

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 30, 2000

W-2745

CASES SUMMARIZED

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Press Release:

[\(R-2392\) Ellen Farrell Named Deputy Associate General Counsel, NLRB Division of Advice](#)

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U.S. Tsubaki, Inc., Roller Chain and Automotive Divisions (1-UC-710; 331 NLRB No. 47) Holyoke and Chicopee, MA June 13, 2000. The Board found that the Regional Director erred in failing to apply *Gitano Distribution Center*, 308 NLRB 1172 (1992), and that, under *Gitano*, the historical collective-bargaining unit of production and maintenance employees at the Employer's plant in Holyoke should be clarified into two separate units of employees located at its Holyoke and Chicopee facilities, respectively. Since all of the unit employees at Chicopee are transferees from the original bargaining unit, the Board held that Steelworkers Local 7912 continues to represent the employees in both the Holyoke and the Chicopee bargaining units. The Employer, a manufacturer of roller chains, engineering chains, sprockets, power transmission units, and automotive timing chains, had housed its two independent divisions (Roller Chain and Automotive) at the Holyoke facility. Employees of both divisions were included in the same bargaining unit covered by the same collective-bargaining agreement. In November 1996, the Employer moved the Automotive Division to a new facility approximately 5 miles away in Chicopee. In *Gitano*, the Board held that when an employer transfers a portion of its employees at one location to a new location, the new facility is presumptively a separate unit. [\[HTML\]](#) [\[PDF\]](#)

The Board, in finding no merit to the Union's contention that *Gitano* is limited to situations involving a merger of represented with unrepresented employees, wrote:

In *Armco Steel Co.*, 312 NLRB 257, 259-260 (1993), the Board rejected the contention that *Gitano* limited unit clarification proceedings to a determination of the inclusion or exclusion of relocated employees vis-à-vis the unit from which they came and applied the *Gitano* analysis to determine the appropriateness of a separate unit of the relocated employees. ...Thus, in *Armco*, the Board relied heavily on the expediency and efficiency of utilizing unit clarification proceedings in resolving unit scope and majority status issues. These concerns are paramount even in the absence of unrepresented employees. Moreover, in *Mercy Health Services*, 311 NLRB 367 (1993), the Board applied a *Gitano* analysis where two registered nurses were transferred to an off-site location from the main hospital in order to create a new dialysis treatment unit. There were no unrepresented employees at this new facility. Accordingly, we find that the *Gitano* analysis is appropriate to determine whether the Automotive Division at the Employer's Chicopee facility is a separate, appropriate unit.

The Board noted these factors in finding that the presumption of a separate, appropriate unit at the Chicopee facility has not been rebutted. The two divisions have operated independently since the Automotive Division moved to Chicopee; they have separate managerial hierarchies, separate training and quality control procedures and separate overtime and vacation seniority; their managers and supervisors have no role in each other's discipline or hiring; each division handles union grievances separately, with guidance from the corporation's central human resources department, and there is limited interchange between the two divisions. Although there is a history of common collective-bargaining since the creation of the Automotive Division in 1989 and employees of both divisions are subject to the same collective-bargaining agreement, have almost identical terms and conditions of employment, and can bid on job openings in the other division, the two divisions were individually represented in negotiations with the Union even prior to the relocation.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

* * *

Midwestern Personnel Services (25-CA-25503-2, et al.; 331 NLRB No. 50) Olive Branch, MI and Louisville, KY June 21, 2000. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers immediately upon their unconditional offer to return to work; violated Section 8(a)(2) by assisting and supporting Teamsters Local 836/100 and recognizing it in the absence of an uncoerced majority of employees having designated the Union as their collective-bargaining representative; and violated Section 8(a)(1) by threatening employees with loss of employment if they did not choose Teamsters Local 836/100 to represent them and threatening them with discipline and discharge for engaging in protected concerted activity. [\[HTML\]](#) [\[PDF\]](#)

The Board rejected as untimely the Respondent's argument, raised for the first time in its brief to the Board, that its contract with Teamsters Local 836 was a valid and enforceable 8(f) prehire contract. It noted that Section 8(f) of the Act, by its terms, applies only to employers engaged in the building and construction industry. The Respondent's president, Samuel Ware,

testified without contradiction that the Respondent is not an employer primarily engaged in the construction industry. In rejecting the Respondent's argument that the unfair labor practice strike was converted to an economic strike by its signing of an informal settlement agreement on February 18, 1998, the Board noted that prior to the submission of the March 27, 1998 unconditional offer to return to work there had been no notice posting, no complete remedying of the pending unfair labor practices, and no assurances given to the employees that they would not be discharged for striking.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Teamsters Local 215; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing at Evansville, Sept. 20-21, 1999. Adm. Law Judge Jane Vandeventer issued her decision Feb. 9, 2000.

