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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September 1, 2000 W-2754

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

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Beverly Enterprises-Tennessee, Inc. d/b/a Allenbrooke Healthcare Center (26-RC-8043; 331 NLRB No. 144) Memphis, TN Aug. 22, 2000. Applying *Atlantic Limousine,* 331 NLRB No. 134, Chairman Truesdale and Members Fox and Liebman agreed with the hearing officer's recommendation to sustain the Petitioner's Objection 5, which alleges that the Employer engaged in objectionable conduct by holding a raffle for employees on the day of the election. The tally of ballots shows 42 votes for, and 42 against, Food and Commercial Workers Local 1529, with 2 determinative challenged ballots. In the absence of exceptions, the majority adopted, pro forma, the hearing officer's recommendations to overrule the challenge to the irregularly marked ballot and record it as a "No" vote, the challenge to employee Mark Kane's ballot, and the Petitioner's Objections 1-4 and 6-12. The majority directed a second election because the Petitioner cannot receive a majority of the ballots cast in the election held on November 28, 1998. [HTML] [PDF]

Based on their dissenting opinion in *Atlantic Limousine,* 331 NLRB No. 134, and applying *Sony Corp. of America,* 313 NLRB 420 (1993), Members Hurtgen and Brame would overrule the Petitioner's Objection 5 and certify the election results.

(Full Board participated.)

* * *

Navigator Communications Systems, LLC et al. (34-CA-8215, 8328; 331 NLRB No. 142) Stamford, CT Aug. 22, 2000. Agreeing with the administrative law judge, the Board held that Respondents Navigator Communications Systems, LLC (Navigator), Aviator Voice/Data, LLC (Aviator), and KM Communications, LLC (KM) functioned as a single-integrated enterprise and a single employer within the meaning of the Act and ordered that the Respondents jointly and severally remedy the unfair labor practices found. Specifically, Respondents violated Section 8(a)(5) and (1) of the Act by ceasing Navigator's operations and laying off all its unit employees on August 15, 1997 without affording the Electrical Workers (IBEW) International with advance notice and an opportunity to bargain regarding the effects of the decision to cease operations on unit employees; failing to abide by the terms of the collective-bargaining agreement without the Union's consent; and failing to furnish the Union, on request, with information regarding the terms and conditions of employment of unit employees. [HTML] [PDF]

(Chairman Truesdale and Members Hurtgen and Brame participated.)

Charges filed by Electrical Workers (IBEW) International; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Hartford, July 20 and Aug. 12-13, 1999. Adm. Law Judge Michael A. Marcionese issued his decision Nov. 17, 1999.

* * *

Projections, Inc. (34-CA-9217; 331 NLRB No. 135) Hartford, CT Aug. 23, 2000. Chairman Truesdale and Member Hurtgen, with Member Brame dissenting, denied the Charged Party's petition to revoke the subpoena duces tecum, finding that the material sought is relevant to the General Counsel's investigation of the liability of the Charged Party (Projections, Inc.) for the conduct alleged in the unfair labor practice charge. The majority disagreed with their dissenting colleague that compliance with the subpoena would implicate the Charged Party's rights under Section 8(c) of the Act or the free speech provisions of the Constitution. [HTML] [PDF]

The Regional Director issued the subpoena to the Charged Party as part of the Region's investigation of an unfair labor practice charge filed by Communications Workers Local 1298 against TCI Cablevision of South Central Connecticut in Case 34-CA-9147. In the instant charge, the Union claims that the Charged Party violated Section 8(a)(1) of the Act by certain statements in its video, "Little Card, Big Trouble," which it sold to TCI and which was shown to TCI's employees during the Union's organizational campaign at TCI. The subpoena seeks documents relating to the purchase of the video from the Charged Party by TCI, which the General Counsel contends are relevant to establishing an agency relationship between TCI and the Charged Party.

(Chairman Truesdale and Members Hurtgen and Brame participated.)

