ABOUT THE WEEKLY SUMMARY

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

Weekly Summary of NLRB Cases

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October 15, 1999 W-2708

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

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King Broadcasting Co. d/b/a KGW-TV (36-RC-5583; 329 NLRB No. 39) Portland, OR Sept. 30, 1999. Chairman Truesdale and Members Fox and Liebman concluded, contrary to the Regional Director, that the associate producers and assignment editors employed by the Employer in the news department of its television station KGW-TV are not supervisors within the meaning of Section 2(11) of the Act because they do not exercise independent judgment in assigning or directing other employees in their performance of their duties. The majority relied on precedent finding similarly situated individuals in the broadcast industry were not Section 2(11) supervisors where they were part of an integrated production team in which their skills and responsibilities were joined in a collaborative effort with those of other news department employees in order to coordinate and develop a single product. See *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123 (1974); *Post-Newsweek Stations*, 203 NLRB 522 (1973); *Meredith Corp. v. NLRB*, 679 F.2d 1332, 1342 (10th Cir. 1982), enfg. 243 NLRB 323 (1979). [HTML] [PDF]

Members Hurtgen and Brame, dissenting in part, would find that the assignment editors are statutory supervisors based on their role in assigning work to employees and exclude them from the unit.

The American Federation of Television and Radio Artists seeks to represent producers, associate producers, assignment editors, and copy editors in the news department.

(Full Board participated.)

* * *

Plumbers Local 562 (14-CD-935, et al.; 329 NLRB No. 53) O'Fallon, MO Sept. 30, 1999. The Board decided that employees of Grossman Contracting Company and C & R Heating and Service Company represented by Plumbers Local 562 rather than employees represented by Sheet Metal Workers Local 36 are entitled to perform the work in dispute. [HTML] [PDF]

In Case 14-CD-935, the disputed work, at the MEMC facility in O'Fallen, Missouri, involves the installation of a piping containment system for separating piping and potential leaks of noxious fumes from the clean room; the attachment to installed duct work of clean rooms, of test ports for gauging temperature and humidity regulation compliance; and the installation of scrubbers to reactor systems for cleaning the air and contaminants produced by reactors. At the Automated Data Processing facility in Sunset Hills, Missouri, it involves installation of nonconducted cooling units in the mainframe computer room. And, at the Harrah's Casino project in Maryland Heights, Missouri, the installation of vertical stack fan coil units in the gambling complex hotel. Employees of Grossman represented by the Plumbers are entitled to perform this work.

In Case 14-CD-936, the work in dispute work awarded to Plumbers-represented employees of C & R Heating and Service Company involves the installation of a small, nonducted air-conditioning unit at the construction site of the Washington University School of Law in St. Louis, Missouri.

In Case 14-CD-937, the work in dispute awarded to Plumbers-represented of Grossman involves the installation of variable air volume boxes with attached hot water reheat booster coils in the gambling complex hotel and casino at the Harrah's Casino project in Maryland Heights, Missouri; and the installation of a metalbestos emergency exhaust flue at building #181 at the Anheuser-Busch project in St. Louis, Missouri.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

* * *

GTE Southwest Inc. (16-CA-17012; 329 NLRB No. 57) Irvine, TX Sept. 30, 1999. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply Communications Workers Local 6171 with requested relevant information concerning the structured interview test for the customer care advocate position. Contrary to the judge's recommended remedy, the Board ordered the Respondent to bargain with the Union concerning disclosure of the requested information, rather than to supply the information. The Respondent conceded that the requested information was relevant to the Union's grievance processing needs, but it asserted a confidentiality defense. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by Communications Workers Local 6171; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Fort Worth on Aug. 10, 1995. Adm. Law Judge Albert A. Metz issued his decision Oct. 23, 1995.

* * *

McGraw Hill Broadcasting Co., Inc., d/b/a KGTV (21-RC-19478; 329 NLRB No. 48) San Diego, CA Sept. 30, 1999. The Board found, contrary to the Regional Director, that the five producers/directors who are employed in the program operations department of the Employer's television station, KGTV, in San Diego, California, are not statutory supervisors. The case was remanded to the Regional Director for further appropriate action. Nabet Local 54 is the petitioning union. The Board found controlling precedent, as more fully discussed in *KGW-TV*, 329 NLRB No. 39 (1999), that has found that similarly situated individuals in the broadcast industry were not Section 2(11) supervisors where they were part of an integrated production team in which their skills and responsibilities were joined in a collaborative effort with those of other news department employees in order to coordinate and develop a single product. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Liebman participated.)

* * *

MGM Grand Hotel (28-RD-776, et al.; 329 NLRB No. 50) Las Vegas, NV Sept. 30, 1999. Chairman Truesdale and Members Fox and Liebman granted the Petitioner's request for review and, on review, affirmed the Regional Director's conclusion that a reasonable time to bargain had not elapsed at the time the decertification petitions were filed and the petitions should be dismissed as barred by the Employer's voluntary recognition of Culinary Workers Local 226 and Bartenders Local 165. Members Hurtgen and Brame wrote separate dissenting opinions. [HTML] [PDF]

(Full Board participated.)

