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

Index of Back Issues Online

April 14, 2000 W-2734

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

OTHER CONTENTS

Press Releases:

St. Vincent Health System (26-RC-8124; 330 NLRB No. 155) Little Rock, AR March 24, 2000. The Board agreed with the hearing officer that the election, lost by Office and Professional Employees International, must be set aside and a new election held because of threats to employees by the Nursing Director and the Director of the Coronary Care Unit. The Board declined to follow the hearing officer's suggestion to conduct the second election by mail ballot on the grounds that the parties' stipulated election agreement mandated a manual election, citing *T&L Leasing,* 318 NLRB 324, 326 (1995), for the premise that agreements cannot be set aside absent unusual circumstances that make them impossible to perform. The hearing officer urged the Board to direct a mail ballot election because the manual election involved 105 hours of voting over 3 days at 3 different sites at substantial expense to the Board and resulted in a 90% voter turnout instead of the typical 95%. Also, mail balloting would eliminate the allegations of improprieties that occurred during the manual election, such as list keeping, campaigning among voters in line, and misconduct by election observers, the hearing officer reasoned. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Brame participated.)

* * *

Capri Sun, Inc. (14-RC-11831; 330 NLRB No. 158) Granite City, IL March 31, 2000. The majority of Members Fox and Liebman affirmed the Acting Regional Director's determination that the maintenance leads are neither statutory supervisors nor managerial employees. Contrary to the Acting Regional Director and dissenting Member Hurtgen, the majority found the petitioned-for maintenance unit is an appropriate unit for bargaining because it has a community of interest sufficiently separate from the Employer's production employees to constitute a distinct, cohesive grouping of employees. Unlike production employees, community of interests factors among maintenance leads include a higher skill level, higher wages, some unique terms and conditions of employment such as having unscheduled lunch and breaks, and "on-call" requirements; and immunity from lay-off procedures. In addition, interchange among production and maintenance employees is insignificant and maintenance workers are separately supervised. (The Petitioner is the Unification Organizing Committee, United Auto Workers, Machinists International, and Steelworkers of America.) [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

* * *

Venture Industries, Inc. (7-CA-39190; 330 NLRB No. 159) Grand Blanc, MI March 31, 2000. The Board adopted the administrative law judge's finding that Manager Ken Winget's comment that he had been in a union shop and that paying union dues had been a waste of money did not violate Section 8(a)(1) of the Act. The Board agreed with the judge that molding supervisors Kellogg and McLaughlin-Smith are statutory supervisors, and that McLaughlin-Smith's interrogation of employee Williams, Ken Winget's threats of loss of promotional opportunities if the Union wins, and CEO Larry Winget's solicitation of grievances violated the Act. [HTML] [PDF]

Members Fox and Liebman agreed with the judge that Ken Winget's statement to employees that UAW means "You Ain't Working," was an unlawful threat of loss of jobs. Contrary to the judge, they found that the statement was also an unlawful threat of the futility of selecting the Union "given the nature of the statement and the context in which it was spoken." Member Brame, dissenting in part, stated that Winget's comment was "a play on the initials and would not by its plain meaning reasonably convey a threat" of adverse action against union supporters.

Contrary to the majority, Member Brame agreed with the judge that Ken Winget's comment that "as far as he was concerned the plant would never be a union shop" was not a threat. According to Member Brame, the majority's finding that such a "vague" comment implied harm to union supporters' interests "is based on sheer speculation," because the comment was an expression of Winget's personal experience with a unionized workplace and was made in the context of predicting which side would win the election. Members Liebman and Brame adopted the judge's dismissal of allegations that Larry Winget's and Supervisor Kellogg's comments that the election would be tied up in court for years were threats of the futility of selecting the Union.

Members Fox and Liebman found that Respondent unlawfully removed union literature from the bulletin board and tables in the employees' break room, while Member Brame found the violation pertained only to the removal of materials from the tables, arguing that the Respondent's property interest in the bulletin board permits it to limit its use.

(Members Fox, Liebman, and Brame participated.)

Charge filed by United Auto Workers International; complaint alleged violations of Section 8(a)(1). Hearing at Grand Blanc, MI, July 10-11, 1997. Decision issued by Adm. Law Judge George Carson II, Sept. 19, 1997.

* * *

New Surfside Nursing Home (29-CA-21696; 330 NLRB No. 161) Far Rockaway, NY March 31, 2000. The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by denying Service Employees Local 144 information it requested in its letter of February 27, 1998, except for employee social security numbers; and by denying the Union's requests for access to the Respondent's facility to observe how work is performed in preparation for collective bargaining. The administrative law judge found that the Respondent was entitled to all the requested information, including employee social security numbers. The Board disagreed, noting that the complaint did not allege, and the General Counsel did not contend at trial, that the Respondent unlawfully withheld social security numbers. Therefore, it found no violation in this respect and did not reach the issue the judge discussed of whether the Union demonstrated the relevance of the social security numbers. The Board distinguished *Troy Hill Nursing Home,* 326 NLRB No. 159 (1998), relied on by the Respondent in excepting to the finding that the Union is entitled to Medicaid cost reports. And, it agreed with the judge that under *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), the Union has a statutory right of reasonable access to the Respondent's facility to observe how work is performed in preparation for collective bargaining. See *Washington Beef, Inc.,* 328 NLRB No. 79 (1999). [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by Service Employees Local 144; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn, Dec. 7-8, 1998. Adm. Law Judge Howard Edelman issued his decision June 10, 1999.

