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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April 28, 2000 W-2736

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

Dico Tire, Inc. (10-CA-28843, 29109; 10-RC-14650; 330 NLRB No. 177) Clinton, TN April 17, 2000. Ruling on exceptions to an administrative law judge's finding of certain Section 8(a)(1) and (3) violations and objections to an election, the majority of Chairman Truesdale and Member Fox found that the judge correctly allowed the General Counsel to amend its complaint to add an allegation that the Respondent unlawfully solicited grievances during the union campaign on the ground that the new allegation was closely related to the general theory and substance of the original charges, and therefore was not time-barred by Section 10(b). Member Hurtgen disagreed, citing his dissent in *Ross Stores,* 329 NLRB No. 59 (1999), and stating that the factors in *Redd-I, Inc.,* 290 NLRB 1115 (1988), were not met. Among other things, he noted that "the theory of the allegation of soliciting grievances is substantially different from the theory of the timely allegations of threats and interrogations," and that the General Counsel's motion came at the end of the trial and did not allow for defense preparation. [HTML] [PDF]

The Board agreed with the judge that that employee Long's discharge violated Section 8(a)(3). Long, a union supporter with an "unblemished work record," was discharged when he went home early after reporting that he was sick on the day Respondent reassigned him to work at a machine that it knew would aggravate his back problem. Citing *Paradise Post,* 297 NLRB 876 (1990), Chairman Truesdale and Member Fox stated that Respondent provoked Long's conduct and seized on this incident to claim that Long had quit to "rid itself of a union supporter," and that Long was disparately treated because other employees who left work without telling anyone were not treated as having quit their jobs. Member Hurtgen agreed with the result but did not rely on *Paradise Post* and would not reach the issue of whether the Respondent provoked the misconduct. On other issues, the Board reversed the judge and concluded that threats made by worker Pitts did not violate Section 8(a)(1) because Pitts is not a statutory supervisor. The judge's finding that Respondent violated Section 8(a)(1) when it threatened loss of jobs if the union were elected, was upheld. A second election was ordered.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Steelworkers; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Knoxville, TN, April 17-19, 1996. Decision issued by Adm. Law Judge Lawrence W. Cullen June 4, 1997.

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Fritz Companies, Inc. (12-CA-17713, et al.; 330 NLRB No. 183) Miami, FL April 21, 2000. The administrative law judge found, with Board approval, that on October 22, 1996, the Respondent engaged in discrimination in violation of Section 8(a)(3) and (1) of the Act, and in unilateral changes in employment conditions in violation of Section 8(a)(5) and (1), when it laid off six prounion warehouse employees who previously had been truckdrivers for the Respondent. The Board rejected the Respondent's exception to the 8(a)(5) and (1) finding concerning the layoffs. The Respondent contended that Teamsters Local 390 in fact received notice and an opportunity to bargain on the day before the layoffs. The Board found no merit to another Respondent exception in affirming the judge's finding that it violated Section 8(a)(1) when its security agent showed discriminatee Aldo Gomis a security report relating that a supervisor had been overheard the day before encouraging an employee to attack Gomis physically. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by Teamsters Local 390 and Individuals; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, Sept. 8-10 and Sept. 29-30, 1997. Adm. Law Judge Pargen Robertson issued his decision Feb. 2, 1998.

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Overnite Transportation Co. (12-CA-18110, et al.; 330 NLRB No. 184) Miami, FL April 20, 2000. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining unit work, unilaterally changing starting times of dockworkers, unilaterally requiring employees to call in before reporting to work, and failing to provide Teamsters Local 390 with a copy of a complaint letter from a Home Deport store in relation to the discipline of Carlos Ramirez. Unlike the judge, the Board found that the Respondent unlawfully failed to provide a complaint letter regarding Ramirez from customer Eurostyle. The Board decided to allow the General Counsel, at the compliance stage of this proceeding, to show whether the unit employees should be granted a monetary remedy

for the Respondent's unlawful unilateral changes (i.e., subcontracting, changes to the starting time, and institution of a call-in procedure). The Board expressed no view as to the merits of the General Counsel's arguments, but it noted that he should not be precluded from advancing them. Member Hurtgen dissented in part. [HTML] [PDF]

As to the subcontracting issue, Members Fox and Liebman wrote in deciding, unlike their dissenting colleague, to adhere to the Board's view as articulated in *Torrington Industries,* 307 NLRB 809 (1992).

