefits. Member Walsh further noted that simply stating "each set of negotiations is different" was not sufficient to neutralize that message. Furthermore, the employer offered no statement of objective facts supporting its suggestion that its employees would suffer the same fate as those at the other two hotels. Finally, although the memorandum blamed the union for the loss of the jobs and benefits at the other hotels, the memorandum actually discussed conduct—subcontracting out work and firing employees—that was within the employer's control rather than the union's control.

6. Preelection Promises of Benefits

In *Suburban Journals of Greater St. Louis, L.L.C.*,[47] the Board majority in agreement with the hearing officer, overruled objections that the employer promised benefits to employees if the union were decertified and that the employer blamed the union for benefits being withheld. Thus, the Board certified the results of the election.

Employee Bradley filed a petition on June 23, 2003, seeking to decertify the union as the representative of the employer's editorial and advertising department employees. The resulting August 4, 2003, election produced 7 votes for and 7 against the union and no challenged ballots.

In July 2003, Bradley faxed to the employer's human resources manager, Buhrman, a comparison prepared by the union of the employees' current health insurance plan and the one that the employer had proposed in bargaining. Buhrman determined that the comparison was misleading and erroneous. Employee Dawson called Buhrman three times to request information regarding the employer's unrepresented employees' benefits. In light of these inquiries, Buhrman decided to meet with each unit employee individually to discuss insurance matters.

The meetings were held in a Denny's restaurant during the final week of July preceding the August 4 election. In each meeting, Buhrman presented an outline of the employer's unrepresented employees' benefits and a chart showing the unrepresented employees' biweekly insurance contributions. She also presented a comparison for each employee of how much the employee paid for insurance and how much unrepresented employees were paying under the equivalent employer plan. Finally, she presented a copy of the union's insurance plan comparison with the employer's corrections marked on it.

At each meeting, Buhrman told the employee that she thought that the employer's insurance plan was the better plan. She told employee May that it was unfortunate that the employees did not currently have the

[47] 343 NLRB No. 24 (Members Schaumber and Meisburg; Member Walsh dissenting).

stock purchase plan or 5 percent pay increase that the unrepresented employees had received. When Dawson asked why the editorial staff was not given the 5 percent pay increase, Buhrman responded that the union had not asked for such an increase. Only employees Cunningham and Bradley asked her what the employees would get if they voted to decertify the union. She told them that she could not make any promises.

In overruling the objections, the Board majority found that nothing in Buhrman's meetings with employees constituted an implied promise of benefits if the employees voted to decertify the union. Buhrman's comparison charts did not convey an implied promise of benefits, as they were simple comparisons of existing health insurance costs for unit employees and unrepresented employees and did not project future benefits. Additionally, the benefit comparisons were presented in response to an employee's requests and therefore were less likely to be considered an implied promise of benefits. Further, Buhrman, when asked what employees would get if they decertified the union, explicitly stated that she could not make any promises. Moreover, while Buhrman's meetings with employees took place during the week preceding the election, the meetings closely followed the employee inquiry and the union's benefits misrepresentation that prompted the meetings.

Dissenting, Member Walsh would have sustained the objection that the employer promised benefits to employees if the union were decertified. He found that, in the last few days of the election, the employer clearly implied to virtually all unit employees that they would receive improved benefits if they decertified the union. In his view, "Buhrman's focused emphasis on the unrepresented employees' better benefits and higher wages during the one-on-one lunches with unit employees just a few days before the election effectively created a sufficient measure of implied assurance, urgency, and personal obligation that reasonably interfered with the unit employees' ability to freely choose whether to continue to be represented by the Union."

In *Allen's Electric Co.*,[48] the Board majority held that it was not objectionable for a union to promise and later pay reimbursements to employees for wages they lost due to voting. The Board also unanimously found that the union's arrangement of an election-day carpool for voters was not objectionable, even though the carpool had the effect of increasing the reimbursements payable to two voters.

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[48] 340 NLRB No. 119 (2003) (Members Liebman and Walsh; Member Schaumber dissenting in part).

Eligibility to vote in the election was determined under the *Steiny/Daniel* formula[49] applicable to construction industry elections, and many eligible voters were working for employers other than Allen's Electric. In response to a voter's expression of concern about losing wages at his current employer in order to vote, the union organizer promised reimbursement for such lost wages. The offer was orally communicated to other prospective voters by various means. The union organizer repeatedly emphasized that reimbursement depended only on an individual's loss of wages due to voting, not on how the individual voted, which the union would have no way of knowing. Several voters who were unemployed or scheduled for work shifts that did not conflict with the election were told that they were ineligible for reimbursement, because they had no lost wages to reimburse. After the election, six voters requested and received reimbursement. The payments were calculated based on each voter's hourly wage and number of work hours lost (including voters' travel time), less applicable payroll taxes. One voter was reimbursed for approximately a half-hour extra time, based on his mistaken estimate of how long the trip to his distant worksite would take.

The Board majority concluded that the union's preelection promises of reimbursement were not objectionable because they did not reasonably tend to interfere with the voters' free and uncoerced choice. The Board found that "[v]oters would have reasonably understood that the purpose of the wage reimbursements was to return them to the financial position they would have been in had they not lost worktime by voting," and thus were not a "benefit" prohibited by *Sunrise Rehabilitation Hospital*.[50] The majority also concluded that the payments themselves, which were provided after the election, could not have interfered with voters' choice in the election that had already occurred. The extra half-hour's payment to one voter did not justify setting aside the election: it was based on an apparently good-faith, if mistaken, estimate of the voter's lost wages and, in any event, the voter did not know of the overpayment until after the election.

Member Schaumber, dissenting, would have found that the promises of reimbursement tainted the election because it was not shown that the offer was communicated to all eligible voters. Finding that "it would not be unreasonable to infer that announcements of the offer were kept largely within the community of prounion employees," Member Schaumber concluded that the reimbursement offer "unfairly cast its

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[49] See *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961), modified 167 NLRB 1078 (1967).
[50] 320 NLRB 212 (1995).

weight in favor of unionization" in a manner prohibited by *Savair Mfg. Co.*[51] Although the employer never alleged that the union's failure to communicate the offer to all eligible voters was objectionable, and the parties never litigated it, Member Schaumber found it necessary to address this issue because "the Employer's objection and exception put the Union's conduct before the Board for review" and this issue was "a key element of the Union's conduct."

7. Maintenance of Overbroad No-Solicitation Policy

In *Pacific Beach Hotel*,[52] the Board majority adopted the recommendation of the administrative law judge to sustain two union election objections alleging that the employer interfered with the election by interrogating four employees and by maintaining an overbroad no-solicitation policy. The Board majority directed a second election if the revised tally of ballots did not result in a majority for the union.[53]

The judge found that the employer's interrogations fell within the scope of an objection alleging that the employer engaged in coercive threats. At the end of the hearing, the union withdrew an objection expressly alleging that the employer engaged in coercive interrogations of employees. However, the parties had fully litigated the issue of interrogations during the hearing, and both parties briefed the issue to the judge. The Board majority found that the issue of interrogations was within the scope of the objection alleging the threats because both objections concerned conduct that was "coercive" and "interfering," and because the parties had fully litigated the issue, thus preventing any prejudice to the employer. In dissent, Chairman Battista asserted that because the interrogations were clearly not within the scope of the objection alleging threats, the objection should be overruled. In his view, because the objection specifically relating to an alleged interrogation was withdrawn, it cannot be resurrected by "seeking to shoe-horn it into [another objection]."

Concerning the alleged overbroad no-solicitation policy, the Board majority of Members Liebman and Walsh, citing *Freund Baking Co.*,[54] held that the mere maintenance of an overbroad rule could affect the results of an election. Employees of the employer were given a handbook upon hire which consisted of rules of conduct, including a prohibition against solicitation "for any cause or organization AT ANY

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[51] 414 U.S. 270 (1973).
[52] 342 NLRB No. 30 (Members Liebman and Walsh; Chairman Battista dissenting in part).
[53] The Union received 209 votes, with 204 votes against and 36 determinative challenged ballots. The Board adopted the judge's recommended disposition of the challenges, except for one ballot, which would be held in abeyance pending a revised tally.
[54] 336 NLRB 847 (2001).

TIME WHILE ON COMPANY PROPERTY." The rule stated that it specifically applied to "labor unions," among others. The majority found that this rule was overbroad, was applied to all unit employees, was disseminated to all in the unit upon their hire, and that employees were never informed that they could disregard it. In these circumstances, the majority found that mere maintenance of the rule reasonably could lead employees wishing to engage in permissible Section 7 conduct to believe that such conduct would result in discipline. Accordingly, the majority found that the rule interfered with the election and sustained the objection.

In dissent, Chairman Battista noted that the rule was not enforced or referred to during the critical period, and that solicitation freely occurred despite the rule. Thus, it was "virtually impossible" to conclude that the mere maintenance of the policy could have affected the results of the election.[55]

D. Objections to Conduct of Board Agent

1. Statements of Personal Opinion

In *Sonoma Health Care Center,*[56] the Board majority overruled objections alleging that comments made by a Board agent impermissibly tainted the election process. During a break in the voting, the employer's observer overheard the union's observer ask the Board agent why companies do not like unions. The Board agent responded: "[C]ompanies don't like unions because they cannot fire or hire anyone, and they cannot take benefits from the staff." Upon hearing that the employer had paid $60,000 to "the consultant" the Board agent replied "whoa, $60,000." Later, when asked why he had answered the union observer's initial question, the Board agent replied, "[W]ell, I can just give my opinion because I'm not going to vote." There was no evidence that anyone else heard (or heard about) any of this dialogue.

The Board unanimously agreed that the standard to be applied is that set forth in *Athbro Precision Engineering Corp.*,[57] which requires that an election be set aside when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. A majority of the Board[58] interpreted *Athbro* to require that an election be set aside when the conduct of the Board election agent tends

[55] Citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

[56] 342 NLRB No. 93 (Members Liebman, Schaumber, Walsh, and Meisburg; Chairman Battista dissenting).

[57] 166 NLRB 966 (1967).

[58] Chairman Battista and Members Schaumber and Meisburg.

to destroy confidence in the Board's election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain. Citing *Hudson Aviation Services*,[59] they concluded that statements of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside an election even if made to a limited audience and even if unaccompanied by procedural irregularities or other "actions that reasonably create the appearance that the election procedures will not be fairly administered."

A majority of the Board[60] found that the specific statements of personal opinion made by the Board agent in this case, while intemperate and inappropriate, did not mandate setting aside the election under *Athbro.* Members Liebman and Walsh concluded that these statements were not objectionable under *Athbro,* which they read as holding that a Board's agent's mere statement of personal feelings to a limited audience will not taint an election, unless they reasonably create the appearance that the election procedures will not be fairly administered. While Members Schaumber and Meisburg declined to adopt their concurring colleagues' "overly restricted reading" of the *Athbro* standard, they ultimately agreed that application of *Athbro* to the specific facts of this case did not mandate setting aside the election.

Chairman Battista, dissenting, concluded that the election should be set aside under *Athbro* because the Board agent's statements reasonably called into question his impartiality. Chairman Battista stated: "The Board's election process is rightly called the 'crown jewel' of the Board's endeavors. . . . Today, the Board's crown jewel has been tarnished. Worse, it has been tarnished by the actions of the Board's own agent. And, worse still, the Board puts its imprimatur on the result." The Chairman said he "would restore the luster" to the Board's "crown jewel" by setting aside the election so that a new election, with unquestionable fairness and integrity, could be held.

2. Failure to Lodge Eligibility Challenges

In *Lakewood Engineering and Manufacturing, Co.*,[61] the Board overruled the union's objections and refused to set aside an election where the Board agent failed to challenge the ballot of a voter suspected to be ineligible to vote.

The Board scheduled a representation election for January 22, 2003, with an eligibility cut-off date of December 22, 2002. Unfair labor

[59] 288 NLRB 870 (1988).
[60] Members Liebman, Schaumber, Walsh, and Meisburg.
[61] 341 NLRB No. 101 (2002) (Chairman Battista and Members Schaumber and Walsh).

practice charges filed by an intervenor union blocked the January 22 election. The Regional Director dismissed the charges and rescheduled the election for February 24 and 25, 2003. Over the employer's objection, the Regional Director decided to use the same December 22, 2002, eligibility cut-off date. As required, the employer supplied the region with a new *Excelsior* list and included among the 320 names, 8 employees who were hired between December 22, 2002, and February 2, 2003, whom the employer contended should be eligible to vote. Along with the *Excelsior* list, the employer broke out the names of the 8 new hires. At the preelection conference, the union noticed the inclusion of the 8 new hires on the list and requested that the Board agent remove the names. The Board agent refused. The February 24 and 25 election ended with no party receiving a majority of votes cast and a runoff election was scheduled for April 24, 2003. The issue of the eight new hires came up again at the April 24 preelection conference. The union requested that the Board agent remove the names; and the Board agent refused, stating that the union could challenge their ballots if they voted. Of the new hires, 4 voted without challenge, 3 voted under challenge, and 1 apparently did not vote.

The union filed objections arguing that the Board agent's failure to challenge the ballots of the 7 new hires who voted required that the election be set aside. The Regional Director sustained the objections without a hearing, determining that because the Board agent knew the eight new hires were hired after the eligibility cut-off date, her failure to challenge their ballots required that the election be set aside. The Board disagreed and overruled the objections.

The Board began with the basic proposition that "the parties bear the primary responsibility for challenging voter eligibility." Generally, "a Board agent must challenge a ballot only when he or she has 'actual knowledge of the voter's ineligibility' and not merely where an employee's eligibility is 'in dispute.'" The Board further explained that a Board agent has such actual knowledge in two limited circumstances: "(1) where an employee's name does not appear on the *Excelsior* list or (2) where the Board has made an affirmative ruling that a given employee or employee classification is ineligible to vote or is to vote under challenge." Here, because the eight new hires were included on the *Excelsior* list and the Board had not ruled on their eligibility, the Board agent was not required to challenge their ballots. Further, because all parties were aware that the eight new hires were included on the *Excelsior* list and were in a position to challenge their ballots if they desired, the Board would not entertain a postelection challenge.

V

Supreme Court Litigation

During fiscal year 2004, the Supreme Court decided, on the merits, no cases involving the Board as a party. The Board did not participate as amicus in any cases before the Court. The Court denied five private party petitions for certiorari in Board cases, and granted none.

VI
Unfair Labor Practices

The Board is empowered under Section 10(c) of the Act to prevent any person from engaging in any unfair labor practice (listed in Sec. 8) affecting commerce. In general, Section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity that Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or any other person irrespective of any interest he or she might have in the matter. They are filed with the Regional Office of the Board in the area where the alleged unfair labor practice occurred.

This chapter deals with decisions of the Board during fiscal year 2004 that involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference with Employee Rights

1. No-Solicitation Rules

In *City Market, Inc.,*[1] the Board majority found that the respondent violated Section 8(a)(1) of the Act when, during an organizing campaign, it promulgated a no-solicitation rule. Although the rule was facially valid, the Board majority found that the respondent instituted it specifically in response to its employees' union organizing activities. Further, the respondent failed to demonstrate that it promulgated the rule to maintain production and discipline.

The respondent posted a "No-Solicitation Policy" and "Interoffice Memorandum" on an employee bulletin board in the store's breakroom after the union had resumed an organizing campaign. The store manager testified that the respondent posted the policy in response to two employees' complaints of organizing efforts by union supporters. There was no evidence that the solicitation attempts that preceded the posting involved unlawful or unprotected activity.

The Board majority found that when a rule such as the one in this case has lain dormant for a substantial period of time, and is resurrected only in the context of the union campaign, there is a reasonable presumption of a nexus between these two events. Once it is shown that

[1] 340 NLRB No. 151 (Chairman Battista and Member Walsh; Member Schaumber dissenting in part).

the rule was promulgated in the context of a union campaign, the burden of explanation lies with the employer to explain its timing. The respondent's explanation was that it received complaints from employees about the union organizing, but the Board majority agreed with the judge that those complaints concerned protected solicitations by fellow employees. Accordingly, "since the reason for the resurrection of the policy was protected concerted activity, i.e. solicitation not shown to be unprotected, the resurrection of the policy was unlawful."

In dissent, Member Schaumber stated that the no-solicitation policy was lawful, expressly permitting, for example, solicitations during employee meals and breaktime, and therefore its posting prior to the second election was not, without more, unlawful. Member Schaumber argued that the majority erred in relying solely on the timing of the respondent's posting of the rule in finding a violation of Section 8(a)(1). Even assuming arguendo that the General Counsel established a prima facie case that promulgation of the "Solicitation Policy" was unlawful, Member Schaumber found that the respondent rebutted that prima facie case by establishing that its no-solicitation policy was implemented in response to legitimate employee complaints. "[S]ince the respondent has the right to establish rules to ensure production and maintain discipline, the promulgation of the no-solicitation policy was not unlawful. And in these circumstances, the mere fact that the respondent promulgated the rule in the context of a union campaign cannot render the lawful promulgation unlawful."

2. Other Employer Rules

In *Double Eagle Hotel & Casino*,[2] a unanimous panel of the Board found, among other things, that the respondent violated Section 8(a)(1) by maintaining a rule in its employee handbook entitled "Customer Service." Members Liebman and Walsh also found unlawful two other rules in the handbook entitled "Confidential Information" and "Communication."

The "Customer Service" rule provided, in part, that employees were "[n]ever [to] discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard." The Board found that the reference to "Company issues" and "other employees" reasonably encompassed subjects such as wages and working conditions and that, by prohibiting the discussion of these legally protected subjects in "public areas," the rule was unlawfully

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[2] 341 NLRB No. 17 (Members Liebman and Walsh; Chairman Battista concurring in part and dissenting in part).

overbroad. The Board explained that although the respondent, a gambling casino, had the right for business reasons to apply the rule to the "gambling area," its extension of the rule to "public areas," which necessarily included the casino parking lots and public restaurants and restrooms, rendered the rule unlawful.

A Board majority additionally found that the Respondent's "Confidential Information" and "Communication" rules were unlawful under the test set forth in *Lafayette Park Hotel*,[3] which holds that where "rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." In finding that the "Confidential Information" rule was unlawful, the majority noted that the rule warned employees that they would be disciplined if they discussed confidential information, which was defined "to include wages and working conditions such as 'disciplinary information, grievance/complaint information, performance evaluations, salary grade, types of pay increases and termination date of employees.'" They concluded that the rule, "which on its face and on threat of discipline, expressly prohibits the discussion of wages and other terms and conditions of employment, plainly infringes upon Section 7 rights and violates Section 8(a)(1)." The Board majority also found that the "Communication" rule was similarly unlawful because it "reference[d] the confidentiality rule" in prohibiting "communicat[ion of] any confidential or sensitive information concerning the Company or any of its employees to any non-employee" without respondent's approval.

Chairman Battista, in a partial dissent, agreed with the administrative law judge's finding that both the "Confidential Information" and "Communication" rules were lawful. The Chairman found that while rules that clearly proscribe Section 7 activity could, without evidence of their application, be found unlawful, neither rule was of that character. The Chairman further found that because there was no evidence that these rules were enforced unlawfully and because both rules, rather than being "aimed at Section 7 activity," achieve a reasonable balance between Section 7 rights and the need for confidentiality, their mere maintenance did not violate the Act.

In *Co-Op City*,[4] a panel majority of the Board agreed with the administrative law judge that the respondent did not violate Section 8(a)(1) by maintaining a rule that prohibited employees from

[3] 326 NLRB 824 (1998).
[4] 341 NLRB No. 34 (Chairman Battista and Member Schaumber; Member Walsh dissenting).

participating in the election of the members of the respondent's board of directors.

The respondent owned, maintained, and operated a cooperative housing development in the Bronx, New York, known as Co-Op City. The union represented the security officers and lobby guards employed by the respondent. The election rule in issue prohibited employees from using their positions as employees to affect the outcome of the election of a member of the respondent's board of directors.

Iris Baez, who ran for the board in 1999, proposed creating a new position of lobby attendant. The union believed that the proposal might lead to downsizing of the security department. Joseph Pizzano, the union president and a security officer, distributed a two-page flyer in late April 1999 that criticized Baez's candidacy and her stand on the lobby attendant proposal. Thereafter, Pizzano was discharged for violating the election rule.[5]

Citing *Lutheran Social Service of Minnesota*,[6] the Board majority stated that employees do not have a general right under Section 7 to participate in the election of a company's board of directors. Therefore, the majority reasoned that the respondent's rule on its face does "not reach or 'chill' protected activity." The majority recognized that in Board law there is an exception for employee protests over the selection of a supervisor or manager if the identity and capabilities of the supervisor have a direct impact on the employees' job interests.[7] However, the majority found that the respondent's board members do not have a direct impact on the employees' terms and conditions of employment. In addition, the potential effect on the security officers of hiring lobby attendants was at most indirect and speculative. The majority found that the evidence "simply does not establish a direct link or nexus between the implementation of the lobby attendant program and the unit employees' working conditions." The majority held that Pizzano's activities aimed at defeating Baez in the election "were not protected, and the Rule as applied to him was not unlawful."

Dissenting, Member Walsh stated that the rule was overbroad and clearly directed at protected activity. He emphasized that employees may protest the selection of a manager who will have a direct impact on their terms and conditions of employment. Member Walsh asserted that the employees did not lose the right to express their views about the lobby attendant proposal simply because the issue arose during the election of the board of directors.

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[5] The complaint did not challenge his discharge as an unfair labor practice.
[6] 250 NLRB 35, 41 (1980).
[7] *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1962).

3. Soliciting Employees to Withdraw Support from the Union

In *Kentucky Fried Chicken,*[8] the Board concluded that the respondent unlawfully solicited employees to decertify the union through speeches delivered at its stores during negotiations for a new collective-bargaining agreement. In the speeches, the respondent told employees that the parties were near agreement on a new contract, but that it was not certain whether the union still had the support of a majority of employees. The respondent cited evidence of employee turnover and union inactivity, and noted that unrepresented employees were receiving a wage increase that was withheld from them because the union objected to it. The respondent told employees that although it might not have enough evidence to establish a loss of majority, it had learned that many employees did not favor the union, and that it would be interviewing its managers to see if there was any more evidence because it could not question the employees. Following these speeches, employees submitted statements to the respondent indicating disaffection from the union, and the respondent thereafter withdrew recognition.

The Board concluded that the speeches unlawfully solicited employees to withdraw their support from the union. The Board also concluded that the respondent's subsequent withdrawal of recognition, on the basis of employee statements of disaffection submitted after the speeches, was unlawful because the speeches "tainted" the statements of disaffection and precluded the existence of a "good faith uncertainty" concerning the union's continued majority status.[9]

Members Liebman and Walsh found that the speeches also unlawfully implied that the union was not necessary for employees to receive a wage increase and that the union was to blame because employees did not receive a wage increase. Member Schaumber, dissenting in part, noted that the complaint alleged only that the speeches unlawfully solicited employee disaffection from the union, and found "no need to parse the speeches" to identify additional ways in which they could be found to violate the Act.

4. Protected Employee Activities

In *Winston-Salem Journal*,[10] the Board reversed the administrative law judge and found that the employer violated Section 8(a)(1) of the Act by threatening employee John Mankins with discipline and Section 8(a)(3) by suspending him. Members Liebman and Walsh further found

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[8] 341 NLRB No. 13 (Members Liebman and Walsh; Member Schaumber dissenting in part and concurring in part).

[9] The Board applied the "good faith uncertainty" standard because the case arose prior to the Board's decision in *Levitz,* 333 NLRB 717 (2001).

[10] 341 NLRB No. 18 (Members Liebman and Walsh; Chairman Battista dissenting in part).

that the employer unlawfully discharged Mankins. Contrary to the judge, the Board found that the employer threatened, suspended, and discharged Mankins not because he was insubordinate, but rather because he had engaged in the protected activity of complaining about the treatment of employees by a supervisor, and that his conduct had not lost the protection of the Act.

Specifically, the Board found that the employer unlawfully threatened Mankins when, in the process of complaining at a crew meeting that his supervisor, Leonard, was treating the employees unfairly, Mankins loudly called Leonard a racist. Citing *Churchill's Restaurant*,[11] the Board first found that Mankins' complaint at the crew meeting was protected activity. The Board next applied the *Atlantic Steel*[12] factors (place of the discussion, subject matter of discussion, nature of the conduct, and provocation by unfair labor practices) and determined that Mankins' conduct was not so opprobrious as to lose the protection of the Act. Consequently, the Board found that the employer violated Section 8(a)(1) of the Act when Leonard threatened Mankins with discipline for Mankins' conduct at the crew meeting.

Following Leonard's threat, Mankins again called him a racist. In response, Leonard suspended Mankins. The Board found that Mankins' remark was again protected, and, applying the *Atlantic Steel* factors, concluded that Mankins' second outburst had not lost the Act's protection. Thus, the suspension violated Section 8(a)(3).

Finally, as Mankins exited the plant to serve his suspension, he walked through a room called the quiet room where he saw Leonard and called him a "bastard red-neck son-of-a-bitch." Based on this conduct, the employer discharged Mankins 5 days later, for "serious insubordination." The majority found that Mankins' comments were a continuation of his protest against Leonard's alleged unfair treatment, were uttered as he was leaving the facility by the most direct route, and—while inflammatory—were not so opprobrious as to cost him the protection of the Act.

Chairman Battista dissented on the issue of Mankins' discharge. Applying the *Atlantic Steel* factors, Chairman Battista agreed with the majority that the location of the outburst favored Mankins losing the Act's protections. Nor, the Chairman stated, was it merely a continuation of the earlier exchange with Leonard. Rather, the Chairman found it physically and temporally removed. In addition, the Chairman found that the unfair labor practices that provoked Mankins' offensive

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[11] 276 NLRB 775, 777 fn. 11 (1985).

[12] 245 NLRB 814 (1979).

remarks "were not so egregious to provoke the outrageous outburst that occurred." The Chairman concluded that Mankins' outburst was highly offensive and insubordinate, and was therefore not protected.

In *Waters of Orchard Park*,[13] the Board majority held that two nursing home employees were not engaged in protected activity under the Act when they called the New York State Department of Health Patient Care Hotline to report excessive heat in the respondent's nursing home.

There was particularly hot weather in Buffalo, New York, in June and July of 2002, and the older portions of the respondent's nursing home did not have central air conditioning. To deal with the heat, the respondent began furnishing bottled spring water for the staff, and, on July 1, the respondent installed two freestanding air conditioners in the unit of the nursing home involved in this case. On July 1 and 3, two patients were sent to the hospital. Both showed symptoms of dehydration. When Kathleen Reed, a certified nursing assistant, arrived at work at 2 p.m. on July 4, two more patients had been sent to the hospital. Reed observed that the patients were refusing to eat and drink, were unresponsive, and were taking off their clothes. When Carol Gunnersen, a licensed practical nurse, arrived at 3:30 p.m., she also noticed that patients were lethargic and were taking their clothes off. There was no bottled water available for the staff on that day, since it was locked in the nursing director's office during her holiday absence. Later that afternoon, Gunnersen dialed the phone number for the New York State Department of Health Patient Care Hotline and tossed the phone to Reed. Reed stated that there was no water for staff members, that several residents were dehydrated, and that she was very hot and wanted them to come look into the conditions. Reed did not identify herself truthfully, but said that she was a relative of a resident. The respondent learned of the call the next morning and began an investigation. When Reed was questioned about the call to the hotline, she initially claimed that she had no knowledge of the call. She later admitted that she had made the call. Reed was suspended pending further investigation and was asked to leave the premises. She was discharged on July 11. Gunnersen was suspended on July 6. She never returned to work.

Chairman Battista and Member Schaumber agreed with the judge that Reed and Gunnersen were engaged in concerted activity. However, contrary to the judge, they found that their activity was not protected

[13] 341 NLRB No. 93 (Chairman Battista and Member Schaumber; Member Meisburg concurring; Members Liebman and Walsh dissenting).

under the Act because it did not relate to a term or condition of their employment. The majority explained:

> Reed and Gunnersen explicitly disclaimed an interest in their own working conditions when they called the hotline. Reed called the hotline to express their concern about patients, as distinguished from an effort to improve their lot as employees. Indeed, Reed went out of her way, to the point of lying, to tell the authorities that she was a relative of a resident. If Reed wanted to complain about employee conditions, she need only to have truthfully identified herself as an employee. In addition, it is significant that the hotline that she called was the "Patient Care Hotline."

The majority relied on precedent holding that employee concerns for the "quality of care" and the "welfare" of their patients are not interests encompassed by Section 7's mutual aid or protection clause.

Member Meisburg concurred with the majority's determination that the employees' discipline did not violate the Act. He wrote:

> It is undoubtedly a good thing that the employees in this case complied with the State law requiring them to report the conditions they found. It is even more of a good thing when the State law at issue protects an interest as important as patient care. But the National Labor Relations Act is not a general whistleblowers' statute. Absent an intent to improve wages, hours, or working conditions, concerted action of the type in this case cannot be deemed "mutual aid or protection." Because the employees here testified that their *sole* motive was to act in the interest of their patients, we cannot find that their conduct was protected by the Act.

In dissent, Members Liebman and Walsh found that Reed and Gunnersen's concerns over patient care necessarily involved their working conditions and that Board law supports this conclusion. They pointed out that the respondent posted a State notice that required the nursing home employees "to report any instance of patient physical abuse, mistreatment or neglect" to the State health department. They agreed with the judge that this requirement was an important part of the employees' working conditions in caring for the patients. They also noted that the severity of the heat directly affected the manner in which the nursing home employees carried out their resident-care duties. Members Liebman and Walsh also expressed their view that in the health care field, it is illogical to separate patient care from working conditions. They stated:

> Contrary to the majority, we do not believe that the intertwining of patient care with the working conditions of those in the healthcare field impermissibly expands the scope of Section 7. Taking care of the patients here *is* the work of Reed and Gunnersen. If they cannot protect their patients from the effects of excessive heat, they cannot fully perform their work. The link between their call to the hotline and their interests as employees is, therefore, direct and in no way attenuated.

In *Pathmark Stores, Inc.*,[14] the Board held that the respondent did not violate the Act when it prohibited bargaining-unit employees from wearing "Don't Cheat About the Meat!" T-shirts and hats during their working time in customer areas of the respondent's grocery stores.

The case arose when the union learned that the respondent was stocking the meat departments in its stores with case-ready, i.e., "prepackaged" meat. Historically, the unit employees had cut all meat in the stores. The sale of prepackaged meat reduced the unit employees' working hours. In response, the union distributed handbills that accurately identified meats the union knew had been prepackaged, and encouraged consumers to ask unit employees which meats they had cut fresh. The union emphasized the latter question because the prepackaged meat was not labeled in any way to distinguish it from fresh-cut meat.

The union also distributed to employees T-shirts bearing the message "Local 342-50 says: Don't Cheat About the Meat!" and hats bearing the slogan "Don't Cheat About the Meat!" The union asserted that the respondent was cheating its customers by allowing them to observe unit employees cutting meat products, thereby creating the impression that all the respondent's meat was cut fresh, and then selling prepackaged meat that was not labeled as such. The nature of the union's dispute with the respondent was well publicized in major media in New York City.

Subsequently, unit employees arrived at work wearing the slogan-bearing T-shirts and hats. Although the respondent had no policy on uniforms and had permitted employees to wear other union insignia, the respondent threatened to suspend the employees if they did not remove these particular T-shirts and hats before starting work. The respondent asserted that the "Don't Cheat About the Meat!" slogan depicted it as dishonest and could damage its relationship with its customers, by encouraging customers to think—aside from the union's criticisms of the sale of prepackaged meat—that the respondent was somehow cheating them in connection with its meat products. The employees refused to

[14] 342 NLRB No. 31 (Chairman Battista and Members Liebman and Schaumber).

remove the T-shirts and hats prior to commencing work, and were suspended.

The Board assumed for purposes of the case that the employees' activity was protected, but nevertheless concluded that the respondent did not violate the Act. The Board found, under *Republic Aviation Corp. v. NLRB*,[15] that the respondent established, as an affirmative defense, special circumstances justifying its decision to prohibit the employees from wearing the "Don't Cheat About the Meat!" T-shirts and hats during their working time in customer areas of the grocery stores.

The Board reasoned that the union's slogan was ambiguous and that it was reasonable for the respondent to expect that the slogan likely could lead the respondent's customers to believe that, aside from the issue of prepackaging, the respondent was cheating them in some way with respect to the meat offered for sale. The Board acknowledged the General Counsel's contention that, in the context of the union's publicity campaign, customers might have understood the "Don't Cheat About the Meat!" slogan as simply referring to the dispute with the union over the sale of prepackaged meat. However, in striking a balance between the parties' competing interests, the Board found that the respondent's concerns were appropriately gauged on the basis of its reasonable construction of the ambiguous slogan.

For these reasons, the Board dismissed the complaint.

The issue presented in *Exxon Mobil Corp.*,[16] was whether the respondent unlawfully terminated Chief Steward Nick Slusher because of his involvement in allegedly protected grievance-related conduct. A Board majority found, contrary to the judge, that Slusher was not in fact engaged in protected grievance activity, but instead was engaged in unprotected harassment of a fellow employee because of that employees' dissident union activities. The majority therefore found that the respondent lawfully terminated Slusher for his unprotected conduct.

The facts showed that, on February 26, 2003, unit member Dan Breneisen filed a decertification petition with the Board. Five days prior to the April 11, 2003 scheduled election date, Slusher showed a court abstract to fellow employees and supervisors allegedly showing that Breneisen had been charged with driving-under-the-influence. Breneisen filed a complaint with the respondent alleging that Slusher harassed him by "tak[ing] personal and confidential records about me and [passing] out photocopies to my fellow-co-workers." The respondent informed

[15] 324 U.S. 793 (1945).

[16] 343 NLRB No. 44 (Chairman Battista and Member Schaumber; Member Walsh dissenting).

Slusher that it had received another harassment complaint against him which it would investigate after the election.

On the date of the election, but before the ballots were tallied, Slusher filed a grievance alleging disparate treatment under the respondent's drug policy. The union was decertified in the election. After the election, Slusher claimed that he had distributed the court abstract in support of his grievance.

The majority rejected Slusher's contention, finding that his grievance filing was an after-the-fact attempt to cloak his unprotected harassment of Breneisen for filing the decertification petition. They noted that Slusher had learned of Breneisen's alleged conduct months earlier, but had taken no action. "Thus, the timing of Slusher's discovery of the DUI incident and the distribution of the court abstract, as compared to this subsequent grievance filing, shows that Slusher's object in circulating the DUI record was to harass Breneisen, who he knew was subject to discharge under the respondent's strict drug policy" if it was determined that Breneisen had failed to report the incident. Further, the grievance was filed only after Slusher learned that the respondent would investigate Breneisen's claim that Slusher had harassed him. Finally, the employee who, in his grievance, Slusher claimed was treated disparately from Breneisen had already been discharged for too long a period for a timely grievance to be filed. In these circumstances, the majority found that Slusher, an experienced union official, who was punctilious in enforcing the contract, filed his grievance in "an attempt to cloak Slusher's earlier harassment of Breneisen with protected status." The majority cautioned that "[w]hile Section 7 shields employees from potential employer discipline or other adverse action in the exercise of Section 7 rights, it does not permit employees to use grievances as a sword to gain immunity from the consequences of harassment."

Member Walsh dissented, emphasizing the long-held rule that grievance-related activity conducted prior to the actual grievance filing is protected, concerted activity. Member Walsh explained that, applying that rule in this case, Steward Slusher's showing of the court abstract to demonstrate the basis for filing his subsequent grievance was protected, concerted activity. Member Walsh observed that the judge credited Slusher's testimony that he showed fellow employees the court abstract in support of his belief that a grievance should be filed, and that the "protected status of a steward discussing and advocating the potential filing of a grievance with unit members is incontrovertible." Member Walsh declared that the "majority's depiction of steward Slusher's protected grievance activity as unprotected harassment of Breneisen is simply unfounded," explaining that Breneisen had no confidentiality

interest in the court abstract (a public document), and in any event that the fact that the respondent or even Breneisen felt that Slusher was engaged in harassment did not render the grievance-related activity unprotected. Member Walsh thus concluded that Slusher was clearly engaged in protected, grievance-related activity; that his discharge for such activity was unlawful; and that he engaged in neither harassment not extreme behavior causing him to lose the protection of the Act.

5. Access to Employer Property

In *ITT Industries, Inc.,*[17] a Board majority affirmed an earlier decision,[18] on remand from the D.C. Circuit,[19] that the respondent violated Section 8(a)(1) of the Act by denying access to offsite employees to handbill in its parking lot.

On two occasions, employees from one of the respondent's plants handbilled in support of the union in the parking lot of another of the respondent's plants, asking employees to sign an organizing petition. The respondent's superintendent each time told the handbillers to leave. The respondent asserted security concerns for ejecting the handbillers, citing various incidents where security was violated over the past few years.

In its original decision, the Board adopted without comment, the judge's finding that the respondent had violated Section 8(a)(1). The judge applied the standard set forth in *Tri-County Medical Center*,[20] that prohibits an employer from denying off-duty employees entry to non-working areas to handbill except where justified by business reasons. The judge had found the evidence of interference with vehicles in the parking "woefully inadequate" to warrant banning the handbillers from the parking lot.

The D.C. Circuit found "that it is no means obvious that Section 7 extends non-derivative access rights to off-site employees . . . [and] the Board was obligated to engage in considered analysis and explain its chosen interpretation."[21]

On remand from the D.C. Circuit, the majority applied *Hillhaven Highland House,*[22] and found that the offsite employees had a nonderivative right of access. The majority further found that since the offsite employees were seeking to organize the onsite employees in a single, 3-plant unit that included their own plant, the common concerns

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[17] 341 NLRB No. 118 (Members Liebman and Walsh; Chairman Battista dissenting).
[18] 331 NLRB 4 (2000).
[19] *ITT Industries v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001).
[20] 222 NLRB 1089 (1976).
[21] *ITT Industries v. NLRB*, supra at 1004.
[22] 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003).

shared by the respondent's onsite and offsite employees were even greater than those that existed in *Hillhaven.*[23]

The majority further found that the respondent's security concerns, although legitimate, did not justify the total exclusion of the Respondent's offsite employees from its parking lot. Thus, they noted, "it is easier for an employer to regulate the conduct of an employee . . . than it is . . . to control a complete stranger's infringement on its property interests."

Weighing the "substantial" Section 7 organizational rights of the respondent's offsite employees against the respondent's security concerns, the majority found that the respondent had not met its burden, under *Hillhaven*, of demonstrating that its security needs warranted the absolute prohibition of handbilling on its property by offsite employees.

Chairman Battista, in dissent, found that the various security violations that had occurred on the respondent's property, including a person who entered the property to physically confront an employee and a threat to shoot an employee, "clearly demonstrate substantial security concerns, and a need to limit access to those who work at the facility." He emphasized that the respondent's longstanding security policy "was developed solely in response to its security concerns" and that the security measures undertaken by the respondent "bore no relation to any protected concerted activity." He distinguished *Hillhaven Highland House,* supra, as not involving "actual events of vandalism and threats of physical harm." Chairman Battista concluded, "[i]n balancing Section 7 rights against security measures, I strike the balance here in favor of the latter."

In *St. Luke's Memorial Hospital*,[24] the Board considered whether the respondent violated the Act by discriminatorily enforcing its no-solicitation/no-distribution and 2-day notice policies against the union. The administrative law judge had found that the respondent violated Section 8(a)(1) of the Act by discriminatorily applying both policies. The Board found merit in the respondent's exceptions to the judge's decision, finding that the General Counsel failed to demonstrate that such rules were applied in a discriminatory manner. Accordingly, the complaint was dismissed.

The facts of the case arose when, in July 2000, the respondent acquired the formerly state-run Jose A. Gandara Hospital, renaming it St. Luke's Memorial Hospital ("St. Luke's II"). The respondent also owned another nearby hospital ("St. Luke's I") and transferred from it a group

[23] Id. at 649.
[24] 342 NLRB No. 106 (Chairman Battista and Members Liebman and Walsh).

of union-represented employees to the new facility at St. Luke's II. Although the respondent's facility at St. Luke's II was not unionized, the respondent agreed to apply the terms of the collective-bargaining agreement to those transferred employees. The collective-bargaining agreement contained provisions entitling union representatives to visit the hospital's premises to ensure compliance with the agreement, "provided they notify the corresponding Hospital representative in advance about their visit."[25]

In correspondence with the union in October 2000, the respondent advised the union of its no-solicitation/no-distribution policies and its requirement that the union give 2-days' advance notice before visiting with their represented employees. For 1-1/2 years following the correspondence, union representatives frequently visited the transferred represented employees at the respondent's facility, giving advance notice of only a few hours each time.

In early April 2002, the union's representative, Ingrid Vega, called the respondent to announce her intent to visit that day. Vega and another union official sat in the respondent's cafeteria distributing copies of the collective-bargaining agreement and talking to employees for 1–2 hours. The respondent asked the union representatives to leave, asserting that they had failed to give adequate notice of their intent to visit.

In its complaint and at trial, the General Counsel alleged that the respondent's ejection of the two union representatives in April 2002 under its no-solicitation/no-distribution rule and prior notice policy was unlawful. More specifically, the General Counsel alleged that the respondent applied the rule "selectively and disparately by denying access to union representatives to the respondent's cafeteria and prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions."[26] The judge agreed with the General Counsel, finding that the respondent discriminatorily applied both policies by permitting solicitation and distribution by other parties (without prior notice), while not allowing the union to do so.

The Board disagreed with the judge's finding that the respondent violated Section 8(a)(1) by evicting the union representatives from the cafeteria. The Board noted that the General Counsel had failed to demonstrate that the respondent treated nonunion solicitations differently from union solicitations. More specifically, the Board found that the respondent's permitting regional newspapers to be placed in the cafeteria was not "sufficiently analogous" to the union's actions, because "these

[25] 342 NLRB No. 106, slip op. at 1.
[26] Slip op. at 2.

newspapers were not provided for the purpose of engendering any reply or other action on the patrons' part."[27]

Likewise, the Board found that the union had failed to establish that the Respondent's tolerance of a single instance of an employee solicitation for personal business was sufficient to show discriminatory treatment. In the absence of evidence demonstrating that the respondent "knew, or was likely to have known, of the employee's solicitation, this single isolated incident fails to demonstrate the respondent's tolerance of such conduct."

As to the 2-day prior notification rule, the Board also found no evidence of discrimination, as there was "no evidence that the [2-day notification] request applied only to the union and not to other organizations."[28] Moreover, there was no evidence that any other organizations were permitted, or even attempted, to enter onto the hospital's property without advance notice.

In a footnote, Members Liebman and Walsh stated that the "record evidence suggests that the respondent unlawfully interfered with the employees' right of access to their elected union representatives, as established by past practice, and/or unilaterally changed the parties' agreement and practice regarding notification and access."[29] However, the General Counsel did not litigate this theory.

6. Unlawful Employer Threats

In *Gold Kist, Inc.*,[30] the Board found that the respondent violated Section 8(a)(1) of the Act by threatening loss of benefits and the inevitability of strikes and strike violence if employees selected the union as their collective-bargaining representative. After the union filed a petition seeking to represent some 900 employees at the respondent's Douglas, Georgia, poultry processing plant, the respondent held a series of meetings with the employees. In the meetings, Crawford, the respondent's labor relations manager, told employees that the union thrived on hostility, strikes were its only weapon to win the respondent's agreement to the union's proposals, and a strike was likely to be violent. A video shown in meetings during the week before the election depicted violence that had occurred during a strike 11 years earlier at another of the respondent's plants, including a picture of a bullet hole in a car accompanied by the sound of a gunshot. Crawford pointed out employees in the video throwing rocks at a bus and trying to cut its tires. After the video, Crawford presented slides that showed a car with a

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[27] Slip op. at 3.
[28] Slip op. at 3.
[29] Slip op. at 3 fn. 8.
[30] 341 NLRB No. 135 (Members Liebman, Schaumber, and Walsh).

bullet hole, a bus with shattered windows, and a man with a bandaged neck. Another slide urged employees to make sure that a strike would not happen there by voting "no union." The respondent also put up posters in its plant showing scenes of violence from the slides. Written on the posters were descriptions of the violence and the slogan "vote no violent strikes, vote no union!" Other posters stated that, in return for striking at five other plants, employees had gotten "lost paychecks, violence (acid in cars, windshields shattered, cars shot into, woman shot), [and] some employees lost their jobs." At the bottom of the posters was the message "Don't let it happen here. Vote no union!"

The Board found that the respondent, through its statements, video, slides, and posters, created a reasonable impression in the minds of its employees that, if they chose the union, a strike was inevitable and was likely to be violent. The Board found that the respondent was not attempting to influence the employees by reasoned argument, but rather was aggressively appealing to the employees' fear of a strike and violence. By doing so, the Board found, the respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and, therefore, violated Section 8(a)(1) of the Act.

The Board also found that the respondent violated Section 8(a)(1) by soliciting grievances and promising to remedy them, threatening to withdraw an existing condition of employment if the employees selected the union to represent them, more closely monitoring prounion employees and restricting their movement, and threatening that other employers would refuse to hire employees because of their union activities. Additionally, the Board found that the respondent violated Section 8(a)(3) and (1) of the Act by depriving employee Preston of overtime work. The Board sustained the objections that paralleled the unfair labor practices and set aside the election, which the union had lost by a vote of 345 to 523.