* * *

Baker Victory Services, Inc. (3-RC-10760; 331 NLRB No. 146) Buffalo, NY Aug. 23, 2000. The Board reaffirmed the standard set forth in *V.I.P. Limousine, Inc.,* 274 NLRB 641 (1985), that an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. In so doing, the Board rejected the "representative complement" standard set forth in the plurality opinion in *Glass Depot, Inc.,* 318 NLRB 766 (1995). [HTML] [PDF]

Applying the *V.I.P. Limousine* standard to the facts of this case, the Board set aside the election in the professional group (group A) because severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote. The Board vacated the Regional Director's Certification of Representative and remanded the case to the Regional Director to hold a new election.

The Employer operates early childhood programs (ECPs) in Buffalo. The Communications Workers seeks to represent various classifications of the Employer's ECP employees. The Regional Director directed an election, finding appropriate two separate units of employees: all professional employees (group A) and nonprofessional employees (group B). Consistent with *Sonotone Corp.,* 90 NLRB 1236 (1950), the professional employees additionally voted for inclusion in a unit with the nonprofessional employees or for separate representation.

More than 4 feet of snow fell in the area during the 2-week period preceding the election, and a state of emergency was declared for the city during the week of the election. The school at which the election was conducted was closed on the day of the election, thereby relieving a significant number of employees of the obligation to report to work. The Employer's ECP facility at the school, however, remained open. The election was conducted as scheduled on January 14, 1999. The Petitioner received a majority of the votes cast in both the professional and nonprofessional voting groups. Among the professional employees, 32 of 51 eligible employees voted, with 17 voting for and 15 against, the Petitioner, and 1 challenged ballot; among the nonprofessional group, 19 of 21 eligible employees voted, with 17 voting for and 2 against, the Petitioner.

The Board wrote in concluding that the eligible employees were not afforded an adequate opportunity to vote: "As the votes of the nonparticipating eligible employees in group A would have been determinative of the election results, we conclude that the election among the professional employees in group A must be set aside." Because under Sonotone, if the professional employees vote to be included in the same unit with the nonprofessional voters, the votes of the professional employees will be counted with the votes of the nonprofessional employees to determine whether the combined unit has voted for union representation, the Board set aside the results of the election among the nonprofessional employees (group B) as well so that a new election can be conducted utilizing the same eligibility date for both groups of voters.

(Chairman Truesdale and Members Fox and Brame participated.)

* * *

Seattle Opera Association (19-RC-13939; 331 NLRB No. 148) Seattle, WA Aug. 24, 2000. The Board concluded, contrary to the Regional Director, that the Employer's auxiliary choristers are employees within the meaning of Section 2(3) of the Act. The Employer is a not-for-profit opera company engaged in producing approximately five operatic productions per year in Seattle, Washington. The Petitioner, American Guild of Musical Artists, currently represents a unit of choristers, dancers, stage managers, assistant stage managers, and assistant stage directors. It seeks to add alternate and auxiliary choristers to the existing unit by a self-determination election. The parties agree that alternate choristers are statutory employees and are properly included in the appropriate voting group. [HTML] [PDF]

Relying on *WBAI Pacifica Foundation,* 328 NLRB No. 179 (1999), and *Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985), the Regional Director found that the auxiliary choristers are not statutory employees, but are volunteers, based on the absence of a sufficient economic relationship with the Employer. The Board disagreed, applying *WBAI and NLRB v. Town & Country Electric,* 516 U.S. 85 (1995). "Central to our analysis is that there is an economic relationship with the Employer," the Board said. It found that auxiliary choristers receive monetary remuneration which is compensation for their work.