"Like our *Torrington* predecessors, we agree with our colleague that, in some cases, nonlabor cost reasons for subcontracting may provide a basis for concluding that a decision to subcontract is not a mandatory subject of bargaining. Unlike our colleague, however, we would *follow Torrington* by reserving such inquiries to cases where the nonlabor cost reasons relate to a change in the scope and direction of a business and are therefore matters of core entrepreneurial concern outside the scope of bargaining. It is manifest (and undisputed) that the instant case does not involve a change in the scope and direction of the Respondent's business. In our view, that fact outweighs the factual distinctions mentioned by our colleague among the instant case, *Torrington,* and *Fibreboard.* [*Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964)]

In particular, we reject our dissenting colleague's contention that *Torrington* is inapplicable because no current unit employees lost their jobs as a result of the subcontracting and there was therefore 'no direct adverse impact' on the unit. At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit. In any event, it is not clear in this case that the Respondent's current employees did not themselves, lose work. The Board's decision in *Acme Die Casting,* 315 NLRB 202 (1994), is instructive in this regard. . . . . Similarly, in this case, the Respondent's regular employee drivers 'might' have lost at least the opportunity for additional work, and, as the judge stated in *Acme Die Casting,* '[t]he fact that no employees were laid off or suffered a reduction in their workweek-even if true-is irrelevant.' Id. at 209."

Member Hurtgen concluded that *Torrington Industries* was wrongly decided and even if *Torrington* is good law, it is distinguishable because there the Board limited its holding to those cases factually similar to *Fibreboard,* in which all that is changed through the subcontracting is the identify of the employees doing the work. 307 NLRB at 811. Member Hurtgen found the Third Circuit's analysis in *Dorsey Trailers, Inc. v. NLRB,* 134 F.3d 125 (3d Cir. 1998), persuasive. He wrote:

"Similarly, here the Respondent's decision was aimed at the increase in freight volume relative to available manpower and was not motivated by a desire to reduce labor costs. Another striking similarity between *Dorsey Trailers* and the instant case is the lack of impact on unit employees. Here, as in *Dorsey,* the subcontracting had no direct adverse impact, in any measureable way, on the existing complement of bargaining unit employees." Addressing his colleagues' statement that the instant decision "might" have an impact on employees, albeit a future one, Member Hurtgen reasoned that assuming arguendo there was such an impact, it does not mean that the decision was a mandatory subject. He noted that under the third category of *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981), "a decision with an impact on employment is a mandatory subject only if the benefits for collective bargaining outweigh the burdens; that is not the situation here."

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by Teamsters Local 390 and Johnny A. Fryer and Hugo Hernandez, Individuals; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Miami, Dec. 9-12, 1997 and Feb. 2-5, 1998. Adm. Law Judge Raymond P. Green issued his decision June 8, 1998.

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American Golf Corp., d/b/a Mountain Shadows Golf Resort (20-CA-26942, et al.; 330 NLRB No. 172) Rohnert Park, CA April 17, 2000. The Board affirmed the administrative law judge's finding that the Respondent unlawfully issued written warnings to Eli Jensen in the first months following his return from layoff in August 1995 and that Jensen was engaged in protected activity on March 4, 1996, when he placed a call to a competitor of the Respondent urging him to attend a city council meeting scheduled for the following day. Contrary to the judge, the Board found that Jensen's distribution of a handbill outside the city council chamber on March 5, 1996, was unprotected under *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard),*

346 U.S. 464 (1953). [HTML] [PDF]

The Board remanded the case to the judge for a finding as to whether the Respondent established its asserted defense under *Wright Line* that it would have suspended and discharged Jensen for his unprotected distribution of the handbill even if he had not made the protected March 4 phone call. The Respondent did not dispute that it relied on both incidents as the basis for its actions against Jensen, but it argued at trial and in exceptions to the judge's decision that it would have discharged Jensen for distributing the March 5 flyer even if he had not made the March 4 phone call. Because the judge concluded that both activities were protected, he made no findings with regard to this contention.

From October 1995 through January 1996, Jensen communicated extensively with Rohnert Park city officials and members of the city council regarding his ongoing disagreement with the Respondent over the treatment of maintenance employees at the city-owned public golf course that the Respondent managed. On March 2 and 3, 1996, Jensen prepared and distributed to area residents a handbill complaining about alleged bad-faith bargaining by the Respondent and the city council's failure to intervene and urging residents to attend the city council meeting on March 5 and to support the maintenance employees. On March 4, Jensen tried to speak with the owner of one of the Respondent's competitors, but he was able only to leave a message.