In *Kelly Brothers Sheet Metal, Inc.*,[31] the Board majority held that the respondent violated Section 8(a)(1) of the Act when it told employees during a union organizing campaign that it could afford to keep them working right now, but if they went union, it could not keep them working because there were not that many union jobs around.

The respondent installs HVAC systems in new and renovated buildings. In March 2002, it began work on a hospital construction project. In late November or early December, employees were told to leave the hospital and go back to the shop and clock out. Bobby Kelly, the respondent's project manager, told employees that they were going to

[31] 342 NLRB No. 9 (Members Schaumber and Walsh; Chairman Battista dissenting in part).

have a meeting about the union, but that they should go across the street to the graveyard since he would have to give the union equal time if he spoke to them on company property. Kelly then told the group of 50 to 60 employees that "he could afford to keep us working year-round right now, but if we went union, he couldn't keep us working because there wasn't [sic] that many union jobs around. There weren't any union contractors around."

The Board majority affirmed the administrative law judge's finding that the respondent unlawfully threatened employees with the loss of job opportunities if they selected the union as their bargaining representative. The majority stated that, pursuant to *NLRB v. Gissel Packing Co.*,[32] "an employer may 'make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . .'" In this case, the majority found that "the Respondent furnished no objective basis for claiming that unionization would adversely affect its operations" and "produced no evidence whatsoever as to the number of nonunion or unionized contractors in the area or that it would be unable to operate as a unionized company." The majority concluded that employees would reasonably interpret Kelly's statement "as an unlawful threat of job loss because the Respondent did not, as *Gissel Packing* requires, phrase its prediction on the basis of objective facts to convey its belief as to 'demonstrably probable consequences beyond his control.'"

Chairman Battista, dissenting on this issue, found "Kelly's stated doubt about the continuing viability of the company 'because there [weren't] that many union jobs around' to be a lawful expression of his opinion about the possible effect of unionization." Chairman Battista pointed out that it is not unusual in the construction industry for unions to insist upon and obtain clauses that require the signatory to work only on union jobs. He continued: "The employer here was simply making the prediction that, under such a clause, work would dry up because there were not that many union jobs available." Thus, Chairman Battista concluded, "the Respondent was making an economic prediction, not an unlawful threat to retaliate."

In *Miller Industries Towing Equipment*,[33] a panel majority reversed the judge and held that pre-election statements by two high-ranking

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[32] 395 U.S. 575, 618 (1969).

[33] 342 NLRB No. 112 (Chairman Battista and Member Schaumber; Member Liebman dissenting in part).

members of management did not unlawfully threaten employees that unionization would result in layoffs.

A few days before a representation election, respondent's general manager, Baker, met with a group of about 20 employees. According to one employee, Baker said that there "might be a possibility of a layoff, if the Union came in, and they really couldn't afford it." The panel majority found "these general references to 'possibilities' are inadequate to establish" a threat because they "do not detail how or why the Union would force the Respondent to lay off employees, but do clearly indicate that these possibilities would be based on the respondent having no alternative" to a layoff. The majority compared Baker's statement to another that was alleged unlawful but dismissed by the judge, and found it equally vague and too abbreviated to constitute a threat.

On the day before the election, respondent's chief executive officer (Badgley) held a meeting with the entire work force. He described how, despite declining sales figures and financial losses over the past 2 years, respondent avoided layoffs by moving work that had been done by outside sources into the facility. He noted that two of respondent's unionized former competitors had gone bankrupt and that its current competitors were nonunion. He said that others in the industry might use the prospect of respondent's unionization to gain a competitive edge and that the possibility of a strike could lead to business interruptions and harm its relationship with customers.

The majority disagreed with the judge's finding that Badgley equated unionization with dire consequences, finding instead that some of the statements were based on "demonstrable facts and verifiable accounts of past events," and others were "limited to Badgley's views about the possible impact of the Union in dealing with a less-than-vigorous industry climate." Distinguishing *Ipilli, Inc.*[34] and *Crown Cork & Seal Co.*,[35] the majority stated that Badgley did not predict unavoidable consequences, but merely offered his perspective on the effect of unionization on respondent's business condition.

Member Liebman, in dissent, agreed with the judge that these comments from two of respondent's highest-ranking officials should be considered together, as they reflected respondent's singular purpose of creating "fear and uncertainty about the effect of unionization on job security." The statements were made within days of each other, just before the election, and dealt with a matter of great importance to employees. Badgley's reminder about respondent's decision to avoid

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[34] 321 NLRB 445 (1996).
[35] 308 NLRB 445 (1992).

layoffs by bringing work in-house implicitly suggested that respondent could decide differently in the future, particularly if employees rejected his request that they work together and forego union representation. Describing the majority's view as failing to apply the appropriate test for coercion, that is, how the standards would be perceived by a reasonable employee, Member Liebman cited *NLRB v. Gissel Packing Co.*:[36] "[T]he Board must be alert to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear."

7. Waiver of Employee Rights

In *Engelhard Corp.,*[37] the Board majority adopted the judge's finding that the respondent violated Section 8(a)(3) and (1) by suspending 38 employees because they picketed its shareholders' meeting at a location 70 miles from the plant. The majority concluded that the picketing did not contravene the no-strike/no-lockout clause in the parties' collective-bargaining agreement because well-established principles of Board law require that waivers of statutory rights, such as the right to picket, must be "clear and unmistakable."[38] Applying these principles to the interpretation of the specific contractual language at issue in the case, the panel majority concluded that the no-strike clause did not apply to the picketing in question because the clause clearly stated that the parties' intent was to "prevent any suspension of work due to labor disputes." Because the picketing was at a location remote from the plant, the Board majority found that it reasonably could not be expected to, and in fact did not cause a suspension of work. Accordingly, the majority found that the no-strike clause did not apply.

Dissenting, Member Schaumber found that the parties' no-strike/no-lockout pledge established a clear and unmistakable waiver of the right to picket the shareholders' meeting, because in it the union agreed "that it will not call, participate in, or sanction, during the term of this Agreement, any strike, boycott, picketing, work-stoppage or slow-down whatsoever." Construing the clause by its literal terms to apply to the picketing in question fulfilled the intent of the parties, in Member Schaumber's view, because it would aid in the prevention of suspensions of work. In addition, Member Schaumber found that the no-strike clause imposed obligations on the employer that went beyond those necessary to prevent suspensions of work, and that a broader reading of the union's pledge was therefore required as well.

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[36] 395 U.S. 575 at 617.
[37] 342 NLRB No. 5 (Members Liebman and Walsh; Member Schaumber dissenting).
[38] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).

8. Seeking Police Assistance in Response to Picketing

In *Nations Rent, Inc.*,[39] the Board majority found 1) that the General Counsel did not carry his burden of showing that the respondent discharged employee Jerry Bickel; and 2) that the respondent did not instigate police interference with lawful picketing in violation of Section 8(a)(1) of the Act. Member Walsh dissented with respect to both of those findings.

On May 19, 2001, Bickel verbally informed Manager Dan Olinger that he was going on strike to protest the respondent's unfair labor practices.[40] Bickel simultaneously handed Olinger a letter stating that the strike was "in protest of the [Respondent's] unfair labor practices" and that Bickel looked forward to returning to work once the "dispute" was resolved.[41] After handing the letter to Olinger, Bickel said, "I'm gone."[42] He then shook hands with another manager who was present and told him it had been nice working with him. Later the same day, Olinger drafted and mailed a letter to Bickel, accepting Bickel's "letter of resignation" and requesting that Bickel return any company property in his possession.[43] Bickel received this letter the following week and responded with a letter dated June 4, 2001, clarifying that he had not resigned, but was on an unfair labor practice strike. The respondent did nothing in response to Bickel's June 4 letter.

In evaluating the General Counsel's allegation that the respondent discharged Bickel by its actions in the spring of 2001, the Board majority considered "the entire course of relevant events following Bickel's declaration of an unfair labor practice strike, and not merely the respondent's May 19 letter" accepting Bickel's resignation.[44] Citing *North American Dismantling Corp.*,[45] the majority reasoned that a discharge would be shown if this course of events would logically lead a prudent person in Bickel's position to believe his tenure had been terminated. Here, however, the majority found no basis for Bickel to form such a belief. After receiving Bickel's June 4 letter, the respondent did not quarrel with Bickel's "last word" that he had not resigned.[46] Nor did the respondent otherwise indicate to Bickel that his employment with the respondent had ended, such as by reiterating its request that he return

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[39] 342 NLRB No. 19 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[40] The respondent does not dispute that Bickel had been engaged in union organizing activities and that some of the measures the respondent took to counteract those activities violated the Act.
[41] Id., slip op. at 1.
[42] Id.
[43] Id.
[44] Id., slip op. at 2.
[45] 331 NLRB 1557 (2000), enfd. in relevant part and remanded 35 Fed.Appx. 132 (6th Cir. 2002).
[46] *Nations Rent*, supra, 342 NLRB No. 19, slip op. at 2.

company property or by mailing him a final paycheck. Thus, the majority found that the General Counsel failed to show that Bickel had been discharged.

In dissent, Member Walsh concluded, based on the entire course of events relied on by the majority as well as the respondent's prior unlawful actions against Bickel, that Bickel would have reasonably believed himself discharged by the Respondent's actions in the spring of 2001.

On May 23, 2001, as representatives of the union picketed in a public easement area outside the respondent's property, the respondent moved several pieces of heavy equipment into the easement. Thereafter, one of the pickets moved his car from the easement onto the respondent's property. Observing this car on the respondent's property, Manager Olinger contacted local police and asked that an officer be sent to the respondent's facility. When a police officer arrived in response to Olinger's call, Olinger told him that one of the pickets' cars had been parked on the respondent's property and that the car had been moved shortly after Olinger called the police. Olinger said he suspected that the pickets had a police scanner, which enabled them to remove the car from the respondent's property before police arrived. Olinger also said the pickets were following employees home at night. Olinger concluded by asking the police officer to "look into that or ask [the pickets] about that."[47] Acting on Olinger's concerns, the police officer spoke to the pickets and warned them that each of Olinger's allegations, if true, could justify their arrest under state law. The pickets denied having a police scanner and denied following employees home at night, admitting only that they had followed employees to other jobsites. The pickets further stated that they trespassed onto the respondent's property only briefly, in order to accommodate the movement of the respondent's equipment.

Citing *Great American*,[48] the Board majority stated that "an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests."[49] Here, according to the majority, the respondent acted on its reasonable concerns that the pickets were trespassing, using a police scanner, and stalking employees after work. Under these circumstances, the majority concluded that the Respondent's involvement of police in speaking to the pickets did not violate Section 8(a)(1).

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[47] Id., slip op. at 3.
[48] 322 NLRB 17, 21 (1996).
[49] Id.

Member Walsh, in dissent, rejected the majority's position that the respondent sought police assistance based on "reasonable concerns." Citing the respondent's contemporaneous efforts to unlawfully interfere with the picketing (e.g., by moving its equipment into the public easement), Member Walsh concluded that the respondent's asserted concerns were pretextual and did not justify the respondent's involvement of police in speaking to the pickets.

9. Union Acting as an Employer

In *Operating Engineers*,[50] the Board considered the issue of whether a union can, under Section 8(a)(1) of the Act, lawfully discharge one of its key employees for criticizing the union's collective-bargaining policies and decisions. The Board assumed, without deciding, that the employee's criticism of the union's policy was concerted activity consistent with the "mutual aid or protection" clause of Section 7. It then held that any arguable Section 7 interest of the employee was outweighed by the strong legitimate interest of the union in ensuring loyalty by its key employees to its policies. Accordingly, it held that the employee's discharge did not violate Section 8(a)(1) of the Act.

10. *Weingarten* Rights

Chairman Battista and Members Schaumber and Meisburg ruled in *IBM Corp.*,[51] that employees who work in a nonunionized workplace are not entitled under Section 7 of the National Labor Relations Act to have a coworker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline. Members Liebman and Walsh dissented.

The majority overruled *Epilepsy Foundation of Northeast Ohio,*[52] which had extended to unrepresented employees a right to have a coworker present during such interviews, and returned to pre-*Epilepsy* Board precedent holding that *Weingarten* rights apply only to unionized employees. Under *NLRB v. J. Weingarten*,[53] employees represented by a union have the right to have a representative accompany them to a disciplinary interview. Member Schaumber agreed with the majority opinion and had a separate concurrence.

In this case, IBM, whose employees are not represented by a union, denied three employees' requests to have a coworker present during investigatory interviews about a former employee's allegations that they

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[50] 341 NLRB No. 114 (Members Liebman, Schaumber, and Walsh).

[51] 341 NLRB No. 148 (Chairman Battista and Members Schaumber and Meisburg; Members Liebman and Walsh dissenting).

[52] 331 NLRB 676 (2000).

[53] 420 U.S. 251 (1975).

had engaged in harassment. An NLRB administrative law judge, applying *Epilepsy Foundation*, found that IBM violated Section 8(a)(1) of the Act by denying the employees' requests for the presence of a coworker. Upon review, a Board majority reversed *Epilepsy* and therefore reversed the judge.

Chairman Battista and Member Meisburg, in reversing the judge, found that national labor policy is best served by not extending to a nonunion workplace a right to representation at a disciplinary interview. They noted changes in work environments requiring employers to conduct various types of workplace investigations pursuant to Federal, State, and local laws, especially workplace discrimination and sexual harassment, and the need for an employer to conduct those investigations in a thorough, prompt, and confidential manner. They also noted increasing instances of workplace violence and the aftermath of events of September 11, 2001.

Chairman Battista and Member Meisburg pointed out that in a nonunion workplace, coworkers do not represent the interests of the entire work force; coworkers have no official status as does a union representative in dealing with an employer and thus cannot redress the imbalance of power between employers and employees; coworkers do not have the same knowledge and skills as a union representative and thus are not as effective in facilitating workplace interviews; and, finally, the presence of a coworker, instead of a union representative, may compromise the confidentiality of a workplace investigation. For these reasons, they concluded that a nonunion employer has the right to conduct prompt, efficient, thorough, and confidential workplace investigations without the presence of a coworker, saying:

> Our reexamination of *Epilepsy Foundation* leads us to conclude that the policy considerations supporting that decision do not warrant, particularly at this time, adherence to the holding in *Epilepsy Foundation*. In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.
>
> Our considerations of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.

Member Schaumber joined the rationale of the majority and offered his own views in a separate concurring opinion. He found that the right to the presence of a witness in a predisciplinary investigatory interview is unique to a workplace in which employees are represented by a union and is distinctly derived from the statute. Member Schaumber concluded that the language of the statute does not provide such a right to nonrepresented employees. In this regard, he explained that the "better construction and the one most consistent with the language and policies of the Act, is that the *Weingarten* right is unique to employees represented by a Section 9(a) bargaining representative. The Board's decision to the contrary in *Epilepsy* sheared *Weingarten* from its historical, factual, and analytical roots; infringed upon recognized and fundamental common law management prerogatives; and ignored extant Board precedent that requires actual proof—rather than presuming its existence—of activity which is both 'concerted' and 'for mutual aid and protection' to qualify for protection under Section 7. Consequently, *Epilepsy* represented an abrupt and unwarranted departure from established law, an error we correct through our decision today."

Members Liebman and Walsh in dissent wrote: "Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy." They found no persuasive basis for the majority's "abruptly overruling" *Epilepsy Foundation of Northeast Ohio*, a recent decision upheld on appeal as "both clear and reasonable." Members Liebman and Walsh concluded that a statutory foundation for coworker representation exists under Section 7 even in the absence of a union, and that due process considerations supported such representation. The presence of a coworker at a disciplinary interview gives the affected worker a "potential witness, advisory, and advocate" in what can be an adversarial situation, Members Liebman and Walsh explained. "On this view, it is our colleagues who are taking a step backwards. They have neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. They have overruled a sound decision not because they must, and not because they should, but because they can. As a result, today's decision itself is unlikely to have an enduring place in American labor law. We dissent."

B. Employer Discrimination Against Employees

1. Quit Versus Discharge

In *Chartwells, Compass Group, USA, Inc.*,[54] the Board majority held that even assuming the continued validity of the "Hobson's choice" theory of unlawful constructive discharge, an alleged Hobson's choice constructive discharge would only violate Section 8(a)(3) if both the respondent's motive for the reprimand was unlawful and the employee's motive for quitting was fear that continued union activity would result in discharge. The majority found that the evidence here did not show either of these two necessary elements.[55]

Here, an employee complained to the respondent during a union organizing campaign that Eileen Bramsen, the principal union supporter, had told the employee that she (the employee) would be discharged if she did not join the union. The respondent summoned Bramsen to a disciplinary interview, read to Bramsen a work rule prohibiting employees from intimidating other employees, and accused Bramsen of violating the rule. Bramsen demanded to know who her accusers were and what her allegedly improper conduct was. The respondent refused to give Bramsen the requested information, citing confidentiality concerns. Bramsen angrily started to leave the office. As Bramsen left, the respondent asked if Bramsen was quitting and Bramsen replied that she was.

In undertaking a Hobson's choice evidentiary analysis here, the majority first addressed the issue of the respondent's motive for issuing Bramsen the reprimand. After reviewing the evidence, they found that the respondent's motive was Bramsen's unprotected intimidation of the employee, not Bramsen's protected union activities.

Then, assuming arguendo that the respondent's motive for issuing the reprimand was unlawful, the majority addressed the separate issue of Bramsen's motive for quitting. After reviewing the evidence, the majority found that Bramsen's motive for quitting was Bramsen's anger at the respondent's refusal to identify the complaining employees, not a fear by Bramsen that she would be discharged if she continued her protected union activities. For these reasons, the majority found that the respondent did not constructively discharge Bramsen in violation of Section 8(a)(3).

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[54] 342 NLRB No. 121 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).
[55] See *Hoerner Waldorf Corp.*, 227 NLRB 612 (1976); *Intercon I (Zercom),* 333 NLRB 223, 224 (2001).

Member Walsh, dissenting, affirmed the validity of Hobson's choice theory of unlawful constructive discharge. He then stated that the threshold issue was whether Bramsen would reasonably have understood the reprimand as being aimed at her union activities, rather than whether the respondent's motive for issuing the reprimand was unlawful. Member Walsh found that Bramsen would reasonably have understood the reprimand as being aimed at her union activities. Member Walsh further found that, in any event, the respondent's motive in issuing the reprimand was unlawful. Finally, with regard to the majority's finding that Bramsen's motive for quitting was her anger at the respondent's refusal to identify the complaining employees rather than her fear of discharge if she continued her union activity, Member Walsh asserted that the majority's finding was an "effort to artificially parse out aspects of the [disciplinary interview]"; he further found the anger was itself based in part on the unlawful reprimand and that the quit was therefore an unlawful constructive discharge.

2. Title VII Liability Concern as a Defense

In *St. Pete Times Forum*,[56] the Board unanimously adopted the administrative law judge's finding that the respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Peter Mullins. Although the Board recognized the respondent's legitimate interest in preventing workplace sexual harassment and a correlative obligation to respond when such incidents occur, the Board concluded that the respondent failed to show that it would have discharged Mullins even in the absence of his union activity in order to avoid the imposition of Title VII liability.

The respondent contended that it discharged Mullins because of its apprehension of potential hostile environment sexual harassment liability under Title VII of the Civil Rights Act of 1964, arising out of an encounter between Mullins and Alice Castillo, an employee of a vendor doing business on the respondent's premises. According to Castillo, Mullins initiated a conversation about the merits of unionization and when she expressed some skepticism, Mullins called her a "Yankee bitch." The respondent argued that Mullins' angry outburst at Castillo created sufficient concern for Title VII liability that it discharged him.

Relying on Supreme Court decisions under Title VII and the testimony of the respondent's director of human resources, who testified that she did not believe Mullins sexually harassed Castillo, the Board found that the respondent did not establish that it discharged Mullins in order to avoid liability under Title VII. For this reason, the Board agreed

[56] 342 NLRB No. 53 (Members Liebman, Schaumber, and Walsh).

with the judge that the respondent's asserted Title VII concerns were pretextual.

The Board also addressed the admonition of the District of Columbia Court of Appeals in *Adtranz ABB Daimler-Benz Transportation v. NLRB*,[57] to interpret the Act in a manner that is sensitive to employers' responsibilities to address workplace harassment under Title VII. In doing so, the Board found that this case did not present the issues that were of concern in *Adtranz*. At issue in *Adtranz* was the employer's maintenance of a policy prohibiting "abusive or threatening language" on company premises. Here, on the other hand, the question presented was whether the respondent discharged Mullins because he was a union supporter. Under the established principles set forth in *Wright Line,*[58] once the General Counsel made the required initial showing that Mullins' union activity was a motivating factor in the decision to discharge him, the burden shifted to the respondent to show that it would have discharged him even in the absence of his union activities, here, because of its Title VII concerns. The Board concluded that the respondent failed to make that showing based on the specific facts of the case, and thus this case did not raise the issue of interfering with employers' Title VII responsibilities generally that was of concern to the court in *Adtranz*.

3. Salting: Refusal to Consider and Hire Union Applicants

In *Jacobs Heating and Air Conditioning*,[59] the Board majority found that the respondent did not violate Section 8(a)(3) and (1) by refusing to hire three union applicants.

The majority found that the General Counsel failed to meet his burden under *FES*,[60] to show that the union applicants had experience or training relevant to the announced or generally known requirements of advertised positions. The majority found that "[it was] clear from the Respondent's advertisement that the relevant experience for the position was broad: i.e., experience in "all aspects" of HVAC work, not merely some. The union applicants had narrow, not broad experience. Their experience was primarily in the sheet metal aspect of HVAC work, which was only a small portion of the Respondent's business." The majority went on to find that, even if the General Counsel had met his burden, the respondent had shown that the union applicants did not possess the specific

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[57] 253 F.3d 19, 27 (D.C. Cir. 2001).

[58] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–403 (1982).

[59] 341 NLRB No. 128 (Chairman Battista and Member Meisburg; Member Liebman dissenting in part).

[60] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

qualifications the position required, and that others had superior qualifications and were hired for that reason.

Dissenting in part, Member Liebman found that the General Counsel had shown that the union applicants were experienced in some, if not most, areas of HVAC work. Contrary to the majority, Member Liebman found that the respondent's advertisement sought "experienced" persons, but did not specify that applicants should be experienced in all aspects of HVAC work. Thus, the General Counsel met his burden under *FES* to show that the applicants had both experience and training relevant to the announced requirements.

In *Allied Mechanical Services,*[61] the Board found that the respondent's refusal to consider for employment and to hire four applicants[62] violated Section 8(a)(3) and (1) of the Act, but that its refusal to consider or hire four others[63] was not unlawful. Applying the standards set forth in *FES*,[64] the Board found that the respondent hired plumbers and pipefitters shortly after union members Calhoun, Conroy, Hill, and Kiss applied for plumbing and pipefitting jobs with the respondent; that Calhoun, Conroy, Hill, and Kiss had experience and training relevant to the requirements of the positions; and that a number of factors showed the respondent's antiunion animus, including its president's instructions to its human resources director not to interview union members. The Board further found that the respondent failed to show that it would not have hired Calhoun, Conroy, Hill, and Kiss even in the absence of their union activities or affiliation. The Board found that the evidence did not support the respondent's contention that it did not consider the applications of Calhoun, Conroy, Hill, and Kiss because it already had enough applicants and was "into the process" of scheduling interviews and checking references when it received the union members' applications. The Board noted that this explanation conflicted with the respondent's written policy of considering all current applications when filling vacancies. Further, the respondent had only 6 current applications when it received the applications of Calhoun, Conroy, Hill, and Kiss, and it hired 5 new employees within a month and tentatively hired a 6th, plus it hired 10 more over the subsequent 4 months. Thus, the Board found implausible the respondent's contention that it disregarded the applications of Calhoun, Conroy, Hill, and Kiss because it already had a sufficient supply.

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[61] 341 NLRB No. 141 (Chairman Battista and Members Schaumber and Meisburg).
[62] Applicants Calhoun, Conroy, Hill, and Kiss.
[63] Applicants Englehart, Hampton, Newcomb, and West.
[64] 331 NLRB 9 (2000).

The Board, however, reversed the judge and found that the respondent did not violate the Act by refusing to consider and hire applicants Englehart, Hampton, Newcomb, and West. The Board found that the respondent considered only current applications when hiring, and these applicants' applications were not current. Under the respondent's policy, an application was deemed current if it had been filed within 30 days or if the applicant had contacted the respondent or the respondent had contacted the applicant during the past 30 days. Englehart, Hampton, Newcomb, and West's applications were at least 2 months old at the time that the respondent began considering hiring new employees, and they had not contacted the respondent during the past 30 days, nor had the respondent contacted them. Contrary to the judge, the Board found that the respondent had not discriminatorily applied its policy of considering only current applications. Rather, the respondent had deviated from this policy on only one occasion in a year in which it hired 25 employees. The Board found this deviation to be an isolated event and an insufficient basis for finding discriminatory application of the policy.

The Board also found that the respondent did not violate Section 8(a)(5) and (1) by withdrawing recognition from Plumbers Local 357. Local 357 was formed by the merger of Plumbers Locals 337 and 513. The respondent had a bargaining obligation with Local 337. The Board noted that, following an incumbent union's merger or affiliation, an employer's duty to recognize and bargain with the union continues unless the union's members did not have an adequate opportunity to participate in a vote on the merger conducted with adequate due process safeguards or unless the merger caused changes so dramatic that substantial continuity was lost between the pre- and postaffiliation union.[65] Because Local 337's members did not have an opportunity to vote on the merger, the Board found that the respondent had no obligation to recognize and bargain with the entity that resulted from the merger.

In *American, Inc.*,[66] a majority of the Board held that the respondent did not violate Section 8(a)(3) and (1) of the Act by failing to consider for hire and/or hire certain union-affiliated applicants.

In March, April, and May 2003, the respondent was performing electrical work on a grocery store in Bakersfield, California.[67] The complaint alleged that the respondent unlawfully failed to consider for

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[65] In support of this proposition, the Board cited *NLRB v. Financial Institution Employees (Seattle-First National Bank),* 475 U.S. 192, 199 (1986), and *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

[66] 342 NLRB No. 76 (Chairman Battista and Member Meisburg; Member Liebman dissenting).

[67] All dates are 2003 unless stated otherwise.

hire and/or hire union-affiliated electrician applicants during this time period.

The key issue in the case was unlawful motivation: whether, under *FES,*[68] the respondent failed to consider or hire the applicants because of their union affiliation. The majority affirmed the administrative law judge's finding that the General Counsel failed to satisfy his burden of showing that antiunion animus was a motivating factor in the respondent's conduct. The majority relied on the fact that the judge did not credit the only direct evidence of such animus: an alleged threat by a manager that the respondent would close its electrical shop before allowing it to be unionized. The majority acknowledged that some of the respondent's conduct might have appeared suspicious, e.g., the respondent deviated from its targeted wage range to hire nonunion applicants over union applicants, but the majority concluded that such suspicion, without more, was insufficient to support a finding of unlawful motivation.

Dissenting, Member Liebman would have remanded the case to the judge to explain her decision not to credit the manager's alleged threat and to address record evidence strongly suggesting unlawful motive. As to the manager's threat, Member Liebman found that the judge actually failed to make a credibility determination. In Member Liebman's view, all the judge did was summarily discredit *both* the employee who claimed to have heard the threat and the manager's denial that he made the threat. Member Liebman argued that the judge must provide some explanation, especially when making key credibility determinations. She found the judge's failure to resolve this critical conflict particularly problematic because of other credited record evidence pointing to unlawful motivation.

4. Employer Lockouts

In *Sociedad Espanola de Auxilio y Beneficencia de Puerto Rico*,[69] the Board majority held that the respondent did not violate Section 8(a)(3) by advancing a lockout after the union canceled the strike. The majority also held that the respondent's statement that the lockout was not against the employees, but against the union, did not independently violate Section 8(a)(1). Member Liebman dissented on both counts.

The union notified the respondent that it would conduct work stoppages on December 22–24, 1998, and on December 31, 1998–January 2, 1999, to protest unfair labor practices. In response, the

[68] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[69] 342 NLRB No. 40 (Chairman Battista and Member Schaumber; Member Liebman dissenting in part).

respondent decided to lock out employees on December 24–30—i.e., between the two planned strikes—to make it easier to recruit replacements, who would thus have a continuous period of employment during the holiday season. The union learned of the planned lockout on December 21. Later that night, with replacement workers already on site, the union canceled the first strike. The respondent, rather than call off the lockout, advanced it to coincide with what would have been the commencement of the strike. Employees were called and told not to report to work; those employees who reported to work were sent away. One employee who was sent away commented that this was the way the institution "paid the long-time employees." The respondent's human resources director replied that the "reprisal" was not against the employees, but against the union.

All of the panel members agreed that the judge correctly determined that, because a lockout, standing alone, is not inherently destructive of employee rights, the legality of Respondent's lockout must be determined using the Great Dane "comparatively slight" impact test. *NLRB v. Great Dane Trailers, Inc.*[70] Under that test, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of "legitimate and substantial business justifications" for its conduct. The panel majority reversing the judge, found that the respondent's reasonable concern for its business and its patients provided a legitimate and substantial business justification for the lockout. The majority noted that the respondent had "reasonable grounds for believing that a strike was imminent," and that the respondent could "reasonably be concerned that the '11th hour' cancellation would not be true and effective." The majority further concluded that it was "this operative purpose, rather than antiunion animus, that motivated the Respondent." Finally, the majority found that it "was not unreasonable—indeed, it was truthful—for Roman to blame the Union for the lockout."

Dissenting Member Liebman wrote that the "employer locked out its employees to punish the Union for calling a lawful strike, just as the employer's human resources director told employees (a statement that itself violated the Act)." Member Liebman reasoned, first, that the respondent "never *proved* that it would have had difficulty in finding replacement workers during the union's two planned strikes." Second, even if the respondent had met that burden, its lockout was motivated by antiunion animus, as evidenced both by its comment and by its additional

[70] 388 U.S. 26 (1967).

unlawful conduct of firing a union activist and soliciting employees to decertify the union.

In *Midwest Generation*,[71] a Board majority held that the respondent's partial lockout of only full-term strikers, but excluding nonstrikers and crossover employees, did not violate the Act.

The union commenced an economic strike in support of its bargaining position following unsuccessful negotiations for a successor contract. Virtually the entire bargaining unit of over 1000 employees participated in the strike. Approximately eight employees did not and continued working (the nonstrikers). During the course of the strike approximately 47 employees individually offered to return to work and the respondent accepted them back (the crossover employees). Approximately 2 months later, the union terminated the strike and made an unconditional offer to return to work on behalf of all strikers. The respondent declined the union's offer and notified the union it was locking out all striking employees until a new contract was reached (these are the full-term strikers). The respondent did not, however, lock out the currently working nonstrikers or crossover employees.

A Board majority found the partial lockout to be lawful. They explained that the lockout was brought in support of the respondent's legitimate bargaining position, and thus could not be considered inherently destructive of employee rights under *NLRB v. Great Dane Trailers.*[72] The majority then found that the respondent had clearly established a legitimate and substantial business justification for the lockout: it was brought for the purpose of bringing economic pressure to bear in support of its legitimate bargaining position. It further found that the respondent had justified the partial nature of its lockout: it applied only to employees who were actively participating in the strike in support of the union's bargaining demands in order to pressure them to abandon those demands.

The majority further observed that the respondent used the nonstrikers and crossover employees to maintain operations during the strike, and that the Board has long recognized the legality of partial lockouts when justified by operational needs and—as in this case—without regard to union membership status. The majority additionally found no evidence whatsoever that the lockout was motivated by antiunion animus. In light of all these circumstances, the majority concluded that the respondent's distinction in locking out only full-term strikers constituted lawful economic pressure in support of its bargaining position.

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[71] 343 NLRB No. 12 (Chairman Battista and Member Schaumber; Member Walsh dissenting).

[72] 388 U.S. 26 (1967).

Member Walsh dissented. He criticized the majority's "one-sided approach" and failure to balance the parties' conflicting legitimate interests. Member Walsh observed that the respondent had not advanced any operational justification for the partial nature of the lockout, and criticized the majority for "invent[ing]" one. He further found that the respondent presented no evidence establishing that the nonstrikers and the crossover employees had in fact abandoned the union's bargaining position, and thus that the respondent had not substantiated its asserted business justification. Emphasizing the powerful negative effect of a partial lockout on Section 7 rights, Member Walsh underscored that "the law requires a partial lockout be justified by substantial business reasons." Absent such justification here, he concluded a violation of Section 8(a)(3) had been established under the framework set forth in *Great Dane Trailers,* supra.

C. Employer Bargaining Obligation

An employer and the representative of its employees, as selected by a majority of employees in an appropriate unit pursuant to Section 9(a), have a mutual obligation to bargain in good faith about wages, hours, and other terms and conditions of employment. An employer or labor organization violates Section 8(a)(5) or 8(b)(3) of the Act, respectively, if it does not fulfill its bargaining obligation.

1. Withdrawal from Multiemployer Bargaining

In *D. A. Nolt, Inc.*,[73] the Board majority reversed the administrative law judge and found that Roofing Contractor Nolt violated Section 8(a)(5) of the Act when it refused to apply the collective-bargaining agreement negotiated by the multiemployer association to which it belonged. The majority found that the judge had erred in finding that Nolt had lawfully withdrawn from the association because the union and the association had engaged in secret negotiations.

Specifically, the Board majority found that Nolt did not properly withdraw from the association as required by *Retail Associates*.[74] In that case, the Board held that employers cannot withdraw from multi-employer bargaining after negotiations begin, unless there is mutual consent or "unusual circumstances." In *Chel LaCort*,[75] the Board found that the association's deliberate withholding of information from its member concerning the start of negotiations was not an "unusual circumstance" under *Retail Associates*, but rather a matter of internal

[73] 340 NLRB No. 152 (Members Liebman and Walsh; Chairman Battista dissenting).
[74] 120 NLRB 388 (1958).
[75] 315 NLRB 1036 (1994).

communications.[76] In dicta, *Chel* stated that there was no evidence of "collusion or conspiracy," and "left to another case to decide whether or when such evidence would be sufficient to show 'unusual circumstances.'"[77]

The Board majority found that the association's decision to withhold information from Nolt concerning the start of negotiations was no different than the situation in *Chel*.[78] The majority found that there was no intention to harm Nolt, and thus no collusion or secret negotiations.[79] Accordingly, they found that there were no unusual circumstances justifying Nolt's untimely withdrawal.[80]

Even were there unusual circumstances, the Board majority found that Nolt's conduct after it learned of the negotiations resulted in its forfeiture of any right to withdraw. After reaching agreement with the union, the association allowed individual members to withdraw rather than accept the agreement; Nolt voted to accept the agreement.[81] The Board majority concluded that this acceptance, coupled with Nolt's attempt, several months later, after its relationship with the union had soured, to withdraw from the association and repudiate the contract, was an impermissible attempt to enjoy the "best of two worlds."[82] Accordingly, the Board majority ordered Nolt to recognize and bargain with the union, honor the terms of the contract negotiated by the association and union, and make whole its employees for any loss of earnings or benefits suffered by the repudiation of the union and refusal to apply the contract.

Chairman Battista dissented and found that the association's withholding of information, at the union's request, concerning the start of negotiations was collusive and thus constituted an unusual circumstance justifying withdrawal.[83] The Chairman further found that the instructions on the ballot and cover letter provided to Nolt after the union and association had negotiated a new agreement were confusing and internally inconsistent. Because the cover letter provided that Nolt reserved the right to withdraw from the association until 90 days prior to the expiration of the current agreement, which Nolt did, the Chairman found that Nolt lawfully withdrew within the time period stipulated by contract, regardless of how it voted on the confusing ballot. *Acropolis*

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[76] Id. at 1037.
[77] Id. at fn. 5.
[78] *Nolt*, slip op. at 3.
[79] Ibid.
[80] Id. at 4.
[81] Id. at 3.
[82] Ibid, citing *Michael J. Bollinger Co.*, 252 NLRB 406, 407 (1980), enfd. mem 705 F.2d 444 (4th Cir. 1983).
[83] Id. at 6.

Painting.[84] Accordingly, the Chairman found that Nolt was no longer a member of the association bound to the new agreement the association negotiated with the union.

In *CTS, Inc.*,[85] the Board majority found that although the employer failed effectively to withdraw from a multiemployer bargaining unit under *Retail Associates, Inc.*,[86] the employer was nevertheless not bound by the results of multiemployer bargaining because the union's course of conduct toward the employer, including the union's demonstrated willingness to engage in individual bargaining with the employer, established that the union acquiesced in the employer's attempted withdrawal from multiemployer bargaining.

Although not a member of the multiemployer bargaining association, the employer had agreed to assume and be bound by the terms of a multiemployer collective-bargaining agreement between the association and the union. The agreement provided that it would continue in effect until its termination date, and from year to year thereafter, unless terminated by timely written notice from either party to the other. The agreement also set out the steps the employer was required to follow to withdraw from multiemployer bargaining.

The union timely notified the individual employers (including the employer) who were party to the agreement that the union intended to terminate the agreement and to negotiate changes to the terms of the agreement. Contrary to the requirements of the agreement, however, the union's notice of termination was not addressed to the association itself. The union said in its notice that it was "ready and willing to meet and confer with you on mutually convenient dates." Shortly after receiving the union's notice, the employer notified the union in writing that the employer was terminating the agreement as of the expiration date, unless the employer and the union reached a settlement on a new agreement before the expiration date of the current one. The employer's notice to the union was, however, untimely (premature) under the termination provisions of the agreement.

The employer subsequently notified the union that the employer wanted to meet with the union to review the employer's "issues." The union replied to the employer that it would "get back to [the employer] and [they] would do it." The employer made 6–8 followup calls to the union attempting to set a date for a negotiation meeting. Although no date for such a meeting was set, the union told the employer that it would negotiate with the employer, and the union never told the employer that

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[84] 272 NLRB 150 (1984).
[85] 340 NLRB No. 99 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[86] 120 NLRB 388, 394 (1958).

it could not bargain with the employer. At one point, the employer told the union that the employer did not agree with having other parties negotiate a collective-bargaining agreement for the employer.

In the meantime, the association and the union engaged in negotiations, and reached agreement on and entered into a successor collective-bargaining agreement. The employer told the union that the employer did not agree to this new agreement, and notified the union in writing that the employer wanted an opportunity to negotiate an individual agreement with the union. The employer told the union that in the meantime, the employer would continue to pay wages and benefits under the terms of the predecessor agreement. The union responded by telling the employer that the employer was obligated by the new agreement and should pay the increased wages called for under that agreement. Nevertheless, the union subsequently agreed to meet with the employer at a restaurant. At the meeting, the employer gave the union a document styled "Summary of Economic Proposals." The document asserted that the employer was not part of any multiemployer bargaining group, and it set out specific bargaining proposals on various proposed terms and conditions of employment. The union reviewed the document and told the employer that no union could ever agree to the employer's proposals. Subsequently, the union notified the employer by letter that the union considered the employer to be bound by the new agreement between the association and the union, and that the union intended to enforce that agreement with the employer in the same manner as the union did with all other signatories to the agreement. The employer replied by letter that it did not agree with the union's position, asserting that the prior collective-bargaining agreement between the employer and the union had expired on its expiration date, and stating that the employer remained committed to negotiating a new collective-bargaining agreement with the union. The employer asked in the letter that the union contact it to arrange mutually agreeable times, dates, and locations for continued negotiations. The union did not do so.

The complaint alleged that the employer violated Section 8(a)(5) and (1) of the Act by refusing to adhere to the terms of the new collective-bargaining agreement between the multiemployer association and the union.

The majority dismissed the complaint. It found that the union's communications with the employer could reasonably be understood as stating that the union wanted to terminate the current collective-bargaining agreement and negotiate changes and modifications to the agreement with employers individually, and further found that the union

implicitly acquiesced in and validated the employer's ineffective attempt under *Retail Associates* to withdraw from multiemployer bargaining.

First, the majority found that the employer's conduct and communications with the union following the employer's ineffective attempt to withdraw from multiemployer bargaining clearly evidenced the employer's plan to withdraw from multiemployer bargaining and engage in individual bargaining. Then, citing *I. C. Refrigeration Service,*[87] the majority also found that the totality of the union's conduct and communications with the employer evidenced the union's acquiescence in the employer's plan: e.g., addressing the contract termination letter to "all contractors," but not to the association itself, and offering in the letter to meet and negotiate with individual employers on modifications to the current agreement that would be incorporated into a new agreement; agreeing to meet with the employer to begin reviewing the issues that the employer was concerned about and to begin negotiating a new collective-bargaining agreement; not telling the employer, in the face of the employer's repeated requests for individual bargaining with the union, that the union did not intend to bargain individually with the employer; and meeting with the employer in the restaurant and reviewing a list of the employer's contract proposals.

In dissent, Member Walsh found that the employer violated the Act by failing and refusing to abide by the new collective-bargaining agreement between the multiemployer association and the union. Citing *Standard Roofing, Inc.*,[88] he found that the union's contract termination letter, while not addressed to the association itself, nevertheless did not constitute or reasonably communicate a withdrawal by the union from multiemployer bargaining and an intent instead to engage in bargaining on an individual employer basis. He found that the union's subsequent course of multiemployer bargaining with the association belied any such communication or intent.

Member Walsh found that the union's conduct following its contract termination letter, culminating in the restaurant meeting with the employer, could not be considered individual negotiations with the employer. He noted that at that meeting, the union was expressly wary of accepting the employer's proffered economic proposals. Before accepting the list of proposals, the union told the employer that the employer was bound by the new collective-bargaining agreement between the association and the union, and that there would be no substantive discussion of the employer's proposals. Member Walsh also

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[87] 200 NLRB 687, 689 (1972).
[88] 290 NLRB 193, 199 (1988), enfd. mem. in pertinent part 920 F.2d 933 (6th Cir. 1990).

found that, under *I. C. Refrigeration*, the union's conduct did not reasonably demonstrate to the employer that the union consented or acquiesced in the employer's unsuccessful attempt to withdraw from multiemployer bargaining, because the union's course of conduct was not clearly contrary to the union's claim that the employer had not withdrawn from multiemployer bargaining. Member Walsh further found that any such asserted union acquiescence was belied by the union's not meeting with the employer about negotiating an individual collective-bargaining agreement despite the employer's repeated requests that the union do so, and by the union's subsequent demands that the employer abide by the new multiemployer collective-bargaining agreement.

2. Mandatory Subjects of Bargaining

In *Servicenet,*[89] the Board concluded that the respondent violated Section 8(a)(5) by bargaining to impasse on contractual proposals concerning the method by which future changes to a health insurance would be decided and a duration clause. The Board found that both proposals were nonmandatory subjects and that the respondent therefore acted unlawfully when it insisted to impasse on them.

The health insurance clause provided that the respondent could deal directly with a group of employees appointed by the union over changes to its health insurance plan during the term of the proposed agreement. Citing *Retlaw Broadcasting,*[90] the Board concluded that the proposal "would be a license for the employer to go to impasse over whether it has to deal with the union; that is the antithesis of good faith bargaining."

As to the duration clause, the Board found that while duration clauses normally are mandatory subjects of bargaining, over which a party may lawfully bargain to impasse, the respondent's proposal was different because it provided that the whole contract, including the contractual no-strike clause, would continue in full force and effect until a successor agreement was agreed upon and ratified by the parties. Members Liebman and Walsh analogized the clause to an interest arbitration clause, which the Board has found to be nonmandatory, because it required adherence to the contract after it had expired and, in light of the contractual no-strike clause, would compel the union to relinquish its right to exercise its economic weapons perpetually. Member Schaumber, concurring, found that the clause was nonmandatory but rejected the analogy to an interest arbitration clause. Instead, he concluded that the

[89] 340 NLRB No. 148 (2003) (Members Liebman, Schaumber, and Walsh).
[90] 324 NLRB 138, enfd. 172 F.3d 660 (9th Cir. 1999).

clause was nonmandatory because it failed to provide a fixed term for the proposed new agreement.

In *Anheuser-Busch, Inc.*,[91] a Board majority (Chairman Battista and Member Walsh; Member Schaumber dissenting) agreed with the administrative law judge's finding that the respondent violated 8(a)(5) and (1) of the Act by failing to notify and bargain with the union prior to the installation and use of surveillance cameras in the workplace. A different majority (Chairman Battista and Member Schaumber; Member Walsh dissenting) agreed with the judge's decision not to revoke the discipline imposed on 16 employees whose misconduct was recorded by the surveillance camera.

The respondent installed hidden surveillance cameras in work and break areas of its facility. For approximately 6 weeks it observed 18 employees in a stairwell, in an elevator motor room, and on the rooftop. Sixteen of the employees were later disciplined for misconduct that the respondent observed through use of the cameras.

Chairman Battista and Member Walsh found that the use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining. While the area surveilled was not a part of the physical plant in which employees worked frequently, employees did work there regularly, at least once a month. The cameras filmed employees going about their regular tasks. Also, the roof area was a designated break area where employees often took their breaks without prohibition from the respondent.

