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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October 6, 2000 W-2759

CASES SUMMARIZED

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Mid-Mountain Foods, Inc. (11-CA-17379, et al.; 332 NLRB No. 20) Abingdon, VA Sept. 21, 2000. Chairman Truesdale and Member Fox, with Member Hurtgen dissenting, affirmed the administrative law judge's findings that the Respondent violated

Section 8(a)(3) and (1) of the Act by terminating Ronnie Brooks when it refused to reinstate him following a disability and issuing a written warning to Larry Nunley. Chairman Truesdale and Member Fox assumed arguendo that the General Counsel demonstrated a prima face case as to Brooks and Nunley and they found, contrary to their dissenting colleague, that the Respondent failed rebutted it. [HTML] [PDF]

Chairman Truesdale and Member Hurtgen reversed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending Tony Orfield with a final warning and later discharging him. Assuming arguendo that the judge correctly found that a prima facie case was established, they concluded that the Respondent successfully rebutted it by showing that it would have taken the same actions against him because he twice negligently damaged the Respondent's property in disregard of established safety practices. Member Fox disagreed.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charged filed by Food and Commercial Workers Local 400; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Bristol, Nov. 5-7, 1997 and April 6-9, 1998. Adm. Law Judge Pargen Robertson issued his decision August 5, 1998.

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Summer's Living Systems, Inc., et al. (7-CA-38546(1), et al.; 332 NLRB No. 22) State of Michigan Sept. 25, 2000. The Board affirmed the administrative law judge's decision that the Respondents' refusal to recognize and bargain with the UAW and AFSCME in 1996 and thereafter violated Section 8(a)(5) and (1) of the Act. [HTML] [PDF]

Respondent Adult Learning Systems provides group home services to mentally disabled and mentally ill persons in Michigan. The other Respondents provide personal care and support services to handicapped individuals within the State of Michigan. Each of the Respondents operates as a joint employer with the Michigan Department of Mental Health (DMH). In all the cases except Case 7-CA-38863, AFSCME sought to represent employees classified as direct care workers or program aides working for the named Respondents. In Case 7-CA-38863, the UAW sought to represent a unit of direct care workers employed by Respondent Adult Learning Systems. Both Unions previously filed individual representation petitions with the Michigan Employment Relations Commission (MERC) seeking separate elections among the employees. The Unions won all the elections and the MERC issued certifications of representative. At the Unions' request, some of the Respondents agreed to bargain, but contingent upon DMH's participation. Others and DMH have refused to recognize and bargain with the Unions.

After the Board's issuance of *Management Training Corp.,* 317 NLRB 1355, the Michigan Court of Appeals determined that MERC's jurisdiction over petitions seeking to represent employees of group home providers with contractual ties to DMH was pre-empted by the NLRA. In *Management Training Corp.,* the Board overruled Res-Care and expanded its jurisdiction to include certain private employers who have close ties to exempt government entities. The Unions in 1996 demanded bargaining with the Respondents alone under the NLRA after MERC's decision.

The Board found that the judge correctly applied its comity policy and affirmed his findings that (1) the state-conducted elections reflect the true desires of the affected employees; (2) there was no showing of election irregularities; and (3) there was no substantial deviation from due process requirements. The removal of joint employer DMH from the bargaining table does not relieve the Respondents from their bargaining obligation, the Board held, in agreement with the judge.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by AFSCME and UAW; complaint alleged violation of Section 8(a)(1) and (5). Hearing held in Detroit, Jan.29-30, 1997. Adm. Law Judge John H. West issued his decision Jan. 9, 1998.

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Beverly Health and Rehabilitation Services and its wholly owned subsidiary, Beverly Enterprises-Pennsylvania, d/b/a Grandview Health Care Center (6-CA-27342, et al.; 332 NLRB No. 26) Fort Smith, AR Sept. 27, 2000. The Board found that

the Respondent unlawfully implemented facially invalid disciplinary rules 1.4 and 1.6 at all its facilities throughout the Commonwealth of Pennsylvania, except Caledonia Manor, and required that the Respondent rescind the rules and post a notice at all of its Pennsylvania facilities. It issued a separate notice to be posted at Caledonia Manor that does not order rescission of Caledonia Manor's rule 1.6. [HTML] [PDF]

The Board, citing *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), found unlawful Respondent's rule 1.6, which bans the making of false or misleading statements. Rule 1.4 prohibits "[r]efusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation company rules, laws, or government regulations." The Board wrote: "The rule plainly permits employer conduct which would be a *Johnnie's Poultry* violation of the Act. It permits the employer to coerce employees, under threat of discipline, to cooperate with an employer investigation of unfair labor practices. As such, the rule inhibits protected, concerted activity."