* * *

Voca Corp. (9-CA-32133-2, 32278; 329 NLRB No. 60) OH, WV, NC, MD, DC Sept. 30, 1999. Members Fox and Liebman, with Member Brame dissenting, agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by the suggestion inherent in the exclusionary language of its corporate-wide bonus program (VOCA Incentive Plan (VIP)) that unrepresented employees will forfeit the plans' benefits if they chose union representation, by telling employees that their benefits would automatically be reduced because they transferred from a nonunion to a union-represented facility, and by impliedly promising benefits to Huntington, West Virginia bargaining unit employees if they continued to reject the Union (SEIU District 1199). [HTML] [PDF]

No exceptions were filed to the judge's findings, adopted by the Board, that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union over the payment of the bonus to the Huntington unit employees and failing to furnish requested information regarding the VIP plan. The Board reversed the judge's findings that the Respondent violated Section 8(a)(3) by changing its established rule excluding union-represented employees from participation in the VIP program and by

delaying the distribution of the VIP payment from August to October 1994.

(Members Fox, Liebman, and Brame participated.)

Charges filed by Service Employees International and its District 1199; complaint alleged violation of Section 8(a)(1), (3), and (5). Adm. Law Judge Judith A. Dowd issued her decision May 22, 1996.

* * *

VFL Technology Corp. (9-RC-16740, et al.; 329 NLRB No. 49) West Chester, PA Sept. 30, 1999. In a 4-1 decision, the Board found, contrary to the Acting Regional Director, that the Employer and the Steelworkers (USWA) have a collective-bargaining agreement that constitutes a 9(a) contract sufficient to bar the instant petitions filed by Operating Engineers Local 18 and Laborers Local 265. Although the majority found that the contract between the Employer and the USWA is a 9(a) agreement, the case was remanded to the Regional Director to reopen the record regarding the effectiveness of the alleged disclaimer of interest by the USWA in representing the Employer's employees, specifically as to whether the petitions are barred by the current contract. The majority (Chairman Truesdale and Members Fox, Liebman, and Hurtgen) wrote: [HTML] [PDF]

"We reject as inherently contradictory the view of the Regional Director and our dissenting colleague that even though the relationship between the Union and the Employer was converted from an 8(f) relationship to a 9(a) relationship by virtue of the Employer's voluntary recognition of the Union as the majority representative of its employees, the agreement somehow remained an 8(f) agreement and therefore may not bar an election."

In his dissent, Member Brame wrote: "I agree with the Acting Regional Director's finding that, assuming that the Employer is primarily engaged in the construction industry, the prehire contract entered into by the Employer and the United Steelworkers of America (USWA) was not transformed into a Section 9 contract simply by the Employer's later recognition of the USWA as its employees' majority representative. Thus, as a prehire contract cannot serve as a contract bar, I would find that, assuming the Employer is primarily engaged in the construction industry (an issue that my colleagues find unnecessary to resolve), the USWA's prehire contract with the Employer does not bar the Petitioners' election petitions."

(Full Board participated.)

* * *

Polaroid Corp. (1-CA-29966, et al.; 329 NLRB No. 47) Cambridge, MA Sept. 30, 1999. The Board upheld an administrative law judge's finding that the Respondent violated Section 8(a)(2) of the Act by establishing an employee participation committee that constituted a labor organization within the meaning of Section 2(5) and existed for the purpose of "dealing with" the Respondent concerning terms and conditions of employment. The majority opinion is by Chairman Truesdale and Member Liebman. Member Brame issued a concurring opinion and Member Hurtgen dissented. [HTML] [PDF]

The Respondent conceded that it dominated and supported the 30-member Employee-Owners' Influence Council (EOIC) and that the group addressed statutory conditions of work. However, the company maintained that EOIC was a unilateral mechanism limited to brainstorming or information-sharing as permitted in *E.I. du Pont & Co.*, 311 NLRB 893 (1993). It also contended that the EOIC did not represent other employees.

Rejecting those arguments, the Board found that the EOIC met the statutory definition of labor organization because it existed "for the purpose of *dealing with*" the Respondent concerning grievances, labor disputes, wages, rates or pay, hours of employment or conditions of work. The Board stated:

"[T]he record evidence establishes that the EOIC was not limited to a unilateral mechanism of brainstorming, information sharing, suggestion box, or survey of the employee population, by which the Respondent gained knowledge regarding its employees' preferences. Nor was the EOIC simply a mechanism by which the Respondent communicated information to its employees, or equipped selected employees to answer questions regarding existing policies or programs. The evidence establishes that the EOIC functioned, on an ongoing basis, as a bilateral mechanism in which that group of employees

effectively made proposals to management, and management responded to these proposals by acceptance or rejection by word or deed."

The majority opinion also found the evidence did not support the Respondent's contention that the EOIC presented only proposals of its individual members, rather than group proposals. It noted "the Respondent would often poll the group to determine majority sentiment on the particular issue under consideration."

In his concurring opinion, Member Brame noted that in determining whether an employer is "dealing with" a labor organization, "the statutory question is whether the organization engages in a bilateral process whereby over time the parties discuss issues relating to terms and conditions of employment and the employees propose resolutions to the questions or problems discussed to which the employer responds." He said he did not believe the Board's decision expanded established interpretations of Section 8 (a)(2).