Member Schaumber noted that the respondent installed the cameras to detect suspected, illegal drug-related activity. He also noted that the cameras were trained inside of and at the staircase leading to an isolated elevator motor's room located on the roof of a building, that very few employees were authorized to enter the motor's room, and that those who were authorized entered the room no more than twice a month for specific maintenance functions. In Member Schaumber's view, the Respondent's limited use of cameras in a single isolated area distinguishes this case from decisions such as *Colgate Palmolive Co.*,[92] in which the Board analogized the use of video cameras in areas frequented by employees to intrusive investigatory tools such as physical examinations, drug and alcohol tests, and polygraph examinations.

Chairman Battista and Member Schaumber affirmed the judge's proposed remedy and rejected the General Counsel's contention that the respondent must rescind the discipline received by the 16 employees

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[91] 342 NLRB No. 49 (Chairman Battista; Members Schaumber and Walsh concurring in part and dissenting in part).

[92] 323 NLRB 515 (1997).

whose misconduct was observed by the cameras. They agreed with the judge that the employees' misconduct was in violation of plant rules, and such misconduct was the basis for the discipline. Citing *Taracorp Industries*,[93] Chairman Battista and Member Schaumber found an insufficient nexus between the respondent's unlawful installation and use of the cameras and the employees' misconduct to warrant a make-whole remedy. They found that the General Counsel's requested make-whole relief was contrary to the specific remedial restriction contained in Section 10(c) of the Act.

Member Walsh disagreed with his colleagues' failure to rescind the discipline imposed on the 16 employees for conduct discovered solely through use of the unlawfully installed cameras, noting that absent the unlawful installation and use of the cameras, the respondent had no basis to even question those 16 employees, let alone to discipline them. He wrote: "In order to remedy its unlawful conduct, the Respondent must be ordered to rescind the employees' discipline, expunge the employees' files of any reference to their discipline, make the employees whole, and offer reinstatement to those employees who were discharged."

In *Trailmobile Trailer, LLC,*[94] the Board adopted the administrative law judge's decision and found that an employer violated the Act by failing to bargain over the installation of video cameras, and by failing to attend grievance meetings, after it withdrew recognition from the union. Chairman Battista dissented, finding that the employer had no obligation either to bargain over the installation of the cameras, or to attend the grievance meetings, because the employer's bargaining obligation had ceased upon its withdrawal of recognition.

The case involved an employer's unilateral conduct occurring after it had withdrawn recognition from the union. The complaint did not allege that the withdrawal of recognition—which occurred prior to the expiration of the contract—was unlawful, but did allege that the subsequent failure to bargain over the installation of surveillance cameras and the subsequent refusal to attend grievance meetings violated the Act.

In the absence of a complaint allegation, the majority reversed the judge's finding that the withdrawal of recognition was unlawful. The majority found, however, that the employer's subsequent conduct in failing to bargain over the camera installation and refusing to attend grievance meetings was unlawful. With respect to the refusal to attend grievance meetings, the majority relied on the fact that the employer did

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[93] 273 NLRB 221 (1984).

[94] 343 NLRB No. 17 (Members Liebman and Walsh; Chairman Battista dissenting).

not use the withdrawal of recognition as its justification for the refusal, but "actually argue[d] that it was faithfully administering the contract in the area of grievances."

With respect to the obligation to bargain over the installation of the security cameras, the majority noted that the employer did defend its refusal to bargain based on its prior withdrawal of recognition, but held that this defense was "contrary to well-established law." The majority held that under *Burger Pits, Inc.*,[95] "an employer with a good-faith doubt about a union's majority status may lawfully implement unilateral changes only *after* the expiration of the contract." The majority further explained that under *Burger Pits*, "[r]equiring an employer to administer a contract carries the inherent obligation to recognize, until the expiration date, the union with whom the contract is made." Thus, because the employer here unilaterally installed the cameras prior to the expiration of the contract, the installation violated Section 8(a)(5).

In his dissent, Chairman Battista rejected the majority's finding that the employer was obligated to bargain over the camera installation and to attend grievance meetings after the withdrawal of recognition. Noting that an 8(a)(5) violation depends on the existence of a Section 9 relationship, Chairman Battista found that because the withdrawal of recognition was lawful, there was no Section 9 relationship thereafter, and thus the employer was under no obligation to bargain over the camera installation or to attend the grievance meetings. Because of the absence of a Section 9 relationship at the time the conduct occurred, the Chairman found no merit to the majority's contention that the employer's defense, which relied on the language in the contract, warranted a finding of an 8(a)(5) violation. The Chairman further found that *Burger Pits*, cited by the majority, was not to the contrary because, unlike here, the withdrawal of recognition in that case was unlawful.

In *Kansas AFL–CIO,*[96] the Board found that the respondent violated Section 8(a)(5) and (1) of the Act by eliminating a bargaining unit position and terminating the employee who held that position without providing the union prior notice and an opportunity to bargain.

The union represented the respondent's unit employees at the time the unit position was eliminated and had done so for more than 25 years. The respondent has deducted dues from the unit employees' paychecks and remitted those dues to the union since the early 1990's. Although the union's business agent visited the respondent's facility only sporadically over the years, this was largely because the union authorized

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[95] 273 NLRB 1001 (1984), affd. 785 F.2d 796 (9th Cir. 1986).

[96] 341 NLRB No. 131 (Chairman Battista and Members Liebman and Walsh).

the employees to negotiate for themselves in regard to changes in terms and conditions of employment. In essence, the union designated the employees as the union's agent for negotiating purposes. However, the union remained the principal and the respondent treated it as such.

Further, the respondent acknowledged the existence of its collective-bargaining obligations when it eliminated the unit position. First, the respondent referenced "the office contract" in the termination letter. Second, after the union's business manager wrote a letter to the respondent protesting the circumstances of the employee's termination, the respondent's executive secretary did not question the business agent's capacity or status in acting on the employee's behalf. Rather, the respondent's executive secretary responded to the union's concerns in a letter that ended by stating that if the union "still had concerns about the propriety of [the respondent's] actions concerning the reduction-in-force, please advise. . . ."

With particular emphasis on these facts, the Board agreed with the judge that the respondent was obligated to bargain with the union concerning the elimination of the unit position and the termination of the unit employee. The Board, therefore, adopted the judge's finding that the respondent's failure to do so was unlawful.

3. Withdrawal of Recognition

In *MSK Corp.*,[97] the Board held that, in determining whether an employer had a good-faith uncertainty under *Allentown Mack,*[98] statements by known union opponents to the effect that other unnamed employees opposed union representation were entitled to little weight and that, even when combined with statements expressing opposition to the union by 30 percent of unit employees, did not demonstrate a good-faith uncertainty.

The respondent was a *Burns*[99] successor. The respondent knew the following regarding the employees' support for the union: (a) some employees recently signed authorization cards; (b) six identified employees (out of a unit of 20) made statements directly to management opposing union representation; (c) some unidentified employees made statements directly to a management official opposing union representation; and (d) two identified employees told management that "most" of the employees and "most of the employees I talked to" opposed the union.

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[97] 341 NLRB No. 11 (Chairman Battista and Members Liebman and Walsh).
[98] *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998).
[99] *NLRB v. Burns Security Service,* 406 U.S. 272 (1972).

The Board noted that, under *Allentown Mack*, an employer claiming good-faith doubt "must demonstrate 'doubt' in the sense of 'uncertainty' rather than 'disbelief,'" and that the Board "does not exclude classes of evidence—such as an employee's hearsay assertion to the employer regarding the antiunion sentiments of other employees—but rather accords such evidence the weight to which it is entitled based on its reliability." The Board gave "some weight" to the fact that the respondent knew some employees signed authorization cards and gave "substantial weight" to the fact that six identified employees made statements directly to management opposing union representation. The Board found that the statements by unidentified employees directly to a management official opposing union representation "would add little" because it was unclear how many employees made the statements and it was unclear to what extent these employees included the six employees already identified as opposing union representation.[100] The Board gave "little weight" to the two employees' statements regarding other employees' opposition to union representation because the respondent knew the two employees were outspoken union opponents, the other employees were not identified (hence raising the possibility of double-counting the six employees already identified as opposing union representation), and it was unclear whether the references to "most of the employees" referred to "most" of a small start-up crew rather than "most" of the bargaining unit. The Board concluded that "reliable evidence" showed only 6 of 20 unit employees opposed union representation and that this did not demonstrate good-faith uncertainty.

Generally speaking, an employer may lawfully withdraw recognition from a union that no longer has majority status.[101] Under Section 8(a)(5) of the Act, however, an employer must recognize its employees' collective-bargaining representative for the year following certification, absent unusual circumstances. This is so even if the employer is presented during that time with evidence indicating that a majority of unit employees wish no longer to be represented by the union.[102] In *Chelsea Industries*,[103] the Board held further that an employer could not withdraw recognition after the certification year ended based on a decertification petition signed by employees and received by the employer 5 months before the end of the certification year. Moreover, an employer is barred from relying on an employee petition to withdraw

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[100] The judge discredited the management official's testimony regarding the unidentified employees' statements; the Board affirmed the credibility determination but found that, even if credited, the testimony would be entitled to little weight regarding the good-faith uncertainty issue.
[101] *Laidlaw Waste Systems*, 307 NLRB 1211 (1992); *Market Place,* 304 NLRB 995 (1991).
[102] *Brooks v. NLRB*, 348 U.S. 96 (1954).
[103] 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002).

recognition if the petition is tainted by the employer's unfair labor practices.[104] Thus, evidence supporting a withdrawal of recognition "must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself."[105] However, *Lee Lumber* requires specific proof of a causal relationship between the unfair labor practices and the loss of support. The standards for such a causal nexus are the closeness in time to the withdrawal of recognition and the likelihood that the unlawful conduct would have a lasting detrimental effect on employees, diminish the union in their eyes, or affect morale, union activity, or union membership.[106]

In *LTD Ceramics*,[107] the respondent withdrew recognition from the union based on an employee petition received after the certification year ended, but bearing signatures dated on the last day of the certification year. The Board majority agreed with the judge's dismissal of the 8(a)(5) allegation, finding, as did the judge, that the prematurity of the signatures was "so slight as to be insignificant," and that *Chelsea Industries* was distinguishable and did not bar reliance on the petition.

In addition, the Board found that the respondent violated Section 8(a)(5) and (1) by posting and implementing an attendance policy that was a subject of negotiation between the parties, without agreement to the policy itself, or to posting and implementation, by the union. But the majority further held, however, that this unfair labor practice was not sufficient to taint the petition. The Board found no "causal nexus" between the unilateral change and the employees' disaffection with the union, noting that, although the unilateral change was relatively close in time to the withdrawal of recognition, nothing in the record indicated that it had a detrimental or lasting effect on unit employees, or that it diminished the union's standing in their eyes, or adversely affected their morale, organizational activities, or union membership.

Member Walsh, in dissent, found that the respondent's unilateral posting of a new attendance policy was causally connected to the petition and the subsequent withdrawal of recognition. He noted that the petition was circulated very soon after the policy was posted, there was no showing of employee disaffection prior to the posting and that the unilateral posting indicated to employees that their union was irrelevant. Member Walsh found it unnecessary to reach the issue of the timeliness

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[104] *United Supermarkets*, 287 NLRB 119 (1987), enfd. 862 F.2d 549 (5th Cir. 1989).

[105] *Lee Lumber & Building Material Corp*., 322 NLRB 175, 177 (1996), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997).

[106] *Master Slack Corp*., 271 NLRB 78, 84 (1984).

[107] 341 NLRB No. 14 (Chairman Battista and Member Schaumber; Member Walsh concurring in part and dissenting in part).

of the petition.

In *AT Systems West*,[108] the Board, among other things, reversed the judge's finding that the respondent did not violate Section 8(a)(5) and (2) of the Act by withdrawing recognition from the union and thereafter entering into a collective-bargaining agreement with a different labor organization. The Board found that the respondent's withdrawal of recognition was unlawful because it came at a time when the respondent was obligated to bargain with the union for a reasonable period following a settlement agreement. The majority additionally found that the withdrawal of recognition was unlawful because there was a nexus between the employees' disaffection with the union and the respondent's unremedied unfair labor practices.

In July 1998, the respondent began face-to-face negotiations with the union concerning seven or eight of the respondent's branches, including Sacramento. No collective-bargaining agreement was reached. On March 3, 1999, the respondent sent specifically tailored letters to unit employees at each of its Sacramento, Oakland, and Ventura facilities entitled "Don't Blame Us." These letters expressed the respondent's frustration that 17 months had passed without a signed collective-bargaining agreement and pointed out that some employees had gone 3 or 4 years without a pay increase. In a section entitled "How Can We Move Forward?" the letters suggested five courses of action the employees could take, including going to the NLRB and demanding a decertification election, and establishing in some creditable form to the respondent that the union did not represent a majority of the employees. Attached to the letters were contract proposals that the respondent was simultaneously providing, for the first time, to the union.

The union filed unfair labor practice charges over the letters and the Board, in *Armored Transport, Inc.*,[109] found that by sending employees the letters with attached contract proposals the union engaged in unlawful direct dealing in violation of Section 8(a)(5). The Board also found that the respondent unlawfully solicited employees to decertify the union in violation of Section 8(a)(1). This decision issued after the judge's opinion in this case.

In July 1999, the respondent implemented a new wage scale for the Sacramento unit employees. The union filed an unfair labor practice charge alleging an unlawful unilateral change. On September 9, 1999, the respondent submitted a last, best, and final proposal for the Sacramento unit. On September 18, 1999, the union conducted a

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[108] 341 NLRB No. 12 (Members Liebman and Walsh; Chairman Battista concurring in part and dissenting in part).

[109] 339 NLRB 374 (2003).

ratification vote among the Sacramento employees and the tally showed 21 votes against ratification and 20 in favor. However, a comparison of this tally to documents each employee signed before voting showed that there were two more votes cast than employee documents. When some employees objected to the vote, a union official told them that one or two votes were not significant enough to warrant a revote. About 2 months later the respondent implemented the terms of the final offer.

In December 1999, the union and the respondent entered into an informal Board settlement agreement regarding the July 1999 unilateral wage increase. Under the terms of the settlement agreement, the respondent agreed that it would not unilaterally implement new wages and that it would, on request, meet and bargain with the union.

In early March 2000, several Sacramento employees began soliciting unit employees to oppose continued union representation. A majority of unit employees signed the petition, which the employees turned over to the respondent. Upon receiving this, the respondent concluded that the union no longer represented a majority of its Sacramento employees. Following its withdrawal of recognition from the union, the respondent recognized and bargained with the employee-formed union, ATSEA. After one bargaining session, the respondent entered into a collective-bargaining agreement with ATSEA.

Applying the factors set forth in *Lee Lumber & Building Material Corp.*,[110] the Board found that the respondent failed to bargain with the union for a reasonable time following the December 1999 settlement agreement, and thus, it was not free to withdraw recognition from the union. The Board relied on the facts that this was an initial contract, the bargaining was complex, only 3 months had elapsed since the settlement agreement, and the parties were exchanging letters showing the intent to bargain in good faith. In these circumstances, the Board concluded the respondent had not satisfied its obligation to continue bargaining with the union for a reasonable period, and that the respondent violated Section 8(a)(5) by withdrawing recognition at a time when it was obligated to bargain under the terms of the settlement agreement. The Board also found that the respondent recognized and bargained with the employee-formed union ATSEA in violation of Section 8(a)(2), stating that an employer may recognize and bargain only with the exclusive representative of its employees.

Members Liebman and Walsh, citing *Master Slack Corp.,*[111] additionally found that there was a causal relationship between the

[110] 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).
[111] 271 NLRB 78 (1984).

respondent's unremedied unfair labor practices (the "Don't Blame Us" letters and attached contract proposals) and the employees' disaffection from the union. The majority found that the unlawful conduct was of a type that "reasonably tends to have a negative effect on union membership and to undermine the employees' confidence in the effectiveness of their selected collective-bargaining representative."[112] The Board majority found it not surprising that an employee petition rejecting the union arose, and that under these circumstances, the respondent could not lawfully challenge the union's majority status. Therefore, the respondent's withdrawal of recognition from the union and its refusal to bargain with the union, violated 8(a)(5) of the Act.

In his partial dissent, Chairman Battista stated that he agreed with the judge that there was no causal nexus between the respondent's "Don't Blame Us" letters and the employees' disaffection from the union. Chairman Battista noted that the period between the last of the letters and the employee disaffection was 9 months and there were no unfair labor practices during that period. Rather, the parties bargained in good faith after the last of the letters. Also, there was an intervening event, closer in time to the disaffection, which would also reasonably cause the disaffection. That event was the ratification vote, which was marred by irregularities in the count. Chairman Battista also cited evidence that the employees were dissatisfied with the lack of effective representation at the bargaining table. On these bases he concluded that the evidence failed to establish a causal nexus between the earlier unfair labor practices and the employee disaffection.

4. Refusal to Execute Collective-Bargaining Agreement

In *Hempstead Park Nursing Home*,[113] the panel majority reversed the administrative law judge's finding that the respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to execute the draft collective-bargaining agreement submitted to it by the union. The majority found that the respondent was under no duty to execute the draft agreement because the parties did not achieve a "meeting of the minds" on the pension plan provision of the draft contract. Although the parties memorialized their agreement for a successor collective-bargaining agreement in a memorandum of agreement (MOA), the majority found that the parties "attached reasonable but incompatible meanings to certain terms within the pension plan provision as set forth in the parties' MOA."

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[112] Slip op. at 5.

[113] 341 NLRB No. 41 (Chairman Battista and Member Schaumber; Member Walsh dissenting).

The parties reached agreement on a successor collective-bargaining contract in March 2002, and memorialized this agreement in a written memorandum of agreement. The MOA contained the substantive terms of a collective-bargaining agreement, but was not a fully integrated contract.[114] Among other things, the MOA "specifically addressed" the "New York State Nurses Association Pension Plan." The pension plan, as stated in the MOA, set forth the rates (per annum per full-time employee) pursuant to which the respondent was obligated to contribute to the pension plan. The dates of contribution read "yr 1," "yr 2," and "yr 3." In April, the union's pension plan and benefit fund office sent the respondent a letter clarifying the dates of contribution for the pension plan provision. The fund office's interpretation was as follows:

> Section 9.03 – NYSNA Pension Plan
> Effective 03/01/02 — 12/31/02: $0
> Effective 01/01/03 — 12/31/03: $4,968
> Effective 01/01/04 — 12/31/04: $5,613
> Effective 01/01/05 — 02/28/05: To be determined by Trustees.

The respondent did not reply to the fund office's letter. In September 2002, the union sent the respondent the draft collective-bargaining agreement for signing. The draft contract incorporated the fund's interpretation of the pension plan provision. After receiving the draft contract, the respondent wrote the union requesting, inter alia, that the dates to the pension plan be read as follows:

> 03/01/02 — 02/28/03 = $0
> 03/01/03 — 02/29/04 = $4,968
> 03/01/04 — 02/28/05 = $5,613

The union refused to change the dates of the pension plan section. The union explained that "[t]he pension contributions are determined on a calendar year basis, from January 1st through December 31st of each year." Thereafter, respondent refused to execute the draft collective-bargaining agreement.

Reversing the judge's finding that the draft collective-bargaining agreement accurately reflected the parties' understanding as stated in the MOA and thus that the respondent violated the Act by refusing to sign it, the majority found that both parties had not reached a "meeting of the minds" on the pension plan provision as set forth in the MOA. Thus, the

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[114] The opening page of the MOA read:

> Any and all terms and conditions of employment of the March 1, 1998 to February 28, 2001 agreement, letters of understanding, or otherwise, not specifically addressed by this Memorandum of Agreement shall remain unchanged, and are hereby incorporated into this Memorandum of Agreement.

respondent was under no obligation to sign the draft contract. The majority held that the respondent and the union attached reasonable but incompatible meanings to the terms "yr 1," "yr 2," and "yr 3" of the pension plan provision in the MOA. "Because the MOA refers only to 'yr 1,' 'yr 2,' and 'yr 3,' without beginning or ending dates, the Union maintain[ed] that the calendar year dating method of the prior contract was incorporated by reference into the MOA." The respondent, however, argued that the parties did not agree on a calendar-year dating method, but on a *contract-year* dating method. Under the respondent's interpretation, the references to "yr 1," "yr 2," and "yr 3" correspond to the first, second, and third years of the successor contract.[115] Because of the ambiguity surrounding the terms "yr 1," "yr 2," and "yr 3," and the parties' attachment of different meanings to those terms, the majority found that the parties did not reach a "meeting of the minds." "When . . . misunderstandings may be traced to ambiguity for which *neither party* is to blame or for which *both parties* are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract." *Meat Cutters Local 120 (United Employers, Inc.).*[116] Thus, the majority dismissed the complaint.

In dissent, Member Walsh agreed with the administrative law judge and found that the union's interpretation of the pension plan provision was the reasonable interpretation, and the respondent's was not. Member Walsh explained:

> The MOA, in plain language, states that the terms and conditions of employment of the predecessor agreement will remain unchanged and are incorporated into the new agreement if "not specifically addressed by this Memorandum of Agreement." Because the MOA did not give specific dates in the pension plan provision, the Union properly incorporated the calendar year dating method of the pension plan provision from the previous agreement.

Accordingly, Member Walsh would have found the violation.

5. Claims of Inability to Pay

In *AMF Trucking & Warehousing, Inc.,*[117] the Board majority reversed the administrative law judge and found that the respondent's

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[115] The respondent also argued that, contrary to the union's understanding, it never agreed to allow the trustees the unfettered discretion in setting the contribution rates for the last 2 months of the pension plan. The majority found merit in the respondent's argument, citing, inter alia, ambiguity of the phrase "Insert new rates as determined by Trustees," at the beginning of sec. 9.03.

[116] 154 NLRB 16, 26–27 (1965).

[117] 342 NLRB No. 116 (Chairman Battista and Member Meisburg; Member Walsh dissenting).

statements during the course of negotiations did not effectively communicate a claim of inability to pay, and thus the respondent's subsequent refusal to furnish the union with requested financial information did not violate the Act.

The case involved the respondent's comments during negotiations for a successor contract. The negotiations focused primarily on wages, health insurance, and pension plans. Responding to the union's proposal to increase health and pension benefits, the respondent stated that the union was asking for "pie in the sky," that the respondent had purchased the company "in distress a year and a half earlier, and that the company was still in distress." The respondent added that it was "fighting to [stay] alive," and was "weaker this year" than it had been in previous years. At the subsequent negotiating session, the respondent responded to the union's proposal to increase wages by stating that it was "still fighting to keep the business alive," and that "the business was weaker than it was in previous years." Thereafter, the union requested access to the respondent's financial records. The respondent refused the request, denying that it was claiming an inability to pay.

Reversing the administrative law judge's finding that the respondent was obligated to grant the union's request for access to the financial records, the majority held that the respondent's statements during negotiations did not communicate an inability to pay. The majority found that the respondent's statements neither claimed that it had insufficient assets nor that acquiescence to the union's demands would cause it to go out of business. The majority found that the respondent's statements were distinguishable from those at issue in *Shell Co.*,[118] where an respondent characterized its financial situation as "a matter of survival." The majority also found the respondent's statements distinguishable from those at issue in *Lakeland Bus Lines*,[119] where an employer said, among other things, that "the future of [the company] depends on" acceptance of the employer's offer. The majority found that, unlike the statements in those cases, the respondent's statements here did not convey any bleak predictions about the employer's future. The majority also found that it was unnecessary to pass on whether the Board's decision in *Lakeland*, which was not enforced by the D.C. Circuit, was correctly decided.

In his dissent, Member Walsh rejected the majority's finding that the respondent's statements did not amount to a claim of inability pay. He found that the respondent's statements clearly communicated that it

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[118] 313 NLRB 133 (1993).

[119] 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003).

could not afford the union's bargaining demands, and that if the respondent had to pay the union's bargaining demands it would lose its fight for its economic life. Accordingly, Member Walsh found that the respondent was obligated to furnish the union with the requested financial information.

In *American Polystyrene Corp.*,[120] the Board majority found that an employer that denied claiming an inability to pay and that further explained why it chose not to meet the union bargaining demands was not obligated to furnish the union with requested financial information.

During bargaining for a successor contract, union negotiator Ferro asked Employer General Manager and Negotiator Tan if she was saying that she could not afford the union's proposals. Tan replied, "No, I can't. I'd go broke."[121] At the end of that bargaining session, Ferro gave Tan a letter stating she had claimed she could not afford the union proposals and requesting to review the employer's financial records. The next day, Tan gave Ferro a letter stating: "I am rejecting this request. While I have told you that we are a small company and times are tough, at no time have I ever told you we cannot afford your proposals. Rather, in these uncertain economic times, we believe that we need to take a more cautious approach than what you propose."

The judge found that Tan's "go broke" comment constituted a claim that the respondent was unable to afford the union's proposals. The Respondent, therefore, was obligated to substantiate its claim.[122] The judge found that Tan's subsequent denial that she made the "go broke" statement was inadequate to retract the inability to pay claim. Accordingly, the judge found the respondent's refusal to provide the information violated Section 8(a)(5) of the Act.

The Board majority reversed and found Tan's denial of the request for information sufficiently retracted any claim of inability to pay that she might have made. Relying on cases where employers have successfully retracted such claims,[123] the majority found that "the Respondent's response was made immediately and in writing, and it unequivocally advised the Union that the Respondent's ability to pay for the Union's bargaining proposals was not in question." The majority further stated that although Tan's testimony denying the "go broke" statement was discredited by the judge, there was no evidence of bad faith on the respondent's part in denying that it was unable to pay for the union's

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[120] 341 NLRB No. 67 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[121] Tan denied making this statement. The judge discredited her testimony on this point.
[122] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).
[123] *Advertisers Mfg. Co.*, 275 NLRB 100 (1985); *Central Management Co.*, 314 NLRB 763 (1994).

proposals. Accordingly, the majority concluded that the respondent had no duty to provide the requested information.

In his dissent, Member Walsh found the respondent's retraction of the inability to pay claim was insufficient and, therefore, the respondent's refusal to provide the requested information violated the Act. Tan's retraction began with a false denial of the fact that she made the "go broke" statement. As found by the judge, the union knew Tan had made the "go broke" statement. Tan's lie was a sign of bad faith and "place[d] in doubt the veracity of any subsequent statements about the subject matter of the lie." The union had no reason to believe the rest of Tan's retraction statement and, therefore, according to the dissent, "the Respondent did not unequivocally retract its initial claim."

6. Surface Bargaining

In *St. George Warehouse*,[124] the Board adopted the administrative law judge's findings that the respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees and by refusing to provide the union with certain requested information. The Board majority reversed the judge's finding that the respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining.

The respondent warehouses containers from ships. On October 27, 2000, the union was certified as the exclusive collective-bargaining representative of a unit of warehouse employees.

Prior to the union election, the respondent had used a fluctuating number of temporary agency employees to supplement its permanent work force of "direct hires," or bargaining unit employees.[125] Sometime after the election, without notifying the union, the respondent decided to stop hiring direct hires and to use temporary agency employees instead. As unit employees quit or were fired for cause, the respondent did not replace them. Instead, the respondent used temporary agency employees. As a result, the unit decreased over time, from about 42 employees at the time of the election to about 8 employees at the time of the July 2002 hearing before the judge.

Meanwhile, from October 2001 through at least May 2002, the parties met and bargained. Although they reached agreement on some issues, they did not reach an overall agreement.

The Board adopted the judge's finding that the respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to

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[124] 341 NLRB No. 120 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

[125] The bargaining unit description specifically excluded temporary agency employees.

temporary agency employees and by failing to provide the union with certain requested information.

On the surface bargaining allegation, however, the Board majority reversed the judge and found that the totality of the respondent's conduct did not support a finding of surface bargaining. The majority emphasized that the respondent met frequently and regularly with the union, made concessions and reached agreement on a number of issues, gave explanations for many of its bargaining positions, and did not engage in regressive bargaining or propose reductions in existing benefits. The majority found that the respondent's conduct away from the bargaining table did not show an intent to frustrate agreement. Although the respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees and failing to provide certain requested information, the majority found no nexus between those violations and the respondent's conduct at the bargaining table. Although the transfer of unit work diminished the unit, the majority found that this did not preclude good-faith bargaining as to the remaining unit. Furthermore, although the respondent failed to provide the union with certain requested information, the majority emphasized that the parties were able to continue negotiations while the information requests were pending. Finally, the majority disagreed with dissenting Member Walsh's reliance on a statement by the respondent's counsel that the union would not get a contract and would end up abandoning the shop. The majority found that the statement was simply a frustrated prediction that the parties would not be able to reach agreement, was not evidence that the respondent intended to frustrate agreement, and, in any event, did not outweigh the other evidence of good-faith bargaining. Accordingly, the majority reversed the judge and dismissed the surface bargaining allegation.

In dissent, Member Walsh found that the totality of the respondent's conduct demonstrated surface bargaining. Member Walsh emphasized the respondent's other violations of Section 8(a)(5) and (1), including the unilateral transfer of unit work to temporary agency employees and the refusal to provide requested information. Contrary to the majority, Member Walsh found a nexus between these violations and the respondent's conduct during negotiations. Member Walsh found that the unilateral transfer of unit work demonstrated the respondent's intent to eliminate the very unit for which the parties were bargaining. Regarding the refusal to provide information, Member Walsh noted that the requested information was related to the transfer of unit work to temporary agency employees, which was a key point of contention during bargaining. Contrary to his colleagues, Member Walsh also

found that the statement by the respondent's counsel and lead negotiator that the union would not get a contract strongly suggested that the respondent lacked a sincere desire to reach agreement. Finally, Member Walsh found that the respondent's conduct at the bargaining table, such as its failure to give reasons for rejecting certain union proposals, further showed the respondent's intent to frustrate bargaining. Accordingly, Member Walsh found that the totality of the respondent's conduct warranted a finding of surface bargaining in violation of Section 8(a)(5) and (1).

7. Proposals for Midterm Contract Modifications

In *St. Barnabas Medical Center*,[126] the Board unanimously adopted the judge's finding that the respondent violated Section 8(a)(5) and (1) of the Act when it implemented wage increases during the term of the contract without the union's consent. The Board rejected the respondent's argument that, "[o]nce the Union urgently requested that wages be reopened and the Medical Center agreed, the Union and the Medical Center incurred the same bargaining obligations and rights that they would enjoy or have had no contract been in existence." Rather, the Board, relying on well-established precedent, held that the proposal of a midterm modification does not impose a bargaining obligation on either party. Accordingly, the Board found that the respondent was not justified in unilaterally increasing employees' wages midterm.

The respondent is an acute care facility in Livingston, New Jersey. It employs approximately 800 registered nurses (RNs) at its facility. The union represents the respondent's RNs, and has represented them since 1991. The most recent agreement between the parties covered the period of November 2, 1999 to November 1, 2002. The collective-bargaining agreement did not contain a wage reopener provision.

By letter to the union dated January 23, 2001, the respondent requested a meeting with the union to discuss the staffing crisis with the hospital's cardio-thoracic RNs. That same day, the union made a "formal request . . . regarding the feasibility of a wage re-opener in the current collective-bargaining agreement." On April 16, 2001, the respondent distributed a memorandum to all employees of its facility. The memo stated that, effective June 1, all eligible employees would receive an increase of 5 percent. Subsequently, the respondent notified the union that an impasse had been reached on all outstanding issues, and thus the respondent would implement its last offer in its entirety "effective immediately." Despite the union's objections, the respondent implemented the wage increase on June 7, 2001.

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[126] 341 NLRB No. 151 (Chairman Battista and Members Schaumber and Walsh).

Affirming the judge's finding that the respondent unlawfully implemented wage increases without the union's consent, the Board reasoned that, "'[a]s the recipient of a midterm proposal clearly has no duty to discuss or agree to it, we find the party proposing a midterm modification does not incur a bargaining obligation by tendering its proposal.'" 341 NLRB at slip op. 1 (quoting *Connecticut Light & Power Co.*, 271 NLRB 766, 766–767 (1984)). Furthermore, the Board found that "absent a wage reopener provision, the parties do not incur traditional bargaining obligations by meeting and discussing proposals for midterm modification. Therefore, when the union requested that the respondent meet to discuss the 'feasibility of a wage reopener,'" the union did not incur traditional bargaining obligations. Accordingly, the respondent unlawfully increased unit wages during the term of the contract without the union's consent.

8. Direct Dealing

In *Georgia Power Co.*,[127] a Board majority held that the respondent's establishment of a committee to review the crew leader selection process was a lawful effort by the respondent to formulate bargaining proposals on that topic, and did not constitute unlawful direct dealing with bargaining unit employees.

The respondent and the union had negotiated a memorandum of understanding concerning the crew leader selection process. Some employees complained to management about that negotiated process. The respondent thereafter created an employee committee concerning the process. The respondent specifically assured the union that the crew leader selection process would not change without negotiations with the union, and specifically advised the committee that it was not a forum for negotiations. The committee met twice, and then submitted recommendations to management on the process.

A Board majority found, contrary to the administrative law judge, that the respondent did not engage in unlawful direct dealing with the employees on the committee. Rather, the majority held that the establishment of the committee was a "lawful effort by Respondent to formulate proposals regarding the crew leader selection process." Slip op. at 2. The majority emphasized that the respondent "made clear that it would honor its bargaining obligation to the Union" and that the crew leader selection process "would change only via negotiations." Id. The majority accordingly concluded that the respondent "lawfully turned to its employees to assist it in formulating" bargaining proposals, while

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[127] 342 NLRB No. 18 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

"remaining vigilant in honoring its obligation to bargain exclusively with the Union." Id.

Member Walsh dissented from the majority's reversal of the judge's finding that the respondent bypassed the union and dealt directly with bargaining unit employees in violation of Section 8(a)(5) and (1) of the Act by establishing the employee committee to review the crew leader selection process. "By virtue of the Union's status as exclusive-bargaining representative, the Respondent was obligated to deal only with the Union with respect to this subject."[128] Instead of doing so, however, Member Walsh observed that the respondent met directly with employees; without notifying the union created the committee; and solicited their comments on changes to the process, while flatly barring any participation by the union. Member Walsh concluded that Respondent's direct communication with unit employees, to the exclusion of the union, strongly supported a finding of unlawful direct dealing.

9. Duty to Provide Requested Information

In *Southern California Gas Co.*,[129] the Board majority found that the respondent did not violate Section 8(a)(5) and (1) of the Act by failing and refusing to provide the union with certain requested information. Rather, the majority found that the requested documents were not relevant or necessary for collective-bargaining purposes, but were sought for the purpose of pursuing a complaint with a state agency. Accordingly, the respondent was under no obligation to provide the union with the requested information.

By letter to the respondent dated February 20, 2002, the union stated that it had filed a formal safety complaint with the California Public Utilities Commission (CPUC) regarding incomplete Maximo[130] backlog orders and deleted Maximo orders. Thus, the union requested that the respondent provide it with copies of all cancelled Maximo orders for transmission and storage for the last 2 years so that it might "intelligently represent the members of the Union before the Commission." The respondent refused to provide the requested documents because they did not relate to a grievance or to general negotiations. Thereafter, the General Counsel issued a complaint alleging that the respondent violated the Act by not providing the union with the requested information.

The majority found no merit in the General Counsel's allegation. The majority noted that "where a union requests information concerning the

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[128] Slip op. at 4.
[129] 342 NLRB No. 56 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[130] "Maximo" is a work order tracking system.

terms and conditions of employment of bargaining unit employees, that information is 'presumptively relevant' to the union's proper performance of its collective-bargaining duties," and thus an employer is obligated to provide the information requested. Here, however, the majority found that the information requested by the union was not presumptively relevant to the union's collective-bargaining responsibilities. Rather, the requested Maximo information was relevant solely to a complaint filed with a state agency. Because the complaint filed with the CPUC was "an action outside of the collective-bargaining context," the respondent had no obligation to provide the union with the requested documents. Accordingly, the complaint was dismissed.

Member Walsh dissented. Because safety is a term and condition of employment over which an employer is required to bargain, and because here the requested documents related to the safety of employees, Member Walsh found that the respondent was obligated to provide the union with this information. Furthermore, Member Walsh found that relevancy of the information sought was also shown by the union's 2001 letters to the respondent, which "shed light" on the 2002 request. Those letters indicated that the union was investigating a grievance and needed the Maximo orders to determine whether the safety of its employees was at risk. Therefore, the respondent was aware from the 2001 letters that "the requested Maximo orders concerned a possible safety grievance." Moreover, the dissent found that under the parties' collective-bargaining agreement, employees have a right not "to work under conditions or operate equipment which does not meet the requirements of the State of California pertaining to employee safety." Thus, there was a "direct link" between the union's pursuit of a safety claim with the CPUC and the parties' contract. Accordingly, the respondent was obligated to furnish the requested information and its refusal to do so is a violation of the Act.

In *Boden Store Fixtures, Inc.*,[131] the Board held that the respondent violated Section 8(a)(5) and (1) of the Act by refusing the union's request for information relating to a grievance filed by the union, even though the union was not a named party to the national agreement between the respondent and the Carpenters.

The respondent's national agreement with the Carpenters obligated the respondent to comply with the terms of certain local agreements where it did business. This included the union's local agreement with an Oregon contractors' association. That local agreement contained a grievance procedure, which expressly authorized the union to process

[131] 342 NLRB No. 68 (Chairman Battista and Members Liebman and Meisburg).

grievances concerning violations of the local agreement. The local agreement also restricted employers' ability to contract out bargaining unit work.

The union, having reason to believe that the respondent was violating the local contracting-out restriction, filed a grievance and requested certain information to assist it in processing the grievance. The respondent refused to provide the information, asserting that the union did not have standing to make the request because it was not a named party to the national agreement and because the respondent had previously ended any bargaining relationship with the union.

The Board rejected the respondent's argument. The Board emphasized that, when the respondent agreed to comply with the union's local agreement, specifically the local grievance procedure, the respondent accepted the Carpenters' effective delegation of authority to the union to enforce the local agreement. Accordingly, the Board held that the respondent was obliged to provide the union with requested information.

In *Allen Storage and Moving Co.*,[132] a Board majority found that the respondent did not violate Section 8(a)(5) of the Act by refusing to provide the union with confidential information. Member Walsh found the information was not confidential. The Board unanimously found that the respondent violated Section 8(a)(5) of the Act by canceling employees' insurance policies and violated Section 8(a)(3) by locking out its employees.

The respondent unilaterally cancelled the life insurance policies it maintained for employees. Employees went on strike after the union apprised them of the status of contract negotiations, including the respondent's cancellation of the insurance policies. The respondent accepted the union's unconditional offer to return to work with the caveat that there was not enough work for all employees to return immediately. The respondent refused to provide the union with information about its work and twice locked out its employees. The respondent told the union that the lockout would end if the union accepted a bargaining proposal that included, inter alia, a proposal to provide employees with an insurance policy that had a much lower face value than the cancelled policies.

The Board unanimously found that the respondent unlawfully cancelled its employees' life insurance policies. The Board also unanimously found that the lockouts were unlawful under the principles

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[132] 342 NLRB No. 44 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

of *American Ship Building Co. v. NLRB*,[133] which states that a lockout is permissible if it is for the "sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position." Here, the lockouts were partly in support of the respondent's insurance proposal, which, on its face, might have been legitimate had it not been proposed in the face of the respondent's unlawful cancellation of the former policies. The Board concluded that the respondent's proposal would have required employees to accept the respondent's unlawful conduct, i.e., cancellation of insurance policies, in order to end the lockout, and that, in this context, the lockouts cannot be found lawful.

The Board majority, reversing the judge, also found that the respondent lawfully refused to give the union information, which the respondent proved was confidential (customer names). The respondent was concerned that the union would misuse the information, based on union contacts with its customers during the strike. These concerns were justified, the Board majority stated, because the union contacted customers after the lockout, urging them to remain neutral during its dispute with the respondent and threatening to boycott them if they did not do so.

The majority noted that although an employer has a statutory duty to furnish a union with necessary and relevant information, a substantial claim of confidentiality may justify a refusal to provide otherwise relevant information.[134] The Board requires an employer to bargain towards an accommodation satisfying both a union's need for the information and the employer's need for confidentiality.[135] The Board majority found that the respondent had satisfied this bargaining obligation in offering the union a chance to review its "financials." The union, without explanation, did not accept that offer.

Member Walsh, dissenting, would not find the requested information to be confidential, finding no reason to suspect that the union would misuse the information at the time the respondent rejected the union's request. Member Walsh also found that the respondent's offer to allow a review of its "financials" was not necessarily a substitute for the information the union sought, agreeing with the judge that the accommodation was proffered only because it would support the respondent's claim that it had insufficient work after the strike.

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[133] 380 U.S. 300, 318 (1965).
[134] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).
[135] *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105–1106 (1991).

10. Duty to Bargain Over Effects of Outsourcing Decision

In *Komatsu America Corp.*,[136] the Board unanimously adopted the administrative law judge's finding that the respondent did not violate Section 8(a)(5) and (1) by failing to engage in meaningful effects bargaining regarding the respondent's outsourcing initiative. The Board held that the respondent satisfied its effects bargaining obligation and did not present the union with a fait accompli even though the respondent implemented a "volume-related" reduction in force before effects bargaining was complete.

The respondent announced its outsourcing initiative in January 2002, and transferred the manufacture of a rear suspension subassembly and, in June, one axle assembly, to its facilities in Japan, while negotiations were in progress. On July 1, 2002, however, the respondent implemented a "volume-related" reduction in force because of a general downturn in business. Even though the reduction in force adversely affected the entire work force, the employee complement in the machine shop, as a percentage of the entire work force, actually increased following the reduction in force. At the time of the reduction in force, the vast majority of components manufactured in the machine shop had not been outsourced, and the respondent added work to the machine shop and increased the employee complement in the machine shop, as well as the entire work force, after July 1, as business improved.

In these circumstances, the Board concluded that a causal nexus had not been shown between the outsourcing initiative and the reduction in force. The Board also concluded that the union was not deprived of its bargaining leverage nor was it presented with a fait accompli by the July 1 reduction-in-force because the parties initiated effects bargaining prior to the June outsourcing and, notwithstanding the July 1 layoffs, continued substantive effects bargaining covering all open issues for some time thereafter.

11. Alleged Union Waiver of Right to Bargain

In *Toma Metals, Inc.*,[137] the Board majority adopted the administrative law judge's finding that the respondent violated Section 8(a)(5) and (1) of the Act by recalling laid-off employees without providing the union with adequate notice and opportunity to bargain about the recalls.

On June 1, 2001, the union became the employees' exclusive bargaining representative after winning an election. On June 8, 2001, the

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[136] 342 NLRB No. 62 (Members Schaumber and Meisburg; Member Walsh dissenting in part on another point).

[137] 342 NLRB No. 78 (Members Liebman and Schaumber; Chairman Battista dissenting in part).

respondent decided to lay off eight employees. Shawn Rolley, a representative of the Steelworkers testified that he first learned of the layoffs through telephone calls from plant workers on June 8, 2001. He stated that he did not contact the respondent after learning of the layoffs as he felt it would be futile, because the workers had been laid off by the time he received word of the respondent's actions. Over the following months, three of the employees who were laid off in June were recalled to work. The respondent did not give the union prior notice of the recalls.

The Board majority agreed with the administrative law judge that the respondent violated the Act by failing to provide the union with adequate notice and opportunity to bargain over the recalls. The majority noted that here the layoff and the recall of employees were linked, and the respondent gave the union advance notice of neither action. The majority found that where the issue is one of the union's alleged waiver of its right to bargain, the employer's prior conduct clearly matters. The majority stated that "[b]y presenting the layoff as a fait accompli, and by then failing to give advance notice of the recalls (an effect of the layoff), the Respondent excused any alleged failure of the Union's to demand bargaining with respect to either the layoff or the recalls."[138]

The majority also noted that in a letter sent by the respondent to union representative Rolley 2 days before the layoffs, the respondent stated that it would be permanently laying off eight employees due to continuing unfavorable economic conditions. The majority held that in light of the respondent's representation to the union that the layoffs would be permanent, it is unreasonable to conclude that the union should have expected, at the time it learned of the layoffs, that the employees would be recalled. The majority further noted that there is also no evidence that the respondent gave the union actual notice prior to the recalls and that the union did not find out about the recalls until after they had already occurred. Therefore, the majority found that the union did not waive its right to bargain over the recalls.

Chairman Battista, dissenting in part, stated that he did not find that the respondent's recall of laid-off employees was unlawful because, although he agreed that the respondent's notice to the union about the layoffs was untimely, he found that the union subsequently became aware that there would be recalls. Chairman Battista noted that even after such awareness, the union never requested bargaining about the manner of the recalls but rather simply filed unfair labor practice

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[138] See, e.g., *Intersystems Design Corp.*, 278 NLRB 759 (1986) (no waiver where union did not receive timely notice of layoff).

charges. Chairman Battista stated that when the first recall occurred the union should have known that recalls were not only a possibility but a reality. Chairman Battista found that layoffs and recalls are not part and parcel of the same thing. Therefore, the duty to bargain about one is not encompassed in the duty to bargain over the other.

12. Unilateral Changes and Past Practice

In *Courier-Journal I,*[139] the Board majority held that the respondent's unilateral changes to the health insurance contributions of represented employees did not violate Section 8(a)(5) of the Act because the respondent acted in a manner consistent with a long-established past practice of treating represented employees the same as unrepresented employees.

