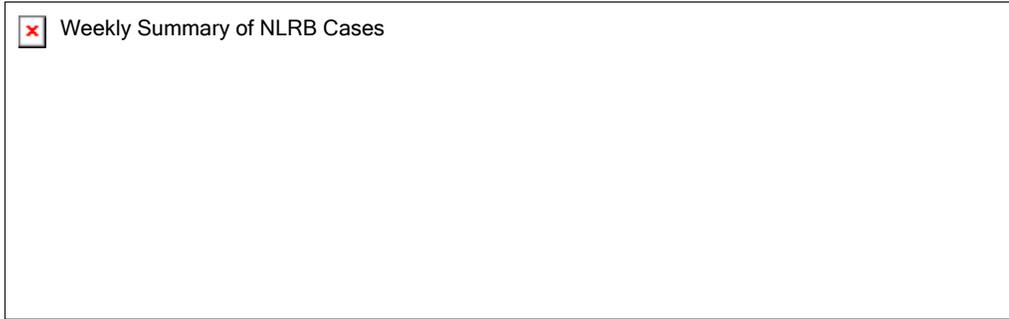


ABOUT THE WEEKLY SUMMARY

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.



[Index of Back Issues Online](#)

October 22, 1999

W-2709

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

[BE & K Construction Company](#), Birmingham, AL
[Food & Commercial Workers Locals 951, 1036 & 7 \(Meijer, Inc.\)](#), Grand Rapids, MI
[Royal Motors Sales](#), San Francisco, CA
[Scripps \(John P.\) Newspaper Corp. d/b/a The Sun](#), Bremerton, WA
[Service Employees Intl. and its Local 525](#), Washington, DC
[Woodbridge Foaming Fabricating](#), Chattanooga, TN

OTHER CONTENTS

[List of Decisions of Administrative Law Judges](#)

[List of No Answer to Complaint Cases](#)

[List of Order Denying Review Cases](#)

Press Release:

[\(R-2346\) Sharon B. Seymour is Named NLRB Director of Personnel](#)

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BE & K Construction Company (32-CA-9474, et al.; 329 NLRB No. 68) Birmingham, AL Sept. 30, 1999. Finding that there is

no genuine issue as to any material fact, the Board granted the General Counsel's motion for summary judgment, denied the Respondent's cross-motion for summary judgment, and found that the Respondent violated Section 8(a)(1) of the Act by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. Applying *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Board agreed with the General Counsel and the Unions that the Respondent's suit was unmeritorious and that it was filed in retaliation against the Unions' protected activities, i.e., the Unions' legislative lobbying, suit filing, and instituting grievance and arbitration proceedings. It also rejected the Respondent's contention that some of the complaint allegations are time barred. The Board ordered the Respondent to make the Unions whole by reimbursing them for the attorneys' fees they incurred in defending against the suit. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Plumbers Local 342, et al.; complaint alleged violation of Section 8(a)(1). General Counsel filed motion for summary judgment March 13, 1996.

* * *

John P. Scripps Newspaper Corp. d/b/a The Sun (19-UC-596; 329 NLRB No. 74) Bremerton, WA Sept. 30, 1999. The issue on review is whether the Employer newspaper's creative services department employees should be added to the existing unit of employees performing composing room work through the Union's (Communications Workers Local 14671) unit clarification petition (whether the nonunit employees to whom the work was transferred [the Creative Services employees] will remain outside the unit). [\[HTML\]](#) [\[PDF\]](#)

Chairman Truesdale and Members Fox and Liebman set forth a new test to be applied in unit clarification proceedings involving bargaining units defined by the work performed, relying on *Bay Shipbuilding, Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983), *United Technologies Corp.*, 287 NLRB 198, 204, 1987), enfd. 884 F.2d 1569 (2d Cir. 1989), and *Illinois-American Water Co.*, 296 NLRB 715 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991). Applying the new test to this case, the majority concluded that Creative Services employees should be added to the existing unit of employees performing composing room work and clarified the unit to include them. Members Hurtgen and Brame wrote separate dissents.

The majority wrote:

"We recognize, as our dissenting colleagues argue, that *Bay Shipbuilding*, *United Technologies*, and *Illinois-American*, unlike this case, were unfair labor practices cases involving the transfer of employees from the unit. While not dispositive of the issues presented here, these cases are nonetheless clearly analogous and provide useful guidelines for our analysis. Each of these cases involved functionally described units. The issue presented was whether the new jobs were sufficiently dissimilar from the jobs performed by unit employees to justify the employer's removal of the work from the unit. That is precisely the issue presented here. Although the Employer in this case has not removed people from the current unit, it has removed work by creating new job classifications that clearly involve the performance of unit work, just as in those unfair labor practice cases. Thus, the principles that guided the Board and the courts in those cases in deciding whether the new positions were unit positions are clearly relevant to resolving the analogous issue in this case. In fact, in *Bay Shipbuilding*, the court said 'Clarification of the unit through the unfair labor practice proceeding was . . . entirely appropriate.' *NLRB v. Bay Shipbuilding*, supra, 721 F.2d at 191. Thus, it is to the principles of these cases to which we turn to determine the appropriate standards to be applied in analogous representation proceedings.

