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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March 31, 2000 W-2732

C A S E S S U M M A R I Z E D

SUMMARIES CONTAIN LINKS TO FULL TEXT

O T H E R C O N T E N T S

PCC Structurals, Inc., formerly named Precision Castparts Corp. (19-CA-24902, et al.; 330 NLRB No. 131) Portland and Clackamas, OR March 17, 2000. The Board agreed with the administrative law judge for the reasons stated by him and additional reasons set forth in its decision, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Patrick Maloney, notwithstanding the Respondent's assertion that it took action against Maloney to protect disabled employee Cheryl Green from alleged harassment and to comply with the Americans With Disabilities Act (ADA). Green suffers from progressive rheumatoid arthritis and was sometimes confined to a wheelchair. The Board also found that the Respondent violated Section 8(a)(1) by issuing three disciplinary warnings to Maloney and by its threat of adverse action when it warned employee Grant Doty not to associate with Maloney. [HTML] [PDF]

The Board said in finding that there is insufficient evidence to support the Respondent's contention that it believed Maloney "harassed" Green, at all, let alone believed he harassed her within the terms of the ADA:

"Like the judge, we find it implausible that [Kim] Schwanz or any other management official decided that a highly skilled, 13-year employee (whose work performance and technical abilities were never at issue) deserved to be discharged on the basis of Green's complaints and the evidence supporting them. We consequently find that the Respondent, in the face of the showing of unlawful discrimination made by the General Counsel has not borne its *Wright Line* burden of establishing that Maloney would have been suspended and discharged even if he had not engaged in conduct protected under the Act."

Member Hurtgen concluded that the Respondent would prevail if it had shown that it would have discharged Maloney based solely on a reasonable fear of a successful ADA lawsuit; that is, the Respondent need not show an actual ADA violation. He agreed that the Respondent has not met the requisite burden.

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Portland, May 26-29 and June 1-5, 1998. Adm. Law Judge Gerald A. Wacknov issued his decision Nov. 13, 1998.

* * *

Aneco, Inc. (12-CA-15738; 330 NLRB No. 152) Orlando, FL March 20, 2000. The Board granted the General Counsel's motion for partial summary judgment as to the allegations contained in the compliance specification's paragraphs 1, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, and 7, and those portions of paragraphs 10 and 11 related to the Respondent's general backpay obligation except insofar as the allegations relate to interim earnings. It also granted the General Counsel's motion as to the Respondent's amended answer to the compliance specification's paragraphs l, 2, except as to the closing date of the backpay period, paragraphs 4, 5, 6, 7, the "make-whole" portions of paragraphs 10 and 11, and the affirmative defense regarding Winton Cox's status as a "tester" insofar as it challenges his status as a bona fide applicant except as those allegations relate to interim earnings. [HTML] [PDF]

The Board remanded the proceeding to the Regional Director to schedule a hearing before an administrative law judge concerning the remaining allegations of the compliance specification. The decision and order in the underlying unfair labor practice proceeding is reported at 325 NLRB 400 (1998).

(Chairman Truesdale and Members Fox and Hurtgen participated.)

General Counsel filed motion for partial summary judgment October 25, 1999.

* * *

Alamo Rent-A-Car (20-RC-17501; 330 NLRB No. 147) San Francisco, CA March 17, 2000. The Board reversed the Acting Regional Director's decision and direction of an election in the petitioned-for unit of only two of the Employer's four San Francisco facilities, and made up of approximately 80 service agents, predelivery inspection employees/fleet control, shuttlers, ready line agents, and "PSRs," excluding parts and inventory clerk Cherry Ho. [HTML] [PDF]

The Employer, a national company engaged in the retail rental of automobiles, has four facilities in the San Francisco area: a maintenance facility located at Burlingame and three car rental facilities located at the San Francisco airport (SFO) and on Folsom and Bush Streets in downtown San Francisco.

The Board agreed with the Acting Regional Director's finding that a unit limited to the petitioned-for job classifications is appropriate. However, it found, contrary to the Acting Regional Director, that Ho should be included in the unit because she shares a community of interest with the unit employees and that a unit of employees that includes the petitioned-for classifications at the Burlingame and SFO facilities must also include employees in the same job classifications who work at the Folsom and Bush Street facilities. The Board wrote:

"The proposed unit does not conform to any administrative function or grouping of the Employer's operations. There is neither substantial employee interchange nor significant functional integration between the two facilities that is distinguishable from that which exists among all four of the San Francisco area facilities. Nor do the employees at the two facilities share common supervision apart from the employees at the other San Francisco facilities. Absent these significant factors, details such as the fact that employees share a common parking lot and were formerly housed at the same location fail to establish the appropriateness of the petitioned-for unit."

