

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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August 11, 2000

W-2751

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Valentine Painting and Wallcovering, Inc. (29-CA-22752; 331 NLRB No. 109) Patchogue, NY July 28, 2000. The Board upheld the administrative law judge's decision that the Respondent failed and refused to hire Ronald Caputo on March 11, 1999 because of his union activities and affiliation in violation of Section 8(a)(3) and (1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Ronald Caputo, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn. Adm. Law Judge Steven Davis issued his decision March 27, 2000.

* * *

Mt. Sinai Hospital (2-CA-28197; 331 NLRB No. 111) New York, NY July 31, 2000. Affirming the administrative law judge, the Board held the Respondent violated Section 8(a)(5) of the Act by (1) unilaterally reclassifying employees in the unit position of sous chef to the nonunit position of assistant culinary manager and transferring the work of the employees out of the bargaining unit; and (2) refusing to provide the Union with the wage rates and job descriptions of the two positions. [\[HTML\]](#) [\[PDF\]](#)

In finding the Respondent's unilateral action constituted a change in the scope of the unit, the panel majority of Chairman Truesdale and Member Fox stated in a footnote:

As the Board stated in *Holy Cross Hospital*, 319 NLRB 1361 (1995), once a position has been included within the scope of the unit, the employer cannot remove it without the consent of the union or the Board. Here, the parties agreed to arbitrate the unit status of the sous chefs, and the arbitrator placed them in the unit. The Respondent effectively removed the position of sous chef from the unit when it reclassified the three employees who occupied the position but continued to have them do the same work. Moreover, the unit sous chef position that the Respondent subsequently posted was substantially altered. Thus, the Respondent violated Sec. 8(a)(5) of the Act by reclassifying the position in order to remove it from the unit. There is no dispute that the Respondent never consulted with the Union and that the Union never agreed in the contract to the alteration.

Finally, we agree with the judge's alternative rationale-and the one on which our concurring colleague relies, that even were the Respondent's unilateral change to constitute a transfer of unit work, rather than an alteration of the unit, the Respondent violated Sec. 8(a)(5) because there had been no agreement, impasse, or waiver.

In a separate opinion concurring in part, Member Hurtgen said he would find the unilateral reclassification unlawful only as a unilateral transfer of unit work. He stated:

In my view, an employer does not have to bargain about the creation of a supervisory position. Nor does an employer have to bargain about the filling of that supervisory position. However, where, as here, a unit employee is selected for the supervisory position, and the promoted employee takes with him some of his unit work, the employer must bargain about that removal of work from the unit.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by National Health and Human Service Employees Union 1199; complaint alleged violation of Section 8(a)(5) and (1). Hearing at New York City, between Feb. 24 - April 4, 1997. Adm. Law Judge Michael A. Marcionese issued his decision Sept. 18, 1997.

* * *

Oscar Serrano, a Sole Proprietor d/b/a Serrano Painting (28-CA-15273; 331 NLRB No. 120) Mesa, AZ July 31, 2000. The Board found the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ Michael Paz, a union official and paid organizer, on June 23, 1998. Severing this uncontested violation from other issues in the case, the Board called for a conditional order of reinstatement entitling the Respondent to avoid the reinstatement and backpay obligation at the completion

date of the project if it is determined an employee hired into the position unlawfully denied Paz would not have been transferred or reassigned to another job. The majority opinion is by Members Fox and Liebman; Member Brame dissented in part. [\[HTML\]](#) [\[PDF\]](#)

The Board remanded to the judge pursuant to its decision in FES, 331 NLRB No. 20 (2000), the issues regarding the Respondent's failure to employ or consider for employment. Local 86 member Richard Elliot, who had 15 years of painting experience. The judge had rejected the General Counsel's allegation that antiunion animosity contributed to the Respondent's decision not to employ Elliot. Regarding this proceeding, Member Brame would agree with the judge that the General Counsel failed to establish the Respondent's decision not to hire Elliot was because of his disclosed union affiliation. He noted the Respondent had hired a number of other union members.

(Members Fox, Liebman, and Brame participated.)

Charge by filed Painters Local No. 86; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix, AZ, March 16, 1999. Adm. Law Judge William L. Schmidt issued his decision Feb. 16, 2000.

* * *

Fred'k Wallace & Son, Inc. (4-CA-25156, 25744; 331 NLRB No. 113) Philadelphia, PA July 31, 2000. The Board agreed with the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by its refusal to consider and hire John Barzeski due to his status as a union member, and by creating the impression of surveillance. It concluded the General Counsel met the burden of proof regarding the refusal to hire Barzeski under FES standards [331 NLRB No. 20 (2000)]. As for the surveillance issue, the Board applied the test in *Flexsteel Industries* [311 NLRB No. 257 (1993)], and determined that questioning by the company superintendent and owner of employee Thomas Barnes, another union member, about a conversation he and other employees had with union organizers on the roof of a school earlier that day--gave the impression the Respondent was keeping union activities of employees under surveillance. The majority opinion is by Members Fox and Liebman. [\[HTML\]](#) [\[PDF\]](#)

Chairman Truesdale, dissenting in part, would dismiss the surveillance allegations, pointing out that the conversations with union organizers occurred in an open area in the workplace. Citing *Impact Industries* [285 NLRB No. 5 (1987)] and *Hoschton Garment Co.* [279 NLRB No. 565 (1986)], he said: "The Board has long held that an employer's mere observation of open union activity on or near its property does not constitute unlawful surveillance."