(Chairman Truesdale and Members Fox and Liebman participated.)

Charges filed by Service Employees Local 585, et al.; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Pittsburgh, June 25 and 26, 1997. Adm. Law Judge William G. Kocol issued his decision Oct. 24, 1997.

* * *

NRNH, Inc. d/b/a Jennifer Matthew Nursing and Rehabilitation Center (3-CA-21861; 331 NLRB No. 27) Rochester, NY Sept. 25, 2000. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire 36 bargaining unit employees of the predecessor employer, Nortonian Nursing Home, because they were represented by SEIU District 1199; violated Section 8(a)(1) by telling employees that they would be represented by a different union; and violated Section 8(a)(5) by refusing to recognize and bargain with District 1199 and setting initial terms and conditions of employment. [HTML] [PDF]

Member Hurtgen, dissenting in part, found that the Respondent lawfully set its initial terms and conditions of employment. He adheres to the view as stated in *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), that a successor employer has a right to set its initial terms and conditions of employment. He also believes that the right is not lost because the successor violated Section 8(a)(3) by unlawfully refusing to hire employees of the predecessor.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by SEIU District 1199; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Rochester, Aug. 30-Sept. 3, 1999. Adm. Law Judge Arthur J. Amchan issued his decision Nov. 17, 1999.

* * *

United States Postal Service (2-CA-29200(P), et al.; 332 NLRB No. 28) Newburgh, NY Sept. 26, 2000. The Respondent discharged Pilar Livingston, Denine Cooper, Roger Bowden, Susan Martinez, Brenda Bellamy, and Joseph Wilson, Jr. because of their protected concerted activities in violation of Section 8(a)(3) and (1) of the Act, the Board held in agreement with the administrative law judge. The judge found that the employees clearly acted together in invoking their contractual right when they refused to work overtime one night because they were not given at least one hour's notice beforehand. He rejected the Respondent's argument that the Board should defer to an arbitrator's decision finding that the discriminatees were justly terminated for "insubordination" when they refused to work the overtime. The arbitrator's decision is wrong and repugnant to the Act, the judge concluded. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Pilar Livingston, Denine Cooper, Roger Bowden, Susan Martinez, and Brenda Bellamy, individuals and Postal Workers Mid-Hudson Area Local 3722; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York, May 12-13, 1998. Adm. Law Judge Howard Edelman issued his decision Sept. 28, 1998.

* * *

Paul Mueller Co. (17-CA-17623, et al.; 332 NLRB No. 29) Springfield, MO Sept. 25, 2000. Chairman Truesdale and Member Liebman found, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by threatening two former strikers with closer supervision because of their union activities. "[T]he strikers' exercise of their lawful right to strike did not justify singling them out for closer supervision on their return to work, whether or not a strike continues," they explained. Chairman Truesdale and Member Liebman found no evidence of a reasonable objective basis for fearing that the returning strikers would not perform their jobs as they had in the past or would attempt to disrupt the productivity of coworkers. Member Hurtgen would dismiss the allegation. He found that "the challenged statements to the strikers were, as found by the judge, 'reasonable understandable precaution[s] against the returning strikers disrupting production in support of the remaining strikers.'" [HTML] [PDF]

The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the bargaining unit work of assembling several stainless steel tanks (used for wine production) to another plant, without bargaining with Sheet Metal Workers Local 208. The Respondent did not contest the judge's finding that the work transfer involved a mandatory bargaining subject, but it contested the judge's finding that the management-rights provision in the parties' expired collective-bargaining agreement did not provide the required clear and unmistakable waiver of the Union's right to bargain.

