

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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September 29, 2000

W-2758

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Aqua Cool, a Division of Ionics, Inc. (1-CA-34338, 1-RC-20467; 332 NLRB No. 7) Ludlow, MA Sept. 18, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by, among other things, soliciting grievances and promising to remedy them, hiring a warehouse worker to perform tasks formerly assigned to drivers, and ceasing to harass employees for taking sick leave. Affirming the judge's recommendation, the Board set aside the results of an election held on July 11, 1996. Contrary to the judge, it concluded that the 8(a)(1) violations can be adequately remedied by the Board's customary notice and cease-and-desist order and that a Gissel bargaining order is not warranted. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). [\[HTML\]](#) [\[PDF\]](#)

In concluding that the Respondent threatened employees with loss of benefits, that it would bargain from scratch, and that election union representation would be futile, Chairman Truesdale and Member Liebman found that Vice President Kachadurian's words, both alone and in context establish the violation. Member Hurtgen, dissenting on this issue, found merit in the Respondent's contention in exceptions that Kachadurian's statements to employees Chris Martin, Billy Massey, Alan Tetrault, and Scott Stephenson were protected by Section 8(c) of the Act and that they are not objectionable.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Teamsters Local 404; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Springfield, Oct. 30-31, 1996. Adm. Law Judge Arline Pacht issued her decision Jan. 3, 1997.

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Four Seasons Solar Products Corp. (29-RC-9061; 332 NLRB No. 9) Holyoke, NY Sept. 15, 2000. Reversing the Regional Director, the Board held that the collective-bargaining agreement between the Employer and the Intervenor (Teamster Local 707) constituted a bar to the instant representation petition filed 53 days prior to the expiration of the contract. The Petitioner (Amalgamated Local 137) is seeking to represent all production, maintenance, and shipping and receiving employees at the Employer's Holyoke, New York facility. [\[HTML\]](#) [\[PDF\]](#)

The Regional Director concluded that the contract appeared to require the payment of assessments as a condition of employment. Contrary to the Regional Director, the Board held that "the contract language regarding certain payments to the Union does not operate to remove the contract bar to the instant petition, since the contract contains no express requirement that an employee pay assessments as a condition of employment." It disagreed also with the Regional Director's findings that the contract forfeited its bar quality because it was retroactively effective and thereby withheld from nonmember incumbent employees the 30-day grace period within which to join the Union as guaranteed by Section 8(a)(3) of the Act; and that the contract forfeited its bar status on three grounds related to articles III and V, which were not litigated during the representation hearing.

(Chairman Truesdale and Members Fox and Liebman participated.)

* * *

Coventry Health Center (1-RC-20761; 332 NLRB No. 13) Coventry, RI Sept. 14, 2000. Members Fox and Liebman reversed the Acting Regional Director's exclusion of the Registered Nurse (RN) charge nurses from the unit found appropriate and concluded that charge nurses' role in the Employer's evaluation procedure does not establish that they are supervisors within the meaning of Section 2(11) of the Act. Member Hurtgen, dissenting, agreed with the Acting Regional Director that the charge nurses are supervisors. Teamsters Local 64 seeks to represent a unit of all RNs employed by the Coventry Health Center at its 344-bed nursing home. [\[HTML\]](#) [\[PDF\]](#)

(Members Fox, Liebman, and Hurtgen participated.)

* * *

T.K. Productions, Inc. (28-CA-15522; 332 NLRB No. 14) Phoenix, AZ Sept. 18, 2000. On recommendation of the administrative law judge, the Board dismissed complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by withdrawing an offer to hire Sean Walby because he was not a member of Teamsters Local 104; and violated Section 8(a)(1) in several ways, including coercive interrogation about Walby's union affiliation and saying he would not be hired unless he was a member of Local 104. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Sean Walby, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix, Dec. 7-8, 1999. Adm. Law Judge James M. Kennedy issued his decision Feb. 22, 2000.