The Board rejected the Respondent's argument that the Section 8(a)(1) allegations are not barred by Section 10(b), pointing out that in *Ross Stores, Inc.*, 329 NLRB No. 59 (1999), the Board recently reaffirmed the 'closely related' test of *Nickles Bakery of Indiana*, [296 NLRB No. 927 (1989)], and overruled *Nippondenso* [299 NLRB No. 545 (1990)]."

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Sheet Metal Workers Local 19; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, June 23-25, 1997. Adm. Law Judge Bruce D. Rosenstein issued his decision Oct. 27, 1997.

* * *

Full Service Beverage Company of Colorado (27-CA-15359; 331 NLRB No. 114) Englewood, CO Aug. 7, 2000. The Board affirmed the administrative law judge's finding that employee Frank Sample was discharged, following a warning and suspension, by the Respondent for engaging in protected union activity, in violation of Section 8(a)(1) and (3) of the Act. It ordered that Sample be reinstated with backpay. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charges filed by Frank Louis Sample, an individual and Teamsters (IBT) Local 435; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Denver, March 16-20, 1998. Adm. Law Judge Albert A. Metz issued his decision May 29, 1998.

* * *

Hudson Valley Electrical Construction & Maintenance, Inc. (3-CA-21486, 21878; 331 NLRB No. 115) Milton, NY Aug. 4, 2000. The Board adopted the administrative law judge's dismissal of an allegation under Section 8(a)(3) of the Act that the Respondent had refused to consider hiring union organizer John Sager as an electrician during an organizing campaign. The judge found that Sager had attempted to harass and embarrass the Respondent with a false report regarding alleged deficiencies in the Respondent's work. "Such activity is not protected and gave the Respondent a legitimate business reason, wholly unrelated to Sager's union membership, for not hiring or considering him for employment," the judge said. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by Electrical Workers (IBEW) Local 363; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Albany, Aug. 24, 1999. Adm. Law Judge Wallace H. Nations, issued his decision Oct. 5, 1999.

* * *

Far West Fibers, d/b/a E-Z Recycling and Association of Western Pulp and Paper Workers (36-CA-8233, 8271; 331 NLRB No. 116) Portland, OR Aug. 7, 2000. Affirming the administrative law judge, the Board found the Respondent violated Section 8(a)(1) of the Act by (1) interrogating employee Krista Henson regarding her union activity; (2) engaging in surveillance of employees engaged in union activity by obtaining through trickery the credit card receipt of a union organizer and confronting Henson with it; and (3) issuing employee Henson a warning because she refused to reveal her Section 7 activities. [\[HTML\]](#) [\[PDF\]](#)

In a footnote, the Board noted the judge's bench decision was not issued within 72 hours after conclusion of the oral argument, as required by Sec. 102.35(a)(10). In addition, the certification was not issued "promptly" after receipt of the transcript, as required by Sec. 102.45.

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by Carpenters; complaint alleged violation of Section 8(a)(3) and (1). Hearing at Portland, April 6, 1999. Adm. Law Judge James M. Kennedy issued his bench decision June 7, 1999.

* * *

FPA Medical Management, Inc. (28-CA-14461; 331 NLRB No. 117) Phoenix, AZ Aug. 3, 2000. In this supplemental decision, a case on remand from the U.S. Court of Appeals for the D.C. Circuit, the Board addressed the narrow question of whether prounion conduct by physicians had improperly influenced the medical support staff employees' choice and thereby interfered with an election won by the union. The Board found that prounion statements made by the physicians and their wearing prounion buttons did not constitute objectionable coercion of unit employees--even assuming the physicians were statutory supervisors. [\[HTML\]](#) [\[PDF\]](#)

The Board declined to decide the broader issue of whether to extend its "no relitigation" rule. Traditionally the Board has applied this rule in cases where the bargaining unit in both the unfair labor practice case and the representation case are the same.

In an unpublished decision (Case 28-RC-5480; June 10, 1997), the Board certified the Union as the exclusive collective bargaining representative of a unit of certain nonphysician medical support staff employees. Overruling the Employer's objections, the Board held that the supervisory status of the physicians had been fully litigated in an earlier representation proceeding, Case 28-RC-5449, where the physicians were found to be employees. Accordingly, it concluded the physicians' conduct in support of the Union had not improperly influenced the staff employees' election choice.

