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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CASES SUMMARIZED

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Cook County College Teachers Local 1600, IFT-AFT (13-CA-37568; 331 NLRB No. 8) Chicago, IL May 15, 2000. Affirming the administrative law judge, the Board held that the Respondent properly issued a warning notice to secretary Louise Winfrey for providing the Respondent's directory, a list of 120 of its management officials and their home addresses and telephone numbers, to her collective-bargaining agent (Chicago Newspaper Guild Local 34071) to advance the Guild's bargaining positions. In recommending the complaint's dismissal, the judge found that the Respondent restricted use of its directory for official business and Winfrey knew of the restriction before she obtained the names and home addresses of the Respondent's officials from the directory and provided them to the Guild. The Board did not rely on the judge's discussion of the relative strengths of certain Section 7 rights and certain union needs. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Chicago Newspaper Guild Local 34071; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago on Oct. 25, 1999. Adm. Law Judge Robert A. Giannasi issued his decision Jan. 10, 2000.

* * *

Grancare, Inc., d/b/a Premier Living Center (11-UC-83; 331 NLRB No. 9) Lake Waccamaw, NC May 15, 2000. The Board affirmed the Regional Director's dismissal of the Employer's UC petition seeking clarification as to the supervisory status of the Employer's licensed practical nurses (LPNs) and seeking to exclude the LPNs from the certified unit (all LPNs and service and maintenance employees). The Board rejected the Employer's contention that the Board is required to determine the supervisory status of job classifications in a bargaining unit any time the issue is raised, citing *I.O.O.F. Home of Ohio, Inc.,* 322 NLRB 921 (1997). Further, the Board found that the Employer raised the same contentions (the assignment of "new" supervisory duties to the LPNs) in this case and the underlying representation proceeding, Case 11-RC-6262, and failed to offer any newly discovered and previously unavailable evidence or unusual circumstances that would require any exception to the Board's relitigation rule with regard to its unit clarification petition and that would warrant the inclusion of the LPNs in the certified unit. The union involved is Food & Commercial Workers Local 204. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

* * *

Carrier Corp., a wholly owned subsidiary of United Technologies Corp. (10-CA-29246, 29437; 331 NLRB No. 11) Athens, GA May 15, 2000. The Board dismissed the complaint, agreeing with the administrative law judge that the record does not support the General Counsel's allegations that the Respondent violated Section 8(a)(1) of the Act by issuing a warning to, suspending, laying off, and subsequently discharging Gary Greshem for engaging in concerted activities. In affirming the administrative law judge's finding that the Respondent's April 8, 1996 warning to and suspension of Gresham did not violate Section 8(a)(1), the Board relied solely on his finding that the Respondent lawfully disciplined Gresham based on his interruption of a meeting conducted by Manager Kathy Holen with other employees; Gresham's insistence on discussing immediately a subject unrelated to the meeting; and his failure and refusal to acquiesce in Hoten's repeated directions to him that his concerns about the presence of the safety shoe truck vendor at the facility would be discussed later that day at a more appropriate time. Even assuming that Gresham's conduct was concerted, it lost the Act's protection, the Board reasoned. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by Gary Gresham, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Athens, Dec. 4-6, 1996. Adm. Law Judge Philip P. McLeod issued his decision Jan. 16, 1997.