* * *

Burrows Paper Corp. (26-CA-19035; 332 NLRB No. 16) Pickens, MI Sept. 18, 2000. The Board granted the General Counsel's motion for summary judgment and found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Pace Local 678. The Board found in September 2000 that the Respondent failed to bargain in good faith with the Union and ordered a 1-year extension of the Union's certification year, running from the date the Respondent begins to negotiate in good faith. 332 NLRB No. 15 (Case 26-CA-18552). [\[HTML\]](#) [\[PDF\]](#)

In this decision, Chairman Truesdale and Member Fox noted that the Respondent withdrew recognition before the extended certification year had run. They wrote: "In the absence of unusual circumstances, not present here, this action constituted a challenge by the Respondent to the Union's majority status at a time when the Respondent was not free to mount such a challenge."

Member Hurtgen did not find the violation based on an extended certification year. Rather, he emphasized that the withdrawal occurred while there were substantial unremedied 8(a)(5) violations. He also found that "any disaffection from the Union was causally connected to the antecedent unfair labor practices which constituted a general refusal to bargain" and that the Respondent could not rely on it as a basis for withdrawing recognition.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Pace Local 678; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for summary judgement March 16, 1999.

* * *

Tree of Life, Inc. d/b/a Gourmet Award Foods, Northeast (3-CA-21569; 332 NLRB No. 24) Albany, NY Sept. 20, 2000. The Board remanded to the administrative law judge the issue of whether the Respondent unlawfully failed to apply provisions of its collective-bargaining agreement with Teamsters Local 294 to temporary employees supplied by Accustaff and other referral agencies performing unit work at the Respondent's Albany, New York facility. The judge will consider the issue, which he dismissed, consistent with the Board's decision in *M.B. Sturgis, Inc.*, 331 NLRB No. 173. In *M.B. Sturgis*, 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. [\[HTML\]](#) [\[PDF\]](#)

No exceptions were filed to the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union requested information that was relevant and necessary to administer the parties' collective-bargaining agreement. The Board severed and adopted the judge's uncontested finding because it does not implicate its decision in *M.B. Sturgis*.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Teamsters Local 294; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Albany on Nov. 16, 1999. Adm. Law Judge Bruce D. Rosenstein issued his decision March 9, 2000.

* * *

Carpenters Local 370 (Eastern Contractors Association, Inc.) (3-CB-6913; 332 NLRB No. 25) Albany, NY Sept. 20, 2000. The Board dismissed the complaint, finding that the Respondent was not legally obligated to provide Charging Party John Newell with information he requested regarding the Respondent's operation of a nonexclusive hiring hall. It wrote in reversing the administrative law judge's finding that the Respondent violated Section 8(b)(1)(A): [\[HTML\]](#) [\[PDF\]](#)

The complaint alleged, and the judge ultimately found, that the Respondent's denial of information to Newell was 'arbitrary and capricious.' This terminology is regularly associated with a union's failure to meet its duty of fair representation. However, as noted, the judge found here, and the General Counsel does not dispute, that under *Superior Asphalt*, supra, no duty of fair representation attached to the Respondent's operation of its nonexclusive hiring hall. Accordingly, the duty of fair representation does not provide a basis for concluding that the Respondent's action (or, better stated, its inaction) toward Newell violated Section 8(b)(1)(A) of the Act. [Teamsters Local 460 (*Superior Asphalt*), 300 NLRB 441 (1990).] We find that the General Counsel failed to establish that the Respondent ignored Charging Party Newell because Newell engaged in activities protected by Section 7 of the Act. We further find that the Respondent did not owe a duty of fair representation to Charging Party Newell regarding its operation of a nonexclusive hiring hall.

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by John Newell, Jr., an individual; complaint alleged violation of Section 8(b)(1)(A). Hearing at Albany on Sept. 16, 1996. Adm. Law Judge George Carson issued his decision Oct. 25, 1996.