In dissent, Member Hurtgen would find the EOIC was not a labor organization since it was designed to serve the employer's purpose of obtaining information and ideas upon which to make a management decision. He stated:

"In essence, a labor organization is designed to express employee concerns to management (through proposals). If the employer interferes with the independence of the entity, Section 8(a)(2) is violated. By contrast, an employer may create an entity designed to obtain information and ideas *for its own purpose*, i.e., to use as a factor in employer decision-making. The employer's control of this mechanism is consistent with the fact that the mechanism is designed to achieve an employer purpose."

(Chairman Truesdale and Members Liebman, Hurtgen, and Brame participated.)

Charges filed by Charla Scivally, an individual; complaint alleged violation of Section 8(a)(2). Hearing held at Boston, MA on June 19-23, 1995. Adm. Law Judge Marvin Roth issued his decision on June 14, 1996.

* * *

Sam Kiva, d/b/a Sam Kiva Management (2-CA-32052; 329 NLRB No. 40) Brooklyn, NY Sept. 30, 1999. The Board declined to grant the General Counsel's Motion for Summary Judgment against the Respondents for allegedly failing to file an answer to a complaint. Instead, noting the Respondent's pro se status, the Board found the Respondents' brief letter to the Region denying the refusal-to-bargain charge sufficiently responsive to the complaint to warrant a hearing on the merits. [HTML] [PDF]

(Members Liebman, Hurtgen, and Brame participated.)

Charge filed by Service Employees Local 32E; complaint alleged violation of Section 8(a)(1) and (5). General Counsel Filed motion for summary judgment June 21, 1999.

* * *

Centurion Auto Transport (12-RC-7744; 329 NLRB No. 42) Jacksonville, FL Sept. 30, 1999. The Board, holding a single-employer relationship exists among the four companies (Centurion, SED, Eagle, and ATC), directed an election be held among employees in a unit of drivers found appropriate. Included in the unit are SED drivers who own a majority of the company's class A shares of stock, but are not "powerful enough to effectively control policy of their employer," as the Board stated. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Liebman participated.)

* * *

Albertson's/Max Food Warehouse (27-UD-99; 329 NLRB No. 44) Denver, CO Sept. 30, 1999. Overruling City Markets, Inc., 266 NLRB 1020 (1983), the Board held that the National Labor Relations Act preempts the union-security deauthorization

procedures contained in Colorado's labor law. The state law places greater restraints on unit members' right to file a deauthorization petition than the NLRA by limiting such a filing to a 15-day window period. The majority opinion by Chairman Truesdale and Members Hurtgen and Brame stated: [HTML] [PDF]

"We think it is evident that through Section 14(b), Congress intended to authorize only those state laws that are more restrictive of union-security agreements than Federal law, and thus, Federal law will take precedence over any less restrictive state law."

In dissent, Members Fox and Liebman would affirm the Regional Director's dismissal of the deauthorization petition in this case for the reasons set forth in then Chairman Fanning's concurring opinion in *Asamera Oil (U.S.) Inc.*, 251 NLRB 684 (1980), adopted by the Board in *City Markets*. They do not believe Section 14(b) only authorizes the States to enact legislation which is in every single respect more restrictive of union security than the NLRA.

In reversing the Regional Director's dismissal of the petition, the Board remanded the case to the Regional Director for further processing.

(Full Board participated.)

* * *

Plumbers Local 562 (Charles E. Jarrell Contracting) (14-CD-938; 329 NLRB No. 54) St. Louis, MO Sept. 30, 1999. In this Section 10(k) proceeding, the Board concluded that employees represented by the Pipefitters Union are entitled to perform the work in dispute with the Sheet Metal Workers Union based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

* * *

Regal Recycling, Inc. (29-CA-16739; et al; 329 NLRB 38) Brooklyn, NY Sept. 30, 1999. Affirming an administrative law judge, the Board found the Respondent unlawfully interrogated and discharged seven employees in undocumented alien status for their support of the Union. The Respondent contended that it had lawfully laid them off until they could produce documentation proving their eligibility under the immigration laws to work in the U.S. The decision is by Chairman Truesdale and Member Liebman, with Member Brame concurring in part and dissenting in part. [HTML] [PDF]

The majority modified the judge's recommended backpay remedy to be in accord with *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 53 (an employer's obligation to reinstate allegedly undocumented workers should be conditioned on their satisfaction of requirements under the Immigration Reform and Control Act). Member Brame, dissenting on the backpay remedy and agreeing with then Member Cohen's dissent in *A.P.R.A.* on this point, maintained "the discriminatees are not entitled to backpay except for periods for which they can establish their eligibility to work legally in the United States."

Member Brame also objected to the majority's special remedy of providing employee names and addresses to the Union as an alternative to a Gissel bargaining order, given the passage of seven years since the violations and small size of the bargaining unit (fewer than 20 employees).

(Chairman Truesdale and Members Liebman and Brame participated.)

Charges filed by Teamsters Local 813; complaint alleged violation of Section 8(a)(3) and (1). Adm. Law Judge Steven Davis issued his decision May 17, 1994.