* * *

Felix Industries, Inc. (2-CA-29785; 331 NLRB No. 12) Lincolndale, NY May 17, 2000. Members Fox and Liebman, with Member Hurtgen dissenting, reversed the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by discharging Salvatore Yonta for claiming the right to night differential pay under the terms of a collective-bargaining agreement. No exceptions were filed to the judge's finding that the Respondent did not violate Section 8(a)(3) by this conduct. Applying the four-factor test of *Atlantic Steel Co.,* 245 NLRB 814 (1979), the judge found that the subject matter of Yonta's telephonic discussion with his supervisor (Felix Petrillo) about the night differential pay was protected, but that Yonta lost protection of the Act by calling Petrillo a "f...ing kid" during the discussion. The factors considered for determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. The judge found that even if Yonta had engaged in protected conduct, he would have been discharged for using a profane term to his supervisor, applying a *Wright Line* analysis. Members Fox and Liebman agreed with the judge that the Atlantic Steel factors are applicable, but they disagreed with her application of the first, third, and fourth factors and her use of a Wright Line analysis in the circumstances here, where the conduct for which the Respondent claims to have discharged Yonta was protected activity. Member Hurtgen found that under the *Atlantic Steel* test, Yonta's conduct was not protected and that the Respondent was privileged to discharge him. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Salvatore Yonta, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York on Dec. 15, 1997. Adm. Law Judge Eleanor MacDonald issued her decision July 15, 1998.

* * *

Eagle-Picher Industries, Inc., Hillsdale Tool and Mfg. Co. Div. (7-CA-41632, 7-RC-21284; 331 NLRB No. 14) Hillsdale and Jonesville, MI May 19, 2000. Chairman Truesdale and Member Hurtgen found that Gerald Elliar's conduct during the course of an employer lawful campaign meeting was insubordinate and unprotected, and agreed with the administrative law judge that the Respondent's issuance of a warning letter to Ellair thus did not violate Section 8(a)(1) of the Act. Prior to the meeting in question, Company President Bill Oeters told employees he would make a speech and employees should hold their questions until he finished. When Elliar nonetheless attempted to ask a question during Oeters' presentation, he was told to sit down and be quiet. When the Respondent continued its presentation, Ellair muttered "garbage" for all to hear. Chairman Truesdale and Member Hurtgen noted that although the relative severity of the discipline-relied on by the judge in dismissing the allegation-may be relevant to the issue of motive, they did not regard it as the determining factor in finding the discipline unlawful. Rather, they held Oeters was privileged to tell Ellair to keep quiet until he was finished and that Ellair's "garbage" comment was insubordinate and unprotected. Chairman Truesdale (and Member Hurtgen in a separate concurrence) found distinguishable *Beverly California Corp.,* 326 NLRB No. 30 (1998), cited by dissenting Member Liebman. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Auto Workers (UAW); complaint alleged violation of Section 8(a)(1). Hearing at Hillsdale, April 19-21, 1999. Adm. Law Judge David L. Evans issued his decision Sept. 7, 1999.

* * *

Roofers Local 11 (Funderburk Roofing) (13-CP-697; 331 NLRB No. 4) Westchester, IL May 19, 2000. The Board agreed with the administrative law judge's finding that the Respondent Union violated Section 8(b)(7)(A) of the Act by threatening to and picketing the Employer's jobsite with an organizational and/or recognitional objective, at a time when a question concerning representation under Section 9(c) could not be raised because the Employer had lawfully recognized Production Workers of Chicago and Vicinity Local 707 under Section 9(a). Rejecting the argument that the judge erred by admitting evidence of Respondent's dealings with the Employer prior to the picketing, the Board noted that such evidence is germane as background and that the judge did not rely on it when he found the violation. The Board did not find merit to the contention that the judge applied a per se rule that the language on the picket signs necessarily demonstrated recognitional picketing, and determined

instead that the judge's decision is consistent with *Alton-Wood River Building,* 114 NLRB 526 (1963). [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by Funderburk Roofing; complaint alleged violation of Section 8(b)(7)(A). Hearing at Chicago, IL, Nov. 13, 1996 and Feb. 4, 1997. Decision issued by Adm. Law Judge Steven M. Charno, May 20, 1997.