The respondent publishes and distributes the Courier-Journal, a daily newspaper based in Louisville, Kentucky. The union represents two bargaining units of employees working in the engraving and pressroom departments. The most recent contracts for those departments expired on August 7, 2000.

The respondent has made changes in the costs or benefits of employees' health insurance coverage for both represented and non-represented employees each year since July 1, 1991. In each instance, it did so without first bargaining with the union, and, until fall 2001, the union never objected.

On July 1, 2001, the respondent increased employees' contributions for healthcare insurance. On September 24, 2001, the respondent announced another increase in employee healthcare contributions effective January 1, 2002. At a bargaining session on October 3, 2001, the union's lead negotiator objected to the changes.

The union filed unfair labor practice charges, arguing that the respondent's unilateral changes in health insurance premiums—a mandatory subject of bargaining—violated Section 8(a)(5).

The Board majority found that the changes did not violate Section 8(a)(5) because they were implemented pursuant to a well established past practice. The majority held the changes were lawful because the respondent regularly made similar unilateral changes, unopposed by the union, in the past, and because the changes were made in a manner consistent with contractual provisions requiring that changes to the benefits of represented employees should be made on the "same basis as" those of unrepresented employees.

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[139] 342 NLRB No. 113 (Chairman Battista and Member Schaumber; Member Liebman dissenting in part).

Dismissing the dissent's contention that the respondent had excessive discretion with respect to the prior changes, the Board's majority held that the respondent's discretion was limited by changes made to the benefits of unrepresented employees, and in accord with the past practice.

In her partial dissent, Member Liebman asserted that while the respondent had made many changes unilaterally in the bargaining unit employees' health insurance benefits over a number of years, the union did not protest the changes until 2002. She contended that lacking either the union's formal or tacit approval, the respondent was no longer entitled to act unilaterally. Member Liebman said: "When the union ceased to acquiesce, and actively opposed not only the respondent's specific changes, but also its authority to act unilaterally at all, that underpinning was swept away." She would find that the respondent violated Section 8(a)(5) by making unilateral changes in unit employees' health care benefits in January 2002.

In *Courier-Journal II,*[140] the companion case to *Courier-Journal I*,[141] the Board majority found, as they had in *Courier-Journal I*, that the respondent's practice of making unilateral changes to health insurance premiums became an established term and condition of employment, and therefore that the respondent did not violate Section 8(a)(5) when it acted consistently with that practice by making further unilateral changes.

In this case, as in *Courier-Journal I*, the respondent's collective-bargaining agreement (with a different union) authorized the respondent to change the costs and benefits of the health care plan for bargaining unit employees unilaterally, on the same basis as for nonrepresented employees. Pursuant to this provision, the respondent made numerous unilateral changes in both represented and nonrepresented employees' health insurance costs and benefits during the term of the contract. After the contract expired, the respondent unilaterally increased employee contributions effective July 1, 2000, July 1, 2001, January 1, 2002, and January 1, 2003. The union did not protest the changes until it filed a charge on January 29, 2003.

Under those circumstances, the majority found that the respondent's practice has become an established term and condition of employment, and thus did not violate the Act.

As in *Courier-Journal I*, Member Liebman dissented, arguing that the union did not waive its right to bargain over postcontract expiration changes in employee health benefits and costs, and therefore that the

[140] 342 NLRB No. 118 (Chairman Battista and Member Schaumber; Member Liebman dissenting).
[141] 342 NLRB No. 113.

respondent's unilateral changes in those conditions violated Section 8(a)(5).

13. Unilateral Change that is not Material, Substantial, or Significant

In *Crittenton Hospital*,[142] the Board reversed the administrative law judge's finding that the respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to notify and bargain with the union over the change made to its dress code policy in October 2001, prohibiting the registered nurses (RNs) from using acrylic or artificial nails on the job.

The respondent operates an acute care hospital. The Michigan Nurses Association (MNA) was the bargaining representative for the respondent's RNs for several years before it ultimately lost a second election to the union. In April 2001, the parties reached a contract that made no reference to the dress code policy that had been in place under the prior MNA contract. In October 2001, Michael Jagels, the respondent's director of human resources and chief negotiator, changed the dress code policy by requiring employees who provided hands-on health care to patients, such as RNs, to remove acrylic or artificial nails. Under the prior policy, fingernails could not be longer than 1/8 inch past the tip of an employee's fingers and the use of acrylic and decorated nails was "strongly discouraged."

In finding that the respondent unlawfully failed to notify and bargain with the union over the October change made to its dress code policy, the judge reasoned, among other things, that apparel rules were a mandatory subject of bargaining under Board law. Although it acknowledged this precedent, the Board found the dress code change lawful because the General Counsel failed to show that the change was material, substantial, and significant. The Board explained that the revised dress code did not constitute a material departure from the previous policy. Further, the Board observed that the General Counsel failed to show how this change affected or would affect the RNs' terms and conditions of employment.

14. Transfer of Unit Employees to Nonunit Positions

In *Hanson SJH Construction*,[143] the Board majority affirmed the administrative law judge's finding that the respondent did not violate Section 8(a)(5) and (1) of the Act when, at the employees' request, it transferred six employees from the laborers bargaining unit to the heavy equipment operators unit, withdrew recognition from the union as their representative, and unilaterally discontinued trust fund contributions on

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[142] 342 NLRB No. 67 (Members Schaumber, Walsh, and Meisburg).

[143] 342 NLRB No. 98 (Chairman Battista and Member Schaumber; Member Walsh dissenting).

their behalf. The majority found that the work of the six transferred employees did not remain essentially the same as the work that they had performed in the laborers unit.

The respondent's operations consist of employees in three units that work at a common paving site: a laborers unit (the laborers), a drivers unit (the drivers), and a heavy equipment operators unit (the operators). Two distinct unions represent the laborers and drivers, but no union represents the operators. The laborers perform operators work on an "overflow" or "as assigned" basis, when there are no operator unit employees available to complete the operating tasks. Thus, the laborers are never guaranteed operator work.

In August 2001, employees in the drivers unit went on strike, and many of the laborers honored this strike. Four of the laborers and two of the laborer foremen honored the strike for a short period of time, but subsequently asked the respondent if they could return to work in the operators unit. The respondent granted their request and transferred the six employees to the operators unit, where they received the higher operators wage rate, plus operator fringe benefits. The six employees resigned from the union; at that time, the respondent stopped applying the union's contract to the six employees and discontinued making contractually required trust fund payments on their behalf.

It is well settled that an employer violates Section 8(a)(5) of the Act when, without the consent of the union, it removes a group of employees from a bargaining unit without showing that the group is sufficiently dissimilar from the remainder of the unit to warrant removal. See, e.g., *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993). Here, the majority rejected the General Counsel's argument that the six transferred employees performed essentially the same duties in their operator positions as they had in their laborer positions. Rather, the majority found that although the laborers performed some operator functions, they had no "entitlement" to operator work. "The record is clear that the essential work of the laborers unit was laborers work and that operators work in this unit was 'non-full time, non-guaranteed, as available, as assigned, on again off again.'"[144] Furthermore, after the employees transferred into the operators unit, they no longer performed *any* laborers work, but were only assigned operator duties. Accordingly, the Board majority dismissed the complaint.

In his dissent, Member Walsh found that the respondent did not satisfy its burden of establishing that the removed group of employees was "sufficiently dissimilar" from the remainder of the unit to warrant

[144] Slip op. at 2.

removal. Member Walsh specifically found that "while in the laborers unit, the four employees performed some operator work. After their removal from the laborers unit, the employees performed primarily operator duties, but also regularly performed some laborer work. In sum, the employees' new job was the mirror image of their former job." Therefore, Member Walsh would have found that the respondent violated Section 8(a)(5) and (1) of the Act.

D. Union Interference with Employee Rights

Even as Section 8(a) of the Act imposes certain restrictions on employers, Section 8(b) limits the activities of labor organizations and their agents. Section 8(b)(1)(A), which is generally analogous to Section 8(a)(1), makes it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their Section 7 rights, which generally guarantee them freedom of choice with respect to collective activities. However, an important proviso to Section 8(b)(1)(A) recognizes the basic right of a labor organization to prescribe its own rules for acquisition and retention of membership.

1. Operation of Hiring Hall

In *Electrical Workers Local 48 (Oregon-Columbia Chapter of NECA)*,[145] the Board held that the union's departures—both intentional and unintentional—from the rules governing its hiring hall violated Section 8(b)(1)(A) of the Act.

IBEW Local 48 operates a hiring hall in Portland, Oregon. From October 1992 to May 1994, Local 48 departed from the dispatching rules governing its hall, both intentionally and unintentionally. Intentional out-of-order dispatches were given to applicants in the following categories: (1) those who engaged in union organizing as "salts" (union members who take jobs with nonunion employers in order to organize their employees) and "peppers" (newly organized employees of nonunion employers who remain with those employers for a time to engage in further organizing); (2) "stripped" employees (i.e., employees of nonunion employers who are persuaded to join the union and leave their employer); (3) those given off-the-books dispatches as a reward for joining Local 48; (4) those who, following discharge, were promptly redispatched to the discharging employer to resolve a dispute over the discharge; (5) those who preserved their position on the out-of-work list despite missing a compulsory resign deadline; and (6) those dispatched in response to a name request. Unintentional departures from the hiring-

[145] 342 NLRB No. 10 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

hall rules benefited applicants of two kinds: those permitted to register on book 1 at a time when they were ineligible to do so, and those who improperly retained their position on the out-of-work list due to Local 48's failure to apply the contractual "short call" rule.

Under Board law, a union's deliberate departure from the rules governing its hiring hall violates the duty of fair representation and Section 8(b)(1)(A) and (2) unless the union demonstrates that the departure was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. Applying this test, the majority found unlawful all six categories of intentional dispatching irregularities listed above. In doing so, the majority explained at some length its view that rewarding union organizing efforts with out-of-order dispatches cannot be justified as necessary to the effective performance of the representative function. Quoting the Supreme Court's statement that "the policy of the Act is to insulate employees' jobs from their organizational rights,"[146] the majority found this policy "plainly undermined by a dispatching regime that steers work to employees who engage in union organizing, to the disadvantage of those who do not."

Dissenting in part, Member Walsh would have found no violation for Local 48's dispatching practices in furtherance of its organizational efforts. In his view, "salts" and "peppers" forewent opportunities to qualify for book 1 as well as more lucrative jobs with union contractors, and Local 48's departures from its dispatch rules "compensated them for their personal sacrifice and prevented them from being unfairly penalized for their organizing work." Member Walsh also disagreed with the majority as to the lawfulness of dispatching practices (2), (4), and (6) listed above.

Turning to Local 48's unintentional dispatching irregularities, the Board unanimously found that they evinced reckless disregard for established procedures and employees' interests, and therefore constituted gross negligence under applicable Board law.[147] The Board acknowledged that the D.C. and Ninth Circuits apply a different standard than does the Board, but found it unnecessary to address that difference because the same result would be reached in this case under either standard.

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[146] *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

[147] *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999); *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB 549 (2001).

E. Multiple Union Liability

In *Electrical Workers Local 98 (Wohlsen Construction),*[148] a majority of the Board held that respondent Electrical Workers Local 98 and respondent Electrical Workers Local 380 were jointly and severally liable for certain 8(b) violations committed by Local 98 representatives.

In 1998, Local 98 Organizer Timothy Browne and Local 380 Organizer Kenneth MacDougall initiated an organizing campaign at State Electric (State). MacDougall was "head[ing] up that campaign." Ultimately, Local 380, alone, filed a petition seeking certification, though Local 98 Organizer Browne played an integral role in the campaign.

MacDougall and Browne's organizing strategy included visiting employers who were doing business with State, or were considering doing so, regarding the employers' contracting with State. On one occasion, MacDougall and Browne picketed a jobsite while State was on the job.

Also, Local 380 Organizer MacDougall and Local 98 Organizer Browne monitored State's attempt to win a contract on a high school construction project in the Cheltenham, PA school district. Browne attended a school district meeting, where he threatened to picket the job, warning that "no one would come in or out and this would cause a lot of delays." MacDougall attended the meeting, but did not appear with Browne. The evidence showed that, although MacDougall and Browne had discussed beforehand the latter's appearance at the meeting, they did not discuss picketing the district or its jobsite.

Neither Local 380 nor Local 98 ever picketed the Cheltenham high school jobsite. Browne, however, visited the site several times. He took pictures of employees and the license plates on their vehicles, and blocked a State employee from operating a forklift for about 15–30 minutes. When the employee asked Browne to move, Browne responded, "I know who you are, I know where you live. We're going to get you some day." Browne engaged in similar activities on additional occasions. However, there was no evidence that MacDougall discussed with Browne his visiting the District's job site, knew that Browne intended to visit the site, or later learned or approved of any of Browne's coercive conduct at the site.

The judge found that Local 98 Organizer Browne's conduct involving State was unlawful, and also that Local 380 was jointly and severally liable for the conduct. The judge reasoned that Local 380 and Local 98 were engaged in a "joint venture" for the purpose of organizing State's

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[148] 342 NLRB No. 74 (Chairman Battista and Member Schaumber; Member Liebman dissenting).

employees. The judge relied on the Board's decision in *Sheet Metal Workers Local 19 (Delcard Associates),*[149] which held that, in a joint venture among unions, each union is liable for unfair labor practices committed by the other unions in furtherance of their shared objective. As an alternative basis for finding Local 380 liable for the violations, the judge found that Local 98 Organizer Browne, himself, was Local 380's agent at the times in question.

The Board majority affirmed the judge's finding that Local 380 was liable for Browne's misconduct. However, the majority relied only on the judge's agency analysis, finding it unnecessary to pass on the judge's application of *Delcard Associates*. The majority found that Browne had actual authority to speak for Local 380 at the school district meeting, and that Browne had apparent authority to act on behalf of Local 380 at the construction site. The majority emphasized that, although MacDougall had not authorized Browne's particular acts, it was enough that MacDougall had permitted Browne to represent Local 380 in support of the campaign generally.[150]

Member Liebman dissented. She argued that, while Local 98 was liable for Browne's unfair labor practices, the majority was stretching agency principles too far by imposing liability on Local 380. Further, Member Liebman would have overruled the joint-venture theory of liability for the reasons given by the Third Circuit, principally, that the theory was inconsistent with the plain language of Section 8(b) of the Act.[151]

F. Failure to Give 8(d) Notice

In *Boghosian Raisin Packing Co.,*[152] the Board majority found that where a union unknowingly failed to send notice of dispute to the Federal Mediation and Conciliation Service (FMCS), as required by Section 8(d)(3), and the unit employees subsequently engaged in a strike, the strikers lost their protection under the Act pursuant to Section 8(d)(3)'s loss-of-protected-status provision. The strikers could therefore be lawfully discharged.

The union gave the respondent employer timely notice of intent to reopen the parties' contract months before its expiration and, as required by Section 8(d)(3), also sent notice to the state labor mediation service. However, due to an undiscovered clerical error, the union's notice to the FMCS was never sent.

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[149] 316 NLRB 426 (1995), enf. denied 154 F.3d 137 (3d Cir. 1998).
[150] *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984).
[151] *NLRB v. Sheet Metal Workers Local 19*, 154 F.3d 137 (3d Cir. 1998), denying enf. to 316 NLRB 426 (1995).
[152] 342 NLRB No. 32 (Chairman Battista and Member Schaumber; Member Liebman dissenting).

After failing to reach agreement, the parties extended the contract (including the no-strike clause) beyond its expiration date in order to continue bargaining, subject to termination by either party. However, the union ultimately took a strike vote and gave the required week's notice of termination. When doing so, the union completed a Teamsters Joint Council questionnaire regarding the dispute. The questionnaire specifically questioned whether 8(d)(3) notice had been provided to the FMCS and directed that the return mail receipt of such delivered notice was to be affixed. Without taking any action to verify that the required notice had been sent, the union signed the questionnaire, affirming that it had.

After receiving notice from the union terminating the extension agreement, the respondent's counsel/negotiator called the FMCS to inquire whether the union had filed the required notice, and learned it had not. The final bargaining session was held on September 30, at which time the parties remained far apart. Thereafter, the union engaged in active preparations for a strike.

The strike began on October 30. Promptly after it commenced, the respondent informed the union that no notice was on file at the FMCS and that unless the union could produce documentation showing that it had send the notice, the strike was unlawful and all of the strikers were subject to discharge. Later the same day, the union offered to return to work under status quo terms and conditions of employment and resume bargaining. The Union did not, however, take any other action to end the strike even when it became clear, on October 1, that the statutory 8(d)(3) notice requirement had not been met.

The picketing continued for 4 additional days. Throughout that period the respondent continued to reserve the option to terminate all the strikers and ultimately did so.

Several months later, after the respondent had hired replacements, a majority of the employees then working at the plant signed a decertification petition. The respondent then withdrew recognition from the union and made unilateral changes in terms of employment.

The majority found that Section 8(d)(3) expressly requires that before a union can engage in a strike it must, among other things, give written notice to FMCS of its intent to strike. The majority stated that 8(d)(3) evidences "a clear expression of Congressional intent to minimize the interruption of commerce resulting from strikes and to further the use of mediation to assist parties in settling their labor disputes peaceably." Here, those requirements were not met. Although acknowledging that "enforcement of these statutory provisions may in circumstances yield a harsh result," the majority noted that the requirements are clear, as are

the forfeiture consequences of noncompliance. The majority rejected, as unsupported by the evidence, the dissent's claim that the respondent purposely withheld from the union its knowledge that the 8(d)(3) requirement had not been met, for the purpose of inducing an unlawful strike. The majority noted that the respondent testified, without contradiction, that—based on the absence of 8(d)(3) notice—it thought that the union would not strike. Further, the majority noted that the obligation to notify FMCS was the union's, and there is no basis for placing any obligation on the respondent to disclose the union's failure to comply.

In dissent, Member Liebman stated that the application of Section 8(d)'s loss-of-status provision in this case "defeats the purpose of Section 8(d)—to avert strikes—and imposes a harsh penalty that serves no statutory purpose." In her view, the respondent's course of conduct "was not consistent with the good faith demanded by Section 8(d)," and the respondent had a duty to inform the union of its filing infraction "if it intended to rely on the loss-of-status provision." Instead, however, the respondent exploited its knowledge and "used the loss-of-status provision as a club, rejecting repeated offers by the Union to return to work . . . before ultimately firing all striking employees when the Union made too few concessions." Because the strikers retained their protection under the Act, in Member Liebman's view, their discharge for striking was unlawful, as were the respondent's subsequent actions.

G. Equal Access to Justice Act

In *B. F. Goodrich*,[153] the Board reversed in part the recommended order of the administrative law judge, and denied the respondent union's application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) and the Board's rules and regulations. These fees and expenses had been incurred by the respondent in defending against an unfair labor practice charge filed by the General Counsel alleging that the respondent had breached its duty of fair representation. The respondent had prevailed against that charge, with the Board affirming the judge's original decision that the respondent had not violated Section 8(b)(1)(A) by its treatment of the charging party's grievance.

In considering the respondent's EAJA application filed thereafter, the judge found that the unfair labor practice case consisted of two distinct "components," and that the General Counsel was "substantially justified" in pursuing only one of those components. In his supplemental decision, thus, the judge awarded the respondent one-half of its requested fees and expenses, derived by the "admittedly unscientific method" of "simply

[153] 343 NLRB No. 42 (Members Liebman, Schaumber, and Meisburg).

dividing the Respondent's claimed fees and costs in half. . . ." The General Counsel filed exceptions, arguing that the respondent was not entitled to recover any fees; the respondent, conversely, filed cross-exceptions seeking recovery of 100 percent of its requested fees.

The Board, reversing the judge in part, dismissed the respondent's application in its entirety. The Board rested its decision on the "fundamental premise" that the case "involved a single grievance giving rise to a single Section 8(b)(1)(A) allegation." The Board reasoned that the judge had erred by fragmenting that "single allegation, namely that the union violated its duty of fair representation vis-à-vis employee Smith by its handling of his grievance." The Board concluded that the General Counsel was "substantially justified in litigating that allegation, both because: (1) it had a reasonable basis in law and fact, and (2) it involved credibility issues not subject to resolution by the General Counsel at the investigative stage of the proceeding."

H. Remedial Order Provisions

1. Union's Noncompliance with Settlement Agreement

In *Postal Service*,[154] the Board majority found that the respondent local union violated the provisions of a settlement agreement with the charging party, a nonmember unit employee, by publishing a commentary in its newsletter commenting adversely on the settlement and the employee.

The employee's charge, under Section 8(b)(1)(A), contested her exclusion from the settlement of a grievance involving lost work. The grievance settlement had provided for a lump sum payment to be divided among the affected unit employees as lost pay. The steward who negotiated the grievance settlement, however, excluded the nonmember employee from sharing in the payment. After the Regional Director issued a complaint, the parties settled the charge through a non-Board settlement agreement requiring the union to make an appropriate payment to the employee and to post a notice stating that the union "recognizes and observes the rights of all employees in the Unit."

The union posted the notice and made the required payment. The following month, however, the union's president, in his monthly column appearing on the union newsletter's front page under the headline, "Want Union Benefits? Join the Union to Get Them," identified the charging party by name, explained the nature of her underlying grievance and Board charge, and noted that the employee "doesn't pay dues and probably never will [but] certainly demands everything that dues paying

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[154] 340 NLRB No. 166 (Chairman Battista and Member Walsh; Member Liebman dissenting).

members struggle for." The column went on to state that "at some point, even when you are right, litigation costs more to defend than it is worth" and that "we [therefore] decided to avoid further litigation that promised to run into the thousands" by settling the charge. The president concluded that "I am never surprised at the steps a SCAB, FREE LOADER or what ever you choose to call a person who refuses to pay their fair share and take a free ride on the dues of dues paying membership. I tell you right now, I am proud of [the steward who settled the grievance] and stand behind and support her 100%. She never intentionally did anything wrong, and I don't believe she ever will."

The employee filed a second charge, and the Regional Director, revoking his dismissal of the initial complaint, issued a consolidated complaint alleging both the initial, grievance-related violation and a second violation through the newsletter column.

The Board majority found that the president's comments "completely undermine[d] the assurances in the notice that the Respondent would respect the rights of all unit employees." In the majority's view, the column "communicated a clear disregard for the rights of non-member employees" and indicated that the president, notwithstanding the settlement, "applauded what [the steward] had done: i.e., conduct alleged to be discriminatory and unlawful." The column therefore "exceeded Section 8(c)'s zone of protection by suggesting that it is . . . laudable for a union to discriminate against non-members." The majority also noted that if an employer took actions analogous to the union's and posted a post-settlement notice "excoriat[ing] membership in the union and say[ing] that the employer 'supports the supervisor 100%,'" the Board would undoubtedly find the employer noncompliant. The majority accordingly approved the revocation of dismissal of the initial complaint and remanded the case for litigation of both allegations.[155]

In dissent, Member Liebman noted that the union had fully complied with the requirements of the non-Board settlement and found that the newsletter column, "[d]espite its harsh words . . . was protected by Section 7." On the basis of this Section 7 right, Member Liebman distinguished the union from an employer in an analogous situation. In her view, the column's primary theme was "the perceived unfairness of the Union's obligation to represent an employee who 'doesn't pay dues and probably never will' but at the same time 'demands everything that dues paying members struggle for.'" She found that the personal references to the charging party, "while antagonistic, did not threaten not to represent her or other non-members in the future and were protected

[155] The majority "express[ed] no view on the merits of either allegation."

under established law that 'favor[s] uninhibited, robust, and wide-open debate in labor disputes.'" Member Liebman also found that the union had a right to explain to its members why it had expended their dues money to settle the litigation.

2. Nonmajority Bargaining Order

In *First Legal Support Services,*[156] a partially divided Board held that the respondent committed egregious violations of Section 8(a)(1) and (3) of the Act in response to the union's organizing effort, that the General Counsel failed to establish that the union obtained a card majority for purposes of a remedial bargaining order, and that the judge properly declined to issue a nonmajority bargaining order or other extraordinary remedies except a broad cease-and-desist order.

The case arose when the union began organizing the respondent's bicycle and driver couriers. The respondent engaged in a campaign of "category one unfair labor practices" under *NLRB v. Gissel Packing Co.*[157] The judge, however, did not recommend a remedial bargaining order under *Gissel* because he found that the General Counsel failed, by one authorization card, to establish that the union had obtained majority support among the employees, and because Board precedent does not permit nonmajority bargaining orders.[158]

The respondent did not except to the judge's unfair labor practice findings, or to his finding that they were "category I" violations. Accordingly, the Board unanimously adopted the findings. The majority also affirmed the judge's finding that the General Counsel failed to establish a card majority, in light of conflicting testimony about the circumstances in which the union obtained a final, decisive authorization card. The majority affirmed the judge's decision not to issue a bargaining order in the absence of a card majority. Last, the majority found no need for extraordinary relief, other than the broad cease-and-desist order issued by the judge.

Member Liebman, in a separate dissent, would have granted the special remedies sought by the General Counsel. Further, Member Liebman would have issued a remedial bargaining order because, in her view, the judge erroneously refused to count the union's decisive authorization card.

Finally, even assuming that the General Counsel failed to establish that a majority of unit employees supported the union, Member Liebman

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[156] 342 NLRB No. 29 (Members Schaumber and Meisburg; Member Liebman dissenting in part).
[157] 395 U.S. 575, 613 (1969).
[158] *Gourmet Foods*, 270 NLRB 578 (1984).

would have overruled *Gourmet Foods*, supra, and issued a bargaining order.

3. Forfeiture of Reinstatement and Backpay Remedies

In *Precoat Metals*,[159] the Board majority adopted the judge's finding that, inter alia, the customary remedy of reinstatement and backpay be withheld from the discriminatee because he gave false testimony and engaged in "deliberate and malicious" misconduct that undermined the Board's ability to effectively administer the policies of the Act.

On August 31, 1998, employee Jack Focht accompanied employees Chester Florian and Jim White to the Board's Chicago Regional Office and gave an affidavit in support of Florian's unfair labor practice charge against the respondent employer. At a September 11 meeting, Focht informed Regional Manager Ray Drufke and Plant Manager Jim Boyle Jr. that he was working with Florian's attorney and that he went to the NLRB. Thereafter, Drufke shared Focht's information with his supervisor, Vice President of Manufacturing Roger Kramer. On September 14, Kramer and Drufke met with Focht to discuss, inter alia, the fact that Focht was working with "someone's attorney in conjunction with the Board." The meeting resulted in the respondent employer placing Focht on a paid leave of absence. Focht remained on a paid leave of absence until October 28. On that date, Focht met with Human Relations Director John Christopher and Kramer. Kramer offered Focht a last chance agreement and a transfer to the respondent employer's Jackson, Mississippi facility. On November 2, Focht declined the respondent employer's offer. On November 3, the respondent employer terminated Focht.

The Board agreed with the judge that the credible evidence established that the respondent employer placed Focht on a paid leave of absence, offered him a last chance agreement, and discharged him because he went to the Board and was working with "someone's attorney." Accordingly, the Board adopted the judge's ruling that the respondent employer violated Section 8(a)(4) and (1) of the Act by retaliating against Focht for engaging in statutorily protected activity.

In determining that Focht was not entitled to reinstatement and backpay, the Board majority agreed with the judge that Focht undermined the Board's process when he falsely testified in his pre-hearing affidavit and during the trial, and engaged in misconduct during his employment with the respondent employer. Relying on the balancing

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[159] 341 NLRB No. 143 (Chairman Battista and Member Schaumber; Member Walsh dissenting in part).

test set forth in *Toll Mfg. Co.*,[160] the Board majority assessed "the impact of the discriminatee's transgression on the integrity of the Board's processes."[161]

In this case, the Board majority found that Focht's "lies to the Board agent about core issues involved in the unfair labor practice charge filed by employee Florian," and his false testimony at trial concerning a central issue in the case, not only "prolonged the proceedings and compounded the waste of the Board's resources" but also constituted "malicious abuse of the Board's processes" sufficient to warrant that the Board protect the integrity of its process by not allowing Focht to benefit from his abuse of the Board's policies.[162]

In addition, the Board majority found that while Focht's abuse of the Board process is the sole and independent reason for the denial of reinstatement and backpay, it agreed with the judge that Focht's misconduct in the workplace further demonstrated that he was "unfit for reemployment with the Respondent Employer."[163] Relying on numerous examples set forth by the judge, the Board majority determined that Focht sowed seeds of distrust and caused conflicts between the employees, the respondent employer and the respondent union, and that, if reinstated, he would continue to disrupt the workplace. In light of this, the Board majority found that it would not effectuate the policies of the Act to order Focht's reinstatement.

Member Walsh, dissenting in part, found that Focht should not have been denied reinstatement and backpay based on the circumstances present in this case. Member Walsh noted that while false testimony by a discriminatee may justify the denial of backpay and reinstatement, the Board is not precluded from awarding those remedies where it would effectuate the Board's policies, citing *ABF Freight System v. NLRB*.[164]

Applying the principles set forth in *Toll Mfg.*, Member Walsh determined that although the judge found Focht to be generally an untrustworthy witness, the judge credited that portion of Focht's testimony relating to the 8(a)(4) violation, and Focht, therefore, should not have been precluded from a remedy even though his testimony was discredited on other matters in the case. He also found that, unlike the circumstances present in *Toll Mfg.*, Focht's false testimony did not affect in any way the unfair labor practice to be remedied nor did it result in any benefit to Focht. Based on the above, Member Walsh concluded

[160] 341 NLRB No. 115.
[161] Id. at slip op. at 4.
[162] 341 NLRB No. 143, slip op. at 3–4.
[163] Id., slip op. at 5.
[164] 510 U.S. 317 (1994).

that, "a forfeiture of remedy should be reserved for cases in which an employee seeks to profit from his abuse and manipulation of the Board processes."[165]

With regard to Focht's misconduct during his employment, Member Walsh relied on the test set forth in *Berkshire Farm Center*,[166] to determine that the respondent employer failed to show that subsequent misconduct, or discovery of that conduct, would have resulted in a lawful discharge of Focht. Member Walsh found that there was no contention that the misconduct occurred after the discharge or that the respondent employer became aware of Focht's misconduct after the termination. As demonstrated by the record, Member Walsh found that the respondent employer tolerated Focht's conduct and failed to prove that the misconduct was of a type that would have resulted in the employee's lawful termination.

4. Calculation of Backpay

In *Velocity Express, Inc.*,[167] the Board majority held that it was inappropriate to deduct from gross backpay certain employment-related expenses that discriminatee Edwin Kirk would have incurred had he not been unlawfully discharged by the Respondent.

Discriminatee Edwin Kirk was employed by the respondent as a delivery driver until March 1999, at which time he was unlawfully discharged.[168] Kirk owned the vehicle he operated on his route, and was paid a regular salary from which the respondent deducted expenses for vehicle insurance and pagers. Kirk was responsible for all expenses related to the operation of his vehicle, including gasoline and repairs.

The majority held that it was appropriate to calculate Kirk's backpay by deducting from gross backpay Kirk's severance pay, his interim earnings, and the expenses for insurance and pagers normally deducted by the respondent. Relying on established law that "the Board does not deduct from gross backpay those expenses that employees would have incurred had they not been unlawfully discharged,"[169] the majority rejected the respondent's argument that Kirk's backpay should further be reduced by the amount of employment-related expenses he would have incurred had he continued to work for the respondent.

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[165] 341 NLRB No. 143, slip op. at 7.

[166] 333 NLRB 367 (2001).

[167] 342 NLRB No. 87 (Members Liebman and Walsh; Chairman Battista dissenting).

[168] See 332 NLRB 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002).

[169] See *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167 (1983), enfd. in relevant part 748 F.2d 1001 (5th Cir. 1984); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1342 (1956), enfd. 225 F.2d 284 (5th Cir. 1958), clarified 281 F.2d 686 (5th Cir. 1960); *Myerstown Hosiery Mills,* 99 NLRB 630, 631 (1952).

Dissenting, Chairman Battista found that a backpay formula that included a deduction of Kirk's employment-related expenses from gross backpay was the formula used in determining his interim earnings, and would most closely approximate what Kirk actually would have earned had he continued to work for the Respondent.

5. Reimbursing Union for Dues not Checked Off

In *Heartland Health Care Center d/b/a Plymouth Court*,[170] the Board granted the General Counsel's request that the Board modify the judge's remedy to order the respondent to pay the union the dues it should have checked off and remitted during the effective dates of the contract while the respondent refused to recognize the union.[171] Citing *W. J. Holloway & Son,*[172] the Board explained that it requires an employer to reimburse the union for dues-checkoff payments that it failed to make under the collective-bargaining agreement where employees have individually signed valid authorizations for the employer to deduct union dues from their wages. Applying this principle, the Board noted that the collective-bargaining agreement contained a union security clause and a dues-checkoff provision, and the respondent had a practice of checking off dues, which it discontinued after withdrawing recognition from the union. On these facts, Members Schaumber and Meisburg found it reasonable to infer that at least some employees had executed valid authorizations, although the extent of authorized checkoff was not shown.

Member Walsh found it unnecessary to infer from the record at this stage of the proceeding that at least some employees had in fact executed valid dues-checkoff authorizations. He reasoned that the modification of the judge's recommended Order did not turn on whether the record in the unfair labor practice proceeding established that at least some employees in fact executed valid dues-checkoff authorizations.

6. No Affirmative Remedy Due to Mootness

In *Borgess Medical Center*,[173] the Board majority held that the respondent had no obligation to provide the union with access to requested information or bargain over an accommodation, notwithstanding the fact that the respondent had violated Section 8(a)(5)

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[170] 341 NLRB No. 49 (Members Schaumber, Walsh, and Meisburg).

[171] There were no exceptions to the judge's finding that the respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition of the union as the exclusive collective-bargaining representative of the respondent's employees.

[172] 307 NLRB 487 fn. 3 (1992), citing *California Blowpipe & Steel Co.*, 218 NLRB 736, 754 (1975), enfd. 543 F.2d 416 (D.C. Cir. 1976).

[173] 342 NLRB No. 109 (Chairman Battista and Member Meisburg; Member Liebman dissenting in part).

by failing to meet its duty to accommodate its confidentiality interest in the information with the union's need. The majority's conclusion was based on its finding that the information request was moot.

The respondent operates an acute care hospital in Kalamazoo, Michigan. It requires all employees to complete incident reports in order to document problems that occur in treating patients. A nurse was discharged after giving the wrong medication to a patient and attempting to cover up the error, in part by omitting to file an incident report. The union requested to view the respondent's incident reports concerning medication errors pursuant to a grievance filed on behalf of the nurse. The respondent refused to supply the incident reports on the grounds that they are confidential and protected from disclosure by Michigan State Law.[174]

The Board majority agreed with the administrative law judge's conclusion that the respondent failed to meet its duty to accommodate the union's need and its own legitimate confidentiality interest in the incident reports. However, the Board majority declined to order an affirmative remedy because the grievance arbitration was complete and the union did not appeal the arbitrator's decision. The majority found that because the union failed to articulate any current or future potential need for the information, the respondent was under no obligation to provide it.

In her partial dissent, Member Liebman argued that the burden of showing mootness falls on the party asserting it, and that the respondent here had not met that burden merely because the grievance proceeding has concluded.[175] Moreover, the dissent argued that the majority's approach creates an incentive for employers to refuse to promptly disclose information and ignores the on-going relationship between the parties, of which the grievance process is only a part. Finally, the dissent warned that the majority decision, read in light of the delay in the Board's handling of cases, means that unions will risk being denied an affirmative remedy if they fail to expressly identify a potential future need for requested information aside from the immediate need when the request is made.

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[174] Michigan's Peer Review Statute states: "The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena." MCLA 333.20175 (8); see also MCLA 333.21515.

[175] *Bloomsburg Craftsmen*, 276 NLRB 400 fn. 2, 405 (1985); *Postal Service*, 307 NLRB 429, 429 fn. 2 (1992).

I. Default Judgment Proceeding

In *Michigan Inn*,[176] the Board majority denied the General Counsel's motion for default judgment against certain of the named respondents, which had failed to file an answer to the consolidated complaint. The majority found that a substantial portion of the complaint was ambiguous or inconsistent, thereby making it impossible to determine whether it was appropriate to find that some or all of these respondents had violated the Act as alleged and what the appropriate remedy should be.

The complaint alleged numerous violations of Section 8(a)(3), (5), and (1) of the Act by various companies and their alleged successor companies. Only the alleged successor respondents filed answers to the complaint. The General Counsel therefore filed a motion for default judgment against the other (predecessor) respondents that did not file an answer.

The Board majority denied the motion, finding the complaint deficient in several respects. First, the complaint failed to specify which respondents committed which violations. Second, it failed to specify the dates when many of the alleged violations occurred. Third, the complaint contained inconsistent allegations regarding when the predecessor respondents ceased managing and controlling the facility. Fourth, the complaint allegations were insufficient to find that the predecessor respondents unlawfully laid off all unit employees and closed or partially closed the facility in violation of Section 8(a)(3) and (5). Fifth, the complaint and motion failed to explain the basis for finding that the predecessor respondents' other alleged 8(a)(5) conduct also violated 8(a)(3). Finally, the complaint also raised a number of other remedial issues, such as whether restoration and reinstatement remedies were appropriate.

The majority found that the complaint was not well pleaded in these circumstances, and that the motion for partial default judgment should therefore be denied and the case remanded. The majority stated that it shared the dissent's concern that this would result in delaying a remedy for the alleged unfair labor practices. However, paraphrasing Judge Posner's decision in *NLRB v. Brooke Industries Inc.*,[177] the majority stated that "we are also properly concerned with the 'integrity and manageability of the [administrative] process,'" and rejected the dissent's "suggestion (in the words of Judge Posner) that 'we have no choice but to rubber stamp' the General Counsel's motion for default judgment in these circumstances." The majority further noted that the

[176] 340 NLRB No. 115 (Chairman Battista and Member Schaumber; Member Walsh dissenting).
[177] 867 F.2d 434, 435–436 (7th Cir. 1989).

General Counsel could promptly address the ambiguities and inconsistencies in the complaint on remand by issuance of an amended complaint.

In dissent, Member Walsh stated that, in his view, the complaint allegations against the predecessor respondents were well pleaded and there was no merit to the six objections raised by the majority sua sponte. Quoting the D.C. Circuit in *Vincent Industrial Plastics, Inc. v. NLRB*,[178] that "relief delayed under the Act may be relief denied," Member Walsh stated that he would therefore grant the General Counsel's motion for default judgment against the predecessor respondents and issue an order requiring those respondents to make the victimized employees whole.

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[178] 209 F.3d 727, 739 (2000).

VII

Enforcement Litigation

A. Access to Private Property

In *Republic Aviation Corp. v. NLRB*,[1] the Supreme Court held that employees may engage in protected union solicitation and distribution of materials on an employer's premises during nonworking time, unless the employer can show that prohibiting the solicitation is necessary to maintain production and discipline. In *NLRB v. Babcock & Wilcox Co.*,[2] the Supreme Court, recognizing the distinction between an "employee" and a "nonemployee" as one "of substance,"[3] held that "an employer may validly post his property against nonemployee distribution of union literature" so long as "the employer's notice or order does not discriminate against the union by allowing other distribution."[4] The Supreme Court based its employee-nonemployee distinction on the ground that employees are already rightfully on the employer's property, pursuant to the employer-employee relationship, thus implicating only the employer's managerial, rather than its property, interests.[5] That holding was reaffirmed in *Lechmere, Inc. v. NLRB,*[6] where the Supreme Court clarified that only rarely will nonemployees be permitted access to private property to engage in activity protected by Section 7 of the Act.

In *Thunder Basin Coal Co. v. Reich*,[7] the Supreme Court elaborated that "[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it," and that "this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances."[8] In several cases decided during the past year, the appellate courts continued to work through the circumstances in which nonemployees may have access to private property to engage in union activity.

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[1] 324 U.S. 793 (1945).
[2] 351 U.S. 105 (1956).
[3] Id. at 113.
[4] Id. at 112.
[5] Id. at 113.
[6] 502 U.S. 527 (1992).
[7] 510 U.S. 200 (1994).
[8] 510 U.S. at 217 fn. 21 (citing *Lechmere*, 502 U.S. at 537, and *Babcock & Wilcox*, 351 U.S. at 112).

In *American Postal Workers Union v. NLRB*,[9] the D.C. Circuit affirmed the Board's dismissal of a complaint alleging that the Postal Service violated Section 8(a)(1) of the Act when it expelled from its contract drivers' lounge an off-duty contract driver and a union representative who were engaged in union organizing. The Board had found (with one member dissenting), and no party disputed before the court, that the off-duty contract driver was a "nonemployee" whose access rights, like those of a nonemployee union representative, were governed by *Lechmere*.[10] The court upheld the Board's disputed finding that the Postal Service's exclusion of those individuals was not discriminatory, and was therefore lawful, because there was no evidence that the Postal Service had ever permitted access to other nonemployees.[11] The court rejected the union's argument that the Postal Service's policy prohibiting union solicitation in the contract drivers' lounge was facially discriminatory because it singled out union solicitation and was invalid without regard to whether the Postal Service granted access to other nonemployees to engage in other solicitation, emphasizing that the challenged policy supplemented a general no-solicitation rule prohibiting commercial and charitable solicitations.[12]

A second D.C. Circuit case explored, but did not decide, some constitutional and federalism questions implicated in Supreme Court cases, teaching that Federal labor rights are, in part, dependent on State law governing access to private property under State law. In *Waremart Foods d/b/a Winco Foods, Inc. v. NLRB*,[13] the court, in accordance with the Board's reading of *Lechmere*, *Babcock*, and *Thunder Basin*, looked to California law to determine whether the employer, which operated a large freestanding grocery store, violated Section 8(a)(1) of the Act by prohibiting nonemployee union representatives from engaging in consumer handbilling on its premises. The court had, in an earlier published decision in the same case, found itself "unsure whether [California law] should be viewed as creating a special exemption for labor activity," and had accordingly issued an order certifying two State-law questions to the California Supreme Court.[14] In certifying those questions, the court had observed that, "[u]nless California law is as the Board says it is, this case is indistinguishable from *Lechmere*," a point the Board did not dispute.[15] The court expressed concern, however, that

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[9] 370 F.3d 25 (D.C. Cir. 2004).
[10] *Postal Service*, 339 NLRB 1175 (2003).
[11] 370 F.3d at 28–29.
[12] Id.
[13] 354 F.3d 870 (D.C. Cir. 2004).
[14] *Waremart Foods d/b/a Winco Foods, Inc. v. NLRB*, 333 F. 223 (D.C. Cir. 2003).
[15] Id. at 224.

"[i]f state law does give labor unions some special exemption, as the Board's analysis . . . may suggest," then the court would "need [to] reach the constitutional question" of whether the State law violates the First Amendment's prohibition against content discrimination.[16] After the California Supreme Court declined to answer the certified questions, the D.C. Circuit denied enforcement of the Board's order, resolving the State-law issue in favor of the employer and thereby avoiding a definitive ruling on the constitutional question. Guided both by constitutional concerns and by its reading of recent California decisions, the court, distinguishing California cases providing for access to large privately-owned shopping centers, found that there was no State law right of access to engage in union-related or other speech activity on the sidewalks adjacent to a freestanding grocery store such as the one at issue in *Waremart*.[17]

A third case involved one of those rare instances where State property law required the owners of certain types of private property, like shopping malls, to respect individual free speech rights to the same extent that the Government must in a public forum.[18] *Glendale Associates* involved informational handbilling by the union representing employees of ABC outside The Disney Store, one of 65 stores inside the Glendale Galleria. During contract negotiations with ABC, the union sought to put pressure on ABC's parent, Disney Enterprises, which was also the parent of The Disney Store, by passing out handbills asking prospective customers of The Disney Store to express their concerns about Disney's employment practices to Disney and to Congress. The Galleria, however, had a rule prohibiting certain groups from engaging in an activity, such as handbilling, that named a tenant of the Galleria. Because the union refused to remove the reference to The Disney Store from its handbills, the Galleria denied the union permission to distribute them and, when the union attempted to do so anyway, threatened to call the police.

The Ninth Circuit agreed with the Board that the Galleria violated Section 8(a)(1) of the Act by promulgating, maintaining and enforcing, by threats to call the police, a rule at the Galleria prohibiting handbilling or other expressive activities protected by Section 7 of the Act that identify by name the Galleria's owner, manager, or any tenant of the Galleria. There was no dispute in the case that the handbilling was protected by the Act. The only question was whether the Galleria had a right under California State property law to exclude that activity. The

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[16] Id. (citing *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 25 Cal.3d 317 (1979)).
[17] 354 F.3d at 875–876.
[18] *Glendale Associates, Ltd. v. NLRB*, 347 F.3d 1145 (9th Cir. 2003).

court had previously held that the California Constitution "prohibits owners of shopping malls and general access stores from excluding speech activity on their private adjacent sidewalks and parking lots."[19] As part of California's broader free speech protections, privately owned shopping centers are required to respect individual free speech rights on their premises to the same extent that Government entities are bound to observe State and Federal free speech rights.[20] The court concluded that the Galleria's prohibition on literature that named a Galleria tenant, owner, or manager was a content-based restriction that was untenable under California free-speech law because it disfavored speech solely on the basis that the speech may adversely affect a business interest.[21] Accordingly, California property law gave the shopping center no right to exclude the union from exercising its free-speech rights, which were also Section 7 rights, on the shopping center's premises.

