

## 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.



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June 23, 2000

W-2744

**CASES SUMMARIZED**

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*United Parcel Service, Inc.* (7-CA-41784; 331 NLRB No. 53) Saginaw, MI June 14, 2000. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by, inter alia, orally promulgating an overly broad no-solicitation rule prohibiting employees from distributing literature in non-work or mixed-use areas during nonwork time. In adopting the judge's finding that the Respondent violated Section 8(a)(1) by discriminatorily enforcing its written no-distribution rule when it did not allow employee Dunning to distribute the Convoy Dispatch, a Teamsters for a

Democratic Union publication, in the Respondent's package car warehouse area during the prestart worktime, the Board relied on the fact that the Respondent routinely permitted drivers to pass out contest forms, raffle tickets, and golf and fishing flyers at that location. Member Hurtgen relied solely on the judge's finding that the Respondent discriminatorily enforced its no-distribution rule, citing his dissent in *United Parcel Service*, 327 NLRB No. 65 (1998). However, the Board did not rely on the drivers' solicitation of signatures on get well cards or the collection of money for flowers, etc. because "such conduct is more in the nature of 'solicitation' rather than 'distribution' as was engaged in by Dunning." No merit was found to the Respondent's contention that the distribution of the Convoy Dispatch was a potential "littering hazard" because the Respondent regularly permitted drivers to read non-union related materials that did not cause any disruption to daily operations. [\[HTML\]](#) [\[PDF\]](#)

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by David Dunning, an Individual; complaint alleged violations of Section 8(a)(1). Hearing at Detroit, MI, Sept. 28-29, 1999. Decision issued by Adm. Law Judge Bruce D. Rosenstein, Jan. 26, 2000.

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*Waste Management of Washington, Inc. d/b/a Waste Management Northwest* (19-RC-13951; 331 NLRB No. 51) Woodinville, WA June 8, 2000. Reversing the Regional Director's Decision and Direction of Election, the Board determined that the single-facility presumption favoring a unit of Port-O-Let employees at the Woodinville location only has been rebutted. Contrary to the Regional Director, the Board found instead that the functional integration of the operations; centralized control over labor relations policies; lack of local autonomy and common supervision of employees at both locations; identical skills, duties, and other terms and conditions of employment; and the evidence of interaction and coordination between the two groups outweighs two factors which would favor the single-facility presumption - the 42-mile distance between the two facilities and the Employer's failure to introduce relevant affirmative evidence demonstrating more than minimal interchange. (The Union is Teamsters Local 174.) [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Hurtgen and Brame participated.)

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*Health Care Services Group, Inc.* (30-CA-14061; 331 NLRB No. 49) Bayside, WI June 13, 2000. The administrative law judge found, and the Board agreed that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively in good faith with the Union. In particular, the judge noted such evidence of bad faith bargaining as Smith's, the Respondent's bargaining agent, lack of authority to commit the Respondent to any proposals and the long delay in raising objections and making counteroffers to Union proposals on which there had been tentative agreement; Smith's failure to show up at several negotiating sessions; and the Respondent's failure to make any proposals until 6 1/2 months after bargaining began. However, the judge found that "[p]ossibly the clearest indication of bad faith and the lack of any intention of reaching agreement with the Union is Respondent's regressive bargaining ... [, which] strongly suggests an intent to prevent the negotiation of a collective-bargaining agreement." The Board found merit in the General Counsel's exceptions and modified the Order to require the Respondent to reinstate the tentative agreements to restore "the status quo between the parties before the unfair labor practices began," citing *NLRB v. Beverly Health & Rehabilitation Services*, 187 F.3d 769 (8th Cir. 1999), enfg. *New Madrid Nursing Center*, 325 NLRB 897 (1998). [\[HTML\]](#) [\[PDF\]](#)

(Members Fox, Liebman, and Brame participated.)

Charge filed by Food and Commercial Workers Local 1444; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Milwaukee, WI, April 27, 1998. Decision issued by Adm. Law Judge Arthur J. Amchan, June 10, 1998.

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*Hogan Transports, Inc.* (14-CA-25382; 331 NLRB No. 38) St. Louis, MO June 9, 2000. The Board, in affirming the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by refusing to hire applicant James Powell because of his past membership in, support of, or activities on behalf of the Teamsters, agreed with the judge that the

General Counsel met his initial evidentiary burden with respect to the Respondent's refusal to hire Powell and that the Respondent failed to show that it would not have hired Powell even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980). Specifically, the Board found that the General Counsel established that the Respondent was hiring at the time that Powell applied for employment; that Powell had experience and training relevant to the announced or generally known requirements of the position for hire (over-the-road truckdriver); and that antiunion animus contributed to the Respondent's decision not to hire him. In defense, the Respondent claimed that its deliveries involved interstate away-from-home work unlike Powell's prior tractor-trailer over-the-road driving. It was presumed, but never asked of Powell that he would be unhappy in such work and was thus an "unsuitable candidate," and that he would be demoralized by the severe reduction in his income from about \$62,000 annually as an appointed International Union business agent to about \$18,000 to \$25,000 as a driver hiree. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by James S. Powell Jr., an Individual; complaint alleged violation of Section 8(a)(1). Hearing at St. Louis, June 9-10, 1999. Adm. Law Judge Thomas R. Wilks issued his decision Jan. 3, 2000.

