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 21, 2000 W-2735

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

Bethlehem Temple Learning Center (9-CA-35206; 330 NLRB No. 166) Cincinnati, OH April 11, 2000. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging the alleged discriminatees for their protected concerted activity in opposing a noncompetition agreement at a staff meeting and their subsequent discussions held in the Respondent's parking lot. Agreeing with the judge, the Board found that the General

Counsel established a prima facie case that the Respondent failed to rebut. The Board noted the timing of the discharges occurring the next business day after the staff meeting, the Respondent's pretextual reasons for the discharges (tardiness, insubordination and failing to report to work as scheduled), its negative reaction to employee attempts to ask questions about the agreement at the meeting, and the Respondent's reliance on its concern that the employees would engage in a work stoppage. The Board added that the Respondent denied that the discharges were due to the alleged discriminatees' failure to sign the noncompetition agreements and has failed to offer any reasons for the terminations apart from the reasons it rejected. [HTML] [PDF]

Pursuant to Section 102.177(e) of the Board's Rules and Regulations, the Board referred the alleged misconduct at the trial by the Respondent's consultant, Rayford T. Blankenship, as set forth in section III,C of the judge's decision, to the Investigating Officer, the Associate General Counsel, Division of Operations-Management.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Cecelia Rainey, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Cincinnati, March 3-4 and May 11-12, 1998. Adm. Law Judge Richard H. Beddow Jr. issued his decision Aug. 20, 1998.

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Detroit Paneling Systems (7-CA-39842; 330 NLRB No. 168) Detroit, MI April 10, 2000. Chairman Truesdale and Member Liebman, with Member Hurtgen dissenting, agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Cedrick Greenhill because of his activities for the Michigan Regional Council of Carpenters. Given the Respondent's knowledge of Greenhill's union activity, the Respondent's expressed hostility toward unionization, and the proximity in time between Greenhill's union activity and his discharge, the majority agreed with the judge that the General Counsel made a strong showing that the discharge was unlawfully motivated. The majority did not agree with dissenting Member Hurtgen that the Respondent demonstrated it would have discharged Greenhill absent his union activity. The Respondent gave Greenhill two reasons for his discharge: poor work and insubordination. [HTML] [PDF]

On another alleged violation, the Board agreed with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging Edward Musser because of his union activity. The Respondent claimed that it discharged Musser allegedly because he "falsified" his employment application by stating that he had been employed by Century Truss Company from June 1986 until April 1997 when, in fact, he only actively worked there until July 1996. The Board, finding that there was no falsification, concluded that the Respondent "seized the pretext it was searching for and summarily discharged Musser, thereby following on the threats it made to discharge union supporters."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Michigan Regional Council of Carpenters; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on Nov. 5, 1997. Adm. Law Judge Karl H. Buschmann issued his decision March 19, 1998.

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Peter Scalamandre & Sons, Inc. and Sea Crest Construction Corp. (34-CA-8354, 8369; 330 NLRB No. 170) Freeport, NY April 12, 2000. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging equipment operator Rick Christmann because of his nonmembership in Operating Engineers Local 825 and that the Respondent did not unlawfully discharge equipment operator Albert Christmann because he was not a member of Operating Engineers Local 138. No exceptions were filed to the judge's dismissal of the allegation that the Respondent threatened R. Christmann with termination because he was not a member of a labor organization in violation of Section 8(a)(1). [HTML] [PDF]

The judge found that the General Counsel established a prima facie case as to R. Christmann, but he found no evidence of animus toward A. Christmann. The evidence showed that R. Christmann was abruptly terminated after more than 6 months on the job without any explanation; that the Respondent had signed a collective-bargaining agreement with Local 825 requiring

that it use the Union's hiring hall by the time of the discharge; that the Respondent omitted R. Christmann's name from its certified list of employees on its payroll performing work within the Union's jurisdiction; and that the only other nonunion equipment operator joined Local 825 a few days before R. Christmann's discharge and a Local 825 member began working for the Respondent the next working day. The judge noted the timing of the discharge, the Respondent's false and shifting reasons (lack of work and lack of skills), and R. Christmann's credited testimony that foremen Beck and Leahy told him that Local 825 wanted him off the job. Although the Respondent is not responsible for the statements because they are outside the scope of apparent authority held by the two foremen and are hearsay, the "statements suggest that the Respondent may have been acting at the request of Local 825 when it terminated Rick Christmann," the judge said, noting that no other credible reason has been advanced for the Respondent's decision.