* * *

Active Fire Sprinkler Corp. (1-CA-29751, 29796; 331 NLRB No. 13) Brooklyn, NY May 17, 2000. The Board granted the General Counsel's motion to strike the Respondent's answer to the compliance specification and motion for summary judgment, filed on March 13, 2000, because the Respondent failed to comply with the specificity requirements of Section 102.56(a), (b), and (c) of the Board's Rules and Regulations. In brief, the Respondent did not swear to its answer or serve a copy on other parties; the answer contained only general denials; and the Respondent did not furnish any alternative backpay formula or calculations, but requested that the Board review, reevaluate, and recalculate the backpay periods and moneys due employees Kelley and Mudgett. The Board stated: "At best, these claims appear to be an attempt to relitigate issues decided in the unfair labor practice proceeding," contrary to *Transport Services Co.,* 314 NLRB 458 (1994). Thus, the Board ordered the Respondent to comply with the compliance specification. (The union here is Plumbers Local 550.) [HTML] [PDF]

(Members Fox, Liebman, and Brame participated.)

* * *

Teamsters Local 71 (11-CA-17290; 331 NLRB No. 18) Charlotte, NC May 18, 2000. Members Fox and Liebman agreed with the administrative law judge that the contractual language at issue (Article 6 Seniority Section 2-Layoff and Recall) does not expressly give the Respondent, Employer Teamsters Local 71, the right to lay off employees unilaterally; and that the Respondent's failure to bargain with the Communications Workers over the layoff of junior clerical employee Betty Smith violated Section 8(a)(5) and (1) of the Act. They found that the judge correctly applied the Board's rule that contract language will not privilege an employer to make unilateral changes in terms and conditions of employment unless a "clear and unmistakable" waiver of the union's right to bargain over such matters is manifested in that language. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983). See *Exxon Research & Engineering Co.,* 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). Members Fox and Liebman held that "even under the 'contract coverage' theory as elucidated by the court of appeals in *NLRB v. Postal Service,* 8 F.3d 832 (D.C. Cir. 1993), the Respondent was not privileged by the contract to act unilaterally with respect to the layoff decision." They found the Respondent's failure to process Smith's grievance and respond to CWA's information request also violated Section 8(a)(5), noting the parties' informal settlement agreement in Case 11-CA-16927 whereby the Respondent agreed to recognize the CWA as the collective-bargaining representative of its clerical and maintenance employees and be bound by the collective-bargaining agreement executed on January 12, 1996. [HTML] [PDF]

Member Hurtgen, dissenting in part, concluded that the Respondent was acting lawfully in deciding to lay off Smith, finding that the contract covers the instant dispute, i.e., the *layoff* of an employee; that the parties have set forth the clear and specific obligations of the Respondent in a layoff situation; that the Board's task is simply to interpret the parties' mutual intentions; and that *Metropolitan Edison* does not require a different result. He found that his colleagues' approach, which starts from the premise that there is a statutory right to bargain and then reasons that contractual silence means that the right has not been waived, "can lead to inconsistent results [] between the Board under Section 8(a)(5) and courts/arbitrators under Section 301." Member Hurtgen said: "In my view, where there is a contract covering the subject matter, all tribunals should seek to interpret and carry out that agreement."

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by CWA; complaint alleged violation of Section 8(a)(1), (3), (4) and (5). Hearing at Charlotte, Oct. 9-10, 1997. Adm. Law Judge George Carson II issued his decision Dec. 5, 1997.

* * *

Special Citizens Futures Unlimited (2-RC-21895; 331 NLRB No. 19) New York, NY May 18, 2000. Applying *Alcohol & Drug Dependency Services,* 326 NLRB No. 58 (1998), which issued after the Regional Director's report, Members Fox and Liebman found that the delay in the Union's receipt of a complete and accurate *Excelsior* list interfered with the purposes behind the *Excelsior* requirement of providing employees with a full opportunity to be informed of the arguments concerning representation. Contrary to the Regional Director's recommendation to overrule the Union's *Excelsior* objections and to certify the election results, the majority set aside the election held at the Employer's three group homes on October 17 and 18, 1997, and directed that a new election be conducted. AFSCME District Council 1707 lost the election 16 to 9. Member Hurtgen, dissenting, agreed with the Regional Director that the Employer acted in good faith and in substantial compliance with the *Excelsior* requirements and that the election should not be set aside, noting that the deficiencies were on the part of the NLRB Regional Office and the Union, i.e., everyone except the Employer, and that the Union had the *Excelsior* list for 10 days prior to the election despite the deficiencies. See his dissent in *Alcohol & Drug Dependency Services.* [HTML] [PDF]