* * *

Altorfer Machinery Company, Lift Truck Division (33-CA-12112, et al.; 332 NLRB No. 12) Davenport, IA Sept. 20, 2000. The Board adopted the administrative law judge's finding that the Respondent had violated the Act by, among other things, engaging in surface and bad faith bargaining, prohibiting employees from communicating with each other about the Union, and discharging an employee for misconduct while striking. The Board concluded that the Respondent's conduct in its entirety reflected an intention on its part either to avoid reaching an agreement or to reach one which would essentially eliminate the Union's representational role. [\[HTML\]](#) [\[PDF\]](#)

In a separate concurring opinion, Member Hurtgen indicated there were certain factors involved in the Respondent's negotiating positions that he would not consider indicia of bad faith bargaining, such as making initial proposals which - if accepted - would have resulted in the employees receiving lesser benefits than they received before the advent of the Union.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Teamsters Local 371; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Davenport on Jan. 27-30 and various dates in March 1998. Adm. Law Judge William J. Pannier III issued his decision Dec. 8, 1998.

* * *

Nelson Electrical Contracting Corp., d/b/a Nelcorp (3-CA-19035, et al.; 332 NLRB No. 17) Endwell, NY Sept. 23, 2000. In this salting case, the Board agreed with the administrative law judge's finding that the General Counsel met his initial evidentiary burden of showing that the union affiliations of the applicants were a motivating factor in the Respondent's refusal to consider them for hire and refusal to hire them. The panel relied on the fact that all of the employees who were refused permission to file applications were wearing union insignia at the time that they applied. The Board also relied on the judge's finding of animus as established by (1) the comments of foreman Alan Winters, who told an employee that the Respondent did not want to hire "anybody union"; (2) the comments of New York project manager Andrew Stebner to employee Douglas

Nelson advising him not to talk to striking employees, or he would "get in trouble;" (3) the fact that none of the applications in which the applicants showed a current, active Union involvement was considered; and (4) the Board's prior finding of animus in *Nelcorp Inc.*, 316 NLRB 625 (1995). [\[HTML\]](#) [\[PDF\]](#)

Citing *FES*, 331 NLRB No. 20, the Board adopted the judge's finding of a discriminatory refusal to hire, pointing out that the applicants actually applied for jobs and were qualified for jobs for which the Respondent was hiring. Specifically, in September 1994, the Respondent won a contract for work at a site in Liberty, NY.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Electrical Workers (IBEW) 325 and 363; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Binghamton, June 25-26 and Aug. 19-20, 1996. Adm. Law Judge Steven Davis issued his decision April 21, 1997.

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Eckert Fire Protection, et al. (25-CA-24505, 24871; 332 NLRB No. 18) Cincinnati, OH, Greenwood, IN, and Lexington, KY Sept. 21, 2000. The Board rejected the General Counsel's exceptions to the administrative law judge's dismissal of numerous refusal-to-hire and/or consider allegations for failing to show, under *FES*, 331 NLRB No. 20, that the employer excluded applicants from the hiring process or was hiring at the time of the alleged unlawful conduct. The Respondents had a policy that they would not consider job applicants over 30 days old on the ground that they were not "fresh." There was no evidence that any hiring took place during any 30-day period during which the applications submitted by the alleged discriminatees were "fresh" and the Respondents were in an "active" hiring mode. Accordingly, the Board affirmed the judge's finding dismissing the complaint. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Road Sprinklers Local 669; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Indianapolis, IN on Feb. 5-7 and Feb. 25-26, 1997. Adm. Law Judge Earl E. Shamwell, Jr. issued his decision April 24, 1998.

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Mid-Mountain Foods, Inc. (11-CA-17049-2, et al.; 332 NLRB No. 19) Abingdon, VA Sept. 21, 2000. The Board agreed with the administrative law judge's recommendation to set aside an election that took place Aug. 1, 1996 (77 votes for the Union, 126 against, 9 challenges), given the Respondent's numerous violations of the Act--including interrogating employees about their union sentiments and threatening plant closure if they voted for union representation. The majority of Chairman Truesdale and Member Hurtgen found merit in General Counsel and Charging Party exceptions to the judge's finding of no violation for the Respondent's supervisors removal of pronoun literature from employees' break areas. [\[HTML\]](#) [\[PDF\]](#)

Concurring in part and dissenting in part, Member Liebman disagreed with her colleagues and the judge with respect to three additional violations. She would find the Respondent violated the Act by (1) displaying a banner in the warehouse that stated: "Vote No, It's Your Job;" (2) refusing to permit employees to show a pronoun video in the breakroom on non-worktime; and (3) by soliciting employees to revoke their authorization cards.