In adopting the judge's finding that the allegation that the Respondent unlawfully terminated A. Christmann was not barred by Section 10(b), Member Brame does not rely on Ross Stores, Inc., 329 NLRB No. 59 (1999). And, in adopting the judge's finding that the General Counsel has established a prima facie case that the Respondent's discharge of R. Christman violated Section 8(a)(3) and (1), Member Brame found it unnecessary to rely on statements by employees Leahy and Beck.

(Chairman Truesdale and Members Liebman and Brame participated.)

Charges filed by Albert Christmann and Rick Christmann, individuals; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford, June 7-8, 1999. Adm. Law Judge Michael A. Marcionese issued his decision Oct. 29, 1999.

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James H. Wood, d/b/a Cruise and Tour Services (21-CA-32819, 33048; 330 NLRB No. 181) San Pedro, CA April 14, 2000. Affirming the administrative law judge, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jean Tober, Pauline Becker, and Myrna Mendoza because of their activities for the Longshore and Warehouse International; and violated Section 8(a)(1) by creating the impression among its employees that their union activities were under surveillance and interrogating them about their protected, concerted activities. The five main witnesses in this case were the three discriminatees and Martina Wertz, Respondent's manager of operations, and Owner James Woods. The judge found that Tober was the most credible witness and he relied on her testimony for all factual findings. In contrast, he found Wertz the least credible and did not place any reliance upon her testimony. [HTML] [PDF]

The Board, in affirming the judge's conclusion that the Respondent unlawfully discharged Tober, Becker, and Mendoza, did not rely on his statement that there was no evidence that Lilia Schaefer or Verna Smirnoff reported alleged misconduct by Tober or Mendoza to the Respondent. Schaefer, whom the judge credited (as he also did Smirnoff), testified without contradiction that she reported alleged misconduct by Mendoza to Wertz, the Board said. It found, however, that the Respondent did not rely on the report in deciding to discharge Tober, Becker, and Mendoza. In adopting the judge's finding, based largely on credibility, that the Respondent waived its 90-day probationary period as to the discriminatees, the Board found it unnecessary to pass on his opinion that the waiver would have been a good business decision on the Respondent's part. In adopting the judge, Member Brame found Lampi LLC, 327 NLRB No. 51 (1998), cited by the Respondent, to be distinguishable.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charges filed by the Longshore and Warehouse International; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, March 15-16 and April 15, 1999. Adm. Law Judge Burton Litvack issued his decision May 14, 1999.

* * *

Southwest Gas Corp. (28-CA-16198-1; 330 NLRB No. 171) Phoenix, AZ April 11, 2000. The Board, finding that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, granted the General Counsel's motion for summary judgment and held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing Electrical Workers IBEW Local 769's request to bargain following the Union's certification as exclusive representative in the underlying representation proceeding, Case 28-RC-5742. [HTML] [PDF]

The Respondent admitted its refusal to bargain, but attacked the validity of the Board's certification, claiming that it was the result of a "fraud" perpetrated on the Board by counsel for the Union in the representation proceeding. The alleged "fraud" is the union counsel's assertion, in briefs filed with the Board in the representation case, that the Union had to intervene in the proceedings of the Arizona Corporation Commission regarding a proposed merger of the Respondent with another gas company before the election. The Respondent asserted that the Board relied on the allegedly false statement in overruling the Respondent's election Objection 8 and in finding two circuit court cases relied on by the Respondent to be distinguishable from the facts presented in the representation case.