Chairman Truesdale and Member Liebman found no need to address the issue, noting that pursuant to well-established precedent the Respondent cannot rely on the management rights provision to justify its unilateral action after the expiration of the contract containing that provision. Member Hurtgen would find the violation because the Respondent's conduct was not shown to be consistent with past practice.

The Board severed and remanded to the judge for further proceedings the timely reinstatement issue in Case l7-CA-18688, i.e., whether the Respondent unlawfully delayed reinstatement for 89 unfair labor practice strikers who made an unconditional offer to return on May 22, 1996.

In the absence of exceptions, the Board adopted the judge's finding that the Respondent violated Section 8(a)(5) by its unilateral implementation of the Med-Pay health insurance plan. It required the Respondent, on request of the Union, to restore the health insurance program in existence prior to the implementation of the Med-Pay plan.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Sheet Metal Workers Local 208; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Springfield, Aug. 19-21, 1996. Adm. Law Judge Marion C. Ladwig issued his decision May 21, 1997.

* * *

Paul Mueller Co. (17-CA-18912, et al.; 332 NLRB No. 30) Springfield, MO Sept. 25, 2000. The Board upheld the administrative law judge's finding that the Respondent violated Section 8(a)(5), (3) and (1) of the Act by refusing to meet and confer about grievances filed by the Union, refusing to notify the Union, dealing directly with employees concerning proposed changes in their hours and days of work, and refusing to promptly reinstate unfair labor practice strikers to their former positions upon their unconditional offer to return to work. [HTML] [PDF]

The Respondent excepted to the judge's finding that it violated Section 8(a)(5) by unilaterally implementing changes in the list of preferred providers under the Med-Pay health care delivery system. It did not except to the judge's finding in another case involving the same parties, that the Respondent violated Section 8(a)(5) by its unilateral implementation for the entire Med-Pay program or to the remedy requiring the Respondent, on request of the Union, to restore the health insurance program in existence prior to the implementation of the entire Med-Pay program. The Board adopted the unfair labor practice finding and remedy in *Paul Mueller Co.,* 332 NLRB No. 29 (Sept. 25, 2000).

The Board found that litigation of the unfair labor practice issue in the other case obviated the need for an additional unfair labor practice finding and remedy in this case. It deleted remedial provisions relevant to the issue from the judge's

recommended Order and Notice.

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Sheet Metal Workers Local 208; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Springfield on Nov. 21, 1997. Adm. Law Judge Albert A. Metz issued his decision Jan. 21, 1998.

* * *

Bultman Enterprises, Inc. d/b/a Le Rendezvous Restaurant, et al. (24-CA-7129; 332 NLRB No. 31) San Juan, PR Sept. 25, 2000. The Board found that the Respondent Taber Partners I d/b/a Ambassador Plaza Hotel & Casino, A Radisson Plaza Hotel (the Hotel) is jointly liable for the violations of Section 8(a)(3) and (1) of the Act committed by Respondent Bultman, and it entered a remedial Order so providing. [HTML] [PDF]

The Board found at 323 NLRB 445 (1997) that Respondent Bultman, a successor to the Hotel, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with HEREIU Local 610, failing to supply the Union with requested information, unilaterally lowering the restaurant employees' wages, and departing from the terms of the Union's collective-bargaining agreement with the Hotel. It found also that Respondent Bultman violated Section 8(a)(3) and (1) by refusing to consider for employment and refusing to hire a substantial portion of the Hotel's restaurant employees because of their union affiliation. The Board severed for further consideration the issues of the joint employer status of the Hotel and its joint liability for Bultman's unfair labor practices in light of the oral argument held in the then pending cases of *Jeffboat Division, American Commercial & Marine Services Co., and T.T.& O Enterprises, Inc.,* 9-UC-405; *M.B. Sturgis, Inc.,* 14-RC-11572; and *Value Recycle, Inc.,* 33-RC-4042. In *M.B. Sturgis, Inc.,* 331 NLRB No. 173 (2000), the Board declined to reexamine or change extant Board precedent concerning the joint employer standard.

In this supplemental decision, the Board found that the judge correctly applied that precedent to the facts of this case in concluding that the Hotel and Bultman are joint employers. The General Counsel does not seek a finding that the Hotel violated its duty to bargain or a remedial bargaining order that runs to the Hotel as well as Bultman.

(Chairman Truesdale and Members Fox and Liebman participated.)