Accordingly, we shall apply the following standard in unit clarification proceedings involving bargaining units defined by the work performed: If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate.

In determining whether the presumption has been rebutted, we will consider community-of-interest factors that relate to changes in the nature and structure of the work. As discussed above, however, a showing that technological innovation has

affected unit work will not suffice to exclude new classifications performing that work from the unit unless the work has changed to such an extent that the unit would no longer make sense if it included the disputed employees. Thus, the presumption will apply if the only significant differences in the work performed 'flow directly from the improved methodology and increased efficiency brought on by computer technology.' *United Technologies*, supra, 287 NLRB at 204.

Further, reliance on community-of-interest factors that are solely within the employer's control would usually not be appropriate to rebut the presumption. For example, reliance on differences in wage rates between existing unit employees and employees sought to be included would be misplaced. Wages of unit employees, of course, are subject to negotiations, which necessarily do not control wages of nonunit employees. Any resulting disparity should not provide a separate basis for continuing to exclude employees from the unit when those employees now perform work covered by the unit description. To permit reliance on factors that an employer can manipulate in an effort to exclude employees from the unit would be a 'patent form of circular reasoning.' [*Oxford Chemicals, Inc.*, 286 NLRB 187, 188 fn. 5 (1987). See also *Austin Cablevision*, 279 NLRB 535, 537 (1986).] We recognize that the burden we impose to show sufficient dissimilarity is a substantial one, but we believe it is both appropriate and necessary to protect the integrity of the bargaining unit the parties have agreed to."

Member Hurtgen, dissenting, would apply extant principles and not include these employees in the existing unit without their consent. He wrote: "In sum, extant law places a heavy burden on the party who wishes to add, without consent a new classification to an existing unit. By contrast, my colleagues place the substantial burden on the party who wishes to avoid the forced representation of these employees. And, my colleagues essentially eschew the 'community of interest' principles that have historically governed the resolution of unit issues. I would follow extant principles, and thereby respect the Section 7 rights of the employees."

In his dissent, Member Brame wrote: "Without analyzing the majority's laborious manipulation of the facts, more appropriate to the resolution of a jurisdictional dispute than a unit placement issue, the obvious point here is that of course, where, as here, nonunit employees are assigned work that in some respect falls within the bargaining unit description, there will be some similarity between certain of their functions and those of unit employees. Since this is a given, it should be the starting point of any unit placement analysis. By taking this given, the logical starting point of any analysis, and making it their analytical conclusion, my colleagues clarify only that their decision to include the creative services employees in the bargaining unit is outcome oriented and that it is driven neither by law nor logic, but only by the engine of their own presumption. Thus, . . . the majority's analysis of this unit placement must fail because it has no basis in logic, the law, or the facts.

Finally, if the application of the traditional accretion analysis, which the Regional Director correctly applied here, requires a finding that the creative services employees, or any other group of employees, should not be accreted into the bargaining unit, so be it. The result is not erroneous simply because it offends the majority, and it does not justify the majority's placement of a presumptive thumb on the scales of justice to ensure a contrary outcome."

(Full Board participated.)

* * *

Service Employees International and its Local 525 (5-CB-6558, et al., 5-CC-1118 (1,2), et al.; 329 NLRB No. 64) Washington, DC Sept. 30, 1999. The Board held that the Respondents violated Section 8(b)(1)(A), (i), and (ii)(B) of the Act by coercing employees in the exercise of their Section 7 rights and by enmeshing Washington Square Limited Partnership (WSLP), The Lenkin Company Management, Inc. (Lenkin), PMI, Monument Parking, the law firm of Arent, Fox, Kintner, Plotkin & Hahn (Arent, Fox), and other neutrals in their primary labor dispute with janitorial contractors Red Coats Co. and United Service States Service Industry (USSI). In agreement with the judge, the Board dismissed allegations that the Respondents violated the Act by attempting to impede a General Maintenance employee from crossing their picket line; by their October 25 (noontime), 26, and 29, 1990 rallies outside the Washington Square building; by organizer Kevin Brown's comments during their October 25 after-work rally; by their October 19 visit to Washington Square offices; by their November 2 demonstration outside 2301 M Street, N.W.; and by their November 6 distribution of flyers at Lenkin's Bethesda, Maryland headquarters. [\[HTML\]](#) [\[PDF\]](#)

The majority opinion is by Members Hurtgen and Brame. Member Hurtgen wrote a separate concurring opinion to note other

situations in which he might be willing to find that neutrality has been lost. Member Liebman, dissenting in part, would dismiss all allegations that the Respondents violated Section 8(b)(4) except for their picketing of the PMI and Monument parking garages. Member Brame, dissenting in part, found three additional incidents in which the Respondents' secondary activity was coercive.