* * *

Zurn/N.E.P.C.O. (12-CA-15833 et al.; 329 NLRB No. 52) Tampa, FL Sept. 30, 1999. Agreeing with the administrative law judge, the Board dismissed a complaint that alleged the Respondent unlawfully had refused to hire or consider for hire a large

number of union members at three construction sites in Florida. [HTML] [PDF]

The Respondent's longstanding hiring policy gives preference to former employees and to employees referred by the Respondent's current managers, supervisors, and employees. The General Counsel argued that this policy was unlawful because it allegedly gave advantage to nonunion applicants and screened out applicants likely to favor unionization. However, the judge found and the Board agreed that the policy does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds. In fact, union members were hired at one of the sites.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Boilermakers International, Carpenters Local 140, Plumbers Local 624, and Lawrence Roberts, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tampa, 18-day trial starting Dec. 12, 1994 and ending May 10, 1995. Adm. Law Judge Richard J. Linton issued his decision Nov. 2, 1995.

* * *

Flying Dutchman Park, Inc. and Teamsters Local 665 (20-CA-26331, 26403, 20-CB-9671; 329 NLRB No. 46) San Francisco, CA Sept. 30, 1999. The Board held the Respondent unlawfully refused to sign a new written contract that it had orally agreed to with the Union. An administrative law judge concluded he could not require the Respondent to sign the agreement submitted by the Union because it contained an unlawful clause in its union-security provision. The judge found, in effect, that the one unlawful clause voided the entire contract and recommended that the complaint be dismissed. The decision is by Chairman Truesdale and Member Liebman. Member Fox concurred in part and dissented in part. [HTML] [PDF]

While the Board agreed the clause was unlawful on its face, it stated, citing *Tulsa Sheet Metal Works* and *Custom Sheet Metal & Service Co.*:

"The judge failed to consider in his analysis whether the Respondent's refusal to sign the contract was motivated by the presence of the unlawful clause in the contract or by other considerations. In cases where a contract contains an unlawful provision, but the employer's refusal to sign the contract is motivated by reasons other than the presence of the unlawful provision in the contract, the Board requires the employer to execute the contract with the unlawful provision deleted."

Because the contract does not provide for an exclusive hiring hall arrangement with the Union, the clause in question - which required employees "engaged outside of the Union office" to obtain a "referral from the Union before starting to work" - the Board concluded the clause was unlawful on its face. Member Fox dissented on this one issue, explaining:

"In my view, the reference to the requirements of obtaining a 'referral' from the Union does not, in context, mandate either that employees must be approved by the Union before they are hired or that they must join the Union before they can lawfully be required to under the 8(a)(3) proviso."

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Toby Kelly, an individual; complaint alleged violation of Section 8(a)(1), (2), (3) and (5) and Section 8(b)(1)(A) and (2). Hearing at San Francisco, July 27, 1995. Adm. Law Judge Jay R. Pollack issued his decision Nov. 9, 1995.

* * *

Elmhurst Extended Care Facilities (1-RC-20080; 329 NLRB No. 55) Providence, RI Sept. 30, 1999. Reversing the Regional Director's finding, Chairman Truesdale and Member Fox concluded that the Employer's charge nurses (CNs) are not statutory supervisors and accordingly remanded the case for further appropriate action. The majority found that the Employer's charge nurses are distinguishable from the LPNs who were found to be supervisors in *Bayou Manor Health Center*, 311 NLRB 955 (1993), relied on by the Regional Director. Here, the Employer failed to meet its burden of establishing that the charge nurses perform a supervisory function in evaluating employees, the majority concluded, answering what it termed the "essential question" (whether the nurses effectively recommend a reward or other personnel action concerning other employees). "Since

the answer to this question is that they do not, they are not statutory supervisors," it held. [HTML] [PDF]

Member Brame, dissenting, would adopt the Regional Director's finding that the CNs are statutory supervisors within the meaning of Section 2(11) based on their authority to evaluate the CNAs. He found the majority's purported grounds for distinguishing *Bayou Manor* are "wholly unpersuasive" because the evaluations prepared by the CNs in this case like those in *Bayou Manor*, "directly determine [] the amount of the merit increase [the CNAs] received . . ." Moreover, Member Brame added, the CNs also prepare probationary evaluations, which directly determine whether a probationary employee is terminated retained, or their probationary period is extended.

The New England Health Care Employees District 1199 is seeking to represent an overall unit of employees at the Employer's 189-bed nursing home, including the approximately 32 registered nurses (RNs) and licensed practical nurses (LPNs) employed as charge nurses.

(Chairman Truesdale and Members Fox and Brame participated.)

* * *

Sheridan Manor Nursing Home (3-CA-19083, et al.; 329 NLRB No. 51) Tonawanda, NY Sept. 30, 1999. Chairman Truesdale and Member Fox reversed the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by its January 6, 1995 memorandum that solicited employees to oppose the Union's announced ratification procedure for a collective-bargaining agreement; and violated Section 8(a)(5) and (1) by withdrawing recognition of Communications Workers Local 1168 as bargaining representative based on an antiunion petition tainted by its unlawful conduct. [HTML] [PDF]

The majority affirmed the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by refusing to execute the collective-bargaining agreement, finding that the parties never reached a mutual understanding to a material term (the agreement's effective date). However, because the Respondent's withdrawal of recognition occurred shortly after tentative agreement on all contractual terms other than an effective date, the majority ordered the Respondent, on request, to bargain with the Union concerning the unresolved subject. If an understanding is reached on the effective date of the tentative agreement ratified on January 12, 1995, following such bargaining, the Respondent shall execute the agreement.