The Board expressed no opinion as to whether a single facility unit would be appropriate because the issue has not been litigated. Since the Petitioner (Teamsters Local 665) has not indicated whether it is willing to proceed to an election in a unit different from the one petitioned for, the Board directed the Union to advise the Regional Director whether it wishes to proceed in the unit found appropriate here.

(Chairman Truesdale and Members Fox and Brame participated.)

* * *

Flannery Motors, Inc. (7-CA-37280; 330 NLRB No. 149) Waterford, MI March 22, 2000. The Board ordered the Respondent to make whole the discriminatees by paying $69,114,65 to Bruce Carland and $96,533.50 to Scott McClellan. The Board recalculated the gross and net backpay due McClellan for the entire backpay period after granting the General Counsel's limited exception. The General Counsel submitted that the administrative law judge's supplemental decision incorrectly stated the gross and net backpay due McClellan for the fourth quarter of 1994 as $5,251.36 and that the parties jointly calculated and agreed that the correct amount is $3,080.62. There were no exceptions to the judge's backpay Order as it applies to Carland. The Board previously found that the Respondent unlawfully discharged Carland and McClellan in violation of Section 8(a)(3) and (1) of the Act. 321 NLRB 931 (1996), enf. 129 F.3d 1263 (6th Cir. 1997). [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Hearing at Detroit, Feb. 22-23 and April 12, 1999. Adm. Law Judge Richard H. Beddow Jr. issued his supplemental decision July 30, 1999.

* * *

Supershuttle of Orange County (21-RC-20060; 330 NLRB No. 138) Anaheim, CA March 23, 2000. Applying *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), and *Liberty Fabrics, Inc.*, 327 NLRB No. 13 (1998), Chairman Truesdale and Member Liebman dismissed the representation petition filed by rival union (Teamsters Local 952), finding that a negotiated initial collective-bargaining agreement between the Employer and Intervenor (Employees Action Representatives) served as a bar to the petition. The majority noted that the unfair labor practice charges filed by the Intervenor were based on conduct preceding the petition and that the bargaining agreement was intended by the parties to, and effectively did, resolve the outstanding Section 8(a)(5) and (1) charges. [HTML] [PDF]

Dissenting Member Hurtgen wrote: "My colleagues having made bad law by a prior reversal of precedent, now extend that bad law even further. The result is a further erosion of the fundamental right of employees to choose, reject, or change a bargaining representative."

In *Douglas-Randall*, the Board overruled precedent and returned to a policy of dismissing a decertification (or other) petition filed subsequent to alleged unfair labor practice conduct where the charges are resolved by a Board settlement agreement in which the employer agrees to recognize and bargain with the Union. The Board described only three situations where resolution of pending charges similar to those here would not result in dismissal of the petition: where the blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit.

Liberty Fabrics extended *Douglas-Randall*, which involved a Board settlement agreement approved by the Regional Director, to cases involving a private settlement agreement between the parties. There, the parties continued negotiations in the face of the outstanding unfair labor practice charges, reached a new collective-bargaining agreement, and included in that agreement a provision settling the unfair labor practices.

Chairman Truesdale and Member Liebman wrote in noting that none of the three situations described in *Douglas-Randall* has occurred here: "Instead, in this case, the Acting Regional Director has found, and the parties have confirmed, that they resolved all unfair labor practice allegations when they negotiated and agreed to their new collective-bargaining agreement. Thus, the reasoning and the holding of *Douglas-Randall* and *Liberty Fabrics* squarely apply, and the petition must be dismissed."

Member Hurtgen noted that the parties reached a contract, not a settlement of the unfair labor practice case and that the contract came after the RC petition. He wrote: "By treating a contract as a settlement, my colleagues have erected a contract bar to dismiss a petition filed before the contract. Further, the result reached by my colleagues can easily lead to collusion between an employer and an incumbent union to freeze out a rival union. That is, the incumbent union would file a charge, and the employer and incumbent union would then reach a contract. As if by magic, the rival petition would go away by dismissal."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

The Painting Co. (9-CA-33482, et al.; 330 NLRB No. 136) Plain City, OH March 23, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating painters Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt from its Franklin Furnace job because of their protected union activity. The Board found that the General Counsel established a compelling prima facie case that the employees were terminated because of their efforts to organize the Franklin Furnace job. It further found that the Respondent failed to rebut that case. Supervisor Courts testified that he terminated the employees on January 2, 1996 solely because other Respondent jobsites were shutting down, resulting in the availability for transfer to Franklin Furnace of many painters with more experience. At the hearing, the Respondent contended that the four employees were terminated because they were substandard employees not suited to Franklin Furnace work. [HTML] [PDF]

The Board found merit in the General Counsel's exception and held that the Respondent violated Section 8(a)(1) by threatening to discharge employees for wearing union T-shirts and amended the judge's proposed Order to include the additional 8(a)(1) violation.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charges filed by Tri-State Building & Construction Trades Council and Painters Local 1275; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge Stephen J. Gross issued his decision July 14, 1998.