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*GRB Entertainment, Inc. d/b/a Aardvark Post* (31-RC-7551; 331 NLRB No. 41) Sherman Oaks, CA June 13, 2000. Members Fox and Liebman concluded, contrary to the hearing officer and Member Brame, that Senior Staff Editor Roger Bartlett is not a supervisor within the meaning of Section 2(11) of the Act and thus overruled the challenge to Bartlett's ballot and directed that it be opened and counted, along with eight other ballots. If the revised tally of ballots shows that a majority of the valid votes were cast for the Stage Employees International, the Regional Director will issue a certification of representative. If not, the Regional Director will issue a notice of hearing on objections. [\[HTML\]](#) [\[PDF\]](#)

The hearing officer found that Bartlett effectively recommended applicants to the Director of Post Production Jeff Kimes for hire without Kimes' further independent review. The majority disagreed, noting it was undisputed that Bartlett never made a recommendation to Kimes that an applicant be hired or rejected. Rather, Kimes' role in the hiring process, it said, "was limited to testing each applicant's technical skills by conducting editing tests and reporting those results to Kimes." Citing a line of cases where the Board has consistently found that such an assessment of an applicant's technical ability to perform the required work does not constitute an effective recommendation to hire, the majority said that Kimes' acceptance and reliance on Bartlett's technical assessment of applicants "represents a deference to Bartlett's technical expertise, which Kimes acknowledged that he lacked, rather than a delegation of statutory supervisory authority." Having concluded that the Petitioner failed its burden of establishing the Bartlett has the authority to effectively recommend applicants for hire, the majority found no other basis for finding that he is a supervisor given the lack of evidence that Bartlett has the authority to transfer, suspend, lay off, recall, promote, discharge, reward employees, or adjust their grievances. "The facts noted by the hearing officer that Bartlett attended management meetings and that others perceived him to be a supervisor are secondary indicia of supervisory status and, because we have not found any primary indicia of supervisory status, cannot be dispositive to finding that Bartlett is a Section 2(11) supervisor," the majority held. In adopting the hearing officer's recommendation to sustain the challenge to the ballot of Li Po Ching, Members Fox and Liebman relied solely on the finding that Ching was briefly employed before the election as a temporary substitute for a vacationing individual and, thus, sustained the challenge to Ching's ballot on the ground that he was a temporary employee and found it unnecessary to pass on the hearing officer's finding that Ching was a supervisor.

Member Brame, dissenting in part, agreed that the challenge to Ching's ballot be sustained; however, he relied on both grounds given by the hearing officer for his decision, i.e., that Ching was both a temporary employee and a supervisor. He agreed also with the hearing officer that Bartlett is a supervisor within the meaning of the Act and that the challenge to his ballot should be sustained. Member Brame found that Bartlett did more than just test applicants and report the test results to Kimes, noting testimony that Bartlett conducted a thorough interview of an applicant and referred him to Kimes for his "stamp of approval," and that Kimes himself conceded that he had never hired anyone that Bartlett had not recommended as technically capable of performing the job. He found "this testimony to establish effective recommendation, despite Quick's and Kimes' testimony, relied on by the majority, that Kimes retained final approval authority."

(Members Fox, Liebman, and Brame participated.)

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*Young Broadcasting of Los Angeles, Inc. d/b/a KCAL-TV* (31-RC-7773; 331 NLRB No. 46) Hollywood, CA June 13, 2000. Citing *Berea Publishing Co.*, 140 NLRB 516 (1963), the Board affirmed the hearing officer's recommendation to overrule the challenge to the ballot cast by Stephanie Farr, the weekend show producer, in an election held on October 22, 1999 and petitioned for by Electrical Workers IBEW Local 45. The parties stipulated that Farr is a dual function employee, who spends approximately 60 percent of her worktime as a weekday associate producer and approximately 40 percent of her time as a weekend show producer. As an associate producer, Farr was eligible to vote in an election held on September 9, 1999 in Case 31-RC-7766 that resulted in certification of IBEW Local 45 as exclusive collective-bargaining representative of the Employer's newsroom employees. In this case, the hearing officer found that as a weekend show producer, Farr is eligible to vote in the election, where the same Union seeks to represent a separate bargaining unit of show producers. [\[HTML\]](#) [\[PDF\]](#)

In *Berea Publishing*, the Board held that dual function employees who share a substantial community of interest with full-time employees in a bargaining unit are entitled to the same rights and privileges in the selection of the majority representative. There the Board said "we can perceive no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer." 140 NLRB at 519. In this decision, the Board wrote in adopting the hearing officer's recommendation to overrule the challenge to Farr's ballot: "Quite obviously, an individual who works part-time for more than one employer may be eligible to vote in an appropriate unit of each employer's employees. Consistent with *Berea Publishing*, we see no policy reason why a dual function employee may never vote in two separate units. We need not and do not define here all instances in which it would be appropriate to permit a dual function employee's participation in more than one unit election. We agree with the hearing officer, however, that under the circumstances of this case, where time spent and work performed by a single dual function employee in one job classification is distinct and separate from time spent and work performed in another classification, that employee should be eligible to participate fully in both bargaining units in which she has a substantial interest."