The Board found that all representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding and that the Respondent did not offer to adduce any newly discovered and previously unavailable evidence, nor does not allege any special circumstances that would require the Board to reexamine the decision made in Case 28-RC-5742. It noted that the Respondent raised a similar argument in the representation proceeding in its Reply in Support of Motion for Leave to File Supplemental Evidence which, due to an administrative error, was not brought to the Board's attention and was not considered in the representation proceeding. The Respondent there claimed that the Union "misrepresent [ed] the evidence of the proceedings before the Arizona Corporation Commission" and that the Union "could have intervened at any time after the May 19, 199 election and before July 16, 1999."

The Board, having considered the reply and finding no merit in the assertions raised, stated: "As is readily apparent from the Board's decision, the Board did not rely on the union counsel's assertions regarding the timing of the Union's intervention in the Arizona Commission proceedings in distinguishing the two circuit court decisions relied on by the Respondent. Thus, we find that the Respondent's arguments regarding alleged 'fraud' do not raise issues warranting a hearing or the denial of the General Counsel's Motion for Summary Judgment, but instead are nothing more than an attempt to relitigate the merits of the representation case."

(Members Fox, Liebman, and Brame participated.)

Charge filed by Electrical Workers IBEW Local 769; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for summary judgment Feb. 8, 2000.

* * *

Allied Signal, Inc. (34-CA-7266, 7302; 330 NLRB No. 175) Stratford, CT April 12, 2000. Overruling the administrative law judge, the majority of Members Fox and Liebman held that the Respondent violated Section 8(a)(5), (1), and 8(d) of the Act by prematurely and unilaterally terminating at mid-term the job-protection competitiveness agreement (CA) of the collective-bargaining contract and by transferring engine work out of its Stratford plant to its Phoenix, AZ plant -- "over half a continent away." The Respondent operates the "Stratford Army Engine Plant," a military contracting operation on a military base it leases from the federal government. In its decision, the majority stated that the judge erred when he applied *NCR Corp.,* 271 NLRB 1212, 1214 (1984), and when he determined that there was no need to definitively interpret the contract language at issue because Respondent's interpretation had a "sound arguable basis." Instead, the majority found that the issue of whether the Respondent could lawfully cancel the CA is "more than a mere matter of contract interpretation. [I]t is situated at the threshold of matters going to the heart of the collective-bargaining relationship and to the Respondent's duty to bargain in accordance with the Act." Based on undisputed evidence, the majoirty concluded that the Respondent was not privileged to terminate the CA because it had not satisfied certain provisions of that agreement which were a prerequisite to early termination, including its obligation to apply for federal fiscal-1996 funding, despite the fact that the base had been identified by the federal government for closure. The majority stressed that it found that the CA was the product of collective-bargaining on a mandatory subject, not that the Respondent's decision to relocate was a mandatory subject of bargaining. They found it unnecessary to reach the two other 8(a)(5) allegations addressed by the judge. [HTML] [PDF]

Dissenting, Member Hurtgen, citing NCR Corp., found that the Respondent did not breach the CA, and that even if it did, the breach was "reasonable," noting a "significant distinction" between a contract breach and a Section 8(d) "termination or modification." He stated: "Thus, if the employer terminates the whole contract or only modifies one of its terms, without a reasonable position, such conduct is unlawful under Section 8(d). Similarly, if the employer has a good-faith position on the contractual issue, such conduct is at most a contract breach, irrespective of whether the case involves a single clause or the

entire contract." Here, Member Hurtgen argued, the Respondent was "not unreasonable" when it did not apply for federal fiscal-1996 funding because it believed such an effort would have been "futile" since the base had been targeted for closure.

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by United Auto Workers Locals 376 and 1010; complaint alleged violations of Section 8(a)(5) and (1). The hearing took place on 16 days from Sept. 18 - Dec. 19, 1996. Adm. Law Judge D. Barry Morris issued his decision April 21, 1997.