* * *

United Parcel Service (17-CA-9015, 19729; 330 NLRB No. 146) Vinita, OK March 23, 2000. The Board upheld the administrative law judge's decision that the Respondent violated Section 8(a)(5) and (1) of the Act on two occasions when it refused to allow employees Dave Walker and Larry Sexton to assist Union Secretary-Treasurer Jerry Van Allen at "local hearings" in grievances concerning the discharge of employee Troy McCarty. The judge found that the Respondent failed to

show that Teamsters Local 516 clearly and unmistakably waived its right to select its representatives for grievance processing at the local hearing level. He noted that Articles 4 and 50 of the parties' contract/local supplement, speaks only to the initial level of grievance presentation and do not describe or place limits on the Union's right to seek additional assistance or input at higher levels of presentation. [HTML] [PDF]

The Board noted that the Act bestows on employees, unions, and employers the right to select representatives of their choice for collective bargaining and grievance adjustment and imposes a concomitant obligation to deal with each other's chosen representatives absent extraordinary circumstances.

Member Hurtgen agreed with the result, but only because the contract is silent as to which individuals can be designated to represent employees at the "local hearing" stage of the grievance procedure. He found that the contract therefore does not "cover" the dispute in question and that the "contract coverage" analysis cannot be used.

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Teamsters Local 516; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Tulsa on March 25, 1998. Adm. Law Judge James M. Kennedy issued his decision April 14, 1999.

* * *

Rankin & Rankin, Inc. (20-CA-27717; 330 NLRB No. 148) Roseville, CA March 24, 2000. Members Fox and Liebman affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs if they selected Teamsters Local 150 as their bargaining representative. Member Brame dissented. [HTML] [PDF]

On March 13, 1997, the Respondent held a group meeting for employees and supervisors to talk about the Union. Leonard Lewis, the Respondent's chief executive officer, told employees that if the Union demanded higher wages and the company disagreed, the Union could call a strike and the employees could be replaced by new employees who would be hired for less money. The remarks were made only 2 days after the Respondent's president, Cheryl Rankin, had approached employees in the lunchroom and coercively threatened them, including Chris Folkman, the leading union organizer. Folkman was unlawfully discharged prior to the March 13 meeting.

Members Fox and Liebman said in agreeing with the judge's finding that Lewis' remarks, given their context, were unlawful: "Since Rankin's earlier statement had clearly shown that the Respondent was predisposed to retaliate against union activity, and since Lewis made his remarks within hours of unlawfully discharging union supporter Folkman, we find ample basis for concluding that Lewis' statement about hiring workers for less money to replace employees who joined a union strike would, in the words of the Board in *Eagle Comtronics*, 263 NLRB 515, 515-516 (1982), 'be fairly understood as a threat of reprisal against employees.'"

Member Brame would dismiss the allegation involving Lewis' March 13 comments. He wrote: "The threat of plant closure on March 11 was communicated by a different speaker during a different conversation with a different audience on a different day. Further, Rankin's statement was predicated on the notion of unilateral employer action to shut down, while Lewis' remark presupposed continued operation and addressed the Respondent's lawful options in the event of union-initiated action." Member Brame also did not adopt the judge's implicit finding that Lewis' remarks about other union members with greater seniority who would "come in and work for us and we'd have to wait for other jobs," was outside the protection 8(d) of the Act.

(Members Fox, Liebman, and Brame participated.)

Charge filed Teamsters Local 150; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Sacramento, July 15-16, 1997. Adm. Law Judge Burton Litvack issued his decision April 17, 1998.

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The Edward S. Quirk Co. d/b/a Quirk Tire (1-CA-33249, 34383; 330 NLRB No. 137) Boston, MA March 20, 2000. A Board majority of Chairman Truesdale and Member Hurtgen affirmed the administrative law judge's conclusion that the Respondent lawfully implemented its health insurance proposal after the parties had reached a good-faith impasse in their contract negotiations. In dissent, Member Fox would have found a violation because "the Respondent, by unlawful conduct, laid the ground work for its unilateral implementation of the new health insurance plan even before any claim of bargaining deadlock had been made." [HTML] [PDF]

The majority stated, "[u]nlike our dissenting colleague, we do not presume that unremedied unfair labor practices preceding the employee vote must have precluded the possibility of a good-faith impasse in negotiations."

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Teamsters Local No. 25; complaint alleged violation of Section 8(a)(5) and (1). Hearing at Boston, Dec. 17-19, 1996. Adm. Law Judge C. Richard Miserendino issued his decision Jan. 29, 1998.