B. Mandatory Subjects of Bargaining

In *Verizon New York, Inc. v. NLRB*,[22] the court agreed with the Board that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating a longstanding practice allowing employees to participate in blood drives during the workday with no loss of pay. For over 30 years, the employer had allowed employees to participate in eight annual union-organized blood drives during the workday. In 2001, however, the employer announced that employees would no longer enjoy the right to participate in blood drives during the workday without loss of pay. Instead, the union would have to schedule the drives after work hours, so the employees could participate on their own time. The union filed a grievance requesting bargaining over this unilateral change, but the employer refused to negotiate.

In finding that the employer's unilateral change violated the Act, the court agreed with the Board that "whether 'employees will be paid while they engage in nonwork activities'" during the workday was "a mandatory subject of bargaining."[23] The court determined that the Board's unilateral change finding "fit[] comfortably" within Board precedent requiring employers to bargain over whether they pay employees for engaging in nonwork activities during the workday, such as serving jury duty, washing up, and cashing paychecks.[24] Like the Board, the court rejected the employer's claim that permitting employees

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[19] *NLRB v. Calkins*, 187 F.3d 1080, 1090 (9th Cir. 1999).
[20] *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 911 (1979), affirmed, 447 U.S. 74 (1980).
[21] 347 F.3d at 1157–1158.
[22] 360 F.3d 206 (D.C. Cir. 2004).
[23] Id. at 210.
[24] Id.

to give blood on paid company time was not a mandatory subject of bargaining because it was a decision to engage in a philanthropic activity that lies at "the core of entrepreneurial control."[25] The court explained that, although "[m]anagement certainly has the prerogative to choose whether to support charities, and which ones[,]" how it "goes about this may be another matter."[26] Where, as here, the employer supported a charity by permitting employees to receive wages for time not worked, its decision to cease doing that impacts the "amount of pay received for the number of hours worked" and, therefore, is "'germane' to an individual's employment[,]" and a mandatory subject of bargaining.[27]

C. Discharge for Protected Activity

Under *Wright Line*,[28] even where the Board's General Counsel has met his burden to prove that an employee's protected activity motivated an employer's decision to take adverse action against the employee, the employer may still escape liability by establishing an affirmative defense that "demonstrate[s] that the same action would have taken place even in the absence of the protected conduct."[29] In *Bowling Transp., Inc. v. NLRB*,[30] the Sixth Circuit considered the character of a proper affirmative defense under *Wright Line*: the defense must state a reason for an employer's action which is independent of the employee's protected activity and must be based on a reason that is itself lawful under the Act. In *Bowling*, the employer—a trucking company that transported products for AK Steel—discharged two employees because they complained to AK Steel's officials about the employer's handling of safety bonuses established by AK Steel for its contractors' employees. AK Steel, in turn, had barred the two employees from working on its property because of their complaint.[31]

The employer argued that it would have discharged the two employees even in the absence of their protected activity because AK Steel had barred the employees from working on its property, the only way the employees could be productively employed. The Board rejected the defense, holding that the employer could not rely on AK Steel's actions as a basis for its affirmative defense because AK Steel had barred

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[25] Id. at 209 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (quoting *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 222, 223 (1964) (Stewart, J., concurring))).
[26] Id. at 209–10.
[27] Id. at 210.
[28] 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981).
[29] Id. at 1089.
[30] 352 F.3d 274 (6th Cir. 2003).
[31] AK Steel was not charged with violating the Act or otherwise made a party to the proceeding.

the employees from its premises for an "unlawful reason."[32] The court agreed, holding that an affirmative defense "must show some independent and lawful basis for a[n] . . . employee's termination."[33] The court reasoned that "[t]o allow an employer to escape liability by asserting one unlawful motive in place of another unlawful motive would produce absurd results."[34] However, because AK Steel was not a party to the proceeding, the court was "reluctant" to adopt the Board's view that AK Steel's actions were "unlawfully motivated."[35] Instead, the court rejected the employer's affirmative defense because AK Steel's action was motivated by the protected activity, and therefore was not an independent basis for the discharges.

D. Extraterritorial Application of Act

In *EEOC v. Arabian Oil Co.* (*Aramco*),[36] the Supreme Court referred to the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'" and that extraterritorial application will not be found absent "the affirmative intention of the Congress clearly expressed . . . ." In *Asplundh Tree Expert Co. v. NLRB*,[37] the Third Circuit applied this principle to reject the Board's assertion of jurisdiction over the discharge of United States citizens whose permanent place of employment was in the United States, but who were discharged for engaging in protected concerted activity while temporarily working in Canada.

The two discharged employees, who had volunteered for a 2-week work assignment in Canada, were discharged when they refused to go to work in protest against what they considered an inadequate daily allowance for food in Canada. The Board found that their discharges violated the Act and ordered the employer to offer them reinstatement to their United States jobs and make them whole for loss of earnings suffered as a result of the failure to retain or reinstate them in those jobs. While recognizing that the presumption against extraterritorial application extends to the Act,[38] the Board held that the application of the Act to United States citizens, permanently employed by a United States employer in the United States but temporarily working for that employer abroad, was not extraterritorial, since the effect of the unlawful conduct

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[32] *Bowling Transportation*, 336 NLRB 393, 394–395 (2001).
[33] 352 F.3d at 283.
[34] 352 F.3d at 283 fn.11.
[35] 352 F.3d at 283.
[36] 499 U.S. 244, 248 (1991).
[37] 365 F.3d 168 (3d Cir. 2004).
[38] *McCulloch v. Sociedad Nacional,* 372 U.S. 10 (1963).

would be principally felt in the United States, where the employees' permanent jobs were; application of the Act would not interfere with Canadian law, since the Board's order would affect only the American operations of an American employer; and failure to assert jurisdiction over the discharge of employees from United States jobs would undermine the Act's policy of protecting the right of employees to engage in concerted activity.

Denying enforcement, the court held that the Board lacked jurisdiction. In the court's view, the Board's policy arguments in favor of asserting jurisdiction were irrelevant, because the question was solely one of statutory construction. The court noted that the general jurisdictional language of Title VII of the Civil Rights Act had been held insufficient in *Aramco* to overcome the presumption against extraterritorial application, and held that the general language of the Act was likewise insufficient. Further, the court noted, while Congress had amended both Title VII and the Americans With Disabilities Act after the Supreme Court's decision in *Aramco*, to provide explicitly for extraterritorial application, it had not similarly amended the Act.

VIII
Injunction Litigation

A. Injunction Litigation Under Section 10(j)

Section 10(j) of the Act empowers the Board, in its discretion, to petition a U.S. district court for appropriate, temporary injunctive relief or restraining order in aid of the unfair labor practice proceeding. Section 10(j) proceedings can be initiated after issuance of an unfair labor practice complaint under Section 10(b) of the Act against any employer or labor organization.[1] Any injunction issued under Section 10(j) lasts until final disposition of the unfair labor practice case by the Board.

In Fiscal 2004, the Board filed in district courts a total of 11 petitions for temporary injunctive relief under Section 10(j). Of these petitions, 10 were filed against employers, and one petition was filed against an employer and a labor organization. Two cases authorized in the prior fiscal year were also pending in district courts at the beginning of this fiscal year. Of these 13 cases, two were settled or adjusted prior to court action, and one case was withdrawn prior to a court decision due to changed circumstances. District courts granted injunctions in nine cases and denied them in none. One case remained pending in district court at the end of the fiscal year.

Three of the cases litigated in district courts involved employer interference with nascent union organizational campaigns, including two cases where the violations precluded a fair election and warranted a *Gissel* bargaining order.[2] Another four cases involved improper employer withdrawals of recognition from an incumbent union. One case involved an employer that was engaging in a pattern of bad faith bargaining with an established union. Finally, one case which was decided by a circuit court of appeals involved an attempt by an employer to undermine the status of an incumbent union.

Chavarry v. E.L.C. Electric, Inc.[3] involved employer interference with a union's organizational campaign where the Board had conducted an election and the votes were not resolved. The union had not achieved

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[1] See, e.g., *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962 (6th Cir. 2001); *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360 (2d Cir. 2001); *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998).

[2] See generally *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

[3] 1:04-CV-0123-JDT-TAB (S.D. Ind. Indianapolis Division).

majority status during the preelection campaign. The court found that the Regional Director had demonstrated a likelihood of success on the merits concerning a wide variety of Section 8(a)(1) violations, including unlawful work rules, threats of physical violence and more onerous working conditions, isolation of employees from other workers, and interrogations. The court further found a likelihood that the Regional Director would successfully prove that the employer discriminatorily laid off most employees and returned them as employees of a labor broker. The Region argued that interim relief was necessary for the union to maintain its presence in the unit and to prevent both the "scattering" of the laid off employees and the resultant "chilling" impact on union organizational efforts. In granting injunctive relief, the court stated, "[it] concludes that these effects of the passage of time will irreparably harm the labor effort and the employees. These effects also demonstrate that there is no adequate remedy at law."[4] The court granted a broad cease and desist order and affirmatively ordered the interim reinstatement of all the laid off employees and the reduction of the employer's use of the labor broker in order to reinstate the employees pending the outcome of the administrative proceeding.

Two cases this fiscal year presented situations where employers allegedly engaged in serious violations during union organizational campaigns where the Regions were seeking to impose card-majority remedial bargaining orders under *Gissel.* In *Overstreet v. Desert Toyota*,[5] and *Tremain v. H H 3 Trucking, Inc.,*[6] the courts granted interim *Gissel* bargaining orders in favor of unions that had achieved card majorities during the campaigns.

In *Desert Toyota,* the district court based its findings of the Regional Director's likelihood of success on the merits upon two decisions of Board administrative law judges (ALJs) which had sustained in substantial part the General Counsel's unfair labor practice complaints. The Regional Director alleged that the employer discharged two primary union activists in a 31-person unit and continued to engage in additional unfair labor practices after the issuance of the administrative law judge's decision finding violations. In granting interim reinstatement and *Gissel* bargaining orders, the court in *Desert Toyota* stated that " '. . . . [t]o refuse to issue an interim bargaining order in these circumstances would

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[4] The district court relied upon *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997).
[5] CV-S-03-1275-LRH (PAL) (D. Nev.) (as amended).
[6] Civil No. 03-C-50494 (N. D. Ill. Western Division).

allow [the Respondent] to take advantage of the declining support for the Union and result in significant harm to the Board's remedial authority.'"[7]

In the second *Gissel* case, *HH3 Trucking*, the district court found a likelihood of success in proving that the employer had, during a union organizing campaign, discriminatorily discharged four of five employees in a small unit of truck drivers and subcontracted their work to a labor broker. In addition to granting the remedial bargaining order, the court ordered the interim reinstatement of the discharged employees to available work. The court further required the employer, when work was not available for the discharged employees, to provide to the Region information concerning trucking work performed by owner-operators working for the respondent, as well as payroll records for all drivers working for respondent, including temporary employees. Finally, the court ordered the employer to bargain with the union over any future decision to transfer or subcontract bargaining unit work, including to employees provided by a temporary employment agency.

Four cases decided this fiscal year involved employers that allegedly withdrew recognition from unions without establishing an untainted loss of majority support for those bargaining representatives. In *Miller v. H & N Fish Co.,*[8] *Glasser v. Plymouth Court,*[9] *Moore-Duncan v. Laneko Engineering Co., Inc.,*[10] and *Pye v. EAD Motors Eastern Air Devices, Inc.*,[11] the courts granted interim orders requiring the employers to recognize and bargain with the respective unions. The antiunion petition in *H & N Foods* was tainted by the employer's unlawful statements to employees blaming the union for the absence of a wage increase, and by the employer's unilateral changes to terms and conditions of employment. In *Laneko*, where the employer required employees to sign an antiunion petition before returning to work after a strike, the court rejected the employer's argument that injunctive relief was unnecessary because the two-facility unit was a "small and intimate" unit that could reconstitute itself after a Board order, and noted that employee support for the union already had begun to wane.[12] The court in *Heartland* found reasonable cause to believe that the recently-negotiated collective-bargaining agreement, which had been signed by both parties, ratified by the membership, and partially implemented by the employer, precluded the employer's reliance on a subsequently-signed antiunion petition to

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[7] The district court quoted from *Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 668 (9th Cir. 2001).
[8] Civil No. C-03-4002-CW (N.D. Ca.).
[9] Civil No. 03-CV-73429 (E.D. Mich.).
[10] 174 LRRM 2395 (E.D. Pa.).
[11] 175 LRRM 2441 (D.N.H.).
[12] See *Kobell v. Suburban Lines*, Inc., 731 F.2d 1076, 1093 (3d Cir. 1984).

withdraw recognition, despite the employer's assertion that the union had rejected the contract by questioning the language of one provision. In *EAD Motors*, the court found that the Regional Director had a strong likelihood of success in proving that the employer prematurely had declared impasse and implemented unilateral changes to the employees' terms and conditions of employment prior to its withdrawal of recognition, noting the administrative law judge's decision finding such violations. In addition, the courts in *Laneko* and *EAD Motors* ordered those employers to cease recognizing employee committees that had been established after they withdrew recognition, and the court in *EAD Motors* ordered the employer to provide relevant requested information to the union.

One case decided during the reporting period concerned an employer's alleged pattern of bad faith bargaining with an incumbent union. In *Miller v. Renzenberger, Inc.*,[13] the employer presented contract proposals that reserved for it largely unfettered control of terms and conditions of employment, refused to provide relevant information requested by the union, threatened employees with job loss, and discharged two open union supporters in a unit of 60 drivers. Relying on the decision of a Board administrative law judge, the court concluded that the Region had shown a likelihood of success on the merits that the employer had engaged in the alleged misconduct. The court applied traditional equitable principles and concluded that as all the equitable factors weighed in favor of the petitioner, the interim injunction was just and proper.[14] In addition to granting an interim bargaining order, the court also ordered the reinstatement of two discharged employees and required the employer to provide requested information.

In addition to the district court cases discussed above, one court of appeals affirmed the issuance of a 10(j) injunction during the fiscal year. In *Ahearn v. Kentucky River Medical Center, Inc.*,[15] the Sixth Circuit rejected the employer's argument that the court's longstanding "reasonable cause/just and proper" standard should be replaced by the "traditional" test for issuing 10(j) injunctions. The court concluded that the district court did not err in finding reasonable cause to believe that the employer had terminated three returning strikers unlawfully, or that the employer's poststrike unilateral change to the employees' break schedule also violated the Act. With respect to the terminations, the court noted that the administrative law judge's decision, which issued after the injunction, supported the reasonable cause determination.

[13] No. CIV. S-04-1518 WBS PAN (E.D. Ca.).

[14] The district court relied upon *Scott v. Toyota of Berkeley, Inc.*, 106 LRRM 2070 (N.D. Ca. 1980).

[15] 351 F.3d 226 (6th Cir. 2003).

Finally, the court held that the district court did not abuse its discretion in finding that interim reinstatement was just and proper because the multiple terminations would have an inherently chilling effect on other employees, and because there was evidence that the terminations had in fact chilled union activity.

B. Injunction Litigation Under Section 10(l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of Section 8(b)(4)(A), (B), and (C),[16] or Section 8(b)(7),[17] and against an employer or union charged with a violation of Section 8(e),[18] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue."[19] In cases arising under Section 8(b)(7), however, a district court injunction may not be sought if a charge under Section 8(a)(2) of the Act has been filed alleging that the employer had dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true and that a complaint should issue." Section 10(l) also provides that its provisions shall be applicable, "where such relief is appropriate," to threats or other coercive conduct in support of jurisdictional disputes under Section 8(b)(4)(D) of the Act.[20] In addition, under Section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the employer, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such ex parte relief, however, may not extend beyond 5 days.

In this report period, the Board filed 6 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 1 case pending at the beginning of the period, 3 cases were settled, 2

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[16] Sec. 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives. These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor-Management Reporting and Disclosure Act) to prohibit not only strikes and the inducement of work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature where an object was to compel an employer to enter into a "hot cargo" agreement declared unlawful in another section of the Act, Sec. 8(e).

[17] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[18] Sec. 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful and unenforceable, with certain exceptions for the construction and garment industries.

[19] See generally *Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013 (1st Cir. 1995); *Kinney v. International Union of Operating Engineers, Local 150*, 994 F.2d 1271 (7th Cir. 1993).

[20] Sec. 8(b)(4)(D) was enacted as part of the Labor Management Relations Act of 1947.

were dismissed, and 1 was pending court action at the close of the report year. During this period, 5 petitions went to final order, the courts granting injunctions in 3 cases and denying them in 2 cases. Injunctions were issued in 2 cases involving secondary boycott action proscribed by Section 8(b)(4)(B), as well as in instances involving a violation of Section 8(b)(4)(A), which proscribes certain conduct to obtain hot cargo agreements barred by Section 8(e). Injunctions were also issued in 1 case to proscribe alleged recognitional or organizational picketing in violations of Section 8(b)(7).

Of the 2 cases in which injunctions were denied, both involved secondary picketing activity by labor organizations.

Two Section 10(l) cases decided during the fiscal year continued to raise somewhat novel issues under Section 8(b)(4)(ii)(B) of the Act, which were the subject of prior injunctive proceedings in Fiscal 2003.[21] These cases, *Kohn v. Southwest Regional Council of Carpenters,*[22] and *Benson v. Carpenters Locals 184 and 1498*,[23] involved the display by a union of a large stationary banner (20 feet by 4 feet) near the premises of a "neutral" employer. The banner, held by 3–4 individuals and accompanied by handbills, stated in large letters "Shame on [neutral employer]," and read in smaller type in the upper corners of the banner the words, "Labor Dispute." The banner failed to name the primary employer with which the union had a primary labor dispute. The Regional Directors argued that the use of the banner by several union agents, which in essence called for a consumer boycott of the neutral employer, either constituted "signal picketing" or traditional picketing under the Act, and was misleading defamatory speech beyond the protections of the First Amendment. Regarding the misleading language theory, the Regions argued that the banner deceived consumers into believing that the union had a primary labor dispute with the neutral employer. Under either theory, the Regional Directors argued that the use of the banners under these circumstances constituted coercive conduct under Section 8(b)(4)(ii)(B) of the Act which also had a proscribed "cease doing business" object.

The district courts denied the requested injunction in both the *Southwest Regional Council* and the *Carpenters Locals 184 and 1498*

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[21] See *Overstreet v. Carpenters Local 1506*, Civil No. 03-0773 J (JFS) (S.D. Ca.), appeal pending Docket No. 03-56135 (9th Cir.), described in the 2003 Annual Report. In *Overstreet* the district court denied the requested 10(l) relief. The Board has appealed this decision to the Ninth Circuit Court of Appeals.

[22] 289 F. Supp. 2d 1155 (C. D. Ca.), appeal pending Docket No. 03-57228 (9th Cir.).

[23] 175 LRRM 2988, Case No. 2:04-CV-00782 PGC (D. Utah Central Division).

cases.[24] In the *Southwest Regional Council* decision, the district court concluded that the union bannering did not constitute "threatening, coercive, or restraining" conduct under Section 8(b)(4)(ii)(B).[25] It also found no merit to the Regional Director's misleading language theory, as it concluded that the message on the banner was not false, as the union had a secondary labor dispute with the neutral employer.[26] In the *Carpenters Locals 184 and 1498* case, the court reviewed these two earlier court decisions on bannering and concluded that the union's conduct did not constitute "threats, coercion or restraint" under Section 8(b)(4)(ii)(B) of the Act because they were like lawful handbilling and billboards and truthfully advised the public about its lawful secondary labor dispute with the neutral employers.

In another case involving somewhat unusual facts, a district court enjoined a union's activities that allegedly constituted an unlawful secondary boycott within the meaning of Section 8(b)(4)(ii)(B). The court in *Kentov v. Sheet Metal Workers Local 15,*[27] found reasonable cause to believe that the union's mock funeral procession in front of a neutral hospital in connection with its dispute involving primary construction employers, coerced and threatened the hospital and its patients and visitors. The procession was conducted by four union representatives carrying a coffin-like box, accompanied by another union representative wearing an oversized grim reaper costume. The court found reasonable cause to believe that, although the union representatives did not carry traditional picket signs or impede ingress or egress, the union's actions constituted a mixture of conduct and communication that properly could be enjoined pending the Board's decision.

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[24] The Board has filed an appeal in the *Southwest Regional Council* decision to the Ninth Circuit Court of Appeals.

[25] 289 F. Supp. 2d at 1165–1168. The district court relied upon *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988).

[26] 289 F. Supp. 2d at 1168–1169.

[27] Civil No. 8:04-CV-1730-T-27TBM (M.D. Fla.), appeal pending Docket No. 04-14126-J (11th Cir.).

IX
Contempt Litigation and Compliance Branch

During fiscal year 2004, the Contempt Litigation and Compliance Branch (CLCB) continued its role as a full-service office, combining advice, training, and assistance to Regions with Federal court litigation, including contempt, actions under the Federal Debt Collection Procedures Act (FDCPA) and bankruptcy actions. A total of 445 cases were referred to CLCB during the fiscal year for advice and/or assistance, or for consideration of contempt proceedings or other appropriate action to achieve compliance with the Act. Of this total, 159 cases were formal submissions respecting contempt or other compliance actions; in 286 other cases, advice and/or assistance was solicited and provided to the Regions or other Agency personnel and the cases returned for further administrative processing. CLCB also conducted 149 asset/entity database investigations to assist Regions in their compliance efforts, a task over and above the 445 referrals to CLCB referenced above. In addition, more than 320 hours were devoted to training Regional and other Agency personnel and members of the private sector bar on contempt and compliance issues.

Of the 159 contempt or other formal submissions, voluntary compliance was achieved in 20 cases during the fiscal year, without the necessity of filing a contempt petition or other initiating papers, and 29 other cases settled after the filing of a formal pleading in court but before trial. In 68 other cases, it was determined that contempt or other proceedings were not warranted.

In cases deemed to have merit, 12 civil contempt or equivalent proceedings were instituted, including one in which body attachment was sought. A number of ancillary compliance proceedings were also instituted by CLCB in FY 2004, including 10 proceedings to obtain postjudgment writs of garnishment under FDCPA; one motion for execution on property under FDCPA; and one motion for a disposition order for funds previously garnished. CLCB instituted seven proceedings in bankruptcy courts, including three actions to declare backpay debts obtained by the Board non-dischargeable; one arguing against approving a free and clear sale without protections for the Board’s interests; and three seeking 2004 examinations. Finally, CLCB instituted nine subpoena enforcement actions and one request for a protective restraining order during the fiscal year.

Seven civil contempt or equivalent adjudications were awarded in favor of the Board in FY 2004, including one writ of body attachment. During FY 2004, CLCB also successfully obtained 2 protective restraining orders and/or injunctions; one order declaring backpay debts nondischargeable; one order protecting the Board's interests against potential successors/alter egos in a free and clear sale; 16 postjudgment writs of garnishment; one order granting a writ of execution postjudgment; 2 turnover orders for garnished funds; and 11 subpoena enforcement orders.

During the fiscal year, CLCB collected $6000 in fines and $1,437,766 in backpay, while recouping $400,000 in court costs and attorneys' fees incurred in contempt.

Several noteworthy cases came to a conclusion during the fiscal year. In *Daufuskie*,[1] CLCB fought an ultimately successful battle on several fronts. The Branch prevailed in a contempt proceeding before the Special Master appointed by the D.C. Circuit based on the employer's failure to properly reinstate employees and to restore contractual terms and benefits; the discriminatory discharge of an employee and bad faith bargaining. While the contempt proceeding was pending, the employer sold its business to another entity. CLCB obtained a protective restraining order (PRO) requiring the employer to deposit $5.5 million of the sales proceeds into the registry of the court to protect the Board's backpay claim. Contempt proceedings were then instituted because of the employer's failure to obey the PRO. Ultimately, the employer was forced to disgorge $5.5 million under the PRO and reached a backpay settlement for that amount. It also agreed to a consent contempt adjudication and the payment to the Board of $400,000 in costs and attorneys' fees, among other remedies. Finally, the Court, sua sponte, ordered a hearing into whether the attorneys for the employer were in contempt and should be reported to their respective bars based on misconduct in failing to cause their client to comply with the PRO. The Special Master's decision holding the attorneys in contempt is pending appeal before the D.C. Circuit.

Another complex and significant case was settled during the fiscal year, after extended litigation. In *Cable Car*, [2] attorneys for CLCB prevailed in a civil contempt case before a Special Master appointed by the Ninth Circuit, based on allegations of discriminatory discharges and bad faith bargaining. At the same time, CLCB began a series of garnishment actions aimed at enforcing a backpay award issued in a

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[1] Board Case 11–CA–17334, D.C. Cir. Nos. 99-1189, 99-1296.

[2] Board Cases 20–CA–25377, –25789, 9th Cir. Nos. 97-70069, 97-70253.

separate *Cable Car* decision. A global settlement was ultimately reached, with *Cable Car* agreeing to pay $248,000 in backpay and to enter into a consent order in connection with their contumacious conduct.

Other notable cases resolved during the fiscal year included *United Postal Service*, in which CLCB settled 17 cases of alleged *Weingarten* violations by USPS. The settlement included a requirement on the part of USPS to implement a nationwide educational program for supervisors and managers. In *Montauk*,[3] CLCB, in conjunction with Region 29 and Special Litigation, settled a protracted bankruptcy case for $105,000 in backpay; and in *Southern Illinois*,[4] CLCB obtained a nondischargeability order in a bankruptcy court even in the absence of a liquidated backpay judgment.

The *U.S. Postal* and *Weingarten* cases concern numerous Board and Regional cases and case cites.

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[3] Board Case 29–CA–19518, U.S. Bankruptcy Ct., Eastern District of NY, Case No. 897-85005-478.

[4] Board Case 14–CA–26946, U.S. Bankruptcy Ct., Southern District of Ill., Case No. 03-60615.

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Special Litigation

The Board participates in a number of cases that fall outside the normal process of statutory enforcement and review. The following represent the most significant cases decided this year:

A. Litigation Concerning the Board's Jurisdiction

In *T & J Meat Packing, Inc. v. SEIU, Local 1,*[1] the U.S. District Court for the Northern District of Illinois granted the Board's motion to intervene and took under advisement the Board's motion to stay an employer's Section 301 suit seeking a declaratory judgment that it had not entered into a collective-bargaining agreement with the union. At the time the employer filed suit, the Region had issued a complaint and a notice of hearing on related unfair labor practice charges filed by the union for alleged violations of Section 8(a)(1) and (5) of the Act. The Board argued that because the court's jurisdiction over the suit was questionable in light of *Textron Lycoming Reciprocating Engine Div. v. UAW*,[2] the court should await the Board's resolution of the same contractual issues in the pending administrative proceeding. The district court declined to stay its consideration, and addressed the *Textron* issue in its decision on the union's motion to dismiss complaint. In *Textron*, the Supreme Court held that Section 301 jurisdiction arises only in the context of suits alleging breach of a collective-bargaining agreement. The district court noted, however, that *Textron* also envisioned that a district court has jurisdiction to declare a contract invalid where the plaintiff has been accused of violating that contract. Accordingly, the district court concluded that Section 301 jurisdiction is conferred whenever an employer's complaint alleges that it has been accused of contract breach by the union, and states with particularity the sections of the contract allegedly violated. Finding that the employer here had done so in its amended complaint, the court denied the union's motion to dismiss. The court then held evidentiary hearings and found that the parties had not entered into a collective-bargaining agreement. The court added in a footnote that its ruling on the contract formation issue would have preclusive effect on the Board, in light of *NLRB v. Donna-Lee*

[1] 2004 WL 813537 (N.D. Ill.) (not reported in F. Supp. 2d and not containing amendment to opinion).

[2] 523 U.S. 653 (1998).

Sportswear[3] and *NLRB v. Heyman*.[4] Upon the Board's motion to amend judgment, the district court acknowledged that the Board unfair labor practice case had been dismissed, and the preclusion finding was moot and therefore mere dicta having no force of law.

In *Amerco v. NLRB*,[5] the United States District Court for the District of Arizona granted the Board's motion to dismiss claims seeking declaratory and injunctive relief against the Board, individual Board members, the General Counsel, and a Regional Director. The claims arose from the prosecution of unfair labor practice claims against U-Haul Co. of Nevada, Inc. While the hearing before an administrative law judge was in progress, the General Counsel amended the administrative complaint, seeking to hold three additional related entities responsible for the unfair labor practices alleged as a single integrated business enterprise. The newly added respondents sued and alleged that 15 days of administrative hearing were held without their participation, denying them notice and an opportunity to participate in the process. Plaintiffs moved the court to declare that the Board defendants violated Board regulations and plaintiffs' due process rights. Plaintiffs further sought an injunction preventing the consolidation of the amended complaint with the ongoing administrative hearing, limiting the issues that may proceed against plaintiffs, and limiting participation by the presiding administrative law judge and Board attorneys in future proceedings against plaintiffs. The court held that it lacked jurisdiction to grant the requested relief because the Supreme Court in *Myers v. Bethlehem Shipbuilding Corp.*[6] held that a district court may not enjoin unfair labor practice hearings. The court rejected plaintiffs' argument that the case fell within the narrow *Fay v. Douds*[7] exception whereby a district court might review nonfrivolous allegations of a constitutional violation. The court reasoned that unlike *Fay v. Douds*, the case at issue did not involve representation matters, but rather, a challenge to an unfair labor practice proceeding. This distinction is important, the district court explained, because parties in unfair labor practice proceedings may seek immediate redress from an adverse Board order in a circuit court and therefore will not be deprived of meaningful judicial review if the district court declines jurisdiction. Moreover, the court noted that the Act vests exclusive power to prevent unfair labor practices in the Board, with

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[3] 836 F.2d 31 (1st Cir. 1987).
[4] 541 F.2d 796 (9th Cir. 1976).
[5] 330 F. Supp. 2d 1083 (D.Ariz.), appeal pending (9th Cir. No. 04-16389).
[6] 303 U.S. 41, 43, 47–48 (1938).
[7] 172 F.2d 720 (2d Cir. 1949).

rights of appeal in a circuit court, and *Myers* explicitly stated that all constitutional questions are open to examination by the circuit court.

B. Litigation Under the Equal Access to Justice Act

In *Nova Plumbing, Inc. v. NLRB,*[8] the D.C. Circuit granted in part the employer's request for attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. The EAJA award was limited to fees incurred in litigating the Section 10(f) appeal before the court, based on the fact that "the argument on which [the employer] prevailed was not presented to the Board." In the underlying case, the circuit court relied on the Supreme Court's decision in *International Ladies Garment Workers v. NLRB,*[9] a case the employer did not cite in the proceedings before the Board, to conclude that the employer did not violate the Act when it withdrew recognition from and refused to bargain with a union. In granting the EAJA award, the court reduced the fees that the employer claimed for the court litigation on the grounds that the hours claimed "far exceed the time that was reasonably necessary to support the [employer's] petition for review . . . . " The employer's application had sought a total of $132,849.09, with approximately $70,000 of that amount for litigating the appellate proceeding. The court reduced the award to $37,000.00.

In *Precision Concrete v. NLRB*,[10] the D.C. Circuit granted in part and denied in part the employer's motion for attorney fees and expenses under the EAJA, 28 U.S.C. § 2412. In the underlying case, the Board found several violations of the Act, one of which was based on employer conduct that was never alleged in a charge, but was asserted for the first time in the General Counsel's complaint. The Board found that Section 10(b) of the Act did not preclude consideration of the misconduct because it was closely related to other conduct included in a timely filed charge. Based solely on its findings as to this uncharged conduct, the Board found a union strike was an unfair labor practice strike, and Precision accordingly was required to reinstate and pay backpay to striking employees.[11] On review, the D.C. Circuit rejected the Board's exercise of jurisdiction over the disputed allegation because it did not share a "significant factual affiliation" with the activity alleged in the charge that had been filed against the employer.[12] Thus, the court vacated the Board's order insofar as it directed reinstatement based upon the uncharged conduct. In its EAJA decision, the court granted the

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[8] No. 02-1085, 2004 U.S. App. LEXIS 6149 (D.C. Cir.) (per curiam).
[9] 366 U.S. 731 (1961).
[10] 362 F.3d 847 (D.C. Cir.) (per curiam).
[11] 337 NLRB 211, 213–214 (2001).
[12] 334 F.3d 88, 93 (D.C. Cir. 2003).

application in part because the Board lacked a "compelling argument for asserting jurisdiction" where the circuit had held there is none.[13] However, the court substantially reduced the amount claimed by the employer under the EAJA because the employer sought fees incurred to litigate the entire case before the administrative law judge and the Board, including issues on which the employer did not prevail. The court further reduced the amount claimed because it found the employer sought remuneration for unreasonable and excessive time spent preparing its appeal, and claimed expenses that are not recoverable under the EAJA (including expenses for couriers, telephone calls and traveling). The court accordingly reduced the employer's requested EAJA award from approximately $144,000 to $75,000.

In *NLRB v. Pueblo of San Juan*,[14] the District Court for the District of New Mexico granted a Native American tribe's application for attorney fees and expenses filed pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. In the underlying case, the en banc Tenth Circuit affirmed the district court's decision dismissing the Board's *Nash-Finch* complaint[15] and finding that the NLRA does not preempt a tribal ordinance which prohibits private employers and unions from entering into union-security agreements. The district court granted the tribe's EAJA application in large part, and ordered the Board to pay approximately $392,000 in fees and expenses, concluding that the Board's litigation position was not substantially justified. The district court rejected the Board's argument that its position that the NLRA prohibited the tribe from enacting the ordinance was reasonable, and based on settled principles of labor law and Indian law. The court further found that the cogency of Judge Murphy's dissent in the en banc opinion was not strong enough to provide substantial justification for the Board's position. The court concluded that the tribe was entitled to recover an enhanced hourly attorney rate because of the expertise of its attorneys in Indian law. After the district court's EAJA decision, the Agency filed a notice of appeal. While the case was pending on appeal, the parties settled the matter for approximately 57 percent of the fees and expenses allowed by the court.

In addition to the above EAJA decisions, in *NLRB v. Triple A Fire Protection, Inc.*,[16] the Eleventh Circuit issued an order without an accompanying opinion, denying an employer's application for fees and expenses under the EAJA, 28 U.S.C. § 2412. The employer sought

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[13] 362 F.3d at 852.

[14] 305 F. Supp. 2d 1229 (D.N.M.).

[15] *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

[16] No. 96-6944 (11th Cir.).

approximately $292,000 in fees and expenses after it prevailed in a contempt proceeding brought against it when it failed to comply with an enforced Board order.

C. Preemption Litigation

In *Chamber of Commerce v. Lockyer*,[17] the Ninth Circuit unanimously affirmed a district court injunction prohibiting on preemption grounds the enforcement of California statute sections that prohibit employers who receive state grants or funds in excess of $10,000 from using such funding to advocate against or in favor of union organizing. The Board had filed an amicus brief in the circuit court arguing that the sections were preempted. Initially, the Ninth Circuit determined that the California statute constituted "regulation" by California, and that the market participant exception did not apply to protect against a finding of preemption. The court further reasoned that "[b]ecause the California statute, on its face, directly regulates the union organizing process itself and imposes substantial compliance costs and litigation risk on employers who participate in that process, it interferes with an area Congress intended to leave free of state regulation. It is therefore preempted under *Machinists*."[18] The court also concluded that, in light of its finding of *Machinists* preemption, it need not reach the question of *Garmon* preemption.[19] The court rejected the argument advanced by California and the AFL–CIO that preemption should not apply because this was a facial, not an as-applied, challenge to the statute. In doing so, the court found that because "California has burdened the NLRA through the very act of regulating[, t]here is thus 'no set of circumstances . . . under which the Act would be valid' as to employers covered by the NLRA."[20] The court also found inapposite California and the AFL–CIO's analogy to First Amendment cases distinguishing direct restrictions on speech from instances where the government limits the use of government funds to subsidize speech or conduct. Finally, the court found that the existence of certain federal statutes that limit employers' use of specific federal grant or program funds to advocate for or against union organizing to be too ambiguous a basis for inferring congressional intent to permit California's broad-based intrusion into the collective bargaining process.

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[17] 364 F.3d 1154 (9th Cir.).
[18] Id. at 1165 (pet. for rehearing pending).
[19] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).
[20] 364 F.3d at 1169.

D. Litigation Alleging Agency Misconduct

In *Richard Lawson Excavating, Inc. v. NLRB*,[21] the United States District Court for the Western District of Pennsylvania dismissed all counts of a complaint alleging that the Board's acceptance of an allegedly illegal videotape from a charging party union violated plaintiffs' rights under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S.A. § 5701 et seq. (the "Pennsylvania Wiretap Act"), the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. (the "Federal Wiretap Act"), and the Due Process Clause of the Fifth Amendment. During an organizing drive, a union member videotaped a conversation among other union members and the plaintiff supervisor. The union gave the videotape to the Board, believing the tape could be useful to the investigation of unfair labor practice charges pending against the employer. Plaintiffs did not allege that the Board solicited or directed the taping.

The court dismissed with prejudice plaintiffs' claim for damages under Section 2520 of the Federal Wiretap Act for lack of subject matter jurisdiction, explaining that Section 2520 expressly precludes relief against the United States. The court also held that if the plaintiffs instead intended to bring their Federal Wiretap Act claim as a Federal Tort Claim under 18 U.S.C. § 2712, any such action was dismissed without prejudice. In so holding, the court noted that plaintiffs conceded they had not met the 18 U.S.C. § 2712 prerequisites to commence an action. Further, the court dismissed with prejudice plaintiffs' claim under the Pennsylvania Wiretap Act, as plaintiffs conceded that sovereign immunity precluded that claim. Finally, the court dismissed with prejudice the procedural due process claim, noting that plaintiffs had not shown that they would be entitled to a hearing, and they had conceded that there is no due process remedy for their alleged injury. The case currently remains pending against the union.

In *Gilgallon v. NLRB*,[22] the Third Circuit affirmed a district court dismissal of a complaint against the Board and individual Board employees. The district court complaint had alleged numerous constitutional, fraud, and malicious prosecution claims against the Board and four Board employees for actions taken in litigating a contempt proceeding following the plaintiffs' failure to comply with an order pursuant to Section 10(j) of the Act, 29 U.S.C. § 10(j). The Third Circuit held that the plaintiffs could not challenge in this action against the Board and its employees, the district court's orders in the separate 10(j)

[21] 333 F. Supp. 2d 358 (W.D. Pa.).
[22] No. 03-2886 (3d Cir.).

litigation. In particular, the Third Circuit rejected the plaintiffs' attempt to raise an argument already rejected by the Third Circuit in the prior appeal in the 10(j) case: that the plaintiffs were not properly joined as respondents in the 10(j) proceeding. Noting that in its earlier opinion in the 10(j) case the circuit had warned plaintiffs that frivolous and vexatious litigation would lead to sanctions, the circuit court found this appeal to be frivolous, and ordered plaintiffs to show cause why the court should not award the Board damages and double costs.

E. Litigation Under the Bankruptcy Code

In *Provident Nursing Home,*[23] the United States Bankruptcy Court for the Southern District of Florida approved a collective-bargaining agreement that had been negotiated during the course of an employer's bankruptcy proceeding. The employer and the union had agreed that the provisions in the agreement would become effective upon approval by the bankruptcy court, but the employer subsequently opposed the approval by the court. While the court was considering the union's motion for approval, the collective-bargaining agreement expired. Thus, the court considered whether the motion for approval was moot, and whether it had authority to approve the collective-bargaining agreement retroactively. At the court's request, the Board filed a memorandum addressing the issues raised. In its decision, the court noted that its approval was not required because contracts entered into postpetition "in the ordinary course of business" do not require court approval. Nonetheless, it found that it did have authority to grant retroactive approval under Section 105 of the Bankruptcy Code,[24] and that equity favored such approval. The court reasoned that the agreement did not affect the rights of creditors in the property of the employer/debtor's estate. Moreover, the employer had already accepted the benefit of labor peace and the work of the bargaining unit employees, and accordingly, must also accept the burdens of the agreement.

[23] No. 98-25061-BKC-AJC (Bankr. S.D. Fla.).
[24] 11 U.S.C. § 105.

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APPENDIX

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

The definitions of terms contained in this glossary are not intended for general application but are specifically directed toward increasing comprehension of the statistical tables that follow. Thus the definitions are keyed directly to the terms used in such tables.

Adjusted Cases

Cases are closed as "adjusted" when an informal settlement agreement is executed and compliance with its terms is secured. (See "Informal Agreement," this glossary.) In some instances, a written agreement is not secured but appropriate remedial action is taken so as to render further proceeding unnecessary. A central element in an "adjusted" case is the agreement of the parties to settle differences without recourse to litigation.

Advisory Opinion Cases

See "Other Cases—AO" under "Types of Cases."

Agreement of Parties

See "Informal Agreement" and "Formal Agreement," this glossary. The term "agreement" includes both types.

Amendment of Certification Cases

See "Other Cases—AC" under "Types of Cases."

Backpay

Amounts of money paid or to be paid employees as reimbursement for wages lost because they were discriminatorily discharged or unlawfully denied employment, plus interest on such money. Also included is payment for bonuses, vacations, other fringe benefits, etc., lost because of the discriminatory acts, as well as interest thereon. All moneys noted in table 4 have been reported as paid or owing in cases closed during the fiscal year. (Installment payments may protract some payments beyond this year and some payments may have actually been made at times considerably in advance of the date a case was closed; i.e., in a prior fiscal year.)

Backpay Hearing

A supplementary hearing to receive evidence and testimony as to the amount of backpay due discriminatees under a prior Board or court decree.

Backpay Specification

The formal document, a "pleading," which is served on the parties when the Regional Director and the respondent are unable to agree as to the amounts of backpay due discriminatees pursuant to a Board order or court decree requiring payment of such backpay. It sets forth in detail the amount held by the Regional Director to be owing each discriminatee and the method of computation employed. The specification is accompanied by a notice of hearing setting a date for a backpay hearing.

Case

A "case" is the general term used in referring to a charge or petition filed with the Board. Each case is numbered and carries a letter designation indicating the type of case. See "Types of Cases."

Certification

A certification of the results of an election is issued by the Regional Director or the Board. If a union has been designated as the exclusive bargaining representative by a majority of the employees, a certification of representative is issued. If no union has received a majority vote, a certification of results of election is issued.

Challenges

The parties to an NLRB election are entitled to challenge any voter. At the election site, the challenged ballots are segregated and not counted when other ballots are tallied. Most frequently, the tally of unchallenged ballots determines the election and the challenged ballots are insufficient in number to affect the results of the election. The challenges in such a case are never resolved, and the certification is based on the tally of (unchallenged) ballots.

When challenged ballots are determinative of the result, a determination as to whether or not they are to be counted rests with the Regional Director in the first instance, subject to possible appeal to the Board. Often, however, the "determinative" challenges are resolved informally by the parties by mutual agreement. No record is kept of nondeterminative challenges or determinative challenges which are resolved by agreement prior to issuance of the first tally of ballots.

Charge

A document filed by an employee, an employer, a union, or an individual alleging that an unfair labor practice has been committed. See "C Case" under "Types of Cases."

Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the Regional Director when he or she concludes on the basis of a completed investigation that any of the allegations contained in the charge have merit and adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information necessary to bring a case to hearing before an administrative law judge pursuant to due process of law. The complaint contains a notice of hearing, specifying the time and place of hearing.

Election, Runoff

An election conducted by the Regional Director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The Regional Director conducts the runoff election between the choices on the original ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the Regional Director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the

establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under Section 8(b)(1)(A) or (2) or 8(a)(1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authorization; or, in the cases of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the reimbursement of such moneys to the employees.

Fines

See "Fees, Dues, and Fines."

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition is not warranted. Formal actions, are, further, those in which the decision-making authority of the Board (the Regional Director in representation cases), as provided in Sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

Compliance

The carrying out of remedial action as agreed upon by the parties in writing (see "Formal Agreement," "Informal Agreement"); as recommended by the administrative law judge in the decision; as ordered by the Board in its decision and order; or decreed by the court.

Dismissed Cases

Cases may be dismissed at any stage. They are dismissed informally when, following investigation, the Regional Director concludes that there has been no violation of the law, that there is insufficient evidence to support further action, or for a variety of other reasons. Before the charge is dismissed, however, the charging party is given the opportunity to withdraw the charge by the administrative law judge, by the Board, or by the courts through their refusal to enforce orders of the Board.

Dues

See "Fees, Dues, and Fines."

Election, Consent

An election conducted by the Regional Director pursuant to an agreement signed by all parties concerned. The agreement provides for the waiving of a hearing, the establishment of the appropriate unit by mutual consent, and the final determination of all postelection issues by the Regional Director.

Election, Directed

Board-Directed

An election conducted by the Regional Director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the Regional Director or by the Board.

Regional Director-Directed

An election conducted by the Regional Director pursuant to a decision and direction of election issued by the Regional Director after a hearing. Postelection rulings are made by the Regional Director or by the Board.

Election, Expedited

An election conducted by the Regional Director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the Regional Director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the Regional Director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the Regional Director or by the Board.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the Regional Director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under Section 10(j) or Section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under Section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of Section 8(b)(4)(D). They are

initially processed under Section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Cases." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purpose of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or combination of other types of C cases. It does not include representation cases.

Types of Cases

General:

Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of Section 8.

