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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May 19, 2000 W-2739

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(OM 00-20) Board's Interest Rate to be 9 Percent for Third Quarter, Fiscal Year 2000

ITT Industries, Inc. (7-CA-40946; 331 NLRB No. 7) Oscoda, East Tawas, and Tawas City, MI May 10, 2000. The Board reversed the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation rule when two of its supervisors prohibited employee Karen Richardson from talking with other employees about the Auto Workers (UAW) during work, disagreeing with the judge's conclusion that the Respondent "was essentially

telling Richardson not to bother her fellow employees at least one of whom had complained . . . and I see at most a de minimus or insignificant infringement on Karen Richardson's Section 7 rights." Viewing the disparate no-solicitation rule in the context of the Respondent's contemporaneous attempts to limit off-duty employees from engaging in solicitation activities in its parking lot, the Board affirmed also the judge's finding that the Respondent violated Section 8(a)(1) by its parking lot restrictions. In adopting the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) by the manner in which its supervisor, Tony Orlando, drove his vehicle near some handbilling employees on May 5, 1998, the Board found that the General Counsel failed to present sufficient objective evidence showing that the employees could reasonably believe that Orlando's reckless driving was directed against union activity. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Auto Workers UAW; complaint alleged violation of Section 8(a)(1). Hearing at Tawas City on Jan. 20-21, 1999. Adm. Law Judge Martin J. Linsky issued his decision May 5, 1999.

* * *

Lexus of Concord, Inc. (32-CA-17396, 17442; 330 NLRB No. 198) Concord, CA April 28, 2000. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' wages and its 401(k) pension plan for them, dealing directly with employees concerning the wage increases, and failing to furnish Machinists District Lodge 190, Local Lodge 1173 with requested information relevant to its collective-bargaining duties. No exceptions were filed to the judge's finding that the Respondent's preceding unfair labor practices tainted its withdrawal of recognition from the Union, that the Respondent withdrew recognition before a reasonable period of time for bargaining had elapsed following its execution of a settlement agreement, and that the Respondent's withdrawal of recognition thus violated Section 8(a)(5) and (1). The Board modified the judge's Order to include an affirmative provision directing that the Respondent supply the information sought. [HTML] [PDF]

(Members Fox, Liebman, and Brame participated.)

Charges filed by Machinists District Lodge 190, Local Lodge 1173; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland on Oct. 27, 1999. Adm. Law Judge Joan Wieder issued her decision Feb. 3, 2000.

* * *

Tualatin Electric (36-CA-6874, 7099; 331 NLRB No. 6) Wilsonville, OR May 12, 2000. Members Fox and Liebman ordered that the Respondent pay backpay in the amounts set forth in the administrative law judge's supplemental decision to Edward Campbell ($8122), who was unlawfully discharged by the Respondent because he was a "salt," and discriminatees Steven Dietrich ($5291), Paul Kingston ($6046), Gary Mangel ($24,003) and Cal Caines ($7056), who the Respondent unlawfully refused to hire because they were "salts." Applying *Ferguson Electric Co.,* 330 NLRB No. 75 (2000), Members Fox and Liebman found no merit to the Respondent's contention that the traditional construction industry backpay and reinstatement remedy should not apply to "salts" and that the discriminatees did not fulfill their obligation to mitigate backpay damages because they followed their normal pattern of seeking employment through the Union's hiring hall. The majority wrote: [HTML] [PDF]

> Under *Dean General Contractors,* 285 NLRB 573 (1987), the Board orders the traditional reinstatement and backpay remedy with the understanding that the respondent can introduce evidence at compliance regarding the likelihood of the discriminatee's transfer or reassignment to other projects subsequent to the job from which he had been unlawfully discharged or denied employment. It is the respondent's burden to establish that, under its established policies, the discriminatees would not have been transferred or reassigned to another job after the project at issue ended. See *Ferguson Electric,* supra, slip op. at 2-3. In the instant case, the Respondent has failed to offer any evidence to meet that burden.

Member Hurtgen, dissenting in part, disagreed that *Dean General* should be applied in determining the amount of backpay due in "salt" situations and he would place the evidentiary burden on the Union regarding the backpay period or the amount of

gross backpay since "the Union is the party which proclaims and administers the policies under which its members can/cannot work for employers." See his dissent in *Ferguson Electric.* He concluded that Campbell is not due any backpay from July 31 to August 24, 1992, finding his quitting a job with a subsequent employer, Team Electric, on July 17 at the Union's request once it realized his "salting" efforts there would be unproductive, constituted a failure to mitigate backpay damages.

(Members Fox, Liebman, and Hurtgen participated.)

Hearing held at Portland on March 11-12, 1997. Adm. Law Judge Burton Litvack issued his supplemental decision Nov. 10, 1997.