(Chairman Truesdale and Members Fox and Liebman participated.)

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*Electronic Data Systems Corp.* (3-CA-19975; 331 NLRB No. 52) Rochester, NY June 15, 2000. In agreeing with the administrative law judge that the Respondent did not violate Section 8(a)(1) of the Act when it discharged service representative Nettie Eaton and when he thus dismissed the complaint, the Board found that Eaton solicited employees to engage in a partial work stoppage and that her conduct in that respect was not protected under Section 7 of the Act. The Respondent provides communication services to Xerox Corporation (Xerox) and contracts with service vendors to resolve various technical problems for Xerox. On the afternoon of January 31, 1996, Eaton spoke with her husband, who was an employee of the Respondent's vendor Rochester Telephone, and learned that Rochester Telephone employees might shortly go on strike. Later that afternoon, Eaton sent two computer e-mail messages to her fellow employees and then had direct conversations with several employees working in the Respondent's network operations center (NOC) regarding the situation at Rochester Telephone. Credited testimony shows that Eaton told NOC employees not to call, refer service requests to or interact with Rochester Telephone. [\[HTML\]](#) [\[PDF\]](#)

The judge found that Eaton's actions were not concerted and bore no "legitimate relationship to the interests of employees, either her fellow EDS employees or the Unionized employees of [Rochester Telephone]." The Board noted however that Eaton's e-mail solicitation of fellow employees to support the striking Rochester Telephone employees was clearly concerted activity, but that she "went further . . . and asked other employees not to call or refer service requests to Rochester Telephone." It agreed with the judge that Eaton thus solicited the Respondent's NOC employees "to stop performing an important portion of their jobs-referring telephone service and circuit problems of Xerox customers to Rochester Telephone-and that this amounted to the solicitation of an intermittent, partial work stoppage by the NOC employees." Because it found that Eaton's solicitation of a partial strike was unprotected, the Board did not reach the issue of whether Eaton's e-mail message that persons crossing a picket line "will suffer the consequences" constituted a threat.

(Members Liebman, Hurtgen, and Brame participated.)

Charge filed by Nettie C. Eaton, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Rochester, Sept. 25-26, 1996. Adm. Law Judge Wallace H. Nations issued his decision Dec. 23, 1996.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Caravan Transportation, Inc.* (Individuals) New York, NY May 8, 2000. 29-CA-22331, et al.; JD-128-99, Judge Margaret M. Kern.

*Lemle & Wolff, Inc.* (an Individual) New York, NY May 8, 2000. 2-CA-32254; JD(NY)-38-00, Judge Steven Fish.

*Sierra Bullets, LLC* (Steelworkers) Springfield, MO May 8, 2000. 17-CA-20255, 20368; JD(ATL)-26-00, Judge Pargen Robertson.

*Refrigeration Service, Inc. d/b/a R.S.I. Appliance Service* (Plumbers Local 636) Detroit, MI June 15, 2000. 7-CA-42161; JD-68-00, Judge Irwin H. Socoloff.

*Nynex Corp. d/b/a Bell Atlantic* (Communications Workers Local 1105) Harrison, NY June 13, 2000. 34-CA-7953, 8130; JD(NY)-43-00, Judge Eleanor MacDonald.

*V.I.P. d/b/a Olympic Specialties* (IBEW Local 357) Las Vegas, NV June 2, 2000. 28-CA-15938; JD(SF)-33-00, Judge James L. Rose.

*TXU Electric Company* (IBEW Local 2337) Fort Worth, TX June 9, 2000. 16-CA-19810, et al.; JD(ATL)-28-00, Judge Pargen Robertson.

*Pactiv Corporation d/b/a Tenneco Packaging, Inc.* (Operating Engineers Local 470) Aiken, SC June 9, 2000. 11-CA-18425, 18442; JD(ATL)-32-00, Judge George Carson II.

*Painters Local 20* (an Individual) New York, NY June 9, 2000. 2-CB-17650; JD(NY)-44-00), Judge D. Barry Morris.

*United Rentals Northwest, Inc.* (Operating Engineers Local 49) Minneapolis, MN June 9, 2000. 18-CA-15482; JD-66-00, Judge William J. Pannier III.

*Alamo Rent-A-Car* (Teamsters Local 665) Burlingame, CA June 1, 2000. 20-CA-29022, et al.; JD(SF)-31-00, Judge Joan Wieder.

*South Coast Refuse Corp.* (Teamsters Local 396) Irvine, CA June 9, 2000. 21-CA-32555, et al.; JD(SF)-35-00, Judge Frederick C. Herzog.

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### 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 issues that are litigable in this unfair labor practice proceeding. The case did not present any other issues.)*

*Public Service Company of Colorado* (IBEW Local 111) (27-CA-16820; 331 NLRB No. 48) Denver, CO June 14, 2000.