The consolidated complaint allegations involve the SEIU's attempt to organize janitorial workers in Washington, D.C., as part of the Unions' nationwide campaign titled "Justice for Janitors." Some allegations stem from a brief strike led by the SEIU at a building serviced by janitorial employees of the General Maintenance Company. Others allege that the SEIU engaged in unlawful secondary activity when it picketed, handbilled, and demonstrated at buildings and homes owned and/or managed by the Charging Parties, and their principals, as part of a campaign to obtain recognition for janitors employed by primary employers Red Coats and USSI.

Members Hurtgen and Brame found that the Respondents' secondary conduct included their October 31 picketing of the PMI-managed garage in Washington Square; the November 1 "trashing" incidents at Washington Square (1130 and 1133 Connecticut Avenue, N.W.); demonstrating at the Aspen Hill Racquet Club on November; their November 15 conduct at the law offices of Arent, Fox; and the November 1, 14, and 16 demonstrations outside the homes of Albert and Ronald Abramson. They found no merit to either the Respondents' claims that Charging Parties Lenkin and WSLP (or their principals), or Arent, Fox, forfeited their neutrality by engaging in a joint venture with primary employers USSI or Red Coats--through the Apartment and Office Building Association (AOBA) or otherwise--to oppose unionization of the primaries' janitorial employees; or to their dissenting colleagues' view that the Charging Parties essentially became parties to the labor dispute and thus lost their neutrality to that dispute. Members Hurtgen and Brame found that Charging Parties WSLP and Lenkin are not "allies" of the primary employers Red Coats or USSI and that the Charging Parties do not substantially control the working conditions of the primaries' employees. Accordingly, they held that under extant law, the judge correctly found that the Charging Parties remain "neutrals."

Member Liebman agreed that the Charging Parties are neither "allies" nor a single employer with Red Coats or USSI, under traditional Board law. However, she would find that, by their choice to actively support and participate, through the AOBA, in the campaign to thwart the Unions' attempt to organize and represent the employees of Red Coats and USSI, the Charging Parties forfeited their "neutrality" in the labor dispute and the protection afforded by 8(b)(4) to neutral employers.

(Members Liebman, Hurtgen, and Brame participated.)

Charges filed by General Maintenance Service Co., Lerner Enterprises, Theodore Lerner, Mark Lerner, Albert Abramson and Gary Abramson, d/b/a Washington Square Limited Partnership, and The Lenkin Company Management; complaint alleged violation of Section 8(b)(1)(A), (i), and (ii). Hearing at Arlington on various dates in June, July, and Aug. 1991. Adm. Law Judge Arline Pacht issued her decision Nov. 6, 1992.

* * *

Royal Motors Sales (20-CA-22989, et al.; 329 NLRB No. 71) San Francisco, CA Sept. 30, 1999. The Board reversed an administrative law judge's determination that the Respondents, three auto dealers, had lawfully bargained to impasse prior to implementing final bargaining proposals during negotiations in 1989. Instead, it found the Respondents violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith and unilaterally implementing impermissibly broad merit wage proposals and by unlawfully locking out certain bargaining unit employees, among other unfair labor practices. The majority opinion is by Chairman Truesdale and Member Fox. Member Brame, dissenting in part, would adopt the judge's impasse findings. [\[HTML\]](#) [\[PDF\]](#)

The majority concluded:

"Applying that principles of *McClatchy II and III*, we find . . . that the wage proposals implemented by the Respondents were merit pay proposals and that they do not contain definable objective procedures and criteria for their application. Accordingly, we find that the proposals conferred impermissible broad employer discretion over wages and, thus, that the Respondents' unilateral implementation of the proposals violated Section 8(a)(5) and (1) of the Act."

In his dissent, Member Brame stated regarding the majority's analysis:

"First, they label any union statement which suggests a resolute and uncompromising opposition to flat-rate systems as 'posturing' while labeling the unions' last minute statements of professed interest in flat rate as 'genuine.' They engage in this one-sided labeling without sharing with the parties or reviewing court the magic formula by which they, reading from a cold record and in utter disregard for the judge's contrary findings, could discern these underlying motivations. Second, and contrary to all our rules, they cavalierly override the judge's credibility resolutions regarding the genuineness of the unions' last minute proffers."

(Chairman Truesdale and Members Fox and Brame participated.)