On September 19 and 23, 1997, respectively, the Union and the Employer executed a Stipulated Election Agreement whereby the Employer agreed to submit an *Excelsior* list to the Regional Office within 7 days of the agreement's approval. Contrary to established Board procedure, the Regional Office failed to notify the parties immediately upon the election agreement's approval on September 26 and did not mail out the Regional Director's preelection letter dated September 26 until October 2, along with the election notices. The letter notified the parties of the election agreement's approval and directed the Employer to file an *Excelsior* list on or before Friday, October 3. On October 3, the Union inquired of the Employer as to when the *Excelsior* list would be sent to the Region. In response, the Employer's counsel contacted the Regional Office and was informed that the *Excelsior* list was due that day. At approximately 6:24 p.m. that evening, after the Regional Office had closed, the Employer's counsel faxed an *Excelsior* list (3 pages comprised of 27 names and addresses) to the Region. The list included only the employees' surnames and first initials, rather than their full names as required. On Monday, October 6, the Regional Director faxed a copy of the list to the Union's counsel; however, counsel received only 2 of the 3 pages. The Union's counsel forwarded it to the Union's director of organizing. Later that day, the Employer's counsel submitted a second, revised *Excelsior* list to the Regional Office. The list omitted one name from the original list, included four additional names, and included the employees' first and last names. Contrary to established Board procedure, the Regional Office did not immediately forward the second *Excelsior* list to the Union's counsel but faxed the list the next afternoon, October 7. Unaware of the disparity between the two lists, the Union's counsel did not forward the second list to its organizing staff. On October 15, at the Regional Office's request, the Employer submitted a third *Excelsior* list, with employees' names organized by polling site. The election was conducted on October 17 and 18.

(Members Fox, Liebman, and Hurtgen participated.)

* * *

Associated Builders & Contractors, Golden Gate Chapter (32-CA-15647; 331 NLRB No. 5) Dublin, CA May 16, 2000. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining a lawsuit against the Charging Parties solely on the ground that the Charging Parties' job targeting program is concerted, protected activity and that, under *Manno Electric,* 321 NLRB 278 (1996), enfd. per curiam mem. (5th Cir. 1997), Respondent's maintenance of its lawsuit constitutes an interference with conduct that is actually protected by Section 7. Chairman Truesdale and Member Liebman found it unnecessary to pass on the judge's analysis of the General Counsel's second theory under *Loehmann's Plaza,* 305 NLRB 663 (1991). Member Hurtgen concluded that there is a violation under Loehmann's Plaza rather than under *Manno Electric.* [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Electrical Workers [IBEW] Locals 180, et al.; complaint alleged violation of Section 8(a)(1). Hearing on March 24, 1997. Decision issued by Adm. Law Judge Clifford H. Anderson, July 1, 1997.