Member Hurtgen, dissenting, found that the Respondent merely stated its 8(c) opinion as to how the ratification process should be conducted and, thus, the employee antiunion petition was not tainted by unlawful conduct. In light of these conclusions, he found it unnecessary to pass on whether the parties agreed that contract ratification was a condition precedent to reaching a binding agreement.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Communications Workers Local 1168; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo, July 24-31, 1995. Adm. Law Judge Howard Edelman issued his decision Dec. 7, 1995.

* * *

Transport Workers of America and its Local 525 (Johnson Controls World Services) (12-CB-3552, et al.; 329 NLRB No. 56) Cape Canaveral, FL Sept. 30, 1999. The Board agreed with the administrative law judge that Respondent Local 525 violated Section 8(b)(1)(A) and (2) of the Act by refusing to honor the objection filed by Mitchell Sohm upon his resignation from union membership, by thereafter refusing to provide Sohm a breakdown of representational and nonrepresentational expenses charged to him, and by failing to refund to Sohm the nonrepresentational portion of dues received and retained by the Respondents since receipt of his objection. Further, the Respondents violated Section 8(b)(1)(A) by maintaining and enforcing a Beck objection policy which prevents employees in the Johnson Controls collective-bargaining unit who have resigned from the Union from filing objections to the payment of fees for expenditures reflecting nonrepresentational activities for a reasonable time after their resignations. [HTML] [PDF]

The Board found, in agreement with the judge, that the Respondent International's practice of not allocating all expenses on a

unit-by-unit basis does not violate the Act, and that Local 525's practice of charging objectors for extra unit representational expenses is also not in and of itself unlawful. The Board also rejected the General Counsel's claim that, because certain expenditures enumerated in the parties' stipulation of facts were not directly attributable to the objectors' bargaining units, the Respondents violated the Act by treating those expenditures as chargeable to the objectors. These complaint allegations were dismissed.

The Board severed issues regarding the chargeability of certain expenses by the Respondent International to Beck objectors and remanded them to the judge for further proceedings, including, if necessary, a reopening of the hearing to adduce additional evidence, and for the issuance of a supplemental decision.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Luman J. Eggleston, Sr., Noah B. Butt, IV, Mitchell L. Sohm, and Charles N. Barrett, individuals; complaint alleged violation of Section 8(b)(1)(A) and (2). Adm. Law Judge Lawrence W. Cullen issued his decision June 3, 1994.

* * *

Sandusky Mall Company (8-CA-25097; 329 NLRB No. 62) Sandusky, OH Sept. 30, 1999. Chairman Truesdale and Members Fox and Liebman held that the Respondent violated Section 8(a)(1) of the Act by refusing to permit nonemployee representatives of Carpenters Northeast Ohio District Council to distribute "area standards" handbills in the Respondent's shopping mall while permitting access for other commercial, civic, and charitable purposes; and by summoning the police to have the representatives arrested. The majority acknowledged that the U.S. Court of Appeals for the Sixth Circuit, in which this case arises, has rejected the Board's interpretation of "discrimination" as used in *Babcock & Wilcox*, 316 NLRB 158 (1995), and that the Fourth and Seventh Circuits have expressed doubt as to that interpretation. The majority "respectfully" disagreed with the Sixth Circuit's conclusion and adhered to the view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation. [HTML] [PDF]

Member Hurtgen, dissenting, would find that the Respondent acted lawfully by prohibiting nonemployee union agents from engaging in "area standards" handbilling on its property and dismiss the complaint. He noted particularly that the union agents sought to persuade the public to boycott a mall tenant.

In a separate dissent, Member Brame concluded that the record does not establish that the Respondent's conduct in excluding the Union comes within the narrow "discrimination exception" to its right to exclude nonemployee solicitations from its property. He explained: "[T]he Respondent's rule which, in application affords access to charitable organizations and commercial ventures not in conflict with the interest of the mall and its tenants is not unlawful because it operates to exclude solicitation by organizations, such as the Union, whose avowed objective is to undermine one of the businesses in the mall. Moreover, there is no evidence that the Respondent's valid no-solicitation rule was not consistently applied."

The Sandusky Mall is an enclosed shopping center containing approximately 96 stores. A common area or concourse at the center of the mall provides access to the tenant stores, places to sit and rest, and space leased for additional "free standing" retail outlets, such as a mall information booth, a jewelry booth, and a watch kiosk. The union business agents handbilled at the entrance to the Attivo store, a mall tenant located in the east concourse. The handbills asked the general public not to patronize Attivo because "they are undermining construction wage and benefit standards in this area" by employing nonunion R.E. Crawford Construction to remodel its store.

(Full Board participated.)

Charge filed by Carpenters Northeast Ohio District Council; complaint alleged violation of Section 8(a)(1). Parties waived their right to a hearing before an administrative law judge.

