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 18, 2000 W-2752

CASES SUMMARIZED

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Roseburg Forest Products (36-CA-7722; 331 NLRB No. 124) Roseburg, OR Aug. 9, 2000. On a stipulated record, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish Western Council of Industrial Workers with requested information relevant to the administration of the parties' collective-agreement or the processing of a grievance alleging that the Respondent violated contractual seniority provisions by awarding a Hardwood Veneer Sorter (helper) job to Gary Booze. The Respondent claimed that it placed Booze in the job pursuant to his doctor's recommendation and to accommodate his disability under the Americans with Disabilities Act (ADA). In rejecting the Respondent's contention that the ADA flatly prohibits it from disclosing the requested information concerning Booze's medical condition, the Board relied on the EEOC's opinion letter addressing the specific facts of this case. It wrote: [HTML] [PDF]

> Applying the framework set forth in the EEOC's opinion letter, we find that the ADA 'permits' the Respondent to provide the Union with Booze's medical information, but the 'information [the Respondent] may share with [the Union] is strictly limited to that which is necessary for [the Union] to fulfill its role in the accommodation process. Necessary information often will not encompass the entire contents of an employee's medical file.' In other words, only that medical information concerning Booze that the Union truly needs may be disclosed to it. All other medical information must be kept confidential by the Respondent.

The Board, citing *GTE Southwest,* 329 NLRB No. 57, decided that the appropriate remedy is to first allow the parties an opportunity to bargain in good faith regarding the conditions under which the Union's need for the relevant information could be satisfied with appropriate safeguards protective of the Respondent's legitimate confidentiality concerns. The Board explained: "Under this approach, we recognize that if the Respondent and the Union are unable to reach agreement on a method of protecting their respective interests, the parties may be back before us again. If there is a question, as to whether the parties have bargained in good faith, we shall make that determination."

(Chairman Truesdale and Members Liebman and Brame participated.)

Charge filed by the Western Council of Industrial Workers; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing before an administrative law judge.

* * *

Richards and Conover Steel Co. (17-CA-20359, et al.; 331 NLRB No. 123) Kansas City, MO Aug. 10, 2000. Granting the General Counsel's motion for summary judgment, the Board held that the Respondent violated Section 8(a)(5), (3), and (1) of the Act in various respects, including failing to bargain collectively with the Union about the effects on unit employees of the sale of the Respondent's rolling division and steel warehouse; failing to continue in effect all the terms and conditions of the 1999-2002 collective-bargaining agreement without the Union's consent; and laying off Chester Williams because he engaged in union and protected concerted activities. The Board granted the General Counsel's motion for summary judgment based on the withdrawal of the Respondent's answer to the original complaint in Case 17-CA-20359, and the Bankruptcy Trustee's consent to the entry of a judgment pursuant to the consolidated complaint. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1), (3), and (5). General Counsel filed motion for summary judgment May 30, 2000.

* * *

Lasalle Bus Service (29-CA-22682, 22859; 331 NLRB No. 118) Brooklyn, NY Aug. 10, 2000. The administrative law judge found, with Board approval, that the Respondent violated Section 8(a)(1) of the Act by discharging Freddie Bowles, Jermaine Phillip, Camino Marin, Lionel Merilien, and Joe Frank because of their protected activities (engaging in a strike to protest Bowles' discharge); and failing to offer reinstatement to Bowles. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by Freddie Bowles, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Brooklyn on Oct. 28, 1999. Adm. Law Judge D. Barry Morris issued his decision Dec. 14, 1999.

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V.I.P. d/b/a Olympic Specialties (28-CA-15938; 331 NLRB No. 127) Clark County, NV Aug. 11, 2000. Agreeing with the administrative law judge, the Board dismissed the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Timothy Fee because he engaged in union and other protected, concerted activity, i.e., contacting the Federal and state departments of labor and the school districts, complaining of his and other employees' wage inadequacy, and soliciting union authorization cards. The Respondent is engaged in business as an electrical contractor at various jobsites in Nevada including one at Valley High School in Clark County, Nevada. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charge filed by Electrical Workers (IBEW) Local 357; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Las Vegas on April 11, 2000. Adm. Law Judge James L. Rose issued his decision June 2, 2000.

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Midon Restaurant Corp., d/b/a Burger King (3-CA-22075; 331 NLRB No. 128) Albany, NY Aug. 11, 2000. The Board upheld the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by restricting solicitation at its facility, especially when employees are on the clock. The Respondent argued in its exceptions that the judge should have dismissed the complaint based on the Board's decision in *Super-H Discount,* 281 NLRB 728 (1986), which he cited in finding the violation. The Board, noting that the present situation is factually distinguishable from *Super-H Discount,* found it unnecessary to pass on the continuing validity of Super-H Discount in the context of this case. In both cases, the employer promulgated an overly broad no-solicitation rule restricting an employee's union activities. In *Super-H Discount,* the Board found that the Employer established that its prohibition was a one-time incident that went ignored by the employee to whom it was directed since he continued to engage in union activities while "on the clock" without further restraint. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Industrial Workers of the World, Philadelphia General Membership Branch; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Albany on March 6, 2000. Adm. Law Judge Joel P. Biblowitz issued his decision June 16, 2000.