* * *

Belle Knitting Mills (29-CA-20611, et al.; 29-CB-10172) Brooklyn, NY May 15, 2000. In brief, the Board adopted the administrative law judge's findings that, inter alia, the Respondent Employer unlawfully solicited complaints and grievances and impliedly promised that it would resolve them without a union; threatened employees with plant closure and relocation "if the Union came in"; and required employees to produce immigration papers for anti-union reasons, suggesting to employees that this was "just the first step in bringing in a union." The judge dismissed, with Board approval, allegations made by the Employer that UNITE Local 155 threatened employees that they would be reported to the Immigration and Naturalization Service if they failed to vote for the Union. Case 29-RC-8728 in this proceeding was severed and remanded to the Regional Director. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charges filed by UNITE Local 155; complaint alleged violations of Section 8(a)(1), (3) and (4). Charge filed by Belle Knitting Mills; complaint alleged violation of Section 8(b)(1)(A). Hearing on consolidated complaints held Oct. 8-10, Nov. 19-21, and Dec. 12, 1997 at Brooklyn, NY. Decision issued by Adm. Law Judge Robert T. Snyder, Feb. 11, 1999.

* * *

Old Dominion Freight Line (29-CA-20002, 20944; 331 NLRB No. 3) High Point, NC May 15, 2000. The Board found that the administrative law judge erred in rejecting the Respondent's 10(b) defense to allegations that it violated Section 8(a)(1) and (3) of the Act by attempting to dampen employee Fuentes' union activity with a pay raise during the election campaign. In Case 29-CA-20002, the Union charged that the Respondent unlawfully discharged 3 union supporters, threatened employees with physical harm and plant closure, and falsely accused employees of bullying other employees into signing authorization cards. The parties agreed to settle the charges on Sept. 11, 1996. [HTML] [PDF]

On April 25, 1997, Fuentes filed a new charge in Case 29-CA-20944. The General Counsel issued a consolidated complaint that vacated the settlement agreement in Case 29-CA-20002.

The judge found that the Respondent violated the Act by promising Fuentes a pay raise in August 1996 and granting him a pay raise on September 12, 1996. All other allegations of the consolidated complaint were dismissed by the judge. On review, the Board found merit to the Respondent's contention that the judge erred in rejecting its 10(b) defense to the Fuentes' pay allegations. The Board noted that the judge correctly cited *Redd-I, Inc.,* 290 NLRB 1115 (1988), by finding that the pay raise allegations are "closely related" to the other allegations of Fuentes' unfair labor practice charge. However, the Board noted, the judge overlooked Redd-I's additional requirement that the complaint allegations must be based on conduct occurring less than 6 months before the filing of a charge. Here, the complaint allegations of case 29-CA-20944 stem from the charge Fuentes' filed on April 25, 1997, which was served on Respondent on April 30, 1997. The Board stated: "Thus, only those complaint allegations involving conduct occurring after October 30, 1996, are timely within the limitations of Section 10(b) of the Act, and those allegations that involve conduct occurring prior thereto are time-barred by Section 10(b). Because the promise and grant of a pay raise to Fuentes found unlawful by the judge occurred in August and September 1996, outside the 10(b) period, those allegations cannot be found to be unfair labor practices includable in the April 25, 1997 charge, and must be dismissed." The Board upheld the judge's finding that the Respondent did not commit any other unfair labor practices after the settlement agreement was approved in Case 29-CA-20944 dismissed the consolidated complaint in its entirety, and reinstated the settlement agreement.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Teamsters Local 707 and Ruben Fuentes, an Individual; complaints alleged violations of Section 8(a)(1) and (3). Hearing at Brooklyn, NY, March 16-17, 1997. Decision issued by Adm. Law Judge Jerry M. Hermele, Sept. 23, 1998.

* * *

Office Employees Local 29 (Dameron Hospital Assn.) (32-CB-3695, 3801; 331 NLRB No. 15) Oakland, CA May 12, 2000. Chairman Truesdale and Member Liebman, with Member Brame concurring in part and dissenting in part, agreed with the administrative law judge that the Respondent/Union breached its duty of fair representation under *California Saw & Knife*