CA:

A charge that an employer has committed unfair labor practices in violation of Section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD:

A charge that a labor organization has committed an unfair labor practice in violation of Section 8(b)(4)(i) or (ii)(D). Preliminary actions under Section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE:

A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of Section 8(e).

CG:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(g).

CP:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under Section 9(c) of the Act.

RC:

A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for determination of a collective-bargaining representative.

RD:

A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this.

RM:

A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

Other Cases

AC:

(Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO:

(Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by Regional Offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC:

(Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classification of employees should or should not be included within a presently existing bargaining unit.

UD:

(Union Deauthorization case): A petition filed by employees pursuant to Section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded.

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases."

Union Deauthorization Cases

See "Other Cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its Regional Director, as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown.

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal or the charge of the petition and such request is approved.

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Editor's Note: The information contained in the Annual Report tables is chiefly derived from the NLRB's case-tracking database. Notes have been inserted to identify minor inconsistencies between tables caused by differences in coding. Questions or comments about the Annual Report should be directed to the NLRB Division of Information, Washington, DC or to the Agency's web site at www.nlrb.gov.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 2004[1]

	Total	Identification of filing party				
		AFL–CIO Unions	Other National Unions	Other local Unions	Individuals	Employers
	All Cases					
Pending October 1, 2003....................	*22,120	13,718	628	722	6,201	851
Received fiscal 2004...........................	31,787	16,835	960	874	11,666	1,452
On docket fiscal 2004.........................	53,907	30,553	1,588	1,596	17,867	2,303
Closed fiscal 2004..............................	34,851	18,986	1,061	1,009	12,300	1,495
Pending September 30, 2004..............	19,056	11,567	527	587	5,567	808
	Unfair labor practice cases[2]					
Pending October 1, 2003....................	20,513	12,683	593	634	5,838	765
Received fiscal 2004...........................	26,890	13,525	749	639	10,693	1,284
On docket fiscal 2004.........................	47,403	26,208	1,342	1,273	16,531	2,049
Closed fiscal 2004..............................	29,954	15,688	853	755	11,317	1,341
Pending September 30, 2004..............	17,449	10,520	489	518	5,214	708
	Representation cases[3]					
Pending October 1, 2003....................	1,453	984	34	82	296	57
Received fiscal 2004...........................	4,588	3,187	202	215	843	141
On docket fiscal 2004.........................	6,041	4,171	236	297	1,139	198
Closed fiscal 2004..............................	4,605	3,186	198	236	853	132
Pending September 30, 2004..............	1,436	985	38	61	286	66
	Union-shop deauthorization cases					
Pending October 1, 2003....................	62	--	--	--	62	--
Received fiscal 2004...........................	127	--	--	--	127	--
On docket fiscal 2004.........................	189	--	--	--	189	--
Closed fiscal 2004..............................	125	--	--	--	125	--
Pending September 30, 2004..............	64	--	--	--	64	--
	Amendment of certification cases					
Pending October 1, 2003....................	5	5	0	0	0	0
Received fiscal 2004...........................	17	7	2	1	0	7
On docket fiscal 2004.........................	22	12	2	1	0	7
Closed fiscal 2004..............................	12	8	2	1	0	1
Pending September 30, 2004..............	10	4	0	0	0	6
	Unit clarification cases					
Pending October 1, 2003....................	87	46	1	6	5	29
Received fiscal 2004...........................	165	116	7	19	3	20
On docket fiscal 2004.........................	252	162	8	25	8	49
Closed fiscal 2004..............................	155	104	8	17	5	21
Pending September 30, 2004..............	97	58	0	8	3	28

[1] See Glossary of terms for definitions. Advisory Opinion (AO) cases not included. See Table 22.
[2] See Table 1B for totals by types of cases.
[3] See Table 1A for totals by types of cases.
* Totals for cases pending Oct. 1, 2003, differ from last year's annual report. Revised totals result from postreport adjustments to last year's "on docket" and/or "closed figures."

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 2004[1]

	Total	Identification of filing party				
		AFL–CIO Unions	Other National Unions	Other local Unions	Individuals	Employers
		CA Cases				
Pending October 1, 2003	*17,576	12,620	586	615	3,690	65
Received fiscal 2004	19,943	13,447	733	615	5,103	45
On docket fiscal 2004	37,519	26,067	1,319	1,230	8,793	110
Closed fiscal 2004	22,874	15,601	836	728	5,648	61
Pending September 30, 2004	14,645	10,466	483	502	3,145	49
		CB Cases				
Pending October 1, 2003	2,583	46	6	15	2,133	383
Received fiscal 2004	6,193	54	13	16	5,546	564
On docket fiscal 2004	8,776	100	19	31	7,679	947
Closed fiscal 2004	6,317	57	14	18	5,629	599
Pending September 30, 2004	2,459	43	5	13	2,050	348
		CC Cases				
Pending October 1, 2003	202	5	0	0	6	191
Received fiscal 2004	440	3	0	3	23	411
On docket fiscal 2004	642	8	0	3	29	602
Closed fiscal 2004	423	7	0	1	21	394
Pending September 30, 2004	219	1	0	2	8	208
		CD Cases				
Pending October 1, 2003	67	9	0	1	2	55
Received fiscal 2004	155	18	0	3	3	131
On docket fiscal 2004	222	27	0	4	5	186
Closed fiscal 2004	157	19	0	4	4	130
Pending September 30, 2004	65	8	0	0	1	56
		CE Cases				
Pending October 1, 2003	25	2	0	3	4	16
Received fiscal 2004	29	2	0	0	6	21
On docket fiscal 2004	54	4	0	3	10	37
Closed fiscal 2004	39	2	0	3	5	29
Pending September 30, 2004	15	2	0	0	5	8
		CG Cases				
Pending October 1, 2003	14	0	0	0	3	11
Received fiscal 2004	30	0	0	0	2	28
On docket fiscal 2004	44	0	0	0	5	39
Closed fiscal 2004	27	0	0	0	4	23
Pending September 30, 2004	17	0	0	0	1	16
		CP Cases				
Pending October 1, 2003	46	1	1	0	0	44
Received fiscal 2004	100	1	3	2	10	84
On docket fiscal 2004	146	2	4	2	10	128
Closed fiscal 2004	117	2	3	1	6	105
Pending September 30, 2004	29	0	1	1	4	23

[1] See Glossary of terms for definitions.

* Totals for cases pending Oct. 1, 2003, differ from last year's annual report. Revised totals result from postreport adjustments to last year's "on docket" and/or "closed figures."

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 2004[1]

	Total	Identification of filing party				
		AFL–CIO Unions	Other National Unions	Other local Unions	Individuals	Employers
	RC Cases					
Pending October 1, 2003	*1,096	981	34	81	0	--
Received fiscal 2004	3,608	3,186	202	215	5	--
On docket fiscal 2004	4,704	4,167	236	296	5	--
Closed fiscal 2004	3,620	3,183	198	236	3	--
Pending September 30, 2004	1,084	984	38	60	2	--
	RM Cases					
Pending October 1, 2003	57	--	--	--	--	57
Received fiscal 2004	141	--	--	--	--	141
On docket fiscal 2004	198	--	--	--	--	198
Closed fiscal 2004	132	--	--	--	--	132
Pending September 30, 2004	66	--	--	--	--	66
	RD Cases					
Pending October 1, 2003	300	3	0	1	296	--
Received fiscal 2004	839	1	0	0	838	--
On docket fiscal 2004	1,139	4	0	1	1,134	--
Closed fiscal 2004	853	3	0	0	850	--
Pending September 30, 2004	286	1	0	1	284	--

[1] See Glossary of terms for definitions.
* Totals for cases pending Oct. 1, 2003, differ from last year's annual report. Revised totals result from postreport adjustments to last year's "on docket" and/or "closed figures."

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 2004—Page 1 of 3

	Number of cases showing specific allegations	Percent of total cases
A. Charges filed against employers under Sec. 8(a)		
Subsections of Sec. 8(a): Total cases	19,946	100.0
8(a)(1)	3,040	15.2
8(a)(1)(2)	152	0.8
8(a)(1)(3)	6,826	34.2
8(a)(1)(4)	165	0.8
8(a)(1)(5)	7,216	36.2
8(a)(1)(2)(3)	129	0.6
8(a)(1)(2)(4)	6	0
8(a)(1)(2)(5)	59	0.3
8(a)(1)(3)(4)	492	2.5
8(a)(1)(3)(5)	1,640	8.2
8(a)(1)(4)(5)	10	0.1
8(a)(1)(2)(3)(4)	6	0
8(a)(1)(2)(3)(5)	67	0.3
8(a)(1)(2)(4)(5)	4	0
8(a)(1)(3)(4)(5)	115	0.6
8(a)(1)(2)(3)(4)(5)	19	0.1
Recapitulation[1]		
8(a)(1)	19,946	100.0
8(a)(2)	442	2.2
8(a)(3)	9,294	46.6
8(a)(4)	817	4.1
8(a)(5)	9,130	45.8
B. Charges filed against unions under Sec. 8(b)		
Subsections of Sec. 8(b): Total cases	6,887	100.0
8(b)(1)	5,141	74.6
8(b)(2)	43	0.6
8(b)(3)	336	4.9
8(b)(4)	595	8.6

[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 2004—Page 2 of 3

	Number of cases showing specific allegations	Percent of total cases
8(b)(5)	6	0.1
8(b)(6)	3	0
8(b)(7)	100	1.5
8(b)(1)(2)	531	7.7
8(b)(1)(3)	83	1.2
8(b)(1)(5)	9	0.1
8(b)(2)(3)	2	0
8(b)(3)(5)	2	0
8(b)(3)(6)	4	0.1
8(b)(1)(2)(3)	29	0.4
8(b)(1)(2)(5)	2	0
8(b)(1)(2)(6)	1	0
Recapitulation[1]		
8(b)(1)	5,796	84.2
8(b)(2)	608	8.8
8(b)(3)	456	6.6
8(b)(4)	612	8.9
8(b)(5)	19	0.3
8(b)(6)	8	0.1
8(b)(7)	104	1.5
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	595	100.0
8(b)(4)(A)	22	3.7
8(b)(4)(B)	384	64.5
8(b)(4)(C)	17	2.9
8(b)(4)(D)	155	26.1
8(b)(4)(A)(B)	15	2.5
8(b)(4)(B)(C)	2	0.3
Recapitulation[1]		
8(b)(4)(A)	37	6.2

[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 2004—Page 3 of 3

	Number of cases showing specific allegations	Percent of total cases
8(b)(4)(B)	401	67.4
8(b)(4)(C)	19	3.2
8(b)(4)(D)	155	26.1
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	100	100.0
8(b)(7)(A)	18	18.0
8(b)(7)(B)	6	6.0
8(b)(7)(C)	72	72.0
8(b)(7)(A)(B)	1	1.0
8(b)(7)(A)(C)	2	2.0
8(b)(7)(B)(C)	1	1.0
Recapitulation[1]		
8(b)(7)(A)	21	21.0
8(b)(7)(B)	8	8.0
8(b)(7)(C)	75	75.0
C. Charges filed under Sec. 8(e)		
Total cases 8(e)	29	100.0
Against unions alone	23	79.3
Against employers alone	5	17.2
Against both	1	3.4
D. Charges filed Sec. 8(g)		
Total cases 8(g)	30	100.0

[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 2004[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	27	25	--	--	--	25	--	--	--	--	--	--	--
Complaints issued	2,972	1,840	1,584	140	24	--	0	1	1	5	33	44	8
Backpay specifications issued	129	65	63	0	0	--	0	0	0	0	0	2	0
Hearings completed, total	752	310	267	18	5	0	0	1	0	0	3	14	2
Initial ULP hearings	718	294	252	17	5	0	0	1	0	0	3	14	2
Backpay hearings	5	4	3	1	0	0	0	0	0	0	0	0	0
Other hearings	29	12	12	0	0	0	0	0	0	0	0	0	0
Decisions by administrative law judges, total	745	345	291	25	4	0	0	1	0	0	3	20	1
Initial ULP decisions	684	314	263	22	4	0	0	1	0	0	3	20	1
Backpay decisions	5	5	4	1	0	0	0	0	0	0	0	0	0
Supplemental decisions	56	26	24	2	0	0	0	0	0	0	0	0	0
Decisions and orders by the Board, total	976	521	451	36	2	8	0	0	0	0	3	17	4
Upon consent of parties:													
Initial decisions	21	9	3	3	1	0	0	0	0	0	0	0	2
Supplemental decisions	5	2	2	0	0	0	0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed):													
Initial ULP decisions	206	121	105	11	0	0	0	0	0	0	0	5	0
Backpay decisions	2	2	2	0	0	0	0	0	0	0	0	0	0
Supplemental decisions	9	6	6	0	0	0	0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	635	336	297	15	1	8	0	0	0	0	3	10	2
Decisions based on stipulated record	2	2	2	0	0	0	0	0	0	0	0	0	0
Supplemental ULP decisions	74	29	21	6	0	0	0	0	0	0	0	2	0
Backpay decisions	22	14	13	1	0	0	0	0	0	0	0	0	0

[1] See Glossary of terms for definitions.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 2004[1]—Page 1 of 2

Types of formal actions taken	Formal actions taken by type of case					
	Cases in which formal actions taken[2]	Total formal actions taken[3]	RC	RM	RD	UD
Hearings completed, total	624	589	508	12	69	6
Initial hearing	460	431	373	8	50	1
Hearing on objections and/or challenges	164	158	135	4	19	5
Decisions issued, total	464	449	387	12	50	13
By Regional Director	407	394	341	10	43	13
Elections directed	348	336	298	5	33	13
Dismissals on record	59	58	43	5	10	0
By Board	57	55	46	2	7	0
Transferred by Regional Directors for initial decision	3	3	3	0	0	0
Elections directed	0	0	0	0	0	0
Dismissals on record	2	2	2	0	0	0
Other	1	1	1	0	0	0
Review of Regional Directors' decisions: Requests for review received	209	208	155	20	33	2
Withdrawn before request ruled upon	32	31	24	2	5	0
Board action on request ruled upon, total	184	181	133	20	0	1
Granted	42	40	31	1	8	1
Denied	129	128	95	18	15	0
Remanded	13	13	7	1	5	0
Withdrawn after request granted, before Board review	2	2	2	0	0	0
Board decision after review, total	54	52	43	2	7	0
Regional Directors' decisions:						
Affirmed	14	13	10	1	2	0
Modified	9	9	8	1	0	0
Reversed	31	30	25	0	5	0
Outcome:						
Election directed	33	32	27	1	4	0
Dismissals on record	7	7	3	1	3	0
Other	14	13	12	0	1	0
Decisions on Objections and/or Challenges, total	476	454	395	7	52	15
By Regional Directors	221	205	179	2	24	10
By Admininstrative Law Judges	11	11	11	0	0	0
By Board	244	238	205	5	28	5
In stipulated elections	211	206	176	5	25	4
No exceptions to Regional Directors' reports	98	96	80	1	15	4
Exceptions to Regional Directors' reports	113	110	96	4	10	0
In directed elections (after transfer by Regional Director)	28	28	26	0	2	1
Review of Regional Directors' supplemental decisions: Request for review received	24	18	16	0	2	1
Withdrawn before request ruled upon	4	4	4	0	0	0

[1] See Glossary of terms for definitions.
[2] Total includes petitions consolidated into one decision.
[3] Case counts for UD not included.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 2004[1]—Page 2 of 2

Types of formal actions taken	Formal actions taken by type of case					
	Cases in which formal actions taken[2]	Total formal actions taken[3]	RC	RM	RD	UD
Board action on request ruled upon, total	22	19	15	1	3	0
Granted	1	1	0	0	1	0
Denied	19	16	13	1	2	0
Remanded	2	2	2	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	5	4	3	0	1	0
Regional Directors' decisions:						
Affirmed	3	2	1	0	1	0
Modified	0	0	0	0	0	0
Reversed	2	2	2	0	0	0

[1] See Glossary of terms for definitions.
[2] Total includes petitions consolidated into one decision.
[3] Case counts for UD not included.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 2004[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case[2]	
		AC	UC
Hearings completed	48	2	39
Decisions issued after hearing	71	6	54
By Regional Directors	60	4	49
By Board	11	2	5
Transferred by Regional Directors for initial decision	1	1	0
Review of Regional Directors' decisions:			
Requests for review received	26	1	19
Withdrawn before request ruled upon	1	0	1
Board action on requests ruled upon, total	30	1	21
Granted	16	1	9
Denied	13	0	11
Remanded	1	0	1
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	10	1	5
Regional Directors' decisions:			
Affirmed	7	0	3
Modified	0	0	0
Reversed	3	1	2

[1] See Glossary of terms for definitions.
[2] While columns at left counts "cases," these two columns reflect "situations," i.e., one or more unfair labor practice cases involving the same factual situation.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 2004[1]—Page 1 of 2

Action taken	Total all	Remedial action taken by–											
		Employer						Union					
		Total	Pursuant to–					Total	Pursuant to–				
			Agreement of parties		Recommen-dation of administra-tive law judge	Order of–			Agreement of parties		Recommen-dation of administra-tive law judge	Order of–	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A. By number of cases involved...	[2]11,752	--	--	--	--	--	--	--	--	--	--	--	--
Notice posted………………..	1,907	1,596	1,285	5	81	101	124	311	269	2	12	10	18
Recognition or other assistance withdrawn…......	9	9	3	0	0	6	0	--	--	--	--	--	--
Employer–dominated union disestablished ……………	4	4	3	0	0	1	0	--	--	--	--	--	--
Employees offered reinstate-ment ……….……..…….	1,299	1,299	1,151	3	29	45	71	--	--	--	--	--	--
Employees placed on prefe-rential hiring list …....….....	42	42	37	0	1	0	4	--	--	--	--	--	--
Hiring hall rights restored........	12	--	--	--	--	--	--	12	9	0	2	1	0
Objections to employment withdrawn..........................	7	--	--	--	--	--	--	7	7	0	0	0	0
Picketing ended.......................	86	--	--	--	--	--	--	86	86	0	0	0	0
Work stoppage ended.............	13	--	--	--	--	--	--	13	13	0	0	0	0
Collective bargaining begun....	2,643	2,529	2,415	4	21	35	54	114	106	1	1	3	3
Backpay distributed................	2,075	2,031	1,857	6	38	52	78	44	36	0	5	3	0
Reimbursement of fees, dues, and fines............................	148	63	57	0	0	3	3	85	85	0	0	0	0
Other conditions of employment improved........	0	0	0	0	0	0	0	0	0	0	0	0	0
Other remedies........................	0	0	0	0	0	0	0	0	0	0	0	0	0
B. By number of employees affected:													
Employees offered reinstate-ment, total..........................	3,496	3,496	3,058	0	44	193	201	--	--	--	--	--	--

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during Fiscal Year 2004 after the company and/or union had satisfied all remedial action requirements.
[2] A single case usually results in more than one remedial action, therefore, the total number of actions exceeds the number of cases involved.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 2004[1]—Page 2 of 2

Action taken	Total all	Employer: Total	Employer: Agreement of parties: Informal settlement	Employer: Agreement of parties: Formal settlement	Employer: Recommendation of administrative law judge	Employer: Order of–: Board	Employer: Order of–: Court	Union: Total	Union: Agreement of parties: Informal settlement	Union: Agreement of parties: Formal settlement	Union: Recommendation of administrative law judge	Union: Order of–: Board	Union: Order of–: Court
Accepted	2,790	2,790	2,471	0	36	171	112	--	--	--	--	--	--
Declined	706	706	587	0	8	22	89	--	--	--	--	--	--
Employees placed on preferential hiring list	342	342	317	0	2	0	23	--	--	--	--	--	--
Hiring hall rights restored	12	--	--	--	--	--	--	12	9	0	2	1	0
Objections to employment withdrawn	7	--	--	--	--	--	--	7	7	0	0	0	0
Employees receiving backpay:													
From either employer or union	31,074	30,784	26,817	350	1,011	1,040	1,566	290	170	0	5	3	112
From both employer and union	11	11	11	0	0	0	0	0	0	0	0	0	0
Employees reimbursed for fees, dues, and fines:													
From either employer or union	1,984	1,476	1,407	0	0	66	3	508	508	0	0	0	0
From both employer and union	1,606	1,387	1,387	0	0	0	0	219	219	0	0	0	0
C. By amounts of monetary recovery, total	[3]207,129,282	206,608,766	182,113,581	1,386,856	1,222,518	6,700,027	15,185,784	520,516	328,940	0	75,345	116,231	0
Backpay (includes all monetary payments except fees, dues, and fines)	205,713,297	205,352,374	180,891,856	1,386,856	1,222,518	6,675,644	15,175,500	360,923	169,347	0	75,345	116,231	0
Reimbursement of fees, dues,and fines	1,415,985	1,256,392	1,221,725	0	0	24,383	10,284	159,593	159,593	0	0	0	0

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during Fiscal Year 2004 after the company and/or union had satisfied all remedial action requirements.
[2] A single case usually results in more than one remedial action, therefore, the total number of actions exceeds the number of cases involved.
[3] The remedies secured in FY 2004 include a $97,182,500 settlement in a single case involving 889 employees as well as a $25,000,000 settlement involving 411 employees.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 2004[1]—Page 1 of 5

Industrial Group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Crop Production	33	22	19	3	0	0	0	0	0	11	10	0	1	0	0	0
Animal Production	21	14	11	3	0	0	0	0	0	7	6	0	1	0	0	0
Fishing, Hunting and Trapping	3	3	1	0	1	0	1	0	0	0	0	0	0	0	0	0
Support Activities for Agriculture and Forestry	21	19	12	3	0	2	0	0	2	2	2	0	0	0	0	0
Agriculture, Forestry, Fishing, and Hunting	78	58	43	9	1	2	1	0	2	20	18	0	2	0	0	0
Oil and Gas Extraction	45	37	30	7	0	0	0	0	0	8	6	0	2	0	0	0
Mining (except Oil and Gas)	141	121	101	15	1	0	2	0	2	18	12	0	6	0	0	2
Support Activities for Mining	37	32	28	0	3	0	0	0	1	4	2	0	2	0	0	1
Mining	223	190	159	22	4	0	2	0	3	30	20	0	10	0	0	3
Utilities	574	458	365	90	1	2	0	0	0	106	82	5	19	2	0	8
Building, Developing and General Contracting	515	456	251	84	85	26	1	0	9	58	52	3	3	1	0	0
Heavy Construction	292	259	153	46	29	17	4	1	9	33	24	2	7	0	0	0
Special Trade Contractors	2,854	2354	1,636	455	154	70	4	0	35	492	407	28	57	5	0	3
Construction	3,661	3069	2,040	585	268	113	9	1	53	583	483	33	67	6	0	3
Food Manufacturing	971	834	666	159	7	0	2	0	0	130	102	1	27	2	0	5
Beverage and Tobacco Product Manufacturing	246	205	156	46	1	0	2	0	0	40	32	0	8	0	0	1
Textile Mills	49	40	33	7	0	0	0	0	0	9	9	0	0	0	0	0
Textile Product Mills	22	15	12	3	0	0	0	0	0	7	6	0	1	0	0	0
Apparel Manufacturing	57	51	43	7	0	0	0	0	1	6	4	0	2	0	0	0
Leather and Allied Product Manufacturing	14	11	9	2	0	0	0	0	0	3	3	0	0	0	0	0
31-Manufacturing	1,359	1156	919	224	8	0	4	0	1	195	156	1	38	2	0	6
Wood Product Manufacturing	164	137	109	26	2	0	0	0	0	26	17	1	8	1	0	0
Paper Manufacturing	415	383	289	94	0	0	0	0	0	30	22	0	8	1	0	1
Printing and Related Support Activities	173	148	121	24	1	2	0	0	0	25	14	0	11	0	0	0
Petroleum and Coal Products Manufacturing	144	118	94	21	1	0	0	0	2	23	18	0	5	2	0	1

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 2004[1]—Page 2 of 5

Industrial Group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Chemical Manufacturing	363	302	252	50	0	0	0	0	0	58	44	1	13	2	1	0
Plastics and Rubber Products Manufacturing	260	216	177	38	1	0	0	0	0	41	29	1	11	3	0	0
Nonmetallic Mineral Product Manufacturing	288	254	209	41	3	1	0	0	0	32	23	1	8	2	0	0
32-Manufacturing	1,807	1558	1,251	294	8	3	0	0	2	235	167	4	64	11	1	2
Primary Metal Manufacturing	571	516	387	128	1	0	0	0	0	51	36	2	13	2	1	1
Fabricated Metal Product Manufacturing	526	452	351	97	3	1	0	0	0	66	46	2	18	4	2	2
Machinery Manufacturing	318	281	208	72	1	0	0	0	0	36	29	1	6	0	0	1
Computer and Electronic Product Manufacturing	80	67	54	13	0	0	0	0	0	12	8	0	4	0	0	1
Electrical Equipment, Appliance and Component Manufacturing	281	250	197	50	3	0	0	0	0	28	22	1	5	1	0	2
Transportation Equipment Manufacturing	1,237	1121	714	400	6	0	1	0	0	113	91	1	21	1	0	2
Furniture and Related Product Manufacturing	110	100	75	25	0	0	0	0	0	9	7	0	2	0	1	0
Miscellaneous Manufacturing	570	486	392	89	5	0	0	0	0	81	56	3	22	2	0	1
33-Manufacturing	3,693	3273	2,378	874	19	1	1	0	0	396	295	10	91	10	4	10
Wholesale Trade, Durable Goods	272	206	174	28	3	1	0	0	0	64	44	8	12	1	0	1
Wholesale Trade, Nondurable Goods	504	406	313	86	5	1	0	0	1	91	74	3	14	5	0	2
Wholesale Trade	776	612	487	114	8	2	0	0	1	155	118	11	26	6	0	3
Motor Vehicle and Parts Dealers	330	231	208	21	2	0	0	0	0	98	80	2	16	1	0	0
Furniture and Home Furnishings Stores	40	35	24	9	2	0	0	0	0	5	3	1	1	0	0	0
Electronics and Appliance Stores	14	13	8	5	0	0	0	0	0	1	0	0	1	0	0	0
Building Material and Garden Equipment and Supplies Dealers	59	43	38	5	0	0	0	0	0	15	10	0	5	1	0	0
Food and Beverage Stores	1,040	940	579	352	3	0	0	0	6	97	65	5	27	2	0	1
Health and Personal Care Stores	87	65	52	13	0	0	0	0	0	21	18	1	2	0	0	1
Gasoline Stations	18	15	14	1	0	0	0	0	0	3	2	0	1	0	0	0

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 2004[1]—Page 3 of 5

Industrial Group[2]	All cases	Unfair labor practice cases: All C cases	CA	CB	CC	CD	CE	CG	CP	Representation cases: All R cases	RC	RM	RD	Union deauthorization cases UD	Amendment of certification cases AC	Unit clarification cases UC
Clothing and Clothing Accessories Stores.............	56	48	34	12	0	0	0	0	2	7	4	1	2	1	0	0
44-Retail Trade..	1,644	1390	957	418	7	0	0	0	8	247	182	10	55	5	0	2
Sporting Goods, Hobby, Book and Music Stores....	29	29	23	6	0	0	0	0	0	0	0	0	0	0	0	0
General Merchandise Stores.................................	203	182	133	45	2	0	0	0	2	21	18	0	3	0	0	0
Miscellaneous Store Retailers................................	39	29	19	8	1	0	1	0	0	10	8	0	2	0	0	0
Nonstore Retailers..	29	22	20	2	0	0	0	0	0	7	6	0	1	0	0	0
45-Retail Trade..	300	262	195	61	3	0	1	0	2	38	32	0	6	0	0	0
Air Transportation..	44	32	20	12	0	0	0	0	0	9	8	0	1	2	1	0
Rail Transportation...	24	17	15	2	0	0	0	0	0	7	7	0	0	0	0	0
Water Transportation..	176	164	67	96	0	1	0	0	0	12	6	0	6	0	0	0
Truck Transportation..	761	635	482	137	7	2	0	0	7	119	92	5	22	4	0	3
Transit and Ground Passenger Transportation........	718	573	419	154	0	0	0	0	0	123	97	0	26	17	0	5
Pipeline Transportation..	18	16	13	3	0	0	0	0	0	2	2	0	0	0	0	0
Scenic and Sightseeing Transportation..................	17	13	12	1	0	0	0	0	0	4	4	0	0	0	0	0
Support Activities for Transportation.....................	457	367	217	139	5	2	4	0	0	85	73	2	10	2	0	3
48-Transportation..	2,215	1817	1,245	544	12	5	4	0	7	361	289	7	65	25	1	11
Postal Service...	2,437	2436	1,716	720	0	0	0	0	0	1	1	0	0	0	0	0
Couriers and Messengers..	253	223	158	65	0	0	0	0	0	29	28	0	1	0	0	1
Warehousing and Storage Facilities.......................	473	369	279	87	2	1	0	0	0	101	92	1	8	2	0	1
49-Transportation..	3,163	3028	2,153	872	2	1	0	0	0	131	121	1	9	2	0	2
Publishing Industries..	304	263	218	45	0	0	0	0	0	36	27	1	8	1	0	4
Motion Picture and Sound Recording Industries.....	54	48	27	15	1	4	1	0	0	6	5	0	1	0	0	0
Broadcasting and Telecommunications..................	937	831	653	169	5	4	0	0	0	98	59	2	37	6	0	2
Information Services and Data Processing Services..	71	59	48	11	0	0	0	0	0	12	9	1	2	0	0	0

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 2004[1]—Page 4 of 5

Industrial Group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Information	1,366	1201	946	240	6	8	1	0	0	152	100	4	48	7	0	6
Monetary Authorities—Central Bank	25	20	18	2	0	0	0	0	0	5	4	1	0	0	0	0
Credit Intermediation and Related Activities	44	39	36	2	1	0	0	0	0	4	3	0	1	0	0	1
Securities, Commodity Contracts and Other Intermediation and Related Activities	17	14	13	1	0	0	0	0	0	3	3	0	0	0	0	0
Insurance Carriers and Related Activities	51	46	26	20	0	0	0	0	0	4	2	0	2	0	0	1
Funds, Trusts and Other Financial Vehicles (U.S. Only)	6	6	6	0	0	0	0	0	0	0	0	0	0	0	0	0
Finance and Insurance	143	125	99	25	1	0	0	0	0	16	12	1	3	0	0	2
Real Estate	229	206	123	62	18	2	0	0	1	22	19	1	2	0	0	1
Rental and Leasing Services	187	135	114	18	3	0	0	0	0	51	40	2	9	1	0	0
Owners and Lessors of Other Non-Financial Assets	7	6	3	3	0	0	0	0	0	1	1	0	0	0	0	0
Real Estate and Rental and Leasing	423	347	240	83	21	2	0	0	1	74	60	3	11	1	0	1
Professional, Scientific and Technical Services	301	233	185	39	8	0	1	0	0	62	56	1	5	2	0	4
Management of Companies and Enterprises	53	48	28	20	0	0	0	0	0	5	5	0	0	0	0	0
Administrative and Support Services	1,828	1454	1,053	369	11	9	2	0	10	349	302	12	35	19	0	6
Waste Management and Remediation Services	590	450	403	41	4	1	0	0	1	136	109	2	25	1	0	3
Administrative and Support, Waste Management and Remediation Services	2,418	1904	1,456	410	15	10	2	0	11	485	411	14	60	20	0	9
Educational Services	419	325	269	48	6	0	1	1	0	85	70	2	13	1	0	8
Ambulatory Health Care Services	433	334	299	35	0	0	0	0	0	93	69	0	24	2	0	4
Hospitals	1,503	1236	950	260	9	1	1	12	3	220	179	1	40	7	7	33
Nursing and Residential Care Facilities	1,626	1268	1,082	171	2	1	0	11	1	340	257	18	65	5	2	11
Social Assistance	377	284	251	31	1	0	0	1	0	84	66	1	17	4	0	5

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 2004[1]—Page 5 of 5

Industrial Group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Health Care and Social Assistance	3,939	3122	2,582	497	12	2	1	24	4	737	571	20	146	18	9	53
Performing Arts, Spectator Sports and Related Industries	201	174	88	79	3	2	1	0	1	24	23	0	1	0	0	3
Museums, Historical Sites and Similar Institutions	11	9	6	3	0	0	0	0	0	2	2	0	0	0	0	0
Amusement, Gambling and Recreation Industries	246	214	157	57	0	0	0	0	0	29	15	1	13	1	0	2
Arts, Entertainment and Recreation	458	397	251	139	3	2	1	0	1	55	40	1	14	1	0	5
Accommodation	586	524	397	122	5	0	0	0	0	61	40	2	19	1	0	0
Foodservices and Drinking Places	476	420	328	85	5	0	0	0	2	51	31	4	16	0	0	5
Accommodation and Foodservices	1,062	944	725	207	10	0	0	0	2	112	71	6	35	1	0	5
Repair and Maintenance	248	180	155	25	0	0	0	0	0	66	59	0	7	1	0	1
Personal and Laundry Services	353	287	232	43	9	0	0	2	1	64	50	2	12	1	0	1
Religious, Grantmaking, Civic, and Professional and Similar Organizations	505	434	224	199	6	2	0	2	1	53	40	1	12	1	1	16
Private Households	3	3	2	1	0	0	0	0	0	0	0	0	0	0	0	0
Other Services (except Public Administration)	1,109	904	613	268	15	2	0	4	2	183	149	3	31	3	1	18
Executive, Legislative, Public Finance and General Government	13	11	10	1	0	0	0	0	0	2	2	0	0	0	0	0
Justice, Public Order, and Safety	90	68	53	14	1	0	0	0	0	19	16	0	3	2	1	0
Administration of Human Resource Programs	24	16	14	2	0	0	0	0	0	7	5	1	1	0	0	1
Administration of Environmental Quality Programs	5	4	4	0	0	0	0	0	0	1	1	0	0	0	0	0
Administration of Housing Programs, Urban Planning, and Community Development	5	2	1	1	0	0	0	0	0	3	2	0	1	0	0	0
Administration of Economic Programs	16	15	14	1	0	0	0	0	0	1	1	0	0	0	0	0
Space Research and Technology	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0
National Security and International Affairs	10	3	2	1	0	0	0	0	0	6	5	0	1	0	0	1
Public Administration	164	120	99	20	1	0	0	0	0	39	32	1	6	2	1	2
Unclassified Establishments	429	339	250	88	1	0	0	0	0	86	68	3	15	2	0	2
Total, all industrial groups	31,777	26880	19,935	6,191	440	155	29	30	100	4588	3,608	141	839	127	17	165

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 2004[1]—Page 1 of 3

Division and State[2]	All cases	Unfair labor practice cases: All C cases	CA	CB	CC	CD	CE	CG	CP	Representation cases: All R cases	RC	RM	RD	Union deauthorization cases UD	Amendment of certification cases AC	Unit clarification cases UC
Illinois	1,988	1628	1,091	393	73	40	3	0	28	340	280	12	48	15	0	5
Indiana	698	609	483	112	8	5	0	0	1	83	66	2	15	2	0	4
Michigan	2,191	1859	1,280	553	16	3	1	2	4	317	248	17	52	3	1	11
Ohio	1,731	1506	1,148	341	8	3	1	2	3	207	168	6	33	7	3	8
Wisconsin	678	557	425	128	1	2	0	1	0	99	46	4	49	12	0	10
East North Central	7,286	6159	4,427	1,527	106	53	5	5	36	1046	808	41	197	39	4	38
Alabama	400	353	310	40	0	0	0	0	3	47	42	1	4	0	0	0
Kentucky	464	401	347	53	0	0	1	0	0	62	42	2	18	1	0	0
Mississippi	161	136	114	22	0	0	0	0	0	25	20	0	5	0	0	0
Tennessee	378	342	251	91	0	0	0	0	0	34	22	1	11	1	0	1
East South Central	1,403	1232	1,022	206	0	0	1	0	3	168	126	4	38	2	0	1
New Jersey	1,334	1101	813	235	27	21	0	0	5	221	181	4	36	4	0	8
New York	3,488	2951	1,923	920	49	23	9	6	21	505	434	11	60	14	0	18
Pennsylvania	1,776	1477	1,178	261	17	14	2	2	3	272	220	5	47	8	2	17
Middle Atlantic	6,598	5529	3,914	1,416	93	58	11	8	29	998	835	20	143	26	2	43
Arizona	450	407	315	61	27	0	0	0	4	41	32	2	7	1	0	1
Colorado	425	371	321	46	4	0	0	0	0	52	36	1	15	1	0	1
Idaho	74	59	55	4	0	0	0	0	0	13	13	0	0	0	0	2
Montana	96	72	63	7	0	1	0	0	1	23	15	2	6	0	0	1
New Mexico	192	142	129	13	0	0	0	0	0	46	38	0	8	3	1	0
Nevada	478	432	316	96	12	4	3	0	1	45	29	1	15	0	0	1
Utah	150	134	48	23	61	0	0	1	1	15	10	0	5	0	0	1
Wyoming	56	48	45	3	0	0	0	0	0	8	7	0	1	0	0	0
Mountain	1,921	1665	1,292	253	104	5	3	1	7	243	180	6	57	5	1	7
Connecticut	510	451	350	97	3	0	0	0	1	57	49	4	4	2	0	0

[1] See Glossary of terms for definitions.
[2] The States are grouped according to the method used by the Bureau of Census, U.S. Department of Commerce.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 2004[1]—Page 2 of 3

Division and State[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Massachusetts	842	715	556	123	23	12	0	1	0	118	93	5	20	1	1	7
Maine	112	102	96	6	0	0	0	0	0	10	9	0	1	0	0	0
New Hampshire	51	42	37	5	0	0	0	0	0	8	7	0	1	1	0	0
Rhode Island	159	122	99	15	6	2	0	0	0	33	28	0	5	1	0	3
Vermont	60	51	45	6	0	0	0	0	0	9	6	1	2	0	0	0
New England	1,734	1483	1,183	252	32	14	0	1	1	235	192	10	33	5	1	10
Puerto Rico	346	270	227	41	0	0	0	2	0	69	61	0	8	1	0	6
Virgin Islands	17	13	11	2	0	0	0	0	0	3	2	0	1	1	0	0
Outlying Areas	363	283	238	43	0	0	0	2	0	72	63	0	9	2	0	6
Alaska	73	49	30	19	0	0	0	0	0	23	14	2	7	1	0	0
American Samoa	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
California	3,928	3397	2,319	987	50	20	3	4	14	498	393	14	91	21	0	12
Federated States of Micronesia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guam	1	0	0	0	0	0	0	0	0	1	1	0	0	0	0	0
Hawaii	328	278	222	56	0	0	0	0	0	45	30	0	15	0	5	0
Marshall Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Northern Mariana Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oregon	324	251	201	45	3	0	2	0	0	66	45	5	16	2	0	5
Palau	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Washington	737	584	441	133	6	1	3	0	0	141	109	1	31	10	0	2
Pacific	5,391	4559	3,213	1,240	59	21	8	4	14	774	592	22	160	34	5	19
District Of Columbia	192	148	87	54	4	0	0	1	2	41	32	7	2	1	0	2
Delaware	120	99	79	18	2	0	0	0	0	19	10	1	8	1	0	1
Florida	995	848	680	152	9	0	1	6	0	143	117	0	26	0	1	3
Georgia	433	370	287	79	3	1	0	0	0	54	46	0	8	0	1	8

[1] See Glossary of terms for definitions.
[2] The States are grouped according to the method used by the Bureau of Census, U.S. Department of Commerce.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 2004[1]—Page 3 of 3

Division and State[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Maryland	465	372	297	65	5	1	0	1	3	87	72	2	13	5	0	1
North Carolina	275	242	193	49	0	0	0	0	0	32	25	0	7	0	0	1
South Carolina	114	104	78	26	0	0	0	0	0	10	6	0	4	0	0	0
Virginia	393	335	284	51	0	0	0	0	0	58	45	1	12	0	0	0
West Virginia	397	347	292	49	5	0	0	0	1	47	41	2	4	1	1	1
South Atlantic	3,384	2865	2,277	543	28	2	1	8	6	491	394	13	84	8	3	17
Iowa	247	204	172	31	0	0	0	0	1	42	37	2	3	0	0	1
Kansas	179	155	110	44	1	0	0	0	0	23	17	1	5	0	0	1
Minnesota	417	297	230	61	4	0	0	1	1	108	76	2	30	3	1	8
Missouri	698	603	459	131	9	2	0	0	2	93	61	5	27	1	0	1
North Dakota	15	9	7	2	0	0	0	0	0	6	6	0	0	0	0	0
Nebraska	87	72	66	6	0	0	0	0	0	15	12	1	2	0	0	0
South Dakota	30	20	16	4	0	0	0	0	0	8	6	0	2	0	0	2
West North Central	1,673	1360	1,060	279	14	2	0	1	4	295	215	11	69	4	1	13
Arkansas	231	204	167	37	0	0	0	0	0	26	18	2	6	0	0	1
Louisiana	343	287	192	95	0	0	0	0	0	55	40	2	13	0	0	1
Oklahoma	215	185	148	34	3	0	0	0	0	29	21	4	4	0	0	1
Texas	1,194	1074	806	267	1	0	0	0	0	117	99	3	15	0	0	3
West South Central	1,983	1750	1,313	433	4	0	0	0	0	227	178	11	38	0	0	6
Total, all States and areas	31,736	26885	19,939	6,192	440	155	29	30	100	4549	3,583	138	828	125	17	160

[1] See Glossary of terms for definitions.
[2] The States are grouped according to the method used by the Bureau of Census, U.S. Department of Commerce.

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 2004[1]—Page 1 of 2

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Connecticut	510	451	350	97	3	0	0	0	1	57	49	4	4	2	0	0
Massachusetts	842	715	556	123	23	12	0	1	0	118	93	5	20	1	1	7
Maine	112	102	96	6	0	0	0	0	0	10	9	0	1	0	0	0
New Hampshire	51	42	37	5	0	0	0	0	0	8	7	0	1	1	0	0
Rhode Island	159	122	99	15	6	2	0	0	0	33	28	0	5	1	0	3
Vermont	60	51	45	6	0	0	0	0	0	9	6	1	2	0	0	0
Region I	1,734	1483	1,183	252	32	14	0	1	1	235	192	10	33	5	1	10
Delaware	120	99	79	18	2	0	0	0	0	19	10	1	8	1	0	1
New Jersey	1,334	1101	813	235	27	21	0	0	5	221	181	4	36	4	0	8
New York	3,488	2951	1,923	920	49	23	9	6	21	505	434	11	60	14	0	18
Puerto Rico	346	270	227	41	0	0	0	2	0	69	61	0	8	1	0	6
Virgin Islands	17	13	11	2	0	0	0	0	0	3	2	0	1	1	0	0
Region II	5,305	4434	3,053	1,216	78	44	9	8	26	817	688	16	113	21	0	33
District of Columbia	192	148	87	54	4	0	0	1	2	41	32	7	2	1	0	2
Maryland	465	372	297	65	5	1	0	1	3	87	72	2	13	5	0	1
Pennsylvania	1,776	1477	1,178	261	17	14	2	2	3	272	220	5	47	8	2	17
Virginia	393	335	284	51	0	0	0	0	0	58	45	1	12	0	0	0
West Virginia	397	347	292	49	5	0	0	0	1	47	41	2	4	1	1	1
Region III	3,223	2679	2,138	480	31	15	2	4	9	505	410	17	78	15	3	21
Alabama	400	353	310	40	0	0	0	0	3	47	42	1	4	0	0	0
Florida	995	848	680	152	9	0	1	6	0	143	117	0	26	0	1	3
Georgia	433	370	287	79	3	1	0	0	0	54	46	0	8	0	1	8
Kentucky	464	401	347	53	0	0	1	0	0	62	42	2	18	1	0	0
Mississippi	161	136	114	22	0	0	0	0	0	25	20	0	5	0	0	0
North Carolina	275	242	193	49	0	0	0	0	0	32	25	0	7	0	0	1
South Carolina	114	104	78	26	0	0	0	0	0	10	6	0	4	0	0	0
Tennessee	378	342	251	91	0	0	0	0	0	34	22	1	11	1	0	1
Region IV	3,220	2796	2,260	512	12	1	2	6	3	407	320	4	83	2	2	13
Illinois	1,988	1628	1,091	393	73	40	3	0	28	340	280	12	48	15	0	5
Indiana	698	609	483	112	8	5	0	0	1	83	66	2	15	2	0	4
Michigan	2,191	1859	1,280	553	16	3	1	2	4	317	248	17	52	3	1	11
Minnesota	417	297	230	61	4	0	0	1	1	108	76	2	30	3	1	8
Ohio	1,731	1506	1,148	341	8	3	1	2	3	207	168	6	33	7	3	8
Wisconsin	678	557	425	128	1	2	0	1	0	99	46	4	49	12	0	10
Region V	7,703	6456	4,657	1,588	110	53	5	6	37	1154	884	43	227	42	5	46

[1] See Glossary of terms for definitions.
[2] The States are grouped according to the method used by the Bureau of Census, U.S. Department of Commerce.