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Tann Electric (17-CA-17811; 331 NLRB No. 130) Mission, KS Aug. 11, 2000. The Board affirmed the administrative law judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act based on the Respondent's changing its hiring policies and practices in 1994 and 1995, purportedly for the purpose of excluding union applicants. In doing so, it found that the lawfulness of the policy changes was neither properly alleged in the amended complaint nor litigated at the hearing. The Board remanded the proceeding to the judge for further consideration under the FES framework, and reopening of the record if necessary, concerning whether the Respondent discriminatorily refused to hire alleged discriminatees Kevin McConnell, Allan Ward, Harvey Henry, Clint Klinge, and Frank Matthews. In *FES (A Division of Thermo Power),* 331 NLRB No. 20, which issued subsequent to the judge's decision, the Board set forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Electrical Workers (IBEW) Local 124; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park, Jan. 21-22, 1997. Adm. Law Judge George Carson II issued his decision May 23, 1997.

* * *

Nicholas County Health Care Center (9-CA-33210, et al.; 331 NLRB No. 122) Richwood, WV Aug. 9, 2000. Citing *Caterair International,* 322 NLRB 64 (1996), the Board agreed with the administrative law judge that an affirmative bargaining order is warranted in this case to remedy the Respondent's unlawful withdrawal of recognition from Health Care and Social Service District 1199, SEIU. It adhered to the view, reaffirmed in *Caterair,* that an affirmative bargaining order is the "traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective bargaining representative of an appropriate unit of employees." Id. at 68. [HTML] [PDF]

The Board acknowledged that the D.C. Circuit has required, in several cases, that it justify, on the facts of each case, the imposition of such an order. See e.g., *Vincent Industrial Plastics, Inc. v. NLRB,* 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB,* 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB,* 28 F.3d 1243, 1248 (D.C. 1994). In *Vincent Industrial Plastics,* the court held that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations." 209 F.3d 738.

"Although we respectfully disagree with the court's requirement for the reasons set forth in Caterair, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order," the Board wrote. It noted that the Respondent's other unfair labor practices were serious and numerous and included: threats to terminate and permanently replace employees if they engaged in an unfair labor practice strike; failing to reinstate unfair labor practice strikers; discontinuing contractual grievance procedure provisions; unilaterally granting a wage increase; telling employees not to discuss the Union or the NLRB while at work; coercively interrogating employees about their protected activities and telling them to cease such activities; and offering an employee her choice of a position if she did not participate in the strike.

The Board found, as did the judge, that the 1996 decertification petition did not reflect employee free choice, but rather the effect of the Respondent's most serious prewithdrawal unfair labor practices. It concluded that the affirmative bargaining order "removes the Respondent's incentive to delay bargaining or to engage in any other conduct designed to further discourage support for the Union" and "ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order." Thus, concluding that an affirmative bargaining order with a temporary decertification bar is appropriate, the Board stated: "A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort reach a collective-bargaining agreement."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Health Care and Social Service District 1199, SEIU; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Richwood, on 12 dates between July 23 and Oct. 3, 1996. Adm. Law Judge Richard A. Scully issued his decision Sept. 30, 1997.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Whirlpool Corporation (Steelworkers) Findlay, OH Aug. 9, 2000. 8-CA-28612; JD-99-00, Judge Earle E. Shamwell Jr.

Information Processing SVC, Inc. d/b/a Information Processing Services (an Individual) Alexandria, VA Aug. 10, 2000. 5-CA-27896, JD-102-00, Judge Richard A. Scully.

Kathleen's Bakeshop, L.L.C. (Bakery Workers Local 3) Southampton, NY Aug. 9, 2000. 29-CA-22254, et al.; JD(NY)-55-00, Judge Eleanor MacDonald.

Hoffman Manor (Service Employees Long Island Local 1115) Long Beach, NY Aug. 11, 2000. 29-CA-23168; JD(NY)-57-00, Judge Raymond P. Green.

Williams Energy Services (PACE Local 4-227) Houston, TX Aug. 11, 2000. 16-CA-20164; JD(ATL)-42-00, Judge George Carson II.

Steelworkers and its Locals 2102 and 3267 (New CF & I, Inc., and Oregon Steel Mills, Inc. d/b/a CF & I Steel, L.P.) Pueblo, CO Aug. 2, 2000. 27-CB-3780, et al.; JD(SF)-44-00, Judge Thomas Michael Patton.

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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.)

Tri County Building Supplies, Inc. (Teamsters Local 331) (4-CA-29386; 331 NLRB No. 125) Cape May Court House, NJ, Aug. 8, 2000.

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NO ANSWER TO COMPLAINCE SPECIFICATION

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

National Trecartin Electric, Inc. (Electrical Workers (IBEW) Local 640) (28-CA-15178; 331 NLRB No. 126) Phoenix, AZ Aug. 10, 2000.