Works, 320 NLRB 224 (1995), and *Communications Workers v. Beck,* 487 U.S. 735 (1988), by requiring that a dues objector specify each expense category that s/he contends has been improperly allocated between chargeable and nonchargeable activities. The majority concluded that the Union's policy "simply places too high a burden on the objector's exercise of her right to challenge the Union's figures." Here, the majority found that the Union treated Charging Party Stoppenbrink's general challenge as a complete waiver of her right to challenge any union expenditures. Moreover, the majority concluded that the Union's failure to follow its own policy of placing the challenged portions of a dues objector's fees into escrow also violated the Act. [HTML] [PDF]

The majority adopted the judge's dismissal of the complaint allegation that the Union's financial disclosure statement unlawfully failed to explain the listed expenditure entitled "General and Defense Funds Reserve," noting that the Respondent's financial disclosure met and, in fact, exceeded what is required under *California Saw & Knife.* In so doing, the majority concluded that the Respondent's duty of fair representation was not breached by failing, at the pre-challenge stage, to explain the "General and Defense Funds Reserve." The majority adopted the judge's finding that the Respondent did not violate Section 8(b)(1)(A) by allocating its chargeable expenses on a "Local-wide" and "International-wide" basis rather than on a unit-by-unit basis. In addition, the majority reversed the judge and dismissed the allegation that the Respondent violated Section 8(b)(1)(A) by charging Stoppenbrink for extra-unit litigation expenses.

Member Brame would not apply the duty of fair representation standard in dues objection cases, finding that it "neither provides adequate protection of the Section 7 right to refrain from participating in union activity nor adheres to binding precedent." He criticized the Board for replicating its "misreading" of *Beck and California Saw & Knife* and set out a separate analysis for unions' obligations when dealing with dues objectors intended "to explicate the holding in Beck, to illustrate the dangers of applying the less rigorous duty of fair representation standard to the statutory rights of employees, and to offer a more appropriate analysis for protecting the rights of dissenting nonmembers." In addition, he would find that "as a matter of law, any expenditure found nonchargeable by the [Supreme] Court in public sector and [Railway Labor Act] cases is nonchargeable under the Act." Conversely, he would permit unions to charge for expenditures necessary for "maintaining their existence as bargaining agents," and for activity outside the objector's unit that ultimately inured to the unit's benefit. Finally, he would treat any activity on which the Court has not passed "as a mixed question of law and fact." Member Brame agreed with the majority's findings of violations, but would also have found that the Union violated Section 8(b)(1)(A) by including the "General and Defense Fund Reserve," by failing to provide Stoppenbrink with a breakdown of expenditures pertaining to her unit, and by charging her for extra-unit litigation.

(Chairman Truesdale and Members Liebman and Brame participated.)

Charges filed by Alexandria Stoppenbrink, an Individual; complaint alleged violations of Section 8(b)(1)(A). Hearing at Oakland, CA, Dec. 2-3, 1992. Decision issued by Adm. Law Judge Clifford H. Anderson, June 9, 1993.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

SEIU Local 32B-32J (Pratt Towers) Brooklyn, NY May 16, 2000. 29-CC-1285; JD(NY)-40-00, Judge Jesse Kleiman.

American Federation of Musicians & Atlanta Federation of Musicians Local 148-462 (Atlanta Symphony Orchestra) (Individual) Atlanta, GA May 16, 2000. 10-CB-7335; JD(ATL)-27-00, Judge Jane Vandeventer.

Sears Auto Center (Retail, Wholesale and Department Store Union Local 108) Paramus, NJ May 19, 2000. 22-CA-22993; JD (NY)-34-00, Judge Steven Davis.

FPE, Inc. (Chemical Workers [PACE]) Circleville, OH May 19, 2000. 9-CA-36958; JD-55-00, Judge David L. Evans.

* * *

TEST OF CERTIFICATION

(In the following case the Board granted the General Counsel's motion for summary judgment on the ground that the respondent has not raised any representation issues that are litigable in the unfair labor practice proceeding.)

Topside Construction, Inc. (Operating Engineers Local 3) (20-CA-29481-1; 331 NLRB No. 16) Carmichael, CA May 17, 2000.