* * *

Westwood Health Care Center (18-CA-11703; 330 NLRB No. 141) Minneapolis, MN March 20, 2000. A Board majority of Chairman Truesdale and Member Fox affirmed the administrative law judge's finding that the Respondent did not unlawfully discharge licensed practical nurse (LPN) Pamela Davis and registered nurse (RN) Nancy Duerr for their union activities because they were supervisors at the time of their discharges. The General Counsel and the Charging Party had contended that even if Davis and Duerr were statutory supervisors at the time of their discharges in 1991, their discharges were nonetheless unlawful because the Respondent promoted them after it learned that they were engaging in union activity. [HTML] [PDF]

The Board also adopted the judge's findings of certain unlawful statements and solicitations of grievances but reversed the judge's dismissal of allegations that other violations of Section 8(a)(1) of the Act (principally interrogations about union sentiments) were committed against LPNs Joanne Plourde and Paula Brillo.

Dissenting Member Brame would find the Respondent's interrogations relating to Plourde and Brill not coercive and therefore not unlawful. He stated:

"In finding to the contrary, my colleagues, perhaps impelled by the Board's historical inclination to find all inquiries suspect, have created out of whole cloth a background of unlawful conduct and hostility, and then have relied on this context to find that the questionings at issue here were unlawful. By finding violations where no coercion exists, the majority has failed to protect the Respondent's right to freedom of speech."

The majority stated:

"[w]e cannot agree with our dissenting colleague that employees Plourde and Brill were merely the targets of questioning that was innocuous because it was done in a 'normal' tone and was not coupled with threats of reprisal. We also do not agree that the Respondent did not independently violate Section 8(a)(1) in the other ways discussed above. In so finding, we have not disregarded the Respondent's right to free speech, but rather have concluded that the incidents we have found unlawful went beyond persuasion or expression of opinion and amounted to coercive pressure on these two employees to reveal their thinking about the ongoing union activity and abandon any support they might have been inclined to give the Union."

(Chairman Truesdale and Members Fox and Brame participated.)

Charges filed by Professional & Technical Health Care Union, Local 113; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Minneapolis, Oct. 1-4, 1991. Adm. Law Judge George Christensen issued his decision Jan. 20, 1993.

* * *

Pepsi-Cola Bottling Co. of Fayetteville, Inc. (11-CA-14889, et al.; 330 NLRB No. 134) Fayetteville, NC March 20, 2000. In a

Supplemental Decision and Order, the Board affirmed the administrative law judge's findings that the Respondent engaged in a number of violations of the Act, including withholding a wage increase in January 1992; denying the increase to employee Romero; and making unilateral changes. In 1996, the Fourth Circuit remanded the Board's initial decision, 315 NLRB 882 (1994), directing the Board to develop the record regarding the nature of the withheld wage increase and to identify any employees similarly situated to Romero. [HTML] [PDF]

The Board noted that identifying individuals affected by the increase and the backpay due them is a function of the Board's compliance proceedings, which follow issuance or enforcement of its decisions. The Board agreed with the judge that the Respondent did not give notice of the unilateral changes.

The case arose with a variety of charges relating to the Respondent's actions before and after a unionization campaign in 1991. The union was certified on September 4, 1992.

(Chairman Truesdale and Members Fox and Brame participated.)

Hearing at Fayetteville on April 29 and May 12, 1998. Adm. Law Judge John H. West issued his supplemental decision Sept. 9, 1998.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Webco Industries, Inc. (Steelworkers) Sand Springs, OK March 20, 2000. 17-CA-20143; JD(ATL)-16-00, Judge Jane Vandeventer.

San Antonio Zoological Society (Food and Commercial Workers Local 308) San Antonio, TX March 20, 2000. 16-CA-20081; JD(ATL)-18-00, Judge William N. Cates.

Electric, Inc. and Cebcor Service Corporation (Electrical Workers IBEW Local 654) Royse City, TX March 20, 2000. 4-CA-24429; JD-39-00, Judge George Aleman.

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TEST OF CERTIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the grounds that the respondent has not raised any representation issues that are litigable in the unfair labor practice proceedings. These cases do not present any other issues.)

Holmes Regional Nursing Center (12-CA-20491; 330 NLRB No. 144) Melbourne, FL March 20, 2000.

Regional Home Care, Inc., d/b/a North Atlantic Medical Services (1-CA-37697; 330 NLRB No. 139) Leominster, MA March 20, 2000.

Randall Warehouse of Arizona, Inc. (28-CA-16040; 330 NLRB No. 135) Tucson, AZ March 20, 2000.

Eastern Natural Gas Company (8-CA-31257; 330 NLRB No. 143) Burghill, OH March 20, 2000.

* * *

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 file an answer the complaint.)

Kastin (Leader) Candy Co. (29-CA-23001, 23105; 330 NLRB No. 140) Brooklyn, NY March 20, 2000.