Applying *Jefferson Standard,* the Board found that Jensen's March 4 phone call to the Respondent's competitor was protected because it was expressly related to the maintenance employees' ongoing dispute with the Respondent and nothing said by Jensen in the course of the call was so flagrantly disloyal, reckless or maliciously untrue as to cause him to lose the Act's protection. The credited testimony is that Jensen simply left a message inviting the owner to the March 5 city council meeting. However, the Board said that Jensen's distribution of the March 5 flyer is "the type of conduct that the Court found to be beyond the protection of the Act in *Jefferson Standard.*" It explained: "Like the handbill at issue in that case, Jensen's March 5 flyer 'made no reference to a labor controversy or to collective bargaining.' 346 U.S. at 468. Like the *Jefferson Standard* handbill, it made a 'sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.' Id. at 471. And like the *Jefferson Standard* handbill, although its ultimate purpose-to put pressure on the Respondent with respect to negotiations with the Union-was lawful, '[T]hat purpose . . . was undisclosed.' Id. at 972, quoting 94 NLRB at 1511."

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by Laborers Local 139 and Eli Jensen, an Individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at San Francisco, May 13-16, 1997. Adm. Law Judge William L. Schmidt issued his decision July 2, 1998.

* * *

WWOR-TV (22-CA-21674; 330 NLRB No. 180) Secaucus, NJ April 17, 2000. Members Liebman and Brame, with Member Hurtgen dissenting, agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with NABET-CWA since October 17, 1996 and by unilaterally changing employees' terms and conditions of employment in the absence of a bargaining impasse. [HTML] [PDF]

The Respondent and the Union have been parties to several collective-bargaining agreements, the most recent of which ran from November 1, 1993 to October 31, 1996. In September through October 17, 1996, the Respondent took the position that the Respondent had failed properly to terminate the 1993-1996 agreement, that the contract had automatically renewed for a year pursuant to its terms, and that the Union had no obligation to bargain with the Respondent for a new contract. On October 3, the Respondent announced that it intended to implement new terms and conditions of employment effective November l. On October 17, the Union replied that, without prejudice to its position that the Respondent had failed to terminate the current contract, the Union was prepared to bargain unequivocally and unconditionally for a new contract. On October 31, the Union filed a grievance claiming that the Respondent had not properly terminated the current contract. At a meeting on November 6, the Union advised the Respondent that although it was not abandoning its position regarding the termination of the contract, it was ready to bargain unconditionally. The Union repeated during the meeting that it was present to bargain unconditionally. The Respondent ended the meeting without having engaged in any bargaining with the Union. On November 7, the Respondent cancelled the meeting that had been scheduled for that date. On December 18, the Respondent implemented the new terms and conditions of employment it had announced earlier.

The judge found, and the majority agreed, that although the Union initially refused to bargain with the Respondent for a new contract, on and after October 17 it offered to bargain unconditionally. The majority also found that the Union's pursuit of its claim that the 1993-1996 contract had automatically renewed did not disable it from negotiating with the Respondent for a successor agreement. Member Liebman found it unnecessary to rely on the judge's analogy of the Union's pursuit of its grievance to the situation in which an employer is refusing to bargain with a union in order to obtain court review of the validity of the union's certification. Member Brame found the judge's analogy "quite apropos here." It is noted in the decision that because only one Board member in the majority relies on the judge's analogy, it is not part of the majority's rationale.

Dissenting Member Hurtgen wrote: "Even assuming that the Union corrected its conduct on and after October 17, when it relented from an absolute refusal to meet with the Respondent to negotiate a successor agreement, the Union conditioned all bargaining on its pursuit of efforts to hold the Respondent to the prior contract. Under these circumstances, the Respondent was legally entitled to refuse to negotiate and to make the unilateral changes at issue."

(Members Liebman, Hurtgen, and Brame participated.)

Charge filed by NABET-CWA; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, June 17-18, 1997. Adm. Law Judge Steven Davis issued his decision July 16, 1998.

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Narraguagus Bay Health Care Facility (1-CA-37634; 330 NLRB No. 182) Millbridge, ME April 20, 2000. On a motion for summary judgment, the Board found that the Respondent, by its own admission, violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union and by failing to pay health insurance premiums under the collective-bargaining agreement. The Respondent filed an answer to the General Counsel's complaint, admitting all allegations, but failed to file a response to the General Counsel's motion for summary judgment. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Downeast Federation of Nurses & Health Professionals Local 5073; complaint alleged violation of Section 8(a)(1) and (5). The General Counsel filed his motion for summary judgment on March 22, 2000.

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Morley Investments and Construction, Inc. (28-CA-14900; 330 NLRB No. 188) Las Vegas, NV April 24, 2000. The Board upheld the administrative judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union. In so doing, the Board relied only on the judge's finding that the General Counsel did not prove that the Union's majority status was established by the Respondent's employee poll. Thus, the Board found it unnecessary to pass on the judge's alternative findings that (1) the General Counsel was precluded from proceeding with this matter because a prior settlement barred the issue from relitigation, and (2) that the Board's rationale in Tennessee Shell Co., 212 NLRB 193 (1974), petition for review denied sub nom. mem. *Carpenters, Southern Council of Industrial Workers v. NLRB,* 515 F. 2d 1018 (D.C. Cir. 1975), requires dismissal of the complaint. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by Building Trades Organizing Project; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Las Vegas, NV, Jan. 21, 1999. Decision issued by Adm. Law Judge Gerald A. Wacknov, March 31, 1999.