* * *

City & Suburban Delivery Systems (29-RC-9016, 29-RM-875; 330 NLRB No. 162) Farmingdale, NY March 31, 2000. The Board found, contrary to the Regional Director, that the facts of this case do not warrant including the five return room counters at the Employer's Farmingdale, New York facility currently represented by Newspaper and Mail Deliverers' Union of New York and Vicinity (NMDU), in a unit from which they have been historically excluded and sought by the Employer in its RM petition and by the Intervenor (Auto Workers Local 2110). The Employer filed the RM petition on March 17, 1998, seeking to include all return room employees, counters, scanners, adders, auditors, receivers, and data entry employees in the unit. On March 18, 1998, NMDU filed an RC petition seeking to represent the employees in the RM unit, except for the five return room counters already represented by NMDU and currently covered by the Long Island City collective-bargaining agreement between NMDU and the Employer. [HTML] [PDF]

The Board decided that the only appropriate unit consists of unrepresented return room employees, counters, scanners, adders, auditors, receivers, and data entry employees employed by the Employer at its Farmingdale, New York facility, but excluding the five return room counters represented by NMDU. It reversed the Regional Director's Decision and Order Dismissing Petition in Case 29-RC-9016 and Decision and Direction of Election in Case 29-RM-875, reinstated the petition in Case 29-RC-9016, and remanded the proceeding to the Regional Director to count the impounded ballots but not the challenged ballots of the five return room counters represented by NMDU.

NMDU represented drivers and warehouse floormen at Metropolitan News in Long Island City for about 20 years prior to the Employer's purchase of Metropolitan News in 1992. These employees transferred to the Employer after the purchase and were covered by its collective-bargaining agreement with NMDU. After the purchase, NMDU filed a grievance claiming that the Employer withdrew return room work belonging to its bargaining unit members and assigned the work to office employees. In

1994, an arbitrator awarded the return room work to the drivers represented by NMDU, noting that the Employer may also assign similar work to office employees. The Employer and NMDU negotiated an agreement to implement the arbitration award, which provided that the Employer would establish five new day-side jobs at Long Island City devoted to counting returns serviced by routemen distributing newspapers from there.

The Employer purchased Imperial Delivery Service in 1996, which had a facility in Farmingdale. It consolidated some of its Long Island City operations with preexisting operations at the Farmingdale facility. In 1996, the five return room counters represented by NMDU were transferred to the Farmingdale facility. They remained in the unit with the drivers and floormen at the Long Island City and continued to be covered under NMDU's collective-bargaining agreement with the Employer. Local 2110 had historically represented office employees at the Employer's Long Island City facility, and continued to do so after the consolidation.

(Chairman Truesdale and Members Fox and Brame participated.)

* * *

Halle Enterprises, Inc. (5-CA-27676, et al.; 330 NLRB No. 163) Silver Spring, MD March 31, 2000. The Board upheld the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by terminating 11 maintenance technicians on November 4, 1997 when they concertedly complained about their wages, hours, and working conditions by demanding wage increases, uniforms, safety equipment, and tools. It disagreed however with the judge's finding that the offer of reinstatement made by Respondent's president, Warren Halle, on November 7, 1997 to four of the unlawfully discharged employees cut off any entitlement they had to reinstatement and backpay as of that date. Instead, the Board found that Halle's offer was superceded when Respondent's property manager, Wayne Ellis, subsequently placed conditions on the offer when the employees attempted to return to work on November 10 and Ellis informed them that they could not return to work and retain their benefits and seniority unless they signed a waiver form. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Individuals; complaint alleged violation of Section 8(a)(1). Hearing at Washington, D.C., May 10-11, 1999. Adm. Law Judge Bruce D. Rosenstein issued his decision July 23, 1999.

* * *

Rainbow Reproductions, Inc., d/b/a Central Apex Reproductions (14-CA-25217; 330 NLRB No. 164) St. Louis, MO March 31, 2000. Chairman Truesdale and Member Liebman denied in part and granted in part the Respondent's motion for reconsideration of a 1999 decision and order (327 NLRB No. 140) that granted the General Counsel's Motion for Summary Judgment and held that the document filed by the Respondent on November 12, 1998 did not constitute a proper answer to the complaint. Member Hurtgen, dissenting, would grant the Respondent's motion and deny the General Counsel's Motion for Summary Judgment. [HTML] [PDF]

The Board relied on these rationales in the prior decision: (1) the November 12, 1998 document was not styled as an answer to the complaint and, due to the absence of a response to the Notice to Show Cause, there was no contention by the Respondent that the November 12 document constituted an answer to the complaint; and (2) the November 12 document "fails to address the substance of the complaint allegations and therefore is legally insufficient under the Board's rules." In its motion for reconsideration, the Respondent demonstrated that it filed a response to the Notice to Show Cause with the Board's Division of Judges in Washington, D.C. on or before the due date. The Respondent contended that the Board should withdraw its decision and reconsider the General Counsel's Motion for Summary Judgment because it apparently did not consider the response. In the response, the Respondent contended that its November 12 document was intended to be its answer to the complaint.