The Board's previous decision in the instant unfair labor practice case (324 NLRB 802, Oct. 22, 1997) concluded the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. It found that this case was

"related" to Case 28-RC-5449. Therefore, the Respondent was precluded from relitigating the supervisory status of the physicians in this case involving the support staff unit. The Board acknowledged here that its earlier finding was made "without adequate explanation."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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Raleigh County Commission on Aging, Inc. (9-RC-17318; 331 NLRB No. 119) Beckley, WV July 31, 2000. The majority opinion by Chairman Truesdale and Member Fox found, contrary to the hearing officer, that a catered victory dinner paid for by the Respondent 15 days after the Union lost an election (30 for, 41 against the Union, with two challenged ballots), did not constitute objectionable conduct in violation of the Act and "cannot reasonably be viewed as anything more than a legitimate form of campaign propaganda." In dissent, Member Hurtgen would set aside the election. He viewed the Respondent's announcement of the dinner as "an inducement to employees to vote for the Employer" that interfered with employee free choice. [\[HTML\]](#) [\[PDF\]](#)

The majority found the instant case distinguishable from *Crestwood Manor*, 234 NLRB 1097 (1978), which Member Hurtgen contended supported his position. In that decision, the majority said "the union's promised raffle could reasonably be appealing to an employee regardless of whether the employee would have otherwise supported the Union [whereas] the instant victory party--even with food--does not carry a similar appeal."

The majority noted that "insofar as the Fifth Circuit decision [in *Trencor, Inc. v. NLRB*, 110 F.3d 268 (5th Cir. 1997)] can be construed "as holding that any announcement of a postelection victory party with food and beverages is objectionable, we respectfully disagree with that decision."

(Chairman Truesdale and Members Fox and Hurtgen participated.)

* * *

Beverly Health and Rehabilitation Services, Inc. (6-CA-28130-1, et al., 331 NLRB No. 121) Chambersburg, PA Aug. 8, 2000. The Board declined to enjoin the prosecution of a defamation lawsuit against the Unions, deciding the case should be held in abeyance pending resolution of the state court lawsuit. The Board emphasized that a decision of the Pennsylvania court in this lawsuit found the Respondent's defamation action was well pleaded consistent with the requirements of *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). [\[HTML\]](#) [\[PDF\]](#)

The complaint in the instant case alleged that the Respondent violated Section 8(a)(1) of the Act by filing the defamation lawsuit. The Board remanded these complaint allegations to the judge, but dismissed amended allegations that the Respondent violated the Act by failing to stay its state court lawsuit after the General Counsel issued his complaint in this case.

The majority opinion is signed by Members Liebman and Brame.

In a separate concurring opinion, Member Hurtgen said neither *Loehman's Plaza*, 305 NLRB 663 (1991), or *Sears v. Carpenters*, 436 U.S. 180 (1978), supports the General Counsel's argument that with respect to libel lawsuits the court loses jurisdiction once the General Counsel issues complaint alleging the union's conduct was protected.

(Members Liebman, Hurtgen, and Brame participated.)

Charges files by Pennsylvania Social Services Local 668, et al.; alleged violation of Section 8(a)(1). Hearing at Pittsburgh on Feb. 25 and March 10, 1997. Adm. Law Judge Martin J. Linsky issued his decision May 19, 1997.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

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Onyx Environmental Services, L.L.C., d/b/a Tradewaste Incineration (Chemical Workers) St. Louis, MO Aug. 3, 2000. 14-CA-25788, 14 RC-12080; JD-97-00, Judge C. Richard Miserendino.

Ray Black & Sons Construction, Inc. (Electrical Workers (IBEW) Local 702) Mt. Vernon, IL Aug. 1, 2000. 14-CA-25168, et al; JD-98-00, Judge William G. Kocol.

Titan Wheel Corporation of Illinois (Steelworkers) Quincy, IL July 31, 2000. 14-CA-25610 (1-2); JD-96-00, Judge David L. Evans.

Oil Capital Sheet Metal, Inc. (Sheet Metal Workers Local 270) Tulsa, OK July 31, 2000. 17-CA-19714; JD(ATL)-41-00, Judge William N. Cates.

Paramount Farms, Inc. (Packing & Food Processing Employees Local 550, Laborers) Lost Hills, CA July 31, 2000. 31-CA-24079 et, al.; JD(NY)-53-00, Judge Michael A. Marcionese.

Consolidated Delivery & Logistics, Inc. (Teamsters Local 418) Teterboro, NJ Aug. 3, 2000. 22-CA-23543; JD(NY)-54-00, Judge Steven Davis.

* * *

NO ANSWER TO COMPLAINT

D & R Enterprises d/b/a Metro Enterprises (Food & Commercial Workers Local 1657) (15-CA-15745; 331 NLRB No. 112) Columbia, GA July 31, 2000.