* * *

TCI Cablevision of Washington (19-RD-3297; 329 NLRB No. 66) Seattle, WA Sept. 30, 1999. Members Hurtgen and Brame affirmed the hearing officer's recommendation to overrule the Union's Objection 3 alleging that the Employer impliedly made a promise to all its employees that they would receive a pay raise and a retirement plan if they voted the Union out, and certified that a majority of the valid ballots cast in the election held January 22, 1997 were not for Communications Workers Local 7855. Members Hurtgen and Brame found this case is analogous to *Viacom Cablevision*, 267 NLRB 1141 (1983), where in a decertification context, the employer compared the pay and benefits of employees in its nonunion locations with those received in its unionized locations. Here, as in *Viacom*, the employer informed the employees about a "historical fact," a benefit which its unrepresented employees received, the majority concluded. And, as in *Viacom*, the Employer advised the employees that it could not make any promises. Members Hurtgen and Brame found the cases cited by their dissenting colleague are inapposite to the facts here. [HTML] [PDF]

Member Fox, dissenting, would find merit in Objection 3, set aside the election, and direct a second election. She pointed out that "the gravamen of the Union's objection was not only that the Employer told employees that they would be covered by the 401(k) plan if the Union was decertified, but that it conveyed to the employees the message that it would not agree to allow them to be covered by the 401(k) plan *unless* they voted to decertify the Union. As the Union correctly argues, such conduct has long been held by the Board to be both unlawful and grounds for setting aside an election."

(Members Fox, Hurtgen, and Brame participated.)

* * *

Piqua Steel Co. (9-CA-32839; 329 NLRB No. 67) Piqua, OH Sept. 30, 1999. Chairman Truesdale and Member Brame found that the Respondent lawfully laid off Richard R. Hedke Jr. for lack of work and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge and discharging Richard R. Hedke, Jr. because of his protected concerted refusal to operate a Lima truck crane that he believed to be unsafe and because he believed that his action was authorized by the Respondent's collective-bargaining agreement with Operating Engineers Local 18. Member Fox dissented. [HTML] [PDF]

The administrative law judge found that the Respondent did not discharge Hedke, but rather unlawfully laid him off because of his protected refusal to operate the crane. Chairman Truesdale and Member Brame found, contrary to the judge, that the General Counsel failed to prove that the Respondent's decision to lay Hedke off was motivated by his refusal to operate the crane. They found, instead, that the Respondent laid Hedke off because it had no work for him at the time of the layoff, other than to operate the crane, which he refused to do. When the crane had been repaired, the Respondent promptly reinstated Hedke. Because they found that the layoff was lawful, Chairman Truesdale and Member Brame found it unnecessary to decide whether Hedke's refusal to operate the crane was protected by Section 7. They assumed, for the purposes of analysis only, that his conduct was protected.

In dissent, Member Fox found that the Respondent violated Section 8(a)(1) of the Act by failing to recall Hedke from layoff when work became available, thus effectively converting the layoff to a discharge.

(Chairman Truesdale and Members Fox and Brame participated.)

Charge filed by Operating Engineers Local 18; complaint alleged violation of Section 8(a)(1). Adm. Law Judge Stephen J. Gross issued his decision April 25, 1996.

* * *

Thoreson-McCosh, Inc. (7-UD-457; 329 NLRB No. 63) Troy, MI Sept. 30, 1999. Chairman Truesdale and Members Hurtgen and Brame decided to adhere to the Board's decision in *Wahl Clipper Corp.*, 195 NLRB 634 (1972), and to affirm the Regional Director's Decision on Challenged Ballots, Order, Revised Tally of Ballots and Certification of Results of Election. Members Fox and Liebman wrote separate dissents. [HTML] [PDF]

The tally of ballots for the election held November 13, 1996 shows that 5 were cast for and 4 against deauthorization, with

challenges to the ballots of 6 unreinstated former strikers, a sufficient number to affect the results of the election. The Regional Director found that, under *Wahl Clipper*, the six challenged former strikers were ineligible to vote because they are permanently replaced economic strikers who had not been reinstated by the October 27, 1996 eligibility date, preceding an election scheduled more than 12 months after commencement of the strike. In its request for review, the Union (Auto Workers and its Local 417) urged the Board to overrule the precedent of *Wahl Clipper*.

Chairman Truesdale and Members Hurtgen and Brame found the reasoning in *Wahl Clipper*, which the Board has applied consistently since 1972, remains "sound" and that neither the Union nor their dissenting colleagues have presented a "convincing" argument why they should abandon it. In *Wahl Clipper*, the Board construed Section 9(c) of the Act, as amended in 1959, to preclude permanently replaced former economic strikers from voting in an election held more than 12 months after the commencement of the economic strike. The Board noted that the legislative history of the provision showed that it was adopted as a compromise among various modifications proposed in both Houses of Congress, to replace the existing total prohibition against eligibility for replaced strikers. The Board concluded that the legislative history describing the final compromise reached on Section 9(c)(3) supported the view that the 12-month limitation period was established as a maximum period of voting eligibility for permanently replaced economic strikers.