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Delchamps, Inc. (15-CA-13401, et al.; 330 NLRB No. 187) Hammond, LA April 21, 2000. The Board upheld numerous findings of Section 8(a)(1) and (3) violations by the Respondent committed during a union organizing campaign and after an election where the Union lost. In so doing, the Board agreed with the administrative law judge that the Respondent's discharging of 14 employees and threatening 1 employee with discharge less than 3 weeks after it entered into an informal settlement

agreement disposing of the numerous 8(a)(1) and (3) charges was a sufficient basis to vacate and set aside the settlement agreement. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Teamsters Local 270 and Individuals; complaint alleged violations of Section 8(a)(1) and (3). Hearing at New Orleans, LA, May 5-9 and June 10-11, 1997. Decision issued by Adm. Law Judge C. Richard Miserendino, May 5, 1998.

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K.T.I., Inc. (22-RC-11766; 330 NLRB No. 185) Newark, NJ April 20, 2000. The majority of Members Fox and Liebman adopted the Acting Regional Director's findings and recommendation to set aside an election lost by General Industrial Union Local 108, LIUNA, and to direct a second election because "the Region failed to take any steps to address the problem with the Excelsior list [until] the day before the election, despite the Petitioner having complained of the problem no later than a full week before the election and perhaps as much as 2 weeks." Dissenting Member Hurtgen would not overturn the election results "particularly where, as here, the fault lies with the Region" and not with the Employer, without giving the Employer an opportunity for a hearing to resolve factual questions on the issue of whether the Regional Office's failure to take earlier action on the Excelsior list resulted in an invalid election. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

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Harborside Healthcare, Inc. (8-RC-15774; 330 NLRB No. 191) Swanton, OH April 24, 2000. Members Fox and Liebman found, contrary to the Regional Director, that the authority of the Employer's charge nurses (CNs) to evaluate and call in employees fails to establish that CNs are statutory supervisors within the meaning of Section 2(11) of the Act. Teamsters Local 20 is seeking to represent a unit consisting of 15 registered nurses (RNs), 18 licensed practical nurses (LPNs) (both RNS and LPNs are referred to as CNs), and 35 state tested nursing assistants (STNAs) at the Employer's long term care nursing facility located in Swanton, Ohio. The majority noted there was no evidence of a direct link between the CNs evaluations and pay increases and that the nurses' role is "more akin to that of more experienced lead employees, who submit to higher authority their opinions on the abilities of the employees that they evaluate." The Employer failed to demonstrate that the CNs' recommendations of continued employment or their ratings in connection with employee evaluations are directly correlated with either job retention or wage increases, and are thereby effective, the majority held. It also found, contrary to the Regional Director, that the CNs' authority to call in employees is routine and does not require the exercise of independent judgment. [HTML] [PDF]

Member Hurtgen, dissenting, agreed with the Regional Director that the CNs are supervisors, relying particularly on the fact that CNs-when designated as shift supervisors-have authority to call-in RNs, LPNs, and STNAs, and the authority to reassign those nurses and assistants in order to meet staffing needs. He further found that the CNs are supervisors based on their role in evaluating STNAs.

(Members Fox, Liebman, and Hurtgen participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Arc Rigging Corp. (Carpenters Local 1121) Middleton, MA April 17, 2000. 1-CA-36784; JD-48-00, Judge Earl E. Shamwell, Jr.

Inn Credible Caterers Ltd. (Hotel and Restaurant Employees Local 100) Goshen, NY April 17, 2000. 34-CA-8845; JD(NY)-35-00, Judge Howard Edelman.

Made in France, Inc. (Longshore & Warehouse Local 6) San Francisco, CA April 7, 2000. 20-CA-29112, 29216, 20-RC-17522; JD-(SF)-16-00, Judge Gerald A. Wacknov.

ICH Corporation and Lyon's of California, Inc. (Hotel and Restaurant Employees Local 340) South San Francisco, CA April 14, 2000. 20 CA-28861; JD(SF)-18-00, Judge Michael D. Stevenson.

Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Centers, Inc., Joint Employers (Food and Commercial Workers Local 1360) Philadelphia, PA April 20, 2000. 4-CA-27274, et al.; JD-34-00, Judge William G. Kocol.

* * *

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.)

Southwestern Electric Company (28-CA-15258 and 15899; 330 NLRB No. 179) Wilcox, AZ April 14, 2000.