The Board noted other factors further supporting its finding of employee status including: auxiliary choristers sign a letter of

intent and sign in at each rehearsal, agreeing to attend rehearsals and performances on time, at times designated by the Employer; auxiliary choristers are given explicit instructions on decorum and conduct and are expected to comply with conditions set forth in a handbook developed specifically for them; and auxiliary choristers audition with alternates and, according to their handbook, receive feedback and are subject to normal expectations of performing the music and staging. Performing as an auxiliary chorister may lead to becoming an alternate, and then, a regular chorister. Auxiliary choristers share dressing rooms with regular choristers, are listed in the opera program along with all other choristers under the general heading "Chorus", and do not present receipts or expense reports, and receive the same compensation at the end of each production.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

The New Otani Hotel & Garden (21-RM-2623, 2627; 331 NLRB No. 159) Los Angeles, CA Aug. 24, 2000. Members Fox and Liebman agreed with the Regional Director that Hotel Employees and Restaurant Employees Local 11 has not demonstrated a present demand for recognition, and therefore affirmed the Regional Director's dismissal of the Employer's petitions to determine whether or not the Hotel's employees desired union representation. Member Hurtgen dissented. [HTML] [PDF]

The Employer asserted that the Union has been engaging in efforts to organize the employees at its hotel for 4 years, and that the Union's picketing/boycott of the hotel and repeated requests that it sign a neutrality/card check agreement amounted to a present demand for recognition. Members Fox and Liebman disagreed and denied the Employer's requests for review of the Regional Director's decision. They noted that under Section 9(c)(1)(B)-enacted by Congress as part of the Taft-Hartley Act of 1947-an employer is entitled to an election only if a claim is made by a party that it is the majority representative of the employees. Members Fox and Liebman explained:

> The legislative history shows that Congress therefore included the language limiting employer petitions to cases in which the union has presented a 'claim to be recognized as the representative in section 9(a),' and that Congress understood this language to mean that employers could ask for an election only after a union had sought recognition as the majority representative of the employees. . . .
>
> The mere fact that the union is engaged in activities which it hopes will enable it eventually to obtain recognition by the employer is not evidence of a present demand for recognition such as would support the processing of an employer petition.

Dissenting Member Hurtgen would grant the Employer's requests for review. He concluded that the totality of the circumstances raises a genuine issue as to whether the Union was seeking recognition. These circumstances include (1) picketing for a recognition object; (2) engaging in an organizational campaign; (3) seeking an employe agreement to recognize the Union upon acquisition of card majority status. Member Hurtgen wrote:

> My colleagues apparently distinguish between a present demand for recognition and an ultimate demand for recognition. However, Section 9(c)(1)(B) contains no distinction. And, even if it did, it is at least arguable that . . . the Union is presently seeking recognition in these cases.
>
> My colleagues cite the language of Section 9(c)(1)(B), and they argue that an employer petition (RM) must be supported by a claim for recognition. The argument misses the mark. No one is contending that an employer can force an election on a union that has not made a claim for recognition. Rather the issue in this case is whether the Union has made a claim for recognition so as to warrant the processing of the RM petitions.

(Members Fox, Liebman, and Hurtgen participated.)

* * *

Pennsylvania Transformer Technology (6-CA-29448; 331 NLRB No. 151) Canonsburg, PA Aug. 25, 2000. The Board affirmed the administrative law judge's finding that Respondent Pennsylvania Transformer is a successor to Cooper Power

Systems, and that it violated Section 8(a)(5) and (1) of the Act by failing to recognize the Steelworkers as the collective-bargaining representative of its production and maintenance employees pursuant to a recognition request made on March 30, 1998. In so concluding, the Board found merit in the General Counsel's exception to the judge's failure to find specifically that, as of April 1998, the Respondent had hired a substantial and representative complement of employees, and rejected the Respondent's contention that the Union's demand for recognition in April 1998 was premature. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Pittsburgh on July 7, 1998. Adm. Law Judge Karl H. Buschmann issued his decision Sept. 30, 1998.