Charges filed by Teamsters Local 665; Machinists Local Lodge 1305 and District Lodge 190; and Auto, Marine and Specialty Painters Local 1176; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at San Francisco, 30 days between July 20, 1992 and February 11, 1993. Adm. Law Judge Michael D. Stevenson issued his decision December 30, 1993.

* * *

Food & Commercial Workers Locals 951, 1036 & 7 (Meijer, Inc.) (16-CB-3850, et al.; 329 NLRB No. 69) Grand Rapids, MI Sept. 30, 1999. Affirming an administrative law judge, the Board held in a 4-1 decision that the Union did not violate Section 8(b)(1)(A) of the Act by charging nonmember *Beck* objectors for organizing expenses. [\[HTML\]](#) [\[PDF\]](#)

The majority (Chairman Truesdale and Members Fox, Liebman and Hurtgen) observed that "organizing is both germane to a union's role as a collective-bargaining representative and can benefit all employees in a unit already represented by a union." It continued:

"Unions are able to negotiate higher wages for the employees they represent when the employees of employers in the same competitive market are organized, and unions are less able to do so when they are not organized. Thus, represented employees, whether or not they are members of the union that represents them, benefit, through the results of collective bargaining, from that union's organization of other employees and consequently, under *Beck*, may be charged their fair share of the union's organizing expenses."

The majority found that the Supreme Court's *Ellis* decision is distinguishable and not controlling under the NLRA. It stated:

"*Ellis* was an action by airline employees challenging fees charged by the union that represented their bargaining unit under the Railway Labor Act. As we held in *California Saw*, precedent under public sector labor law and the Railway Labor Act, although possibly providing useful guidance, is not binding in the context of the NLRA. In this instance, we find that *Ellis'* rationale in holding organizing expenses, nonchargeable is inapplicable to cases under the NLRA."

While dissenting Member Brame joined his colleagues in adopting the judge's findings that the Union had engaged in certain *Beck* violations, such as notifying newly hired employees that they were required to become union members as a condition of employment, he disagreed on the majority's principal finding that organizing expenses are chargeable to objecting nonmembers. He pointed out the Court held in *Ellis* that under Section 2, Eleventh of the Railway Labor Act organizing expenses are not chargeable to objectors, and the Court in *Beck* found that Section 8(a)(3) of the NLRA has the same meaning as Section 2, Eleventh of the RLA.

(Full Board participated.)

Adm. Law Judge William J. Pannier III issued his supplemental decision Jan. 31, 1997.

* * *

Woodbridge Foam Fabricating, Inc. (10-CA-27548, 10-RC-14487; 329 NLRB No. 72) Chattanooga, TN Sept. 30, 1999. In this proceeding, an administrative law judge found that the Respondent (1) had violated Section 8(a)(1) of the Act by

unlawfully soliciting grievances and promising to remedy them. Although he found a violation, he did not set aside the election, which the Union had lost. The judge also dismissed allegations that the Respondent had told employees that unionization would be an exercise in futility, and (2) had ascribed an alleged reduction in a pay increase to the employees' union activities. [\[HTML\]](#) [\[PDF\]](#)

A panel majority (Chairman Truesdale and Member Fox) agreed with the judge's finding of the 8(a)(1) violation on soliciting grievances. In a separate dissent, Member Brame would find the Respondent committed no unfair labor practices and would dismiss the complaint in its entirety. A different panel majority (Chairman Truesdale and Member Brame) agreed with the judge's dismissal of the two other 8(a)(1) allegations and his conclusion that the Respondent "did no more than explain the sometimes harsh economic realities of collective bargaining." That same panel majority agreed with the judge that the election should not be set aside. In a separate dissent, Member Fox would find violations of those allegations and set aside the election.

(Chairman Truesdale and Members Fox and Brame participated.)

Charge filed by Needletrades, Industrial and Textile Employees; complaint alleged violation of Section 8(a)(1). Adm. Law Judge Phillip P. McLeod issued his decision Nov. 14, 1995.

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Gulf Caribe Maritime, Inc. and Seafarers (Longshoremens' and Warehousemens, Union) Rendondo Beach, CA September 30, 1999. 31-CA-23820, 31-CA-23918 and 31-CB-10449; JD(SF) 89-99, Judge Frederick C. Herzog.

Signature Flight Support (an Individual) Orlando, FL October 6, 1999. 12-CA-19431; JD(ATL)-43-99, Judge Keltner W. Locke.

* * *

NO ANSWER TO COMPLAINT

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

Le Club, Inc. (2-CA-29433; 329 NLRB No. 70) New York, NY September 30, 1999.

* * *

ORDER DENYING REVIEW

(In the following case, the Board denied the request for review on the ground that no substantial issue warranting review was raised.)

United Foods, Inc., d/b/a Pictsweet Mushroom Farm (36-RC-5912; 329 NLRB No. 73) Salem, OR September 30, 1999.