* * *

Union Carbide Corp. (9-CA-36332; 331 NLRB No. 54) South Charleston, WV June 21, 2000. The Board agreed with the administrative law judge that the Respondent unlawfully discharged Rex A. King for pursuing his contract rights, i.e., attempting to find out his continuous service date (CSD), which is used to determine eligibility for contract benefits including vacation and severance. The Board found to be distinguishable *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), relied on by the Respondent, where the Board found that an employee's behavior in asserting a contract right constituted insubordination because he *persisted* in challenging his supervisor's direct order to clock out. Agreeing with the judge that King's conduct was not so "out of line" as to remove him from the protection of the Act, the Board concluded that King's behavior was "at most rude and disrespectful." See *Severance Tool Industries*, 301 NLRB 1166 (1991), *enfd.* 953 F.2d 1384 (6th Cir. 1992). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Rex A. King, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Charleston on May 11, 1999. Adm. Law Judge William N. Cates issued his decision June 9, 1999.

* * *

Operating Engineers Local 3 (32-CB-4847; 331 NLRB No. 60) Alameda, CA June 21, 2000. The administrative law judge found, and the Board agreed, that the Union violated Section 8(b)(1)(A) of the Act by threatening to discipline, and disciplining, members John Hillman, Ruben Serrano, David Knapp, and Preston Pope because they continued to work for a nonunion employer, Specialty Crushing, Inc. Specifically, the judge found that the Respondent's threats and discipline were unlawful efforts to impose representation on a unit of employees who had rejected the Respondent in a Board-conducted election held in June 1997. The Respondent had no express rule prohibiting members from working nonunion at the time that it disciplined Knapp, Hillman, Serrano, and Pope, but it enacted such a rule on October 12, 1997, after the instant unfair labor practice charge was filed. The Respondent did have a rule that specified that members must "conform and abide by the hours, wages, and conditions of employment provided for in agreements negotiated by this Local Union." The Board wrote: [\[HTML\]](#) [\[PDF\]](#)

"It is well settled that unions are prohibited under Section 8(b)(1)(A) from coercing employees in the exercise of rights guaranteed by Section 7 of the Act. Although the proviso to Section 8(b)(1)(A) permits labor organizations to prescribe their own rule regarding the acquisition and retention of membership, the scope of the proviso is limited. As set forth in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), a union may enforce properly adopted internal rules against its members only where those rules: (1) reflect a legitimate union interest; (2) impair no policy Congress has imbedded in the labor laws; and (3) are reasonably enforced against union members who are free to leave the union and escape the rule. Here, the Respondent has not satisfied the third element of the *Scofield* test. Thus, without deciding whether the Respondent had a properly adopted rule prohibiting members from working for a nonunion employer, we agree with the judge that--even were there such a rule--it was not reasonably enforced against the four members. Rather, that rule was disparately enforced against these members."

In agreeing that the Respondent's discipline of the four members was not protected under *Scofield* principles, Members Hurtgen and Brame also noted that the Respondent did not rely on its rule cited above at the time of the events here.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by Specialty Crushing, Inc.; complaint alleged violation of Section 8(b)(1)(A). Hearing at Oakland on Jan. 26, 1998. Adm. Law Judge Jay R. Pollack issued his decision May 5, 1998.

* * *

Audubon Regional Medical Center (9-CA-31725-1, et al., 9-RC-16332; 331 NLRB No. 42) Louisville, KY June 22, 2000. The Board affirmed the administrative law judge's findings that the Respondent engaged in extensive and serious unfair labor practices in response to an organizing drive by the Nurses' Professional Organization conducted among the Respondent's registered nurses (RNs) and that the possibility of erasing the effects of such conduct and of conducting a fair rerun election by the use of traditional remedies alone are unlikely. The Board decided however that a Gissel bargaining order remedy is unwarranted and concluded instead that employee rights can best be served by directing a new election but also adopting the judge's recommended broad cease-and-desist order and ordering certain additional special remedies, including the submission of the names and addresses of current employees to the Union, a public reading of the notice to employees at Audubon's facility, and reasonable access to the Respondent's bulletin boards. Chairman Truesdale would not impose the special remedies requiring reading of the notice and reasonable access to bulletin boards [\[HTML\]](#) [\[PDF\]](#)

The Board wrote in granting the Respondent's motions to reopen the record to include evidence on managerial turnover and the transfer of company ownership and management from Columbia/HCA Healthcare Corporation to Alliant Health System, Inc. (Alliant):

"We would normally at least consider issuing a bargaining order in the circumstances of this case. However, the unchallenged evidence submitted by the Respondent shows that none of the supervisory or managerial employees who perpetrated the unfair labor practices is still associated with Audubon in any capacity. . . . Given this unrefuted contention that there has been 100-percent turnover in management, and the long delay of the case here at the Board, we recognize that a bargaining order would likely be unenforceable in the courts. . . . Accordingly, rather than engender further litigation and delay over the propriety of a bargaining order, we believe employee rights would better be served by proceeding directly to a second election."