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 2004[1]—Page 2 of 2

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Arkansas	231	204	167	37	0	0	0	0	0	26	18	2	6	0	0	1
Louisiana	343	287	192	95	0	0	0	0	0	55	40	2	13	0	0	1
New Mexico	192	142	129	13	0	0	0	0	0	46	38	0	8	3	1	0
Oklahoma	215	185	148	34	3	0	0	0	0	29	21	4	4	0	0	1
Texas	1,194	1074	806	267	1	0	0	0	0	117	99	3	15	0	0	3
Region VI	2,175	1892	1,442	446	4	0	0	0	0	273	216	11	46	3	1	6
Iowa	247	204	172	31	0	0	0	0	1	42	37	2	3	0	0	1
Kansas	179	155	110	44	1	0	0	0	0	23	17	1	5	0	0	1
Missouri	698	603	459	131	9	2	0	0	2	93	61	5	27	1	0	1
Nebraska	87	72	66	6	0	0	0	0	0	15	12	1	2	0	0	0
Region VII	1,211	1034	807	212	10	2	0	0	3	173	127	9	37	1	0	3
Colorado	425	371	321	46	4	0	0	0	0	52	36	1	15	1	0	1
Montana	96	72	63	7	0	1	0	0	1	23	15	2	6	0	0	1
North Dakota	15	9	7	2	0	0	0	0	0	6	6	0	0	0	0	0
South Dakota	30	20	16	4	0	0	0	0	0	8	6	0	2	0	0	2
Utah	150	134	48	23	61	0	0	1	1	15	10	0	5	0	0	1
Wyoming	56	48	45	3	0	0	0	0	0	8	7	0	1	0	0	0
Region VIII	772	654	500	85	65	1	0	1	2	112	80	3	29	1	0	5
American Samoa	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Arizona	450	407	315	61	27	0	0	0	4	41	32	2	7	1	0	1
California	3,928	3397	2,319	987	50	20	3	4	14	498	393	14	91	21	0	12
Federated States of Micronesia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guam	1	0	0	0	0	0	0	0	0	1	1	0	0	0	0	0
Hawaii	328	278	222	56	0	0	0	0	0	45	30	0	15	0	5	0
Marshall Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Northern Mariana Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nevada	478	432	316	96	12	4	3	0	1	45	29	1	15	0	0	1
Palau	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Region IX	5,185	4514	3,172	1,200	89	24	6	4	19	630	485	17	128	22	5	14
Alaska	73	49	30	19	0	0	0	0	0	23	14	2	7	1	0	0
Idaho	74	59	55	4	0	0	0	0	0	13	13	0	0	0	0	2
Oregon	324	251	201	45	3	0	2	0	0	66	45	5	16	2	0	5
Washington	737	584	441	133	6	1	3	0	0	141	109	1	31	10	0	2
Region X	1,208	943	727	201	9	1	5	0	0	243	181	8	54	13	0	9
Total, all States and areas	31,736	26885	19,939	6,192	440	155	29	30	100	4549	3,583	138	828	125	17	160

[1] See Glossary of terms for definitions.
[2] The States are grouped according to the method used by the Bureau of Census, U.S. Department of Commerce.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 2004[1]—Page 1 of 2

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases[2]		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	29,804	100.0	--	22,748	100.0	6,299	100.0	421	100.0	153	100.0	39	100.0	27	100.0	117	100.0
Agreement of the parties	10,632	35.7	100.0	9,261	40.7	1,088	17.3	190	45.1	25	16.3	10	25.6	12	44.4	46	39.3
Informal settlement	10,621	35.6	99.9	9,250	40.7	1,088	17.3	190	45.1	25	16.3	10	25.6	12	44.4	46	39.3
Before issuance of complaint	8,466	28.4	79.6	7,305	32.1	929	14.7	155	36.8	25	16.3	9	23.1	9	33.3	34	29.1
After issuance of complaint, before opening of hearing	2,047	6.9	19.3	1,840	8.1	156	2.5	35	8.3	0	0.0	1	2.6	3	11.1	12	10.3
After hearing opened, before issuance of administrative law judge's decision	108	0.4	1.0	105	0.5	3	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Formal settlement	11	0.0	0.1	11	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Before opening of hearing	7	0.0	0.1	7	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated decision	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Consent decree	7	0.0	0.1	7	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After hearing opened	4	0.0	0.0	4	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated decision	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Consent decree	4	0.0	0.0	4	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Compliance with	819	2.7	100.0	736	3.2	51	0.8	20	4.8	2	1.3	3	7.7	0	0.0	7	6.0
Administrative law judge's decision	7	0.0	0.9	7	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Board decision	412	1.4	50.3	376	1.7	29	0.5	3	0.7	2	1.3	2	5.1	0	0.0	0	0.0
Adopting administrative law judge's decision (no exceptions filed)	166	0.6	20.3	149	0.7	14	0.2	1	0.2	1	0.7	1	2.6	0	0.0	0	0.0
Contested	246	0.8	30.0	227	1.0	15	0.2	2	0.5	1	0.7	1	2.6	0	0.0	0	0.0
Circuit court of appeals decree	399	1.3	48.7	352	1.5	22	0.3	17	4.0	0	0.0	1	2.6	0	0.0	7	6.0
Supreme Court action	1	0.0	0.1	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Table 8 for summary of disposition of stage. See Glossary of terms for definitions.
[2] CD cases closed in this stage are processed as jurisdictional disputes under Sec. 10(k) of the Act. See Table 7A.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 2004[1]—Page 2 of 2

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases[2]		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Withdrawal	8,779	29.5	100.0	6,626	29.1	1,916	30.4	132	31.4	43	28.1	20	51.3	7	25.9	35	29.9
Before issuance of complaint	8,623	28.9	98.2	6,478	28.5	1,908	30.3	132	31.4	43	28.1	20	51.3	7	25.9	35	29.9
After issuance of complaint, before opening of hearing	98	0.3	1.1	94	0.4	4	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After hearing opened, before administrative law judge's decision	5	0.0	0.1	5	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After administrative law judge's decision, before Board decision	44	0.1	0.5	40	0.2	4	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After Board or court decision	9	0.0	0.1	9	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Dismissal	9,327	31.3	100.0	5,941	26.1	3,236	51.4	78	18.5	31	20.3	6	15.4	7	25.9	28	23.9
Before issuance of complaint	9,183	30.8	98.5	5,815	25.6	3,220	51.1	77	18.3	31	20.3	6	15.4	7	25.9	27	23.1
After issuance of complaint, before opening of hearing	47	0.2	0.5	38	0.2	8	0.1	0	0.0	0	0.0	0	0.0	0	0.0	1	0.9
After hearing opened, before administrative law judge's decision	1	0.0	0.0	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By administrative law judge's decision	6	0.0	0.1	4	0.0	2	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By Board decision	87	0.3	0.9	82	0.4	5	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Adopting administrative law judge's decision (no exceptions filed)	51	0.2	0.5	47	0.2	4	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Contested	36	0.1	0.4	35	0.2	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By circuit court of appeals decree	3	0.0	0.0	1	0.0	1	0.0	1	0.2	0	0.0	0	0.0	0	0.0	0	0.0
By Supreme Court action	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
10(k) actions (see Table 7A for details of dispositions)	51	0.2	--	0	0.0	0	0.0	0	0.0	51	33.3	0	0.0	0	0.0	0	0.0
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	196	0.7	--	184	0.8	8	0.1	1	0.2	1	0.7	0	0.0	1	3.7	1	0.9

[1] See Table 8 for summary of disposition of stage. See Glossary of terms for definitions.
[2] CD cases closed in this stage are processed as jurisdictional disputes under Sec. 10(k) of the Act. See Table 7A.

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 2004[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	51	100.0
Agreement of the parties-informal settlement	24	47.1
Before 10(k) notice	17	33.3
After 10(k) notice, before opening of 10(k) hearing	5	9.8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	3.9
After Board decision and determination of dispute	0	0.0
Compliance with Board decision and determination of dispute	4	7.8
Withdrawal	13	25.5
Before 10(k) notice	7	13.7
After 10(k) notice, before opening of 10(k) hearing	3	5.9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	3.9
After Board decision and determination of dispute	1	2.0
Dismissal	10	19.6
Before 10(k) notice	4	7.8
After 10(k) notice, before opening of 10(k) hearing	6	11.8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	0.0
By Board decision and determination of dispute	0	0.0

[1] See Glossary of terms for definitions.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 2004[1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed
Total number of cases closed	29,966	100.0	22,885	100.0	6,318	100.0	423	100.0	157	100.0	39	100.0	27	100.0	117	100.0
Before issuance of complaint	26,346	87.9	19,633	85.8	6,062	95.9	365	86.3	130	82.8	35	89.7	24	88.9	97	82.9
After issuance of complaint, before opening of hearing	2,258	7.5	2,015	8.8	177	2.8	35	8.3	14	8.9	1	2.6	3	11.1	13	11.1
After hearing opened, before issuance of administrative law judge's decision	181	0.6	171	0.7	6	0.1	0	0.0	4	2.5	0	0.0	0	0.0	0	0.0
After administrative law judge's decision, before issuance of Board decision	60	0.2	52	0.2	8	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After Board order adopting administrative law judge's decision in absence of exceptions	265	0.9	240	1.0	18	0.3	1	0.2	5	3.2	1	2.6	0	0.0	0	0.0
After Board decision, before circuit court decree	342	1.1	315	1.4	20	0.3	2	0.5	4	2.5	1	2.6	0	0.0	0	0.0
After circuit court decree, before Supreme Court action	512	1.7	457	2.0	27	0.4	20	4.7	0	0.0	1	2.6	0	0.0	7	6.0
After Supreme Court action	2	0.0	2	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Glossary of terms for definitions.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 2004[1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	4,604	100.0	3,619	100.0	132	100.0	853	100.0	125	100.0
Before issuance of notice of hearing	618	13.4	388	10.7	39	29.5	191	22.4	63	50.4
After issuance of notice, before close of hearing	3,394	73.7	2,722	75.2	77	58.3	595	69.8	34	27.2
After hearing closed, before issuance of decision	34	0.7	30	0.8	1	0.8	3	0.4	0	0.0
After issuance of Regional Director's decision	368	8.0	317	8.8	11	8.3	40	4.7	25	20.0
After issuance of Board decision[2]	190	4.1	162	4.5	4	3.0	24	2.8	3	2.4

[1] See Glossary of terms for definitions.
[2] Cases closed after Board decision includes all cases where the Board has granted review in a preelection case, or exceptions have been filed in a postelection proceeding.

Table 10—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 2004[1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	4,545	100.0	3,573	100.0	131	100.0	841	100.0	110	100.0
Certification issued, total	2,654	58.4	2,204	61.7	37	28.2	413	49.1	59	53.6
After:										
Consent election	58	1.3	58	1.6	0	0.0	0	0.0	0	0.0
Before notice of hearing	19	0.4	19	0.5	0	0.0	0	0.0	0	0.0
After notice of hearing, before hearing closed	39	0.9	39	1.1	0	0.0	0	0.0	0	0.0
After hearing closed, before decision	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated election	2,200	48.4	1,807	50.6	30	22.9	363	43.2	41	37.3
Before notice of hearing	256	5.6	198	5.5	4	3.1	54	6.4	20	18.2
After notice of hearing, before hearing closed	1,934	42.6	1,601	44.8	26	19.8	307	36.5	21	19.1
After hearing closed, before decision	10	0.2	8	0.2	0	0.0	2	0.2	0	0.0
Expedited election	1	0.0	0	0.0	1	0.8	0	0.0	0	0.0
Regional Director-directed election	236	5.2	202	5.7	4	3.1	30	3.6	15	13.6
Board-directed election	159	3.5	137	3.8	2	1.5	20	2.4	3	2.7
By withdrawal, total	1,677	36.9	1,297	36.3	60	45.8	320	38.0	43	39.1
Before notice of hearing	277	6.1	160	4.5	18	13.7	99	11.8	31	28.2
After notice of hearing, before hearing closed	1,282	28.2	1,023	28.6	40	30.5	219	26.0	11	10.0
After hearing closed, before decision	22	0.5	21	0.6	1	0.8	0	0.0	0	0.0
After Regional Director's decision and direction of election	77	1.7	75	2.1	1	0.8	1	0.1	1	0.9
After Board decision and direction of election	19	0.4	18	0.5	0	0.0	1	0.1	0	0.0
By dismissal, total	214	4.7	72	2.0	34	26.0	108	12.8	8	7.3
Before notice of hearing	64	1.4	9	0.3	17	13.0	38	4.5	7	6.4
After notice of hearing, before hearing closed	88	1.9	19	0.5	10	7.6	59	7.0	1	0.9
After hearing closed, before decision	1	0.0	0	0.0	0	0.0	1	0.1	0	0.0
By Regional Director's decision	49	1.1	37	1.0	5	3.8	7	0.8	0	0.0
By Board decision	12	0.3	7	0.2	2	1.5	3	0.4	0	0.0

[1] See Glossary of terms for definitions.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 2004[1]

	AC	UC
Total, all	12	155
Certification amended or unit clarified	4	14
Before hearing	4	7
By Regional Director's decision	4	7
By Board decision	0	0
After hearing	0	7
By Regional Director's decision	0	7
By Board decision	0	0
Dismissed	1	38
Before hearing	0	17
By Regional Director's decision	0	14
By Board decision	0	3
After hearing	1	21
By Regional Director's decision	0	17
By Board decision	1	4
Withdrawn	7	103
Before hearing	7	100
After hearing	0	3

[1] See Glossary of terms for definitions.

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 2004[1]

Type of case	Type of election					
	Total	Consent	Stipulated	Board-directed	Regional Director-directed[2]	Expedited elections under 8(b)(7)(C)
All types, total:						
Elections	[3]2,764	58	2,290	0	415	1
Eligible voters	197,105	6,551	144,005	0	46,534	15
Valid votes	162,950	4,898	120,092	0	37,946	14
RC cases:						
Elections	2,240	58	1,841	0	341	0
Eligible voters	159,806	6,551	115,566	0	37,689	0
Valid votes	131,253	4,898	95,709	0	30,646	0
RM cases:						
Elections	37	0	30	0	6	1
Eligible voters	2,392	0	1,684	0	693	15
Valid votes	2,178	0	1,509	0	655	14
RD cases:						
Elections	421	0	371	0	50	0
Eligible voters	28,513	0	22,610	0	5,903	0
Valid votes	24,935	0	19,809	0	5,126	0
UD cases:						
Elections	66	0	48	0	18	--
Eligible voters	6,394	0	4,145	0	2,249	--
Valid votes	4,584	0	3,065	0	1,519	--

[1] See Glossary of terms for definitions.
[2] Cases where election is held pursuant to a decision and direction by the Board.
[3] Due to technical difficulties, data discrepancies exceed 1 percent but are less than 3 percent in case totals for Tables 11, 15B, 15C, and 16.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 2004[1]

Type of election	All R elections: Elections conducted: Total elections	All R: Withdrawn or dismissed before certification	All R: Resulting in a rerun or runoff	All R: Resulting in certification	RC elections: Elections conducted: Total elections	RC: Withdrawn or dismissed before certification	RC: Resulting in a rerun or runoff	RC: Resulting in certification	RM elections: Elections conducted: Total elections	RM: Withdrawn or dismissed before certification	RM: Resulting in a rerun or runoff	RM: Resulting in certification	RD elections: Elections conducted: Total elections	RD: Withdrawn or dismissed before certification	RD: Resulting in a rerun or runoff	RD: Resulting in certification
All representation elections	2,826	71	54	2,701	2,356	67	46	2,243	39	2	0	37	431	2	8	421
Rerun required	--	--	52	--	--	--	44	--	--	--	0	--	--	--	8	--
Runoff required	--	--	2	--	--	--	2	--	--	--	0	--	--	--	0	--
Consent elections	60	2	0	58	60	2	0	58	0	0	0	0	0	0	0	0
Rerun required	--	--	0	--	--	--	0	--	--	--	--	--	--	--	--	--
Runoff required	--	--	0	--	--	--	0	--	--	--	--	--	--	--	--	--
Stipulated elections	2,321	42	38	2,241	1,912	41	31	1,840	30	0	0	30	379	1	7	371
Rerun required	--	--	36	--	--	--	29	--	--	--	0	--	--	--	7	--
Runoff required	--	--	2	--	--	--	2	--	--	--	0	--	--	--	0	--
Regional Director–directed	444	27	16	401	384	24	15	345	8	2	0	6	52	1	1	50
Rerun required	--	--	16	--	--	--	15	--	--	--	0	--	--	--	1	--
Runoff required	--	--	0	--	--	--	0	--	--	--	0	--	--	--	0	--
Board-directed	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rerun required	--	--	0	--	--	--	--	--	--	--	--	--	--	--	--	--
Runoff required	--	--	0	--	--	--	--	--	--	--	--	--	--	--	--	--
Expedited–Sec. 8(b)(7)(C)	1	0	0	1	0	0	0	0	1	0	0	1	0	0	0	0
Rerun required	--	--	0	--	--	--	--	--	--	--	0	--	--	--	--	--
Runoff required	--	--	0	--	--	--	--	--	--	--	0	--	--	--	--	--

[1] The total of representation elections resulting in certification excludes election held in UD cases which are included in the total in Table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed Fiscal Year 2004

Type of election/case	Total elections	Objections only		Challenges only		Objections and challenges		Total objections[1]		Total challenges[2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	2,832	136	4.8	27	1.0	8	0.3	144	5.1	35	1.2
By type of cases:											
In RC cases	2,362	116	4.9	25	1.1	6	0.3	122	5.2	31	1.3
In RM cases	39	1	2.6	0	0.0	1	2.6	2	5.1	1	2.6
In RD cases	431	19	4.4	2	0.5	1	0.2	20	4.6	3	0.7
By type of election:											
Consent elections	60	1	1.7	0	0.0	0	0.0	1	1.7	0	0.0
Stipulated elections	2,330	33	1.4	14	0.6	5	0.2	38	1.6	19	0.8
Expedited elections	1	1	100.0	0	0.0	0	0.0	1	100.0	0	0.0
Regional Director-directed elections	441	101	22.9	13	2.9	3	0.7	104	23.6	16	3.6
Board-directed elections	0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election.
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing Fiscal Year 2004[1]

Type of election/case	Total		By employer		By union		By both parties[2]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	242	100.0	91	37.6	148	61.2	3	1.2
By type of case:								
RC cases	208	100.0	82	39.4	123	59.1	3	1.4
RM cases	4	100.0	1	25.0	3	75.0	0	0.0
RD cases	30	100.0	8	26.7	22	73.3	0	0.0
By type of election:								
Consent elections	1	100.0	0	0.0	1	100.0	0	0.0
Stipulated elections	112	100.0	27	24.1	82	73.2	3	2.7
Expedited elections	1	100.0	0	0.0	1	100.0	0	0.0
Regional Director-directed elections	128	100.0	64	50.0	64	50.0	0	0.0
Board-directed elections	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Glossary of terms for definitions.
[2] Objections filed by more than one party in the same cases are counted as one.

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 2004[1]

Type of election/case	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	242	98	144	132	91.7	12	8.3
By type of case:							
RC cases	208	86	122	112	91.8	10	8.2
RM cases	4	2	2	2	100.0	0	0.0
RD cases	30	10	20	18	90.0	2	10.0
By type of election:							
Consent elections	1	0	1	0	0.0	1	100.0
Stipulated elections	112	74	38	30	78.9	8	21.1
Expedited elections	1	0	1	1	100.0	0	0.0
Regional Director-directed elections	128	24	104	101	97.1	3	2.9
Board-directed elections	0	0	0	0	0.0	0	0.0

[1] See Glossary of terms for definitions.

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 2004[1]

Type of election/case	Total rerun elections		Union certified		No Union chosen		Outcome of original election reversed	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	31	100.0	12	38.7	19	61.3	11	35.5
By type of case:								
RC cases	26	100.0	9	34.6	17	65.4	9	34.6
RM cases	0	0.0	0	0.0	0	0.0	0	0.0
RD cases	5	100.0	3	60.0	2	40.0	2	40.0
By type of election:								
Consent elections	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated elections	25	100.0	11	44.0	14	56.0	10	40.0
Expedited elections	0	0.0	0	0.0	0	0.0	0	0.0
Regional Director-directed elections	6	100.0	1	16.7	5	83.3	1	16.7
Board-directed elections	0	0.0	0	0.0	0	0.0	0	0.0

[1] Includes only final rerun elections, i.e., those resulting in certification. See Glossary of terms for definitions.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 2004[1]

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote)					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
							Resulting in deauthorization		Resulting in continued authorization					
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible
Total	67	30	44.8	37	55.2	6,353	2,687	42.3	3,666	57.7	4,559	71.8	2,035	32.0
AFL–CIO unions	59	25	42.4	34	57.6	5,309	1,955	36.8	3,354	63.2	3,899	73.4	1,525	28.7
Other national unions	3	2	66.7	1	33.3	307	239	77.9	68	22.1	208	67.8	163	53.1
Other local unions	5	3	60.0	2	40.0	737	493	66.9	244	33.1	452	61.3	347	47.1

[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 2004[1]—Page 1 of 3

Participating unions	Total elections[2]	Elections won by unions					Elections in which no representative chosen	Employees eligible to vote					In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Other national unions	Other local unions		Total	In elections won	In units won by			
										AFL–CIO unions	Other national unions	Other local unions	
A. All representation elections													
AFL–CIO	2,343	50.8	1,190	1,188	2	--	1,153	162,706	74,166	74,085	81	--	88,540
Other local unions	119	58.8	70	--	1	69	49	5,948	3,293	--	90	3,203	2,655
Other national unions	103	65.0	67	--	67	--	36	7,068	4,205	--	4,205	--	2,863
1-union elections	2,565	51.7	1,327	1,188	70	69	1,238	175,722	81,664	74,085	4,376	3,203	94,058
AFL–CIO v. AFL–CIO	80	71.3	57	57	--	--	23	6,265	4,447	4,447	--	--	1,818
AFL–CIO v. Local	25	96.0	24	12	--	12	1	2,437	2,381	1,525	--	856	56
AFL–CIO v. National	21	81.0	17	5	12	--	4	2,451	2,331	418	1,913	--	120
Local v. Local	6	100.0	6	--	--	6	0	887	887	--	--	887	0
National v. Local	5	100.0	5	--	3	2	0	1,933	1,933	--	1,834	99	0
National v. National	8	75.0	6	--	6	--	2	714	552	--	552	--	162
2-union elections	145	79.3	115	74	21	20	30	14,687	12,531	6,390	4,299	1,842	2,156
AFL–CIO v. AFL–CIO v. AFL–CIO	1	0.0	0	0	--	--	1	216	0	0	--	--	216
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO	2	0.0	0	0	--	--	2	946	0	0	--	--	946
AFL–CIO v. AFL–CIO v. National	2	50.0	1	0	1	--	1	79	56	0	56	--	23
AFL–CIO v. Local v. Local	2	100.0	2	1	--	1	0	220	220	110	--	110	0
Local v. Local v. Local	2	100.0	2	--	--	2	0	94	94	--	--	94	0
3 (or more)-union elections	9	55.6	5	1	1	3	4	1,555	370	110	56	204	1,185
Total representation elections	2,719	53.2	1,447	1,263	92	92	1,272	191,964	94,565	80,585	8,731	5,249	97,399

[1] See Glossary of terms for definitions.
[2] Includes each unit in which a choice regarding collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 2004[1]—Page 2 of 3

Participating unions	Total elections[2]	Elections won by unions					Elections in which no representative chosen	Employees eligible to vote					In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Other national unions	Other local unions		Total	In elections won	In units won by			
										AFL–CIO unions	Other national unions	Other local unions	
B. Elections in RC cases													
Other national unions	89	66.3	59	--	59	--	30	5,393	2,787	--	2,787	--	2,606
AFL–CIO	1,918	54.6	1,047	1,045	2	--	871	134,085	60,598	60,517	81	--	73,487
Other local unions	108	62.0	67	--	1	66	41	5,597	3,069	--	90	2,979	2,528
1-union elections	2,115	55.5	1,173	1,045	62	66	942	145,075	66,454	60,517	2,958	2,979	78,621
National v. Local	5	100.0	5	--	3	2	0	1,933	1,933	--	1,834	99	0
National v. National	8	75.0	6	--	6	--	2	714	552	--	552	--	162
Local v. Local	6	100.0	6	--	--	6	0	887	887	--	--	887	0
AFL–CIO v. National	20	85.0	17	5	12	--	3	2,445	2,331	418	1,913	--	114
AFL–CIO v. AFL–CIO	78	71.8	56	56	--	--	22	6,128	4,318	4,318	--	--	1,810
AFL–CIO v. Local	22	95.5	21	12	--	9	1	2,343	2,287	1,525	--	762	56
2-union elections	139	79.9	111	73	21	17	28	14,450	12,308	6,261	4,299	1,748	2,142
AFL–CIO v. AFL–CIO v. AFL–CIO	1	0.0	0	0	--	--	1	216	0	0	--	--	216
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO	1	0.0	0	0	--	--	1	939	0	0	--	--	939
AFL–CIO v. AFL–CIO v. National	2	50.0	1	0	1	--	1	79	56	0	56	--	23
AFL–CIO v. Local v. Local	2	100.0	2	1	--	1	0	220	220	110	--	110	0
Local v. Local v. Local	2	100.0	2	--	--	2	0	94	94	--	--	94	0
3 (or more)-union elections	8	62.5	5	1	1	3	3	1,548	370	110	56	204	1,178
Total RC elections	2,262	57.0	1,289	1,119	84	86	973	161,073	79,132	66,888	7,313	4,931	81,941

[1] See Glossary of terms for definitions.
[2] Includes each unit in which a choice regarding collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 2004[1]—Page 3 of 3

Participating unions	Total elections[2]	Elections won by unions					Elections in which no representative chosen	Employees eligible to vote					In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Other national unions	Other local unions		Total	In elections won	In units won by			
										AFL–CIO unions	Other national unions	Other local unions	
C. Elections in RM cases													
AFL–CIO	34	29.4	10	10	--	--	24	2,226	410	410	--	--	1,816
Other national unions	1	100.0	1	--	1	--	0	45	45	--	45	--	0
1-union elections	35	31.4	11	10	1	0	24	2,271	455	410	45	0	1,816
AFL–CIO v. AFL–CIO	1	100.0	1	1	--	--	0	129	129	129	--	--	0
AFL–CIO v. National	1	0.0	0	0	0	--	1	6	0	0	0	--	6
2-union elections	2	50.0	1	1	0	0	1	135	129	129	0	0	6
Total RM elections	37	32.4	12	11	1	0	25	2,406	584	539	45	0	1,822
D. Elections in RD cases													
Other national unions	13	53.8	7	--	7	--	6	1,630	1,373	--	1,373	--	257
Other local unions	11	27.3	3	--	--	3	8	351	224	--	--	224	127
AFL–CIO	391	34.0	133	133	--	--	258	26,395	13,158	13,158	--	--	13,237
1-union elections	415	34.5	143	133	7	3	272	28,376	14,755	13,158	1,373	224	13,621
AFL–CIO v. AFL–CIO	1	0.0	0	0	--	--	1	8	0	0	--	--	8
AFL–CIO v. Local	3	100.0	3	0	--	3	0	94	94	0	--	94	0
2-union elections	4	75.0	3	0	0	3	1	102	94	0	0	94	8
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO	1	0.0	0	0	--	--	1	7	0	0	--	--	7
3 (or more)-union elections	1	0.0	0	0	0	0	1	7	0	0	0	0	7
Total RD elections	420	34.8	146	133	7	6	274	28,485	14,849	13,158	1,373	318	13,636

[1] See Glossary of terms for definitions.
[2] Includes each unit in which a choice regarding collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 2004[1]—Page 1 of 3

Participating unions	Total valid votes cast	Valid votes cast in elections won					Valid votes cast in elections lost				
		Votes for unions				Total votes for no union	Votes for unions				Total votes for no union
		Total	AFL–CIO unions	Other national unions	Other local unions		Total	AFL–CIO unions	Other national unions	Other local unions	
A. All representation elections											
AFL–CIO	138,319	41,422	41,422	--	--	19,211	27,137	27,137	--	--	50,549
Other local unions	4,392	1,732	--	--	1,732	652	558	--	--	558	1,450
Other national unions	5,125	2,176	--	2,176	--	937	708	--	708	--	1,304
1-union elections	147,836	45,330	41,422	2,176	1,732	20,800	28,403	27,137	708	558	53,303
AFL–CIO v. AFL–CIO	4,750	2,968	2,968	--	--	273	597	597	--	--	912
AFL–CIO v. Local	1,908	1,750	1,027	--	723	113	12	8	--	4	33
AFL–CIO v. National	1,763	1,618	498	1,120	--	66	26	12	14	--	53
Local v. Local	472	469	--	--	469	3	0	--	--	0	0
National v. Local	1,014	936	--	701	235	78	0	--	0	0	0
National v. National	459	341	--	341	--	9	32	--	32	--	77
2-union elections	10,366	8,082	4,493	2,162	1,427	542	667	617	46	4	1,075
AFL–CIO v. AFL–CIO v. AFL–CIO	182	0	0	--	--	0	55	55	--	--	127
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO	1,811	0	0	--	--	0	1,388	1,388	--	--	423
AFL–CIO v. AFL–CIO v. National	73	38	7	31	--	15	20	20	0	--	0
AFL–CIO v. Local v. Local	143	142	52	--	90	1	0	0	--	0	0
Local v. Local v. Local	13	13	--	--	13	0	0	--	--	0	0
3 (or more)-union elections	2,222	193	59	31	103	16	1,463	1,463	0	0	550
Total representation elections	160,424	53,605	45,974	4,369	3,262	21,358	30,533	29,217	754	562	54,928
B. Elections in RC cases											
Other national unions	3,773	1,535	--	1,535	--	457	635	--	635	--	1,146
AFL–CIO	113,020	33,787	33,787	--	--	14,781	22,937	22,937	--	--	41,515
Other local unions	4,080	1,565	--	--	1,565	621	516	--	--	516	1,378
1-union elections	120,873	36,887	33,787	1,535	1,565	15,859	24,088	22,937	635	516	44,039
National v. Local	1,014	936	0	701	235	78	0	--	--	--	--
National v. National	459	341	--	341	--	9	32	--	32	--	77
Local v. Local	472	469	0	0	469	3	0	--	--	--	--

[1] See Glossary of terms for definition.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 2004[1]—Page 2 of 3

Participating unions	Total valid votes cast	Valid votes cast in elections won					Valid votes cast in elections lost				
		Votes for unions				Total votes for no union	Votes for unions				Total votes for no union
		Total	AFL–CIO unions	Other national unions	Other local unions		Total	AFL–CIO unions	Other national unions	Other local unions	
AFL–CIO v. National	1,757	1,618	498	1,120	--	66	20	12	8	--	53
AFL–CIO v. AFL–CIO	4,622	2,851	2,851	--	--	273	591	591	--	--	907
AFL–CIO v. Local	1,846	1,689	1,015	--	674	112	12	8	--	4	33
2-union elections	10,170	7,904	4,364	2,162	1,378	541	655	611	40	4	1,070
AFL–CIO v. AFL–CIO v. AFL–CIO	182	0	--	--	--	--	55	55	0	0	127
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO	1,805	0	--	--	--	--	1,388	1,388	0	0	417
AFL–CIO v. AFL–CIO v. National	73	38	7	31	--	15	20	20	0	--	0
AFL–CIO v. Local v. Local	143	142	52	0	90	1	0	--	--	--	--
Local v. Local v. Local	13	13	0	0	13	0	0	--	--	--	--
3 (or more)-union elections	2,216	193	59	31	103	16	1,463	1,463	0	0	544
Total RC elections	133,259	44,984	38,210	3,728	3,046	16,416	26,206	25,011	675	520	45,653
C. Elections in RM cases											
AFL–CIO	2,037	212	212	--	--	157	639	639	--	--	1,029
Other national unions	33	17	0	17	0	16	0	--	--	--	--
1-union elections	2,070	229	212	17	0	173	639	639	0	0	1,029
AFL–CIO v. AFL–CIO	117	117	117	0	0	0	0	--	--	--	--
AFL–CIO v. National	6	0	--	--	--	--	6	0	6	0	0
2-union elections	123	117	117	0	0	0	6	0	6	0	0
Total RM elections	2,193	346	329	17	0	173	645	639	6	0	1,029
D. Elections in RD cases											
Other national unions	1,319	624	--	624	--	464	73	--	73	--	158
Other local unions	312	167	--	--	167	31	42	--	--	42	72
AFL–CIO	23,262	7,423	7,423	--	--	4,273	3,561	3,561	--	--	8,005
1-union elections	24,893	8,214	7,423	624	167	4,768	3,676	3,561	73	42	8,235
AFL–CIO v. AFL–CIO	11	0	--	--	--	--	6	6	0	0	5
AFL–CIO v. Local	62	61	12	0	49	1	0	--	--	--	--

[1] See Glossary of terms for definition.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 2004[1]—Page 3 of 3

Participating unions	Total valid votes cast	Valid votes cast in elections won					Valid votes cast in elections lost				
		Votes for unions				Total votes for no union	Votes for unions				Total votes for no union
		Total	AFL–CIO unions	Other national unions	Other local unions		Total	AFL–CIO unions	Other national unions	Other local unions	
2-union elections..................................	73	61	12	0	49	1	6	6	0	0	5
AFL–CIO v. AFL–CIO v. AFL–CIO v. AFL–CIO...	6	0	--	--	--	--	0	0	0	0	6
3 (or more)-union elections..................	6	0	0	0	0	0	0	0	0	0	6
Total RD elections..............................	24,972	8,275	7,435	624	216	4,769	3,682	3,567	73	42	8,246

[1] See Glossary of terms for definition.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 1 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions: Total	AFL–CIO unions	Other national unions	Other local unions	Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions: Total	AFL–CIO unions	Other national unions	Other local unions	Total votes for no union	Eligible employees in units choosing representation
Illinois	199	116	104	8	4	83	11840	10,113	5,918	4,875	757	286	4,195	6403
Indiana	44	20	19	0	1	24	2468	2,249	1,045	1,031	0	14	1,204	864
Michigan	170	86	76	7	3	84	11935	9,772	5,292	4,256	814	222	4,480	6949
Ohio	129	64	59	4	1	65	7079	6,300	2,844	2,790	47	7	3,456	2443
Wisconsin	51	24	21	2	1	27	1749	1,609	808	665	89	54	801	1034
East North Central	593	310	279	21	10	283	35071	30,043	15,907	13,617	1,707	583	14,136	17693
Alabama	23	11	11	0	0	12	1819	1,669	797	797	0	0	872	669
Kentucky	37	12	12	0	0	25	5014	4,505	1,813	1,790	0	23	2,692	520
Mississippi	15	6	4	1	1	9	1245	1,108	405	305	23	77	703	391
Tennessee	28	11	11	0	0	17	2572	2,246	965	965	0	0	1,281	1001
East South Central	103	40	38	1	1	63	10650	9,528	3,980	3,857	23	100	5,548	2581
New Jersey	146	53	49	2	2	93	13510	11,122	5,302	4,974	99	229	5,820	4058
New York	294	177	139	15	23	117	24165	17,903	10,457	9,606	194	657	7,446	15256
Pennsylvania	193	91	78	9	4	102	11757	11,049	5,979	5,441	255	283	5,070	5714
Middle Atlantic	633	321	266	26	29	312	49432	40,074	21,738	20,021	548	1,169	18,336	25028
Arizona	31	19	16	2	1	12	1723	1,419	791	441	334	16	628	861
Colorado	36	18	18	0	0	18	1310	1,003	388	388	0	0	615	493
Idaho	8	6	6	0	0	2	73	68	43	43	0	0	25	59
Montana	11	7	7	0	0	4	301	254	141	141	0	0	113	231
Nevada	32	24	22	1	1	8	914	828	523	458	0	65	305	737
New Mexico	29	11	8	2	1	18	1389	1,219	527	471	47	9	692	462
Utah	8	3	3	0	0	5	495	432	185	185	0	0	247	48
Wyoming	5	4	4	0	0	1	335	305	147	147	0	0	158	186
Mountain	160	92	84	5	3	68	6540	5,528	2,745	2,274	381	90	2,783	3077
Connecticut	39	21	18	2	1	18	1842	1,536	853	705	131	17	683	916
Maine	5	1	0	1	0	4	163	142	62	53	9	0	80	16
Massachusetts	58	32	27	1	4	26	2755	2,539	1,263	1,196	24	43	1,276	1381

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 2 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
New Hampshire	3	1	1	0	0	2	113	101	48	48	0	0	53	39
Rhode Island	26	18	16	0	2	8	1666	1,516	747	709	0	38	769	619
Vermont	5	3	1	2	0	2	113	103	54	29	25	0	49	42
New England	136	76	63	6	7	60	6652	5,937	3,027	2,740	189	98	2,910	3013
Puerto Rico	42	25	15	4	6	17	2741	2,283	1,312	1,054	24	234	971	1628
Virgin Islands	3	1	1	0	0	2	228	90	70	70	0	0	20	202
Outlying Areas	45	26	16	4	6	19	2969	2,373	1,382	1,124	24	234	991	1830
Alaska	12	5	5	0	0	7	523	402	184	184	0	0	218	94
American Samoa	0	0	0	0	0	0	0	0	0	0	0	0	0	0
California	291	165	149	6	10	126	27731	22,234	12,207	10,683	741	783	10,027	17806
Federated States of Micronesia	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guam	1	1	1	0	0	0	21	15	12	12	0	0	3	21
Hawaii	26	9	4	4	1	17	1510	1,206	509	304	198	7	697	380
Marshall Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Northern Mariana Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oregon	46	21	19	0	2	25	1690	1,533	707	637	27	43	826	629
Palau	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Washington	79	51	48	3	0	28	4347	3,527	2,244	2,210	24	10	1,283	3163
Pacific	455	252	226	13	13	203	35822	28,917	15,863	14,030	990	843	13,054	22093
Delaware	10	4	4	0	0	6	883	747	366	366	0	0	381	590
District Of Columbia	21	18	6	6	6	3	1736	1,186	1,033	385	142	506	153	1538
Florida	86	55	47	6	2	31	6759	5,850	3,430	3,159	232	39	2,420	4267
Georgia	39	19	17	2	0	20	3697	3,097	1,430	1,343	87	0	1,667	1138
Maryland	52	30	24	2	4	22	3327	2,700	1,421	1,223	87	111	1,279	1851
North Carolina	20	14	13	0	1	6	1536	1,368	942	936	0	6	426	977

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 3 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
South Carolina	6	4	2	2	0	2	473	389	215	159	56	0	174	119
Virginia	33	23	17	1	5	10	1485	1,209	745	624	60	61	464	843
West Virginia	29	19	17	2	0	10	2413	2,161	1,285	1,274	0	11	876	1670
South Atlantic	296	186	147	21	18	110	22309	18,707	10,867	9,469	664	734	7,840	12993
Iowa	27	19	16	1	2	8	1524	1,328	765	742	0	23	563	1058
Kansas	13	4	3	1	0	9	1671	1,499	536	523	13	0	963	100
Minnesota	64	24	23	0	1	40	3227	2,948	1,346	1,337	0	9	1,602	940
Missouri	64	25	24	1	0	39	6144	5,379	2,133	1,843	276	14	3,246	650
Nebraska	9	6	5	1	0	3	754	678	401	388	13	0	277	652
North Dakota	4	2	2	0	0	2	257	233	118	115	3	0	115	176
South Dakota	3	1	1	0	0	2	380	347	81	81	0	0	266	28
West North Central	184	81	74	4	3	103	13957	12,412	5,380	5,029	305	46	7,032	3604
Arkansas	17	13	11	1	1	4	1544	1,442	678	626	42	10	764	411
Louisiana	36	20	19	1	0	16	2412	1,848	1,032	1,019	12	1	816	1080
Oklahoma	17	8	8	0	0	9	677	608	306	306	0	0	302	304
Texas	64	33	30	2	1	31	4923	4,478	2,088	1,861	208	19	2,390	2443
West South Central	134	74	68	4	2	60	9556	8,376	4,104	3,812	262	30	4,272	4238
Total, all States and areas	2,739	1,458	1,261	105	92	1,281	192958	161,895	84,993	75,973	5,093	3,927	76,902	96150

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Geographic Distribution of Collective-Bargaining Elections[1] Held in Cases Closed, Fiscal Year 2004—Page 1 of 3

Division and State[2]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Illinois	168	105	95	7	3	63	10244	8,673	5,100	4,238	662	200	3,573	5387
Indiana	34	17	16	0	1	17	1868	1,687	649	635	0	14	1,038	361
Michigan	141	69	59	7	3	72	8757	6,887	3,693	2,657	814	222	3,194	4672
Ohio	115	58	54	4	0	57	6628	5,916	2,583	2,536	47	0	3,333	2138
Wisconsin	33	21	19	1	1	12	1251	1,154	627	524	61	42	527	960
East North Central	491	270	243	19	8	221	28748	24,317	12,652	10,590	1,584	478	11,665	13518
Alabama	20	10	10	0	0	10	1382	1,265	546	546	0	0	719	319
Kentucky	28	11	11	0	0	17	4487	4,044	1,679	1,656	0	23	2,365	505
Mississippi	12	3	1	1	1	9	928	838	236	136	23	77	602	74
Tennessee	22	8	8	0	0	14	2373	2,059	862	862	0	0	1,197	867
East South Central	82	32	30	1	1	50	9170	8,206	3,323	3,200	23	100	4,883	1765
New Jersey	137	50	46	2	2	87	13132	10,788	5,123	4,796	99	228	5,665	3751
New York	273	169	131	15	23	104	23173	17,054	10,091	9,250	190	651	6,963	14891
Pennsylvania	162	84	72	8	4	78	9716	9,285	5,173	4,637	255	281	4,112	4526
Middle Atlantic	572	303	249	25	29	269	46021	37,127	20,387	18,683	544	1,160	16,740	23168
Arizona	25	15	14	1	0	10	1273	1,063	582	432	150	0	481	432
Colorado	27	13	13	0	0	14	676	528	239	239	0	0	289	297
Idaho	8	6	6	0	0	2	73	68	43	43	0	0	25	59
Montana	7	5	5	0	0	2	140	123	71	71	0	0	52	123
Nevada	25	21	20	1	0	4	604	549	345	345	0	0	204	458
New Mexico	25	10	7	2	1	15	1168	1,019	424	368	47	9	595	304
Utah	5	2	2	0	0	3	438	378	161	161	0	0	217	9
Wyoming	5	4	4	0	0	1	335	305	147	147	0	0	158	186
Mountain	127	76	71	4	1	51	4707	4,033	2,012	1,806	197	9	2,021	1868
Connecticut	35	18	15	2	1	17	1543	1,274	670	522	131	17	604	627
Maine	4	0	0	0	0	4	147	127	53	53	0	0	74	0

[1] Does not include decertification (RD) elections.
[2] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Geographic Distribution of Collective-Bargaining Elections[1] Held in Cases Closed, Fiscal Year 2004—Page 2 of 3

Division and State[2]	Total elections	Number of elections in which representation rights were won by unions: Total	AFL–CIO unions	Other national unions	Other local unions	Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions: Total	AFL–CIO unions	Other national unions	Other local unions	Total votes for no union	Eligible employees in units choosing representation
Massachusetts	48	27	22	1	4	21	2404	2,213	1,114	1,047	24	43	1,099	1198
New Hampshire	2	1	1	0	0	1	63	53	32	32	0	0	21	39
Rhode Island	22	16	14	0	2	6	1395	1,269	612	574	0	38	657	452
Vermont	4	3	1	2	0	1	99	91	54	29	25	0	37	42
New England	115	65	53	5	7	50	5651	5,027	2,535	2,257	180	98	2,492	2358
Puerto Rico	41	25	15	4	6	16	2725	2,268	1,308	1,054	24	230	960	1628
Virgin Islands	2	1	1	0	0	1	222	84	70	70	0	0	14	202
Outlying Areas	43	26	16	4	6	17	2947	2,352	1,378	1,124	24	230	974	1830
Alaska	9	4	4	0	0	5	323	295	138	138	0	0	157	58
American Samoa	0	0	0	0	0	0	0	0	0	0	0	0	0	0
California	241	148	134	5	9	93	21353	16,882	10,074	8,860	474	740	6,808	15747
Federated States of Micronesia	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guam	1	1	1	0	0	0	21	15	12	12	0	0	3	21
Hawaii	18	7	3	3	1	11	1095	858	374	193	174	7	484	273
Marshall Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Northern Mariana Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oregon	34	19	17	0	2	15	989	889	432	362	27	43	457	413
Palau	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Washington	62	47	44	3	0	15	3490	2,758	1,863	1,829	24	10	895	2825
Pacific	365	226	203	11	12	139	27271	21,697	12,893	11,394	699	800	8,804	19337
Delaware	6	2	2	0	0	4	158	145	59	59	0	0	86	75
District Of Columbia	21	18	6	6	6	3	1736	1,186	1,033	385	142	506	153	1538
Florida	75	51	43	6	2	24	6021	5,232	3,176	2,929	208	39	2,056	4065
Georgia	33	16	14	2	0	17	3426	2,845	1,295	1,208	87	0	1,550	918
Maryland	46	28	23	2	3	18	3105	2,503	1,323	1,141	87	95	1,180	1729

[1] Does not include decertification (RD) elections.
[2] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Geographic Distribution of Collective-Bargaining Elections[1] Held in Cases Closed, Fiscal Year 2004—Page 3 of 3