* * *

M.B. Sturgis, Inc. and Jeffboat Div., American Commercial Marine Service Co. (14-RC-11572, 9-UC-406; 331 NLRB No. 173) Maryland Heights, MO Aug. 25, 2000. The Board held that employees obtained from a labor supplier may be included in the same bargaining unit as the permanent employees of the employer to which they are assigned, when the supplied employees are jointly employed by both employers. The majority opinion was by Chairman Truesdale and Members Fox and Liebman, and came in a consolidated case also involving the Jeffboat Division of American Commercial Marine Service Company. [HTML] [PDF]

In so holding, the Board overruled *Lee Hospital,* 300 NLRB 947 (1990), which held that bargaining units including jointly employed employees together with the employees of the user employer are multiemployer bargaining units and require the consent of the employers. Rejecting Lee Hospital, the Board concluded:

> In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

Because these combined units are employer units under the statute, the Board said it would apply its traditional community of interest analysis to determine their appropriateness on a case-by-case basis.

The Board also clarified the decision in *Greenhoot,* 205 NLRB 250 (1973), in which a petitioned-for unit of employees of a supplier employer, who were assigned to work in 14 separate office buildings, was found an inappropriate multiemployer unit, and 14 separate units were instead found appropriate. As that decision is clarified in Sturgis,

> a petition that names as the employers unrelated employers will be treated as seeking an inappropriate multiemployer unit absent the consent of all the employers; a petition that seeks a unit only of the employees supplied to a single user, or seeks a unit of all the employees of a supplier employer and names only the supplier employer, does not involve a multiemployer unit.

Member Brame, in dissent, concluded that units including both solely employed and jointly employed employees are multiemployer units under Section 9(b) because, although the employees have an employer in common, they do not share the same employer. Therefore, in Member Brame's view, the Board lacks authority to require employers to bargain in such a unit without their consent. Moreover, Member Brame found that the majority's broad holding concerning these units disregards the diversity of temporary employment arrangements and the conflicting interests of user and supplier employers.

Member Hurtgen was recused from participating in the decision and took no part in its consideration or disposition.

(Chairman Truesdale and Members Fox, Liebman, and Brame participated.)

* * *

Oklahoma Fixture Co. (17-CA-18734, 19036; 331 NLRB No. 145) Tulsa, OK Aug. 25, 2000. Chairman Truesdale and Member Hurtgen found, contrary to the administrative law judge and dissenting Member Liebman, that the Respondent did not fail to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act during negotiations for a successor collective-bargaining agreement covering a unit of employees known as the "outside" unit. Instead, they found that the Respondent utilized lawful bargaining pressure in an effort to secure from the Union an agreement that met its express goal in the negotiations, i.e., the elimination of the contractual requirement to hire employees through the Union's hiring hall. Chairman Truesdale and Member Hurtgen agreed with the judge that the Respondent violated Section 8(a)(5) and (1) by ceasing to deduct fees from employees' pay and by ceasing to remit those sums to Carpenters Local 943, with respect to another unit of employees known as the "inside" unit. [HTML] [PDF]

Member Liebman, dissenting in part, would find that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1), relying on "substantial" evidence establishing that the Respondent's regressive final offer was designed to frustrate the possibility of arriving at an agreement with the Union. She wrote:

> I emphasize that my disagreement with the majority is primarily factual and centers on two key points. First, the record does not support the majority's finding that the Respondent adequately supplied an explanation for the changes in its final offer. Second, the record clearly establishes, contrary to the majority's finding, that although the parties were not at impasse, the Respondent was unwilling to meet with the Union for further negotiations after the Respondent presented its final offer.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Carpenters Local 943; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Tulsa on June 2, 1997. Adm. Law Judge Pargen Robertson issued his decision Aug. 14, 1997.

* * *

Tri-County Transportation (7-CA-40201(1), et al.; 331 NLRB No. 152) Cadillac, MI Aug. 25, 2000. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by discharging Lillian Dick, Ivan Dick, and John Croskey because they engaged in protected concerted activity when filing unemployment compensation claims; and by promulgating, maintaining, and enforcing a rule precluding employees from acting concertedly in presenting work-related concerns to higher management officials of Tri-County or third parties. [HTML] [PDF]

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Lillian Dick, Ivan Dick, and John Croskey, individuals; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Cadillac, June 25-26, 1998. Adm. Law Judge Robert T. Wallace issued his decision March 16, 1999.