The Board reversed the judge's findings that the Respondent violated Section 8(a)(5) and (1) by failing to recognize the Union and making unilateral changes since it did not find that a bargaining obligation arose on the basis of the Union's card majority. It affirmed the judge's findings that the Respondent violated Section 8(a)(1), (3), and (4) by, among other things, soliciting grievances accompanied by promises to adjust them; threatening employees with plant closure or sale, job and benefit loss, discrimination, and discipline; discriminating against employees because of their union and/or protected concerted activities; issuing an employee a low evaluation because she joined, supported, or assisted the Union; and assigning an employee to second shift, issuing an employee a low evaluation, and denying employees full-time patient care leader positions, all because they gave testimony to the Board in the form of an affidavit and for testifying on behalf of the Board in Cases 9-CA-31725-1 and 32276. The Board remanded Case 9-RC-16331 to the Regional Director to conduct a second election. The Union lost the election held on March 3 and 4, 1994 by a 336-to-220 vote.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Nurses' Professional Organization; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Louisville, Sept. 19-22 and 26-29, Nov. 6-9, and Dec. 4-8, 1995, and Feb. 12, 1996.

* * *

St. George Warehouse, Inc. (22-CA-23223, et al.; 22-RC-11703; 331 NLRB No. 55) Kearny, NJ June 23, 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 Leonard Sides and Jesse Tharp because of their membership in, and activities on behalf of Teamsters Local 641; and violated Section 8(a)(1) by creating the impression that its employees union activities were under surveillance and soliciting grievances from them about working conditions to induce them not to select the Union as their collective-bargaining representative. The Board directed the Regional Director to open and count the challenged ballots cast by Sides and Tharp in the election held in

Case 22-RC-11703 and to issue a revised tally of ballots and the appropriate certification. The original tally of ballots shows 16 for and 17 against, the Union, with 4 challenged ballots. Pursuant to a stipulation, the challenges to 2 ballots were sustained. [\[HTML\]](#) [\[PDF\]](#)

The Board found it unnecessary to rely on the judge's application of the "small shop theory" to establish the Respondent's knowledge of Tharp's union activities. In addition, Member Brame found it unnecessary to rely on the judge's findings that the Respondent did not have to pay for Sides' miscounting mistakes, in order to find that the Respondent violated Section 8(a)(3) and (1) when it discharged Sides. The Board concluded, based on Paul Smith's agency status, and without regard to his supervisory status, that the record sufficiently demonstrates that his attendance at a union meeting in his capacity as the Respondent's agent created the impression of surveillance. It found it unnecessary to pass on the judge's finding that Smith was a supervisor within the meaning of Section 2(11) of the Act.

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by interrogating its employees about their union activities, promising increased benefits and improved terms and conditions of employment to induce them not to select the Union as their collective-bargaining representative; and promulgating and distributing to its employees an overly broad no-solicitation, no-distribution clause; that the Respondent violated Section 8(a)(3) and (1) by increasing the volume of written discipline given to employees after it became aware of employees' union activities and issuing written warnings to employees; and that the Respondent did not unlawfully discriminate against Tharp by assigning him heavier workloads.

(Chairman Truesdale and Members Liebman and Brame participated.)

Charges filed by Teamsters Local 641; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Newark, July 28 and Aug. 4, 6, 10, and 11, 1999. Adm. Law Judge Howard Edelman issued his decision Feb. 8, 2000.

* * *

Kmart Corp. (11-CA-17778; 331 NLRB No. 58) Greensboro, NC June 21, 2000. The Board affirmed the administrative law judge's dismissal of the complaint, concluding that the parties' collective-bargaining agreement provided for second and third year wage increases for top out employees only, and that, consequently, the Respondent did not violate the Act by failing to grant across-the-board increases on July 28, 1997. [\[HTML\]](#) [\[PDF\]](#)

In 1996, the Respondent and UNITE reached agreement on their first collective-bargaining agreement, which was effective from July 28, 1996 through July 27, 1999. Appendix A specifies the wage rates for all unit jobs, varying according to length of employment, during the first year of the contract. For the second and third years of the contract, the agreement specifies only the wage rate for "top out" employees. The term refers to those employees who have reached the highest level of pay for their job based on length of service in that position. The Respondent's employees top out in their jobs at 2 years. The chart does not specify raises in the second and third years for other unit employees. In July 1997, the Respondent granted a 75-cent wage increase to top out employees, but provided no raises to other unit employees. The Union and General Counsel contended that the parties agreed at the bargaining table to an across-the-board wage increase of 75 cents per hour for the second and third years of the contract. The Respondent argued that the contract required second and third year raises for top out employees only. The Board agreed after determining the meaning of the wage chart by examining the literal language of Appendix A, as well as the extrinsic evidence regarding the parties' intent.