Chairman Truesdale and Member Liebman noted that the Notice to Show Cause specifically required that any response be "filed with the Board in Washington, D.C. . . ." Although the Respondent's response was improperly filed, they granted the motion for reconsideration insofar as it seeks consideration of the response, decided to no longer rely on the first rationale described above, and modified the Board's initial decision at footnote 2 to reflect that the Respondent filed a response to the

Notice to Show Cause contending that the November 12 document constituted an answer to the complaint. Chairman Truesdale and Member Liebman denied the motion insofar as it requests that the decision and order be withdrawn, noting that the Respondent is still relying on the same November 12 document that the Board specifically found not to be a proper answer to the complaint. They found "nothing in the response that calls into question the validity of the Board's second rationale for granting the General Counsel's Motion for Summary Judgment."

In dissent, Member Hurtgen wrote:

> It is now clear, through the Respondent's motion for reconsideration that the Respondent did intend its November 12 document to be a response to the complaint allegations in the instant case. In light of that fact, I now consider whether it is a valid answer to those allegations. I conclude that it is.
>
> The Respondent's November 12 document stated, inter alia, that each of the relevant factual allegations made by the General Counsel was 'specifically and categorically denied, and strict proof required thereof.' In my view, this was a clear and specific denial of the complaint allegations.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Freeman Decorating Co. (28-RC-5688; 330 NLRB No. 160) Las Vegas, NV March 31, 2000. Considering a determinative challenge and an objection to an election where the vote shows 2 for and 1 against petitioning Teamsters Local 631, the majority of Chairman Truesdale and Member Fox concluded, contrary to Member Hurtgen and the hearing officer's recommendation, that Maestas, the most senior employee in the carpeting department, is not a statutory supervisor. Thus, the majority held that Maestas' name was properly included on the eligibility list and ordered that his ballot be opened and counted. The majority determined that the evidence did not establish that Maestas' performed such statutory supervisory activities as making schedule changes, granting time off, effectively recommending or imposing discipline, or using independent judgment in deciding to return 2 temporary employees to the employment agency. Member Hurtgen would sustain the challenge to Maestas' ballot and certify the Union. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

* * *

Merchants Transfer Co. (15-RC-8199; 330 NLRB No. 165) Mobile, AL March 31, 2000. The majority of Members Liebman and Hurtgen found that the record fully supports the hearing officer's finding that, at least, the Employer was grossly negligent in providing an *Excelsior* list it knew had employee addresses so inaccurate that it no longer used them for its own purposes. Thus, the majority set aside an election showing 27 for and 29 against the Petitioner, PACE International, with no challenged ballots, and ordered a new election. The Employer provided incorrect addresses for 22.41 percent of the employees and the Petitioner, even with further efforts, was unable to reach 10.34 percent of the employees. "In short, the dissent's claim that this is a case in which the Employer provided 'its latest best list' lacks support in the record. Because the facts clearly show that the Employer itself recognized that the list was essentially worthless for its own purposes, a far more accurate characterization of this case is that the Employer provided its 'laid-to-rest' list," the majority stated. In reaching this decision, the majority discusses and distinguishes many Board decisions cited by dissenting Member Brame, including *Women in Crisis Counseling*, 312 NLRB 589 (1991), *Singer Co.*, 175 NLRB 211 (1969), *Bear Truss, Inc.,* 325 NLRB 1162 (1998), *Lobster House,* 186 NLRB 148 (1970), and *Dr. David M. Brotman Memorial Hospital,* 217 NLRB 558 (1975). [HTML] [PDF]

(Members Liebman, Hurtgen, and Brame participated.)

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Condea Vista Company, Lake Charles Chemical Complex (Paper, Allied Industrial, Chemical & Energy Workers No. 4-555) Lake Charles, LA April 5, 2000. 15-CA-15219; JD(ATL)-14-00, Judge Pargen Robertson.

Bell Atlantic Corporation (Communications Workers) New York, NY April 5, 2000. 2-CA-32010; JD(NY)-31-00, Judge Michael A. Marcionese.

M & R Services, Inc. (Electrical Workers IBEW Local 124) Overland Park, KS April 7, 2000. 17-CA-18627; JD(ATL)-19-00, Judge Pargen Robertson.

* * *

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the respondent has not raised any representation issue that is litigable in the unfair labor practice proceeding. This case does not present any other issue.)

The Baltimore Sun Company (5-CA-27814; 330 NLRB No. 167) Baltimore, MD, April 7, 2000.