* * *

Electrical Workers (IBEW) Local 98 (AIMM, Inc.) (4-CD-1017; 331 NLRB No. 156) Philadelphia, PA Aug. 24, 2000. The Board decided that employees of AIMM, Inc., represented by the Caprenters Metropolitan Regional Council of Philadelphia & Vicinity, are entitled to perform the work of unloading, moving and installation of refrigerators and television sets at the Hotel Sofitel in Philadelphia, Pennsylvania. The Board considered all the relevant factors and awarded the work based on the terms of the collective-bargaining agreement between the Employer and the Carpenters, the Employer's preference and past practice, the economy and efficiency of the Employer's operation resulting from its current assignment of the work to its Carpenter employees. [HTML] [PDF]

(Members Fox, Liebman, and Brame participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Dilling Mechanical Contractors, Inc. (Indiana State Pipe Trades Assoc. et al.) Logansport, IN Aug. 18, 2000. 25-CA-23973, et al.; JD-106-00, Judge Robert M. Schwarzbart.

MHI Enterprises, Inc. d/b/a Mead-Hatcher, Inc. (Bakery Workers Local 110-G) Buffalo, NY Aug. 21, 2000. 3-CA-22142; JD-107-00, Judge Jerry M. Hermele.

A & P Brush MFG. Corp. and its Alter Ego A & P Diversified Technologies Inc. (Luggage Workers Local 60) Metuchen, NJ Aug. 22, 2000. 2-CA-28129; JD(NY)-56-00, Judge Steven Davis.

New Silver Palace Restaurant (Restaurant Workers 318) New York, NY Aug. 23, 2000. 2-CA-32157, 32276; JD(NY)-59-00, Judge D. Barry Morris.

The Twin Valley Electric Cooperative, Inc. (Electrical Workers (IBEW) Local 1523) Altamont, KS Aug. 9, 2000. 17-CA-20420; JD(SF)-46-00, Judge James L. Rose.

United Parcel Service, Inc. (an Individual) Denver, CO Aug. 11, 2000. 27-CA-16064, et al.; JD(SF)-48-00, Judge Albert A. Metz.

D & F Industries, Inc. and Staffing Services America, Inc. ("Olsten"). Joint Employers (Food & Commercial Workers Local 234) Orange, CA Aug. 9, 2000. 21-CA-32952, 32973; JD(SF)-49-00, Judge Burton Litvack.

Hampton Lumber Mills-Washington, Inc. (Lumber and Sawmill Workers Local 2767, Carpenters) Randle, WA Aug. 3, 2000. 19-CA-26789; JD(SF)-47-00, Judge Clifford H. Anderson.

The Montana Power Company (Electrical Workers (IBEW) Local 44) Butte, MT Aug. 15, 2000. 19-CA-26558 et al.; JD(SF)-51-00, Albert A. Metz.

* * *

NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to answer the complaint.)

USR Metals, Inc. and USR Industrials Inc. (PACE Local 2-719) (6-CA-31100; 331 NLRB No. 147) Bloomsburg, PA Aug. 23, 2000.

Victory Specialty Packaging, Inc. (PACE 1707) (3-CA-22425; 331 NLRB No. 139) Victory Mills, NY Aug. 18, 2000.

Saffles Construction Corporation (International Assoc. of the United States and Canada Local 797) (28-CA-16210; 331 NLRB No. 143) Las Vegas, NV Aug. 24, 2000. *(withdrawal of answer to complaint.)*

* * *

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 no to the compliance specification.)

Diamond Dismantling, Inc. (an Individual) (7-CA-41760; 331 NLRB No. 138) Detroit, MI Aug. 22, 2000.