Member Fox said that she agrees with the dissent in *Wahl Clipper* and her dissenting colleague here that Section 9(c)(3) does not preclude permanently replaced former economic strikers from voting in an election conducted more than 12 months after the commencement of the strike. She also agrees that eligibility of such former strikers to vote in an election should properly be determined on a case-by-case basis under the same test used to determine whether laid-off employees are eligible to vote, i.e., whether the employee has a reasonable expectancy of reemployment with the employer in the foreseeable future. Member Fox wrote separately "to point out the particular irrationality of extending the rationale of *Wahl Clipper* to the circumstances of this case and to note how this case illustrates the discriminatory treatment of former strikers under that decision."

Dissenting Member Liebman wrote: "The Board's decision in *Wahl Clipper* is contrary to the plain words of Section 9(c)(3) and in conflict with subsequent law regarding the reinstatement rights of permanently replaced former economic strikers. Yet today my colleagues in the majority refuse to abandon this precedent. Their action results in the continuing diminishment of the statutory right to strike--a right that Congress sought to protect in enacting the 1959 amendments. I dissent."

(Full Board participated.)

* * *

Ross Stores, Inc. (5-CA-23991; 329 NLRB No. 59) Carlisle, PA Sept. 30, 1999. Overruling *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990), a Board majority affirmed an administrative law judge's finding that a sufficient factual relationship exists between a timely-filed Section 8(a)(3) discharge allegation in the original charge and two untimely-filed 8(a)(1) allegations in an amended charge under the test of *Nickles Bakery* and *Redd-I* to survive a Section 10(b) challenge. [HTML] [PDF]

The majority position on this issue is by Chairman Truesdale and Members Fox and Liebman. The majority noted the D.C. Circuit's rejection of the Board's attempts in *Drug Plastics & Glass Co.* to distinguish *Nippondenso*:

"Based on the foregoing, we agree with the judge that the 8(a)(3) discharge allegation in the original charge and the 8(a)(1) allegations in the amended charge are closely related under the test of *Nickles Bakery* and *Redd-I*."

Members Hurtgen and Brame, in separate dissents, would find the 8(a)(1) allegations time-barred under 10(b). Member Hurtgen would dismiss the complaint in its entirety, while Member Brame concurred with the majority that the Respondent unlawfully discharged an employee based on his union activities.

Members Fox and Liebman, dissenting in part, disagreed with Chairman Truesdale and Members Hurtgen and Brame that the Respondent did not violate 8(a)(1) by threatening that the Respondent "would do anything in [its] power to keep the Union out of the building." Like the judge, they would find this statement violated 8(a)(1).

(Full Board participated.)

Charge filed by David L. Jumper, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Carlisle Feb. 7 and 8, 1994. Adm. Law Judge Michael O. Miller issued his decision April 5, 1995.

* * *

Plumbers Local 342 (Contra Costa Electric) (32-CB-4435; 329 NLRB No. 65) Oakland, CA Sept. 30, 1999. Reversing an administrative law judge, the Board held in a 4-1 opinion that "mere negligence in hiring hall operations, as in other contexts where the union is administering a contract provision, does not breach the duty of fair representation." The majority said it was following the Supreme Court's instruction in Air Line Pilots Assn. O'Neill that the same "arbitrary, discriminatory, or in bad faith" standard for finding a breach of the duty applies to all union activity. The decision is by Chairman Truesdale and Members Fox, Liebman, and Hurtgen. [HTML] [PDF]

The judge, relying on *Iron Workers Local 118 (California Erectors)*, had found that the Union's inadvertent failure to refer applicant Jacoby from its exclusive hiring hall violated Section 8(b)(1)(A) and (2) of the Act, even though no invidious or unfair considerations had been shown.

In dissent, Member Brame said nothing in *O'Neill* or another Supreme Court decision relied on by the majority, *Steelworkers v. Rawson*, "stands in the way of finding violations of both subsections of the Act based on the Union's conduct toward Jacoby." He continued: "These Supreme Court cases concern court suits alleging a breach of the duty of fair representation. They have no relevance at all to a legal theory that focuses on a violation of Section 8(b)(2) under *Radio Officers* and then derives a traditional 8(b)(1)(A) unfair labor practice from that predicate."

(Full Board participated.)

Charges filed by Joe Jacoby, an individual; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Oakland on Aug. 21, 1995. Adm. Law Judge Mary Miller Cracraft issued her decision on Dec. 5, 1995.

* * *

TNS, Inc. (10-CA-17707, 18785; 329 NLRB No. 61) Jonesboro, TN Sept. 30, 1999. In a case on remand from the D.C. Circuit, a Board majority of Members Fox and Liebman found a work stoppage at the Respondent was protected by Section 502 of the Act and that the Respondent was not entitled to hire permanent replacements for the employees who had walked off the job because of conditions that they reasonably believed were abnormally dangerous. Member Hurtgen dissented. The majority concluded: [HTML] [PDF]

"Accordingly, we find that the Respondent was without a legitimate business justification when it refused to reinstate the unit employees upon their unconditional offer to return to work and, thereby, violated Section 8(a)(3) and (1). In addition, by withdrawing recognition from and refusing to bargain with the Union based on the contention that the decertification petition signed by the replacement employees evidenced the Union's loss of majority support, the Respondent further violated Section 8 (a)(5) and (1)."