Division and State[2]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
North Carolina	18	14	13	0	1	4	1501	1,335	930	924	0	6	405	977
South Carolina	5	3	2	1	0	2	400	332	173	159	14	0	159	46
Virginia	30	22	16	1	5	8	1413	1,153	729	608	60	61	424	813
West Virginia	27	18	16	2	0	9	2345	2,095	1,258	1,247	0	11	837	1644
South Atlantic	261	172	135	20	17	89	20105	16,826	9,976	8,660	598	718	6,850	11805
Iowa	26	19	16	1	2	7	1519	1,323	765	742	0	23	558	1058
Kansas	11	4	3	1	0	7	1605	1,434	511	498	13	0	923	100
Minnesota	48	21	20	0	1	27	2614	2,409	1,143	1,134	0	9	1,266	829
Missouri	45	22	21	1	0	23	5231	4,533	1,808	1,518	276	14	2,725	483
Nebraska	9	6	5	1	0	3	754	678	401	388	13	0	277	652
North Dakota	4	2	2	0	0	2	257	233	118	115	3	0	115	176
South Dakota	2	0	0	0	0	2	352	321	65	65	0	0	256	0
West North Central	145	74	67	4	3	71	12332	10,931	4,811	4,460	305	46	6,120	3298
Arkansas	14	12	10	1	1	2	1181	1,097	529	477	42	10	568	301
Louisiana	30	18	17	1	0	12	2187	1,635	951	938	12	1	684	1032
Oklahoma	12	5	5	0	0	7	454	404	184	184	0	0	220	124
Texas	59	32	29	2	1	27	3520	3,194	1,405	1,198	188	19	1,789	1288
West South Central	115	67	61	4	2	48	7342	6,330	3,069	2,797	242	30	3,261	2745
Total, all States and areas	2,316	1,311	1,128	97	86	1,005	164294	136,846	73,036	64,971	4,396	3,669	63,810	81692

[1] Does not include decertification (RD) elections.
[2] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 2004—Page 1 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Illinois	31	11	9	1	1	20	1596	1,440	818	637	95	86	622	1016
Indiana	10	3	3	0	0	7	600	562	396	396	0	0	166	503
Michigan	29	17	17	0	0	12	3178	2,885	1,599	1,599	0	0	1,286	2277
Ohio	14	6	5	0	1	8	451	384	261	254	0	7	123	305
Wisconsin	18	3	2	1	0	15	498	455	181	141	28	12	274	74
East North Central	102	40	36	2	2	62	6323	5,726	3,255	3,027	123	105	2,471	4175
Alabama	3	1	1	0	0	2	437	404	251	251	0	0	153	350
Kentucky	9	1	1	0	0	8	527	461	134	134	0	0	327	15
Mississippi	3	3	3	0	0	0	317	270	169	169	0	0	101	317
Tennessee	6	3	3	0	0	3	199	187	103	103	0	0	84	134
East South Central	21	8	8	0	0	13	1480	1,322	657	657	0	0	665	816
New Jersey	9	3	3	0	0	6	378	334	179	178	0	1	155	307
New York	21	8	8	0	0	13	992	849	366	356	4	6	483	365
Pennsylvania	31	7	6	1	0	24	2041	1,764	806	804	0	2	958	1188
Middle Atlantic	61	18	17	1	0	43	3411	2,947	1,351	1,338	4	9	1,596	1860
Arizona	6	4	2	1	1	2	450	356	209	9	184	16	147	429
Colorado	9	5	5	0	0	4	634	475	149	149	0	0	326	196
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Montana	4	2	2	0	0	2	161	131	70	70	0	0	61	108
Nevada	7	3	2	0	1	4	310	279	178	113	0	65	101	279
New Mexico	4	1	1	0	0	3	221	200	103	103	0	0	97	158
Utah	3	1	1	0	0	2	57	54	24	24	0	0	30	39
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Mountain	33	16	13	1	2	17	1833	1,495	733	468	184	81	762	1209
Connecticut	4	3	3	0	0	1	299	262	183	183	0	0	79	289
Maine	1	1	0	1	0	0	16	15	9	0	9	0	6	16

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 2004—Page 2 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Massachusetts	10	5	5	0	0	5	351	326	149	149	0	0	177	183
New Hampshire	1	0	0	0	0	1	50	48	16	16	0	0	32	0
Rhode Island	4	2	2	0	0	2	271	247	135	135	0	0	112	167
Vermont	1	0	0	0	0	1	14	12	0	0	0	0	12	0
New England	21	11	10	1	0	10	1001	910	492	483	9	0	418	655
Puerto Rico	1	0	0	0	0	1	16	15	4	0	0	4	11	0
Virgin Islands	1	0	0	0	0	1	6	6	0	0	0	0	6	0
Outlying Areas	2	0	0	0	0	2	22	21	4	0	0	4	17	0
Alaska	3	1	1	0	0	2	200	107	46	46	0	0	61	36
American Samoa	0	0	0	0	0	0	0	0	0	0	0	0	0	0
California	50	17	15	1	1	33	6378	5,352	2,133	1,823	267	43	3,219	2059
Federated States of Micronesia	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Hawaii	8	2	1	1	0	6	415	348	135	111	24	0	213	107
Marshall Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Northern Mariana Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oregon	12	2	2	0	0	10	701	644	275	275	0	0	369	216
Palau	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Washington	17	4	4	0	0	13	857	769	381	381	0	0	388	338
Pacific	90	26	23	2	1	64	8551	7,220	2,970	2,636	291	43	4,250	2756
Delaware	4	2	2	0	0	2	725	602	307	307	0	0	295	515
District Of Columbia	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Florida	11	4	4	0	0	7	738	618	254	230	24	0	364	202
Georgia	6	3	3	0	0	3	271	252	135	135	0	0	117	220
Maryland	6	2	1	0	1	4	222	197	98	82	0	16	99	122

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 2004—Page 3 of 3

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
North Carolina	2	0	0	0	0	2	35	33	12	12	0	0	21	0
South Carolina	1	1	0	1	0	0	73	57	42	0	42	0	15	73
Virginia	3	1	1	0	0	2	72	56	16	16	0	0	40	30
West Virginia	2	1	1	0	0	1	68	66	27	27	0	0	39	26
South Atlantic	35	14	12	1	1	21	2204	1881	891	809	66	16	990	1188
Iowa	1	0	0	0	0	1	5	5	0	0	0	0	5	0
Kansas	2	0	0	0	0	2	66	65	25	25	0	0	40	0
Minnesota	16	3	3	0	0	13	613	539	203	203	0	0	336	111
Missouri	19	3	3	0	0	16	913	846	325	325	0	0	521	167
Nebraska	0	0	0	0	0	0	0	0	0	0	0	0	0	0
North Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota	1	1	1	0	0	0	28	26	16	16	0	0	10	28
West North Central	39	7	7	0	0	32	1625	1,481	569	569	0	0	912	306
Arkansas	3	1	1	0	0	2	363	345	149	149	0	0	196	110
Louisiana	6	2	2	0	0	4	225	213	81	81	0	0	132	48
Oklahoma	5	3	3	0	0	2	223	204	122	122	0	0	82	180
Texas	5	1	1	0	0	4	1403	1,284	683	663	20	0	601	1155
West South Central	19	7	7	0	0	12	2214	2,046	1,035	1,015	20	0	1,011	1493
Total, all States and areas	423	147	133	8	6	276	28664	25,049	11,957	11,002	697	258	13,092	14458

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 1 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Crop Production	5	4	4	0	0	1	248	221	115	115	0	0	106	148
Animal Production	7	2	2	0	0	5	3755	3,201	929	929	0	0	2,272	144
Support Activities for Agriculture and Forestry	1	1	1	0	0	0	7	7	7	7	0	0	0	7
Agriculture, Forestry, Fishing, and Hunting	13	7	7	0	0	6	4010	3,429	1,051	1,051	0	0	2,378	299
Oil and Gas Extraction	6	4	3	0	1	2	181	169	120	74	0	46	49	124
Mining (except Oil and Gas)	9	4	4	0	0	5	568	547	201	201	0	0	346	40
Support Activities for Mining	3	1	1	0	0	2	49	43	24	24	0	0	19	34
Mining	18	9	8	0	1	9	798	759	345	299	0	46	414	198
Utilities	65	37	35	1	1	28	3452	3,217	1,836	1,785	30	21	1,381	2113
Building, Developing and General Contracting	22	13	13	0	0	9	644	512	211	209	0	2	301	244
Heavy Construction	21	11	9	0	2	10	623	578	323	316	0	7	255	290
Special Trade Contractors	259	151	135	1	15	108	7703	5,624	3,468	3,171	12	285	2,156	4318
Construction	302	175	157	1	17	127	8970	6,714	4,002	3,696	12	294	2,712	4852
Food Manufacturing	95	38	34	3	1	57	10114	9,781	4,975	4,792	91	92	4,806	2987
Beverage and Tobacco Product Manufacturing	26	5	3	2	0	21	1009	908	311	237	74	0	597	109
Textile Mills	5	4	4	0	0	1	631	593	306	306	0	0	287	228
Textile Product Mills	4	1	1	0	0	3	227	218	97	97	0	0	121	8
Apparel Manufacturing	3	1	1	0	0	2	256	224	85	29	0	56	139	28
Leather and Allied Product Manufacturing	3	0	0	0	0	3	498	501	119	103	16	0	382	0
31-Manufacturing	136	49	43	5	1	87	12735	12,225	5,893	5,564	181	148	6,332	3360
Wood Product Manufacturing	19	8	7	1	0	11	1158	1,111	486	463	0	23	625	311

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 2 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Paper Manufacturing	19	12	12	0	0	7	1125	1,107	559	509	0	50	548	574
Printing and Related Support Activities	15	2	1	1	0	13	1240	1,118	349	321	28	0	769	47
Petroleum and Coal Products Manufacturing	12	7	6	0	1	5	399	389	230	152	38	40	159	163
Chemical Manufacturing	40	14	14	0	0	26	2598	2,428	1,125	1,124	0	1	1,303	1022
Plastics and Rubber Products Manufacturing	27	8	6	2	0	19	3888	3,447	1,712	1,268	400	44	1,735	1438
Nonmetallic Mineral Product Manufacturing	26	9	8	1	0	17	1004	926	459	456	3	0	467	494
32-Manufacturing	158	60	54	5	1	98	11412	10,526	4,920	4,293	469	158	5,606	4049
Primary Metal Manufacturing	30	15	15	0	0	15	1948	1,904	1,103	1,092	6	5	801	1012
Fabricated Metal Product Manufacturing	47	15	14	1	0	32	4307	3,980	1,574	1,506	61	7	2,406	959
Machinery Manufacturing	27	12	12	0	0	15	2253	2,155	905	905	0	0	1,250	459
Computer and Electronic Product Manufacturing	10	4	4	0	0	6	1797	1,635	720	703	0	17	915	161
Electrical Equipment, Appliance and Component Manufacturing	21	8	8	0	0	13	2965	2,733	1,209	1,142	67	0	1,524	946
Transportation Equipment Manufacturing	69	41	38	3	0	28	6778	6,209	3,222	2,886	336	0	2,987	3682
Furniture and Related Product Manufacturing	10	6	5	0	1	4	768	702	342	256	0	86	360	347
Miscellaneous Manufacturing	55	15	14	1	0	40	4453	4,106	1,757	1,609	35	113	2,349	1037
33-Manufacturing	269	116	110	5	1	153	25269	23,424	10,832	10,099	505	228	12,592	8603
Wholesale Trade, Durable Goods	46	20	19	1	0	26	1559	1,448	651	558	89	4	797	539
Wholesale Trade, Nondurable Goods	58	17	17	0	0	41	2927	2,561	1,457	1,364	7	86	1,104	1359
Wholesale Trade	104	37	36	1	0	67	4486	4,009	2,108	1,922	96	90	1,901	1898
Motor Vehicle and Parts Dealers	52	29	27	2	0	23	924	837	387	387	0	0	450	397

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 3 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Furniture and Home Furnishings Stores...	4	2	2	0	0	2	39	36	20	20	0	0	16	25
Electronics and Appliance Stores............	2	1	1	0	0	1	58	52	29	29	0	0	23	45
Building Material and Garden Equipment and Supplies Dealers................................	7	3	3	0	0	4	320	282	89	89	0	0	193	37
Food and Beverage Stores........................	59	30	28	1	1	29	1699	1,415	588	553	26	9	827	772
Health and Personal Care Stores..............	9	6	6	0	0	3	175	139	78	78	0	0	61	107
Gasoline Stations......................................	2	1	1	0	0	1	23	19	11	11	0	0	8	14
Clothing and Clothing Accessories Stores	5	1	1	0	0	4	402	356	146	146	0	0	210	6
44-Retail Trade..................................	140	73	69	3	1	67	3640	3,136	1,348	1,313	26	9	1,788	1403
Sporting Goods, Hobby, Book and Music Stores..	1	1	1	0	0	0	12	9	7	7	0	0	2	12
General Merchandise Stores....................	16	7	7	0	0	9	2305	2,018	975	975	0	0	1,043	1354
Miscellaneous Store Retailers..................	6	3	3	0	0	3	141	126	49	47	0	2	77	40
Nonstore Retailers....................................	3	1	1	0	0	2	73	68	22	22	0	0	46	6
45-Retail Trade..................................	26	12	12	0	0	14	2531	2,221	1,053	1,051	0	2	1,168	1412
Air Transportation....................................	1	1	1	0	0	0	21	15	12	12	0	0	3	21
Rail Transportation..................................	2	2	2	0	0	0	94	87	83	83	0	0	4	94
Water Transportation...............................	9	2	2	0	0	7	97	76	25	23	0	2	51	27
Truck Transportation................................	80	42	41	0	1	38	2605	2,193	1,123	1,120	0	3	1,070	1368
Transit and Ground Passenger Transportation..	82	39	36	0	3	43	7422	6,035	3,138	2,994	11	133	2,897	3457
Pipeline Transportation............................	3	1	1	0	0	2	87	71	42	42	0	0	29	39
Scenic and Sightseeing Transportation.....	1	0	0	0	0	1	145	128	45	45	0	0	83	0
Support Activities for Transportation.......	40	20	19	0	1	20	1373	1,211	703	671	3	29	508	977
48-Transportation................................	218	107	102	0	5	111	11844	9,816	5,171	4,990	14	167	4,645	5983

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 4 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Couriers and Messengers	18	12	12	0	0	6	784	600	349	336	13	0	251	534
Warehousing and Storage Facilities	65	27	25	0	2	38	4937	4,476	1,793	1,657	0	136	2,683	1345
49-Transportation	83	39	37	0	2	44	5721	5,076	2,142	1,993	13	136	2,934	1879
Publishing Industries	23	9	9	0	0	14	672	604	282	282	0	0	322	363
Motion Picture and Sound Recording Industries	2	1	1	0	0	1	39	36	15	15	0	0	21	3
Broadcasting and Telecommunications	74	28	27	0	1	46	4560	4,122	1,494	1,486	0	8	2,628	993
Information Services and Data Processing Services	6	4	4	0	0	2	150	138	57	53	0	4	81	42
Information	105	42	41	0	1	63	5421	4,900	1,848	1,836	0	12	3,052	1401
Monetary Authorities–Central Bank	2	1	1	0	0	1	97	80	37	37	0	0	43	48
Credit Intermediation and Related Activities	4	2	2	0	0	2	232	219	78	78	0	0	141	65
Securities, Commodity Contracts and Other Intermediation and Related Activities	2	2	0	2	0	0	63	55	54	0	54	0	1	63
Insurance Carriers and Related Activities	3	0	0	0	0	3	4944	3,886	2,113	2,113	0	0	1,773	964
Finance and Insurance	11	5	3	2	0	6	5336	4,240	2,282	2,228	54	0	1,958	1140
Real Estate	13	8	5	2	1	5	136	122	70	44	19	7	52	62
Rental and Leasing Services	26	10	10	0	0	16	803	730	367	367	0	0	363	252
Owners and Lessors of Other Non-Financial Assets	1	1	1	0	0	0	13	11	8	8	0	0	3	13
Real Estate and Rental and Leasing	40	19	16	2	1	21	952	863	445	419	19	7	418	327
Professional, Scientific and Technical Services	39	22	18	1	3	17	1369	1,195	573	463	11	99	622	450

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 5 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Management of Companies and Enterprises	7	5	3	1	1	2	379	334	184	127	21	36	150	229
Administrative and Support Services	169	114	47	44	23	55	10276	6,952	4,677	1,626	2,140	911	2,275	7591
Waste Management and Remediation Services	85	38	38	0	0	47	3860	3,504	1,678	1,649	19	10	1,826	1743
Administrative and Support, Waste Management and Remediation Services	254	152	85	44	23	102	14136	10,456	6,355	3,275	2,159	921	4,101	9334
Educational Services	54	46	36	2	8	8	5933	4,363	2,823	2,464	70	289	1,540	5508
Ambulatory Health Care Services	52	31	27	1	3	21	4282	3,687	2,386	2,175	78	133	1,301	2957
Hospitals	145	104	84	7	13	41	27767	21,948	12,403	10,997	563	843	9,545	18072
Nursing and Residential Care Facilities	190	120	114	5	1	70	16240	12,219	7,933	7,806	110	17	4,286	12069
Social Assistance	56	34	29	2	3	22	3890	3,058	1,739	1,514	58	167	1,319	2039
Health Care and Social Assistance	443	289	254	15	20	154	52179	40,912	24,461	22,492	809	1,160	16,451	35137
Performing Arts, Spectator Sports and Related Industries	9	5	5	0	0	4	395	312	86	86	0	0	226	110
Museums, Historical Sites and Similar Institutions	1	1	1	0	0	0	28	26	15	15	0	0	11	28
Amusement, Gambling and Recreation Industries	14	7	5	2	0	7	1150	989	461	461	0	0	528	475
Arts, Entertainment and Recreation	24	13	11	2	0	11	1573	1,327	562	562	0	0	765	613
Accommodation	33	19	18	0	1	14	1676	1,332	705	646	0	59	627	865
Foodservices and Drinking Places	26	18	16	2	0	8	1314	1,049	668	598	70	0	381	1003
Accommodation and Foodservices	59	37	34	2	1	22	2990	2,381	1,373	1,244	70	59	1,008	1868
Repair and Maintenance	33	18	18	0	0	15	1208	1,114	607	602	0	5	507	652

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 2004—Page 6 of 6

Industrial Group[1]	Total elections	Number of elections in which representation rights were won by unions				Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions				Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Other national unions	Other local unions				Total	AFL–CIO unions	Other national unions	Other local unions		
Personal and Laundry Services	36	21	19	1	1	15	1467	1,265	645	619	13	13	620	664
Religious, Grantmaking, Civic, and Professional and Similar Organizations	24	19	16	2	1	5	1390	1,298	619	596	18	5	679	575
Other Services (except Public Administration)	93	58	53	3	2	35	4065	3,677	1,871	1,817	31	23	1,806	1891
Justice, Public Order, and Safety	11	8	3	5	0	3	1043	750	502	116	386	0	248	779
Administration of Human Resource Programs	2	1	1	0	0	1	88	85	58	58	0	0	27	56
Administration of Environmental Quality Programs	1	1	1	0	0	0	50	43	28	28	0	0	15	50
Administration of Housing Programs, Urban Planning, and Community Development	3	1	1	0	0	2	171	156	87	87	0	0	69	73
Administration of Economic Programs	2	0	0	0	0	2	78	65	31	31	0	0	34	0
National Security and International Affairs	4	4	1	3	0	0	234	191	148	11	137	0	43	234
Public Administration	23	15	7	8	0	8	1664	1,290	854	331	523	0	436	1192
Unclassified Establishments	51	29	26	1	2	22	1672	1,481	753	721	10	22	728	639
Total, all industrial groups	2,735	1,453	1,257	104	92	1,282	192537	161,971	85,085	76,035	5,123	3,927	76,886	95778

[1] Source: Standard Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C.

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 2004[1]—Page 1 of 2

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumu-lative percent of total	Elections in which representation rights were won by						Elections in which no representative was chosen	
					AFL–CIO unions		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	A. Certification elections (RC and RM)											
Total RC and RM elections	161,711	2,283	100.0	--	1,098	100.0	106	100.0	85	100.0	994	100.0
Under 10	3,005	464	20.3	20.3	280	25.5	16	15.1	15	17.6	153	15.4
10 to 19	6,626	442	19.4	39.7	223	20.3	20	18.9	26	30.6	173	17.4
20 to 29	7,281	277	12.1	51.8	115	10.5	12	11.3	9	10.6	141	14.2
30 to 39	6,735	199	8.7	60.5	93	8.5	9	8.5	6	7.1	91	9.2
40 to 49	5,457	123	5.4	65.9	59	5.4	3	2.8	5	5.9	56	5.6
50 to 59	6,415	117	5.1	71.0	47	4.3	4	3.8	3	3.5	63	6.3
60 to 69	6,017	89	3.9	74.9	43	3.9	6	5.7	2	2.4	38	3.8
70 to 79	5,546	69	3.0	78.0	34	3.1	4	3.8	2	2.4	29	2.9
80 to 89	4,533	55	2.4	80.4	24	2.2	10	9.4	4	4.7	17	1.7
90 to 99	4,879	51	2.2	82.6	25	2.3	2	1.9	1	1.2	23	2.3
100 to 109	4,641	44	1.9	84.5	19	1.7	2	1.9	2	2.4	21	2.1
110 to 119	3,645	34	1.5	86.0	17	1.5	4	3.8	1	1.2	12	1.2
120 to 129	4,065	31	1.4	87.4	14	1.3	2	1.9	0	0.0	15	1.5
130 to 139	2,891	21	0.9	88.3	8	0.7	1	0.9	1	1.2	11	1.1
140 to 149	3,213	21	0.9	89.2	8	0.7	1	0.9	0	0.0	12	1.2
150 to 159	3,213	20	0.9	90.1	4	0.4	1	0.9	1	1.2	14	1.4
160 to 169	2,509	17	0.7	90.8	5	0.5	2	1.9	1	1.2	9	0.9
170 to 179	1,253	7	0.3	91.2	0	0.0	0	0.0	1	1.2	6	0.6
180 to 189	1,901	10	0.4	91.6	4	0.4	1	0.9	0	0.0	5	0.5
190 to 199	1,510	8	0.4	91.9	2	0.2	0	0.0	0	0.0	6	0.6
200 to 299	17,241	75	3.3	95.2	29	2.6	2	1.9	2	2.4	42	4.2
300 to 399	14,148	43	1.9	97.1	18	1.6	1	0.9	2	2.4	22	2.2
400 to 499	7,892	19	0.8	97.9	9	0.8	0	0.0	0	0.0	10	1.0
500 to 599	7,205	13	0.6	98.5	5	0.5	2	1.9	1	1.2	5	0.5
600 to 799	8,125	13	0.6	99.1	4	0.4	0	0.0	0	0.0	9	0.9
800 to 999	7,001	9	0.4	99.5	2	0.2	0	0.0	0	0.0	7	0.7
1,000 to 1,999	6,327	8	0.4	99.8	5	0.5	1	0.9	0	0.0	2	0.2

[1] See Glossary of terms for definition.

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 2004[1]—Page 2 of 2

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumu-lative percent of total	Elections in which representation rights were won by: AFL–CIO unions: Number	AFL–CIO unions: Percent by size class	Other national unions: Number	Other national unions: Percent by size class	Other local unions: Number	Other local unions: Percent by size class	Elections in which no representative was chosen: Number	Elections in which no representative was chosen: Percent by size class
2,000 to 2,999	8,437	4	0.2	100.0	2	0.2	0	0.0	0	0.0	2	0.2
3,000 to 9,999	0	0	0.0	100.0	0	0.0	0	0.0	0	0.0	0	0.0
Over 9,999	0	0	0.0	100.0	0	0.0	0	0.0	0	0.0	0	0.0
	B. Decertification elections (RD)											
Total RD elections	28,594	422	100.0	--	133	100.0	8	100.0	6	100.0	275	100.0
Under 10	428	73	17.3	17.3	9	6.8	0	0.0	0	0.0	64	23.3
10 to 19	1,163	84	19.9	37.2	15	11.3	1	12.5	1	16.7	67	24.4
20 to 29	1,514	61	14.5	51.7	15	11.3	0	0.0	2	33.3	44	16.0
30 to 39	807	26	6.2	57.8	9	6.8	0	0.0	0	0.0	17	6.2
40 to 49	1,121	25	5.9	63.7	9	6.8	0	0.0	0	0.0	16	5.8
50 to 59	1,408	28	6.6	70.4	12	9.0	1	12.5	1	16.7	14	5.1
60 to 69	1,144	18	4.3	74.6	7	5.3	2	25.0	0	0.0	9	3.3
70 to 79	944	12	2.8	77.5	4	3.0	0	0.0	0	0.0	8	2.9
80 to 89	1,068	13	3.1	80.6	8	6.0	0	0.0	0	0.0	5	1.8
90 to 99	675	7	1.7	82.2	2	1.5	0	0.0	2	33.3	3	1.1
100 to 109	467	5	1.2	83.4	3	2.3	0	0.0	0	0.0	2	0.7
110 to 119	1,209	11	2.6	86.0	6	4.5	1	12.5	0	0.0	4	1.5
120 to 129	1,207	9	2.1	88.2	4	3.0	1	12.5	0	0.0	4	1.5
130 to 139	521	4	0.9	89.1	2	1.5	0	0.0	0	0.0	2	0.7
140 to 149	698	5	1.2	90.3	4	3.0	0	0.0	0	0.0	1	0.4
150 to 159	880	6	1.4	91.7	4	3.0	0	0.0	0	0.0	2	0.7
160 to 169	514	3	0.7	92.4	1	0.8	0	0.0	0	0.0	2	0.7
170 to 199	716	4	0.9	93.4	2	1.5	0	0.0	0	0.0	2	0.7
200 to 299	3,340	14	3.3	96.7	8	6.0	0	0.0	0	0.0	6	2.2
300 to 499	2,942	8	1.9	98.6	6	4.5	1	12.5	0	0.0	1	0.4
500 to 799	2,188	4	0.9	99.5	2	1.5	1	12.5	0	0.0	1	0.4
800 and Over	3,640	2	0.5	100.0	1	0.8	0	0.0	0	0.0	1	0.4

[1] See Glossary of terms for definition.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 2004[1]

Size of establishment (number of employees)	Total number of situations	Total: Percent of all situations	Total: Cumulative percent of all situations	CA: Number of situations	CA: Percent by size class	CB: Number of situations	CB: Percent by size class	CC: Number of situations	CC: Percent by size class	CD: Number of situations	CD: Percent by size class	CE: Number of situations	CE: Percent by size class	CG: Number of situations	CG: Percent by size class	CP: Number of situations	CP: Percent by size class	CA-CB combinations: Number of situations	CA-CB combinations: Percent by size class	Other C combinations: Number of situations	Other C combinations: Percent by size class
Totals..........	25,000	100.0	--	18,264	100.0	5,656	100.0	330	100.0	127	100.0	25	100.0	24	100.0	85	100.0	434	100.0	55	100.0
Under 10...............	1,715	6.9	6.9	1,239	6.8	325	5.7	55	16.7	31	24.4	7	28.0	0	0.0	15	17.6	29	6.7	14	25.5
10-19....................	2,136	8.5	15.4	1,651	9.0	367	6.5	36	10.9	34	26.8	5	20.0	0	0.0	9	10.6	28	6.5	6	10.9
20-29....................	2,037	8.1	23.6	1,541	8.4	376	6.6	39	11.8	15	11.8	1	4.0	0	0.0	19	22.4	40	9.2	6	10.9
30-39....................	1,029	4.1	27.7	802	4.4	166	2.9	33	10.0	4	3.1	1	4.0	0	0.0	6	7.1	14	3.2	3	5.5
40-49....................	843	3.4	31.0	659	3.6	158	2.8	7	2.1	2	1.6	1	4.0	0	0.0	4	4.7	11	2.5	1	1.8
50-59....................	1,866	7.5	38.5	1,301	7.1	454	8.0	44	13.3	15	11.8	5	20.0	6	25.0	7	8.2	29	6.7	5	9.1
60-69....................	746	3.0	41.5	593	3.2	141	2.5	2	0.6	0	0.0	0	0.0	1	4.2	2	2.4	5	1.2	2	3.6
70-79....................	621	2.5	44.0	501	2.7	101	1.8	7	2.1	1	0.8	0	0.0	0	0.0	1	1.2	7	1.6	3	5.5
80-89....................	522	2.1	46.1	421	2.3	86	1.5	6	1.8	3	2.4	0	0.0	1	4.2	0	0.0	5	1.2	0	0.0
90-99....................	320	1.3	47.3	264	1.4	48	0.8	2	0.6	0	0.0	0	0.0	0	0.0	1	1.2	5	1.2	0	0.0
100-109...............	2,230	8.9	56.3	1,432	7.8	691	12.2	39	11.8	5	3.9	1	4.0	2	8.3	4	4.7	54	12.4	2	3.6
110-119...............	178	0.7	57.0	144	0.8	31	0.5	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	0.7	0	0.0
120-129...............	441	1.8	58.7	356	1.9	57	1.0	7	2.1	1	0.8	0	0.0	0	0.0	1	1.2	17	3.9	2	3.6
130-139...............	232	0.9	59.7	185	1.0	36	0.6	3	0.9	0	0.0	0	0.0	0	0.0	3	3.5	5	1.2	0	0.0
140-149...............	151	0.6	60.3	125	0.7	25	0.4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	1.8
150-159...............	621	2.5	62.8	430	2.4	155	2.7	12	3.6	5	3.9	0	0.0	3	12.5	1	1.2	12	2.8	3	5.5
160-169...............	178	0.7	63.5	151	0.8	25	0.4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.5	0	0.0
170-179...............	163	0.7	64.1	128	0.7	29	0.5	1	0.3	2	1.6	1	4.0	0	0.0	0	0.0	2	0.5	0	0.0
180-189...............	147	0.6	64.7	112	0.6	31	0.5	0	0.0	0	0.0	0	0.0	0	0.0	3	3.5	1	0.2	0	0.0
190-199...............	49	0.2	64.9	39	0.2	8	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.2	1	1.8
200-299...............	1,923	7.7	72.6	1,423	7.8	451	8.0	8	2.4	1	0.8	0	0.0	1	4.2	3	3.5	35	8.1	1	1.8
300-399...............	986	3.9	76.5	698	3.8	259	4.6	5	1.5	8	6.3	0	0.0	0	0.0	2	2.4	13	3.0	1	1.8
400-499...............	629	2.5	79.1	474	2.6	139	2.5	3	0.9	0	0.0	0	0.0	0	0.0	1	1.2	10	2.3	2	3.6
500-599...............	842	3.4	82.4	573	3.1	247	4.4	3	0.9	0	0.0	0	0.0	1	4.2	0	0.0	18	4.1	0	0.0
600-699...............	330	1.3	83.7	249	1.4	75	1.3	0	0.0	0	0.0	0	0.0	0	0.0	1	1.2	5	1.2	0	0.0
700-799...............	262	1.0	84.8	213	1.2	45	0.8	1	0.3	0	0.0	0	0.0	0	0.0	0	0.0	3	0.7	0	0.0
800-899...............	228	0.9	85.7	162	0.9	54	1.0	0	0.0	0	0.0	0	0.0	1	4.2	0	0.0	11	2.5	0	0.0
900-999...............	109	0.4	86.1	83	0.5	24	0.4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2	0.5	0	0.0
1,000-1,999..........	1,728	6.9	93.0	1,123	6.1	542	9.6	8	2.4	0	0.0	2	8.0	5	20.8	2	2.4	44	10.1	2	3.6
2,000-2,999..........	600	2.4	95.4	407	2.2	178	3.1	4	1.2	0	0.0	1	4.0	1	4.2	0	0.0	9	2.1	0	0.0
3,000-3,999..........	233	0.9	96.4	137	0.8	89	1.6	2	0.6	0	0.0	0	0.0	0	0.0	0	0.0	5	1.2	0	0.0
4,000-4,999..........	119	0.5	96.9	64	0.4	49	0.9	0	0.0	0	0.0	0	0.0	2	8.3	0	0.0	4	0.9	0	0.0
5,000-9,999..........	340	1.4	98.2	230	1.3	106	1.9	2	0.6	0	0.0	0	0.0	0	0.0	0	0.0	2	0.5	0	0.0
Over 9,999............	446	1.8	100.0	354	1.9	88	1.6	1	0.3	0	0.0	0	0.0	0	0.0	0	0.0	3	0.7	0	0.0

[1] See Glossary of terms for definitions.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 2004; and Cumulative Totals, Fiscal Years 1936 through 2004

	Fiscal Year 2004									July 5, 1936 Sept. 30, 2004	
	Number of proceedings[1]					Percentages					
	Total	vs. employers only	vs. unions only	vs. both employers and unions	Board dismissal[2]	vs. employers only	vs. unions only	vs. both employers and unions	Board dismissal[2]	Number	Percent
Proceedings decided by U.S. courts of appeals and other courts………..	74	66	6	0	2	89.2	8.1	--	2.7	--	--
On proceedings for review and/or enforcement………..………......	62	57	3	0	2	77.4	4.8	--	3.2	11,754	100.0
Board orders affirmed in full …………………………………...	46	42	2	0	2	91.3	4.3	--	4.3	7769	66.1
Board orders affirmed with modification ……………………….	3	3	0	0	0	100.0	--	--	--	1545	13.1
Remanded to the Board ………………………………………….	3	3	0	0	0	100.0	--	--	--	588	5.0
Board orders partially affirmed and partially remanded ………..	0	0	0	0	0	0.0	0.0	--	--	262	2.2
Board orders set aside …………………………………………..	10	9	1	0	0	90.0	10.0	--	--	1590	13.5
On petitions for contempt ……………………………………………	12	9	3	0	0	75.0	25.0	--	--	--	--
Ancillary proceedings in district courts and/or bankruptcy courts	29	28	1	0	0	96.6	3.4	--	--	--	--
Total Court Orders …………………………………………………..	40	36	4	0	0	90.0	10.0	--	--	--	--
Compliance after filing of petition, before court order …..…......	29	27	2	0	0	93.1	6.9	--	--	--	--
Court orders holding respondent in contempt ………………..…...	3	2	1	0	0	66.7	33.3	--	--	--	--
Court orders denying petition or discontinuing proceedings at CLCB request……………………………………………………	4	4	0	0	0	100.0	--	--	--	--	--
Court orders directing compliance without contempt adjudication …………..…………………………………………	4	3	1	0	0	75.0	25.0	--	--	--	--
Proceedings decided by U.S. Supreme Court[3] …………………………	0	0	0	0	0	--	--	--	--	259	100.0
Board orders affirmed in full ………………………..………...	0	0	0	0	0	--	--	--	--	155	59.8
Board orders affirmed with modification …………………………...	0	0	0	0	0	--	--	--	--	18	6.9
Board orders set aside …………………………………………....	0	0	0	0	0	--	--	--	--	46	17.8
Remanded to the Board …………………….…………………….	0	0	0	0	0	--	--	--	--	20	7.7
Remanded to court of appeals ……………………………...…….	0	0	0	0	0	--	--	--	--	17	6.6
Board's request for remand or modification of enforcement order denied ……….………………………...……………………..…	0	0	0	0	0	--	--	--	--	1	0.4
Contempt cases remanded to court of appeals ……………………...	0	0	0	0	0	--	--	--	--	1	0.4
Contempt cases enforced ……………………...…………………….	0	0	0	0	0	--	--	--	--	1	0.4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary of terms for definitions.
[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.
[3] The Board appeared as "amicus curiae" in 0 cases.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 2004, Compared With 5-Year Cumulative Totals, 1999 Through 2003[1]

Circuit courts of appeals (headquarters)	Total fiscal year 2004	Total fiscal years 1998-2003	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal Year 2004		Cumulative fiscal years 1999–2003		Fiscal Year 2004		Cumulative fiscal years 1999–2003		Fiscal Year 2004		Cumulative fiscal years 1999–2003		Fiscal Year 2004		Cumulative fiscal years 1999–2003		Fiscal Year 2004		Cumulative fiscal years 1999–2003	
			Num-ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num -ber	Per-cent	Num ber	Per-cent
Total all circuits	62	451	46	74.2	306	67.8	3	4.8	31	6.9	3	4.8	37	8.2	0	0.0	26	5.8	10	16.1	51	11.3
Boston, MA……..	1	12	1	100.0	8	66.7	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	8.3	0	0.0	3	25.0
New York, NY….	2	25	1	50.0	21	84.0	0	0.0	0	0.0	0	0.0	2	8.0	0	0.0	1	4.0	1	50.0	1	4.0
Philadelphia, PA..	4	30	2	50.0	25	83.3	0	0.0	3	10.0	1	25.0	0	0.0	0	0.0	1	3.3	1	25.3	1	3.3
Richmond, VA….	3	35	1	33.3	20	57.1	1	33.3	3	8.6	0	0.0	3	8.6	0	0.0	3	8.6	1	33.3	6	17.1
New Orleans, LA.	3	15	2	66.7	9	60.0	0	0.0	3	20.0	0	0.0	0	0.0	0	0.0	1	6.7	1	33.3	2	13.3
Cincinnati, OH…..	11	73	8	72.7	53	72.6	1	9.1	6	8.2	0	0.0	0	0.0	0	0.0	6	8.2	2	18.2	8	11.0
Chicago, IL……...	9	33	7	77.8	21	63.6	1	11.1	1	3.0	0	0.0	1	3.0	0	0.0	4	12.1	1	11.1	6	18.2
St. Louis, MO…...	5	22	4	80.0	16	72.7	0	0.0	2	9.1	1	20.0	1	4.5	0	0.0	1	4.5	0	0.0	2	9.1
San Francisco, CA	3	20	3	100.0	14	70.0	0	0.0	0	0.0	0	0.0	2	10.0	0	0.0	3	15.0	0	0.0	1	5.0
Denver, CO…..…	3	18	3	100.0	12	66.7	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	16.7	0	0.0	3	16.7
Atlanta, GA..……	2	25	2	100.0	20	80.0	0	0.0	0	0.0	0	0.0	1	4.0	0	0.0	0	0.0	0	0.0	4	16.0
Washington, DC...	16	143	12	75.0	87	60.8	0	0.0	13	9.1	1	6.3	27	18.9	0	0.0	2	1.4	3	18.8	14	9.8

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Sections 10(e), 10(j), and 10(l), Fiscal Year 2004

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions				
		Pending in appelate court Oct. 01, 2003	Filed in appellate court fiscal year 2004		Granted	Denied	Settled	Withdrawn	Pending
Under Sec. 10(e) total……………	3	0	3	3	3	0	0	0	0

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions				
		Pending in district court Oct. 01, 2003[1]	Filed in district court fiscal year 2004		Granted	Denied	Settled	Withdrawn	Pending
Under Sec. 10(j) total…………….	13	2	11	12	9	0	2	1	1
8(a)(1)………………………	0	0	1	1	1	0	0	0	0
8(a)(1)(2)(3)(5)……………..	0	0	2	2	2	0	0	0	0
8(a)(1)(3)(5)………………..	0	2	8	10	7	0	2	1	0
8(a)(1)(2)(3)(5), 8(b)(1)(A), 8(b)(2)………………………	0	0	1	1	1	0	0	0	0
Under Sec. 10(l) total…………….	7	1	6	7	3	2	3	0	0
8(b)4)(A)…………………...	0	0	2	2	0	1	2	0	0
8(b)(4)(B)…………………..	0	1	3	4	2	1	1	0	0
8(b)(7)(C)…………………..	0	0	1	1	1	0	0	0	0

[1] Totals for cases identified in this table as pending on October 1, 2003, differ from the FY 2003 Annual Report due to postreport adjustments to last year's "on docket" and/or "closed figures."

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 2004—Page 1 of 2

Type of Litigation	Number of Proceedings														
	Total—all courts			In courts of appeals			In district courts			In bankruptcy courts			In state courts		
		Court Determination			Court Determination			Court Determination			Court Determination			Court Determination	
	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position
Totals—all types	12	9	3	5	4	1	4	3	1	3	2	1	0	0	0
NLRB—initiated actions or interventions	2	2	0	1	1	0	1	1	0	0	0	0	0	0	0
Motion to file Board's late proof of claim	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
To stay district court § 301 action	1	1	0	0	0	0	1	1	0	0	0	0	0	0	0
To lift stay in subpoena enforcement action	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
To enjoin local ordinance as preempted	1	1	0	1	1	0	0	0	0	0	0	0	0	0	0
Action by other parties	10	7	3	4	3	1	3	2	1	3	2	1	0	0	0
To review:	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Prosecutorial discretion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nonfinal/representation orders	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
To restrain NLRB from:	2	2	0	0	0	0	1	1	0	1	1	0	0	0	0
Enforcing Board subpoenas	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in R case	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in unfair labor practice case	2	2	0	0	0	0	1	1	0	1	1	0	0	0	0
To compel NLRB to:	1	1	0	0	0	0	0	0	0	1	1	0	0	0	0
Issue complaint	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Take action in R case	1	1	0	0	0	0	0	0	0	1	1	0	0	0	0
Vacate election/decertify rep	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
To issue decision or take specific action	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 2004—Page 2 of 2

Type of Litigation	Number of Proceedings														
	Total—all courts			In courts of appeals			In district courts			In bankruptcy courts			In state courts		
		Court Determination			Court Determination			Court Determination			Court Determination			Court Determination	
	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position	Number decided	Upholding Board position	Contrary to Board position
Other	7	4	3	4	3	1	2	1	1	1	0	1	0	0	0
Motion to classify Board's claim	1	0	1	0	0	0	0	0	0	1	0	1	0	0	0
Intervention to argue collateral estoppal of prior Board decision	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Suit alleging fraudulent and corrupt conduct by Board agents	1	1	0	1	1	0	0	0	0	0	0	0	0	0	0
EAJA	4	2	2	3	2	1	1	0	1	0	0	0	0	0	0
Suit for violation of constitutional rights	1	1	0	0	0	0	1	1	0	0	0	0	0	0	0
Federal Tort Claims Act	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
State claims preempted by §§ 8(b)(4) & 303	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 2004[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State board
Pending October 1, 2003	0	0	0	0	0
Received fiscal 2004	0	0	0	0	0
On docket fiscal 2004	0	0	0	0	0
Closed fiscal 2004	0	0	0	0	0
Pending September 30, 2004	0	0	0	0	0

[1] See Glossary of terms for definitions.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 2004[1]

Action taken	Total cases closed
Total Cases	0
Board would assert jurisdiction	0
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	0
Withdrawn	0
Denied	0

[1] See Glossary of terms for definitions.

Table 23–Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 2004; and Age of Cases Pending Decision, September 30, 2004

Stage	Median days
I. Unfair Labor Practice Cases:	
A. Major Stages Completed—	
1. Filing of charge to issuance of complaint	87
2. Complaint to close of hearing	114
3. Close of hearing to administrative law judge's decision	78
4. Receipt of briefs or submissions to issuance of administrative law judge's decision	27
5. Administrative law judge's decision to issuance of Board decision	392
6. Originating document to Board decision	206
7. Assignment to Board decision	154
8. Filing of charge to issuance of Board decision	690
B. Age of cases pending administrative law judge's decision, September 30, 2004	
1. From filing of charge	332
2. From close of hearing	70
C. Age of cases pending Board decision, September 30, 2004	
1. From filing of charge	1159
2. From originating document	583
3. From assignment	521
II. Representation cases:	
A. Major stages completed—	
1. Filing of petition to notice of hearing issued	1
2. Notice of hearing to close of hearing	14
3. Close of hearing to Regional Director's decision issued	21
4. Close of pre-election hearing to Board's decision issued[1]	485
5. Close of post-election hearing to Board's decision issued	133
6. Filing of petition to—	
a. Board decision issued	304
b. Regional Director's decision issued	38
7. Originating document to Board decision	129
8. Assignment to Board's decision	94
B. Age of cases pending Board decision, September 30, 2004	
1. From filing of petition	576
2. From originating document	336
3. From assignment	426
C. Age of cases pending Regional Director's decision, September 30, 2004	135

[1] This median does not include cases in which the Board denied requests for review.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, FY 2004

	Action taken	Cases/ Amount
I.	Applications for fees and expenses filed with the Board under 5 U.S.C. § 504 during this fiscal year:	
	A. Number of applications filed:	5
	B. Decisions in EAJA cases ruled on by the Board during this fiscal year (includes ALJ awards adopted by the Board, and settlements):	
	Granting fees:	1
	Denying fees:	5
	C. Amount of fees and expenses in cases listed in B, above:	
	Claimed:	$355,204.05
	Recovered:	$ 35,000.00
II.	Petitions for Review of Board Orders denying fees under 5 U.S.C. § 504:	
	A. Awards granting fees (includes settlements):	0
	B. Awards denying fees:	0
	C. Amount of fees and expenses recovered pursuant to court award or settlement (includes fees recovered in cases in which court finds merit to claim but remands to Board for determination of fee amount):	0
III.	Applications for fees and expenses before Circuit Courts of Appeals under 28 U.S.C. § 2412:	
	A. Awards granting fees (includes settlements):	3
	B. Awards denying fees:	1
	C. Amount of fees and expenses recovered:	$140,631.22
IV.	Applications for fees and expenses before District Courts under 28 U.S.C. § 2412:	
	A. Awards granting fees (includes settlements):	1
	B. Awards denying fees:	0
	C. Amount of fees and expenses recovered:	$225,000.00