* * *

Yellowstone International Mailing (13-RC-20399; 332 NLRB No. 35) Elk Grove Village, IL Sept. 27, 2000. The Board concluded that the Employer's current workforce is a substantial and representative complement of employees, notwithstanding the Employer's anticipated expansion of its operations, such that an immediate election is appropriate. It reversed the Regional Director's decision and order which found that the processing of the petition filed by Manufacturing, Production 7 Service Workers Local 24 is premature; and remanded the case to the Regional Director for further action. The Board wrote: [HTML] [PDF]

> [E]ven assuming that the Employer's projected expansion by the first quarter of 2001 is not too indefinite, speculative, or remote in time to serve as the standard against which to measure the present complement of employees, and assuming that all of the employees hired as a result of the expansion would be included in the unit, the Employer's current unit workforce (113 employees) would constitute 38 percent of the ultimate projected workforce of approximately 300 employees at the new facility. Additionally, as it is undisputed that there will be no new job categories created by the Employer, the current employees are employed in 100 percent of the ultimate job classifications.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Professional Facilities Management (12-RC-8043; 332 NLRB No. 40) Coral Springs, FL Sept. 26, 2000. The Board, citing

M.B. Sturgis, Inc., 331 NLRB No. 173 (2000), found that there is no statutory or policy impediment to a unit where, as here, a petitioner seeks to represent an appropriate unit of the employees of a single "user" employer without regard to whether the unit employees are jointly employed by another employer. The Board wrote: [HTML] [PDF]

> Here, the Petitioner seeks to represent a bargaining unit consisting only of the employees of a single user employer. In these circumstances, as with a petition seeking a unit only of the employees of a single supplier employer, we will not require the naming of all potential joint employers and the litigation of their potential relationship with the user employer. For the same reasons we cited in M.B. Sturgis, we conclude that the absence of one of the alleged joint employers at the bargaining table does not destroy the ability of the named employer (here, the user) to engage in effective bargaining with respect to employees to the extent it controls their terms and conditions of employment. Id., slip op. at 11 fn. 22. A petitioner may, therefore, seek to bargain with and name in its petition only the single user employer.

The Regional Director had found that the Employer and Easy Staff, Inc., d/b/a Employee Services (ES) were not joint employers of the petitioned-for employees, that ES was not denied adequate notice and opportunity to be heard at the hearing, and that a unit of stagehands, excluding maintenance and operations employees, is an appropriate unit. The Board found it unnecessary to rule on the joint employer and due process findings because the Petitioner (the Theatrical Stage Employees International) seeks to represent employees of a statutory employer in an appropriate unit. Having concluded that the status of ES as a joint employer is no longer a relevant issue in the circumstances of this case, the Board found it is unnecessary to reach the due process arguments raised by the Employer.

(Chairman Truesdale and Members Fox and Liebman participated.)

* * *

Labor Ready, Inc. (9-CA-36223, 36395; 332 NLRB No. 33) Huntington and South Charleston, WV Sept. 27, 2000. The Board agreed with the administrative law judge that Donald Huff, Thomas Williams, Steve Montoney, and James Blevins were bona fide job applicants. It agreed also that the Respondent violated Section 8(a)(1) of the Act by refusing to allow the job applicants to solicit union authorization cards from other employees and job applicants during their nonworking time and in nonwork areas of its Huntington and Charleston offices, calling the police to remove them from its offices for engaging in such conduct, and telling job applicants not to sign union authorization cards; and violated Section 8(a)(3) and (1) by refusing to refer the four men for employment because of their union activities. The Board wrote: [HTML] [PDF]

> In agreeing with the judge's conclusion that the four men were not subject to that portion of the Respondent's no-solicitation policy applicable to nonemployees, we emphasize our agreement with his finding that they were rightfully on the Respondent's premises pursuant to Respondent's own policy that persons who had submitted applications, passed the safety test, and signed the referral list must be physically present in the referral office in order to be eligible for referrals. We further emphasize the judge's finding that the area in which the four were soliciting is not a working area for the employeee applicants but serves primarily as a waiting room and gathering place for them as they wait for referrals to the various jobsites where their actual work is to be performed. Finally, we note that here, as in a prior case against the Respondent, *Labor Ready, Inc.,* 327 NLRB No. 179 (1999), there is no evidence that the solicitation activity in what was a nonwork area for the employee applicants created a disturbance or otherwise interfered with the work going on in the areas adjacent to the waiting area.