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by UNITE; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Greensboro on June 24, 1998. Adm. Law Judge Pargen Robertson issued his decision Aug. 14, 1998.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

IBEW Locals 98 and 380 (MCF Services, Inc., t/a State Electric, et al.) Philadelphia, PA June 23, 2000. 4-CC-2214, et al.; JD-52-00, Judge George Aleman.

Teamsters Local 282 (E.G. Clemente Contracting Corp.) Brooklyn, NY June 21, 2000. 29-CB-10969; JD-62-00, Judge Margaret M. Kern.

Alexandria Clinic, P.A. (Minnesota Liscensed Pracitcal Nurses Association) Alexandria, MN June 16, 2000. 18-CA-15371; JD-61-00, Judge John H. West.

Kentucky Association of Electrical Cooperatives, Inc. (IBEW Local 369) Louisville, KY June 20, 2000. 9-CA-36715; JD-67-00, Judge Earl E. Shamwell Jr.

Steelworkers Local 169 (Philip Metals, Inc., a/k/a Luntz, a wholly owned subsidiary of Philip Services Corp.) Mansfield, OH June 23, 2000. 8-CC-1635; JD-73-00, Judge William G. Kocol.

Howard's Sheet Metal, Inc. (Sheet Metal Workers Local 24) Baltimore, OH June 20, 2000. 9-CA-37162; JD-75-00, Judge Arthur J. Amchan.

Herre Bros., Inc. (Sheet Metal Workers Local 19) Enola, PA June 21, 2000. 5-CA-27807, 28290; JD-78-00, Judge Thomas R. Wilks.

Detroit Newspaper Agency d/b/a Detroit Newspapers (Detroit Mailers Union 2040, Teamsters) Detroit, MI June 21, 2000. 7-CA-42544; JD-79-00, Judge Paul Bogas.

Transmontaigne, Inc. (Teamsters Local 929) Philadelphia, PA June 23, 2000. 4-CA-27610; JD-81-00, Judge Richard A. Scully.

Aiken Underground Utility Services (an Individual) Aiken, SC June 22, 2000. 11-CA-16393; JD(ATL)-33-00, Judge Keltner W. Locke.

Midon Restaurant Corp. d/b/a Burger King (Industrial Workers, Philadelphia General Membership Branch) Albany, NY June 16, 2000. 3-CA-22075; JD(NY)-45-00, Judge Joel P. Biblowitz.

Staten Island University Hospital (New York Nurses Association) Staten Island, NY June 22, 2000. 29-CA-23193; JD(NY)-46-00, Judge Raymond P. Green.

Adirondack Transit Lines, Inc. (United Transportation Local 1582) Kingston, NY June 22, 2000. 3-CA-22172; JD(NY)-47-00, Judge Steven Davis.

USF Dugan, Inc. (Teamsters Local 554) Omaha, NE June 12, 2000. 17-CA-19761; JD(SF)-32-00, Judge Albert A. Metz.

Food & Commercial Workers Local 101 (Federation of Agents and International Representatives) San Francisco, CA June 14, 2000. 20-CA-28857, 29252-1; JD(SF)-34-00, Judge Mary Miller Cracraft.

* * *

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.)

Steven Womack, Kenneth Womack and James Womack, d/b/a Womack Brothers (Teamsters Local 525) (14-CA-25027; 331 NLRB No. 61) Lenzburg, IL June 22, 2000.

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TEST OF CERTIFICATION

(In the following cases, 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 these unfair labor practice proceedings. The cases did not present any other issues.)

Pontiac Osteopathic Hospital d/b/a POH Medical Center (Auto Workers) (7-CA-42923; 331 NLRB No. 62) Pontiac, MI June 22, 2000.

Laidlaw Transit, Inc. (Teamsters Local 78) (32-CA-18104-1; 331 NLRB No. 63) Haywood, CA June 22, 2000.

* * *

NO ANSWER TO COMPLAINT SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

ITAL General Construction, Inc., and its alter ego *LATI Development, Inc.* (Bricklayers Local 11) (3-CA-20225; 331 NLRB No. 64) East Rochester, NY June 22, 2000.