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Allied Signal, Inc. (34-CA-7898-2, 7905; 330 NLRB No. 176) Morristown, NJ April 12, 2000. In accordance with the administrative law judge, the majority of Members Fox and Liebman found that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith when it unilaterally extinguished severance benefits as soon as the Effects Bargaining Agreement expired. They stated: "Our dissenting colleague misperceives the essential issue in this case. The issue is whether the Respondent was obliged under Section 8(d) ... to maintain existing conditions concerning severance benefits after the expiration of the Effects Bargaining Agreement, not whether the Respondent had an enforceable contractual obligation. As the judge thoroughly explained, the Respondent did have such a maintenance-of-status-quo obligation under Section 8(d)." Citing "black-letter labor law," the majority stated that the "contract coverage theory" on which dissenting Member Hurtgen relies "is entirely inapposite." [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by United Auto Workers Locals 376 and 1010; complaints alleged violations of Section 8(a)(1) and (5). Hearing at Hartford, CT, Oct. 6-7, 1998. Decision issued by Adm. Law Judge Wallace H. Nations Nov. 30, 1998.

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Brusco Tug and Barge Co. (19-CA-26716; 330 NLRB No. 169) Longview, WA April 11, 2000. The Board granted the General Counsel's motion for summary judgment and found that the Respondent violated Section 8(a)(1) of the Act by promulgating and distributing to employees classified as mates a rule that any mate who participates in or encourages union activity will be terminated. In so doing, the Board noted that the Respondent relied solely on the record of a prior representation proceeding where a Board majority upheld the Regional Director's decision that the mates were "employees" and not "supervisors." The Respondent admitted it promulgated the rule and unequivocally stated that it did not desire to present any additional evidence regarding the employee status of mates in this proceeding in order to facilitate judicial review of the issue. The Board commented that, although the Respondent chose not to, it had a right to relitigate the status of the mates in this proceeding: "Unlike in an 8(a)(5) case where an employer is refusing to bargain in order to challenge a union's certification, when, as here, independent violations of Section 8(a)(1) or (3) are alleged, and the resolution of those issues turns on the status of certain individuals, the determination in a previous representation proceeding that those individuals are employees rather than statutory supervisors does not have binding force and may be relitigated." However, the Board stated that it may accord a certain "persuasive relevance, a kind of 'administrative comity'" to the prior representation case findings, subject to reconsideration and any additional evidence adduced in the unfair labor practice case. Since Respondent raised nothing new in this proceeding and there were no contested facts, the violation was found on summary judgment. Member Hurtgen noted that he dissented from the denial of review in the prior representation case, but agreed "for institutional reasons" that summary judgment is appropriate here. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by International Organization of Masters, Mates, and Pilots, Pacific Maritime Region; complaint alleged violation of Section 8(a)(1). General Counsel filed motion for summary judgment Feb. 24, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

North General Hospital (an Individual) New York, NY April 12, 2000. 2-CA-32293; JD(NY)-32-00, Judge Raymond P. Green.

Electrical Contractors, Inc. (Electrical Workers IBEW Local 90) Hartford, CT April 14, 2000. 34-CA-8911; JD(NY)-33-00, Judge Michael A. Marcionese.

Unique Fabricating, Inc. (an Individual) Madison Heights, MI April 13, 2000. 7-CA-42168; JD-47-00, Judge Irwin H. Socoloff.

Meadowlands Plaza III, Inc. (Hotel and Restaurant Employees Local 69) Newark, NJ April 14, 2000. 22-CA-23556; JD-49-00, Judge Margaret M. Kern.

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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.)

Quality Color Graphics, Inc. (29-CA-23136 and 23164; 330 NLRB No. 173) Bohemia, NY April 12, 2000.

A.J. Mechanical, Inc. (15-CA-15350, et al.; 330 NLRB No. 178) Pensacola, FL April 14, 2000.