Members Fox and Liebman stated further:

"In sum, as a matter of statutory interpretation and Congressional policy, we hold that an employer cannot permanently replace employees engaged in a Section 502 work stoppage. The *Mackay* employer privilege, and its underlying rationale, apply only to the circumstances of a pure economic dispute. It would be particularly inappropriate to extend it to employers whose employees are forced to leave their workplace because of potentially life-threatening, abnormally dangerous working conditions, such as those which prompted the TNS employee work stoppage."

Section 502 states in pertinent part: "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." Applying this statutory provision in this case, the Board found in its initial decision, 309 NLRB 1348 (1992), by a 3-1 vote that

conditions at the Respondent's plant were not abnormally dangerous within the meaning of Section 502 when employees engaged in a work stoppage on May 1, 1981, and, accordingly, the Respondent did not violate Section 8(a)(3) and (1) by permanently replacing the employees.

In the prior decision, a two-member plurality (former Chairman Stephens and Member Oviatt) reversed the judge and dismissed the complaint, in pertinent part, on the grounds that the General Counsel had failed to prove that, at the time of the walkout, "the totality of available evidence supplied a sufficient basis for a reasonable good-faith belief that the employees' working conditions were 'abnormally dangerous' within the meaning of 502."

A third Member (Raudabaugh) concurred but relied on a sole-cause test for Section 502 subsequently rejected by the Court, which remanded the case to the Board for reconsideration. The court's instructions were "to articulate a majority-supported statement of the rule that [it] will be applying now and in the future . . . in determining the applicability of Section 502 in the context of occupational exposure to low-level radiation."

In the instant case, the Board majority held as follows:

[W]e adopt the following test to be applied in this and future cases involving cumulative, slow-acting dangers to employee health and safety. In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety. Applying this test, we find . . . that the General Counsel met the burden of proving that the Respondent's employees engaged in a Section 502 work stoppage. Further, we hold that employees who quit work under circumstances governed by Section 502 are not economic strikers and are not subject to permanent replacement. We therefore conclude that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the employees when they offered to return to work and violated Section 8(a)(5) by withdrawing recognition from the Union and refusing to bargain with it."

In dissent, Member Hurtgen would dismiss the complaint in its entirety. He stated:

"In sum, I find that an employer, whose employees have quit work because of abnormally dangerous working conditions within the meaning of Section 502, does not violate the Act by choosing to hire permanent replacements to continue business. It is clearly reasonable to permit the hiring of permanent replacements, in light of the foregoing review of Section 502's language, its legislative background, and relevant Board and judicial precedent. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) by permanently replacing and failing to reinstate employees who ceased work in protest of alleged abnormally dangerous working conditions. Consequently, I conclude that the Respondent also did not violate Section 8(a)(5) by withdrawing recognition from the Union based on the decertification petition signed by the replacement employees."

(Members Fox, Liebman and Hurtgen participated.)

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Kasa Associates d/b/a Oak Tree Mazda (Machinists Local 1101) San Jose, CA September 28, 1999. 32-CA-16835; JD(SF)-84-99, Judge Jay R. Pollack.

Elevator Constructors Local 19 (Hobson Elevator, Inc.) Pasco, WA September 28, 1999. 19-CB-8115; JD(SF)-82-99, Judge William L. Schmidt.

E.I. Dupont De Nemours & Co. Inc., d/b/a Dupont Automotive Paint Products (Auto Workers (UAW)) Mt. Clemens, MI October 1, 1999. 7-CA-40971(1)(2) and 7-CA-41340; JD-136-99, Judge Robert T. Wallace.

Anheuser-Busch, Incorporated (Teamsters Local 6) St. Louis, MO October 1, 1999. 14-CA-25299; JD-124-99, Judge Bruce D.

Rosenstein.

Code Electric Corporation (Electrical Workers (IBEW) Local 640) Tempe, AZ September 27, 1999. 28-CA-15266; JD(SF)-85-99, Judge Burton Litvak.

Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation (Ladies Garment Workers' International and its Local 99) 29-CA-14548, et al.; JD(NY)-69-99, Judge Michael A. Marcionese.

National Propane Partners (Teamsters Local 525) Moro, IL September 30, 1999. 14-CA-25471; JD-114-99, Judge John H. West.

Hudson Valley Electrical Construction & Maintenance, Inc. (Electrical Workers (IBEW) Local 363) Milton, NY October 5, 1999. 3-CA-21486 and 21878; JD-132-99, Judge Wallace H. Nations.

Ready Mix, Inc. (Teamsters Local 631) No. Las Vegas, NV September 27, 1999. 28-CA-14984; JD-(SF)-86-99, Judge Frederick C. Herzog.

Tomlinson Construction, Inc. (an Individual) Yuba City, CA September 28, 1999. 20-CA-28831; JD(SF)-87-99, Judge Clifford H. Anderson.

* * *

NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the respondent's failure to answer the complaints.)

Eagle Construction & Design, Inc. (4-CA-28281; 329 NLRB No. 45) Blue Bell, PA September 30, 1999.

Allied General Services (7-CA-41841; 329 NLRB No. 58) Detroit, MI September 30, 1999.