* * *

Brinks Inc. (29-RC-8914; 331 NLRB No. 10) Brooklyn, NY May 12, 2000. Chairman Truesdale and Member Hurtgen, with Member Fox dissenting, found that the Union observer's conduct at the polls constituted objectionable electioneering under *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 (1982), enfd. 703 F.2d 876 (5th Cir. 1983); set aside the election held November 21, 1997 (United Federation of Security Officers, Inc. won 177-163); and directed that a second election be held. [HTML] [PDF]

Union Observer Muhammad told four employees, as each one approached the observer table, to vote for the Union. One of the four employees (Rolean) told other employees, waiting to vote, what Muhammad had said. Muhammad also gave a "thumbs up" signal to other employees as they approached the table. The Employer's observer (Mayo) credibly testified that the Board agent gave both him and Muhammad instructions at the preelection conference not to converse "with the people coming in." The hearing officer credited Mayo's testimony that the Board agent admonished Muhammad for his conduct.

Chairman Truesdale and Member Hurtgen found that their dissenting colleague inappropriately relied on the hearing officer's finding that Muhammad did not greet voters "in the manner of an authority in control of the election." They wrote: "The relevant factor under *Boston Insulated* is whether Muhammad was an agent of a party. Clearly, he was such an agent. Further, . . . Muhammad, while acting as the Union's observer and agent, defied instructions from the Board agent and, inter alia, told employees, in the final seconds before they cast their ballots, how to vote. Thus, Muhammad's behavior met the criteria set forth in *Boston Insulated* and it is therefore appropriate to draw 'an inference that it interfered with the free choice of the voters.'"

(Chairman Truesdale and Members Fox and Hurtgen participated.)

* * *

Summa Health System, Inc. (8-CA-26463-1, et al.; 330 NLRB No. 197) Akron, OH April 28, 2000. The Board panel, including Member Hurtgen, who concurred in part and dissented in part, upheld nearly all of the administrative law judge's findings of violations of Section 8(a)(1), (3), and (5) of the Act, including a finding that the employees engaged in an unfair labor practice strike. However, the majority of Members Fox and Liebman agreed with the judge that the Respondent violated Section 8(a)(1) and (2) of the Act by creating an employer-dominated labor organization. Unlike the majority, Member Hurtgen found only that the Respondent violated Section 8(a)(5) when it bypassed the Union and created "Process Enhancement Teams" (PETs). Member Hurtgen reasoned that his remedy of the violation, i.e., ordering the Respondent to disband the PETs, would make it unnecessary to reach the issues of whether PETs are statutory labor organizations and whether 8(a)(2) was violated, citing his "contract coverage" analysis, rather than a waiver analysis, in *Dorsey Trailers, Inc.,* 327 NLRB No. 155 (1999). Also, Member Hurtgen stated that viewing the totality of the Respondent's conduct and its offer to submit to binding arbitration, he cannot find that Respondent engaged in overall bad-faith bargaining. The majority countered by stating that its affirmance of the judge's finding of bad faith bargaining was not premised merely on the Respondent's "firm advocacy of certain significant contract changes [which] demonstrated an intent to avoid reaching an agreement," as Member Hurtgen stated. Rather, the majority noted that they based their finding on a variety of factors in addition to the finding that the Respondent continued to insist on sweeping proposals on work transfer, job classification, and wages. "This case is therefore distinct from other cases in which we have found a violation of Section 8(a)(5) purely on the basis of the substance of employer proposals, e.g., *A-1 King Size Sandwiches, Inc.,* 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984)." [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by AFSCME Local 684 and Ohio Council 8; complaint alleged violations of Section 8(a)(1), (2), (3), and (5). Hearing held Feb. 23-26 and March 23-26, 1998. Decision issued by Adm. Law Judge Thomas R. Wilks, March 29, 1999.

* * *

FES (A Division of Thermo Power) (5-CA-26276; 331 NLRB No. 20) York, PA May 11, 2000. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) of the Act by refusing to consider for employment 9 members of Plumbers Local 520. However, "given the confusion in the law" concerning the treatment of allegations of discriminatory refusals to consider or to hire applicants for employment and the stage at which the employer may present its defense, "which we have attempted to clarify today," the Board remanded the proceeding to the judge to consider, in an unfair labor practice hearing rather than at the compliance stage, whether any of the 9 applicants would have been hired, absent the discriminatory refusal to consider. Oral arguments in this case were heard by the Board on August 10, 1999. [HTML] [PDF]

The Board outlined its framework for litigating refusal-to-consider and/or hire cases by making clear the elements of the violation, the burdens of the parties, and the stage at which issues are to be litigated. To establish a discriminatory refusal to hire violation, the General Counsel must, at the hearing on the merits, show: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If established, the respondent must show that it would not have hired the applicants even in the absence of their union activity or affiliation. The Board discussed the appropriate remedy for such violations and, in cases where the number of applicants exceeds the number of job openings, adopted the approach in *Starcon, Inc. v. NLRB,* 176 F.3d 948 (7th Cir. 1999).