On the video broadcast issue, Member Liebman said "the Board should not permit employer restrictions on playing videotaped messages on nonworktime in a nonwork area, absent special circumstances, not present here, related to production or discipline. Such a restriction unduly limits employees' rights to communicate with each other about unionization and violates Section 8(a)(1) of the Act." The majority stated:

[T]here is no statutory right of an employee to use an employer's equipment or media. For example, there is no right to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981) (per curiam). Nor is there a statutory right of an employee to use an employer's telephone for personal or nonbusiness purposes, such as union organizing matters. *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), enfd. in relevant part 714 F.2d

657, 663-664 (1983). Similarly, the Board has held that employees are not entitled to use an employer's public address system to communicate their union views. *See, e.g., The Heath Co.*, 196 NLRB 134 (1972). From these cases, it appears equally clear that the Union's employee supporters do not have a statutory right to show the video, especially since it has not been established that the Respondent permitted employees to show other videos.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Food & Commercial Workers [UFCW] Local 400; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Bristol on Feb. 10-14, and Abingdon on March 10-14, 1997. Adm. Law Judge Keltner W. Locke issued his decision Dec. 22, 1997.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Florida Wire & Cable, Inc. (Steelworkers Local 9292) Jacksonville, FL Sept. 20, 2000. 12-CA-19534, et al.; JD(ATL)-47-00, Judge Howard I. Grossman.

C. Factotum, Inc. (Individuals) Detroit, MI Sept. 20, 2000. 7-CA-42352(1), (2); JD-118-00, Judge C. Richard Miserendino.

M. J. Mechanical Services, Inc. (Sheet Metal Workers Local 46) Buffalo, NY Sept. 18, 2000. 3-CA-18626 et al.; JD-119-00, Judge Jerry M. Hermele.

Jacee Electric, Inc. (Electric Workers (IBEW) Local 269) Morrisville, PA Sept. 20, 2000. 4-CA-28979, 4-RC-19914; JD-121-00, Judge Arthur J. Amchan.

Planned Building Services, Inc. (Service Employees (SEIU) Local 32B-32J, et al.) New York, NY Sept. 18, 2000. 2-CA-31245 et al.; JD(NY)-61-00, Judge Steven Fish.

Carnival Carting, Inc. (Teamsters Local 813) Woodside, NY Sept. 18, 2000. 29-CA-20586, 29-CA-22552; JD(NY)-62-00, Judge Eleanor MacDonald.

Mass Electric Construction Co. & Balfour Beatty Construction, Inc. A Joint Venture (Electrical Workers (IBEW) Local 90) Old Saybrook, CT Sept. 20, 2000. 34-CA-8886; JD(NY)-63-00, Judge Michael A. Marcionese.

J.I.T. Steel Inc. (Steelworkers) Tulare, CA Sept. 11, 2000. 32-CA-17346; JD(SF)-54-00, Judge Jay R. Pollack.

Folsom Ready-Mix Inc. (Teamsters Local 150) Rancho Cordova, CA Sept. 11, 2000. 20-CA-29476-1; JD(SF)-57-00, Judge Clifford H. Anderson.

Asbestos Services, Inc., d/b/a A.S.I., Inc. (an Individual) Bakerfield, CA Sept. 11, 2000. 31-CA-23691; JD(SF)-59-00, Judge Fredrick C. Herzog.

International Protective Services, Inc. (United Government Security Officers of America Local 46) Anchorage, AK Sept. 12, 2000. 19-CA-26325, et al.; JD(SF)-60-00.

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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 issue that is litigable in this unfair labor practice proceeding. The case did not present any other issues.)

Heritage Broadcasting Co. of Michigan (Broadcast Employees [NABET]) (7-CA-43206; 332 NLRB No. 23) Cadillac, MI Sept. 20, 2000.