To establish a discriminatory refusal-to-consider violation, the General Counsel must show at the hearing on the merits that (1) the respondent excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider the applicants for employment. If established, the respondent must show that it would not have considered the applicants even in the absence of their union activity or affiliation. The Board discussed the appropriate remedy for this type of violation, including the requirement that the General Counsel must initiate a compliance proceeding if job openings arise after the beginning of the hearing on the merits. The Board stated that its approach "is appropriate notwithstanding the criticisms ... that there can be no violation of Section 8(a)(3) when no hiring is taking place and that the Board is improperly litigating issues of liability in a compliance proceeding that is confined to remedial issues." Thus, it stated that (1) a discriminatory refusal to consider may violate Section 8(a)(3) even when no hiring is occurring; and (2) the compliance proceeding for a refusal-to-consider violation is an appropriate forum for determining whether there was an actual job loss as a result of that refusal.

Chairman Truesdale and Member Liebman signed the majority opinion. Member Hurtgen concurred with most of the majority opinion, but expressed his "somewhat different views" on two points: (1) that proof of a hiring process is essential to a refusal-to-consider violation; and (2) in agreement with Member Brame, that "wage compatibility" is "not necessarily a code word for a discriminatory refusal to hire union members." Member Brame, concurring, stated that the clarified framework is "a substantial improvement over the ambiguous and, in many respects, conflicting mandates of the Board's prior case law in this area." Member Fox, concurring and dissenting in part, agreed with the majority's general framework, but did not agree that the General Counsel should have the burden to establish not only that antiunion animus contributed to the decision not to hire the alleged discriminatees, but also that the applicants were qualified for the jobs or that the requirements were pretextual or not uniformly followed.

(Full Board participated.)

Charge filed by Plumbers Local 520; complaint alleged violation of Section 8(a)(1) and (3). Hearing at York, PA, July 20, 1998. Decision issued by Adm. Law Judge Arthur J. Amchan, Sept. 29, 1998.

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Carlisle Engineered Products (7-RC-21333; 330 NLRB No. 189) Lapeer, MI April 28, 2000. The Board disagreed with the hearing officer's recommendation that 11 processors (production equipment operators, who also perform manual production and repair functions) including the process engineer were supervisors under Section 2(11) of the Act. In so doing, the Board found merit to the Employer's exceptions to an election where the vote shows 90 for and 76 against the Petitioner (Auto Workers (UAW)), with 21 challenged ballots, a number sufficient to affect the results. In brief, the Board found that the processors' role in assigning work, granting time off, and disciplining employees did not involve the use of "independent judgment" and that the processors infrequent substitution for undisputed supervisors "is insufficient to clothe them with supervisory authority." In the absence of objections, the Board adopted the hearing officer's recommendations to overrule the challenges to the ballots of 4 other employees. Thus, the Board ordered that the ballots of 15 employees be opened and counted, and a revised tally issue. The challenges to 2 other ballots were held in abeyance for resolution only if they remain determinative after the revised tally. Dissenting, Member Hurtgen agreed with the hearing officer's "well-supported findings" that the 11 processors are statutory supervisors. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Independence Coal Company, Inc., d/b/a Progress Coal Company (Mine Workers) Charleston, WV May 5, 2000. 9-CA-36998-1,-2,-3; JD(SF)-23-00, Judge James L. Rose.

West Michigan Plumbing & Heating, Inc. (Plumbers Local 357) Grand Rapids, MI May 11, 2000. 7-CA-42086; JD-53-00, Judge C. Richard Miserendino.

International Business Machines Corporation (Communications Workers Local 1120) Poughkeepsie, NY May 12, 2000. 3-CA-22062; JD(NY)-39-00, Judge Raymond P. Green.

Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park (Teamsters Local 731) Orland Park, IL May 12, 2000. 13-CA-38061, 38185; JD-58-00, Judge William J. Pannier III.

Dilling Mechanical Contractors, Inc. (Plumbers Local 166) Indianapolis, IN May 12, 2000. 25-CA-25094, 25485; JD-57-00, Judge Paul Bogas.

Hoosier Living Centers, Inc., d/b/a Heritage House of New Castle (Retail, Wholesale and Department Store Union Local 512) New Castle, IN May 12, 2000. 25-CA-26565; JD-59-00, Judge Thomas R. Wilks.

Metro Transport LLC, d/b/a Metropolitan Transportation Services, Inc. (Teamsters Local 41) Kansas City, MO May 12, 2000. 17-CA-20061 et al., 17-RC-11776 JD(ATL)-29-00, Richard J. Linton.