Member Hurtgen emphasized his "agreement with the judge's finding that, having completed the process mandated by the Respondent, including filling out the required forms and placing their names on the Respondent's referral list, the four men ceased being mere applicants and became employees with an expectation of receiving a work assignment as soon as their names were reached on the list."

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charge filed by Tri-State Building and Construction Trades Council; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Huntington, Jan. 14-15, 1999. Adm. Law Judge George Aleman issued his decision July 12, 1999.

* * *

P H Nursing Home (26-CA-17726, et al., 26-RC-7849; 332 NLRB No. 21) Jackson, MS Sept. 28, 2000. The Board agreed with the administrative law judge that the Respondent engaged in objectionable conduct that interfered with an election held in Case 26-RC-7849 and violated Section 8(a)(3) and (1) of the Act. Specifically, the Respondent unlawfully suspended and discharged Felicia Jackson, implemented and enforced an unlawful no-solicitation/no distribution rule, threatened employees with discipline for passing out union literature, threatened employees with adverse changes in working conditions if they supported Food and Commercial Workers Local 1529, and interrogated an employees about her union activity. In agreeing with the judge's finding that a bargaining order is not warranted in this case, the Board did not rely on the closeness of the vote in the election or the fact that no unfair labor practices were committed in the weeks preceding the election. The Board set aside the election and directed a second election. [HTML] [PDF]

Member Hurtgen, dissenting in part, disagreed that the Respondent violated Section 8(a)(1) by threatening employee Rowena McLain with adverse working conditions if the Respondent were unionized, finding that Supervisor Riddley was "simply giving her view as to the role that the Union would play as a bargaining representative."

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Food and Commercial Workers Local 1529; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Jackson, April 14-16, 1997. Adm. Law Judge J. Pargen Robertson issued his decision July 8, 1997.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Western Rubber, Inc. (Steelworkers Local 650-01) Goshen, IN Sept. 22, 2000. 25-CA-26803; JD-114-00, Judge Margaret M. Kern.

Ray Angelini, Inc. (Electrical Workers (IBEW) Local 98) Philadelphia, PA Sept. 26, 2000. 4-CA-24904; JD-116-00, Judge Nancy M. Sherman.

Tim Foley Plumbing Service, Inc. (Indiana State Pipe Trades Assoc. Local 661) Muncie, IN Sept. 22, 2000. 25-CA-26181(E); JD-120-00, Judge David L. Evans.

Bowling Transportation, Inc. (an Individual) Owensboro, KY Sept. 22, 2000. 25-CA-26896; JD-122-00, Judge William G. Kocol.

Innovative Communications Corp. and Virgin Islands Telephone Co. (VITELCO) and St. Croix Cable TV, Inc. (Our Virgin Islands Labor Union) St. Croix, VI Sept. 29, 2000. 24-CA-8472; JD-123-00, Judge C. Richard Miserendino.

Elf Atochem North America, Inc. (Steelworkers Local 88) Philadelphia, PA Sept. 25, 2000. 4-CA-27569, 27657; JD-124-00, Judge Eric M. Fine.

Toering Electric Company and Foster Electric, Inc. (Electrical Workers (IBEW) Local 275) Grand Rapids, MI Sept. 29, 2000. 7-CA-37768, et al., JD-127-00, Judge Arthur J. Amchan.

NSA, A Division of Southwire Company (Steelworkers) Hawesville, KY Sept. 26, 2000. 26-CA-18725 et al.; JD(ATL)-23-00, Judge Lawrence W. Cullen.

M & R Services, Inc. (Electrical Workers (IBEW) Local 124) Overland Park, KS Sept. 29, 2000. 17-CA-18627; JD(ATL)-51-00, Judge Pargen Robertson.

Data Mail, Inc. (Teamsters Local 559) Newington, CT Sept. 27, 2000. 34-CA-8457, 8694; JD(NY)-66-00, Judge Steven Fish.

Pratt Towers, Inc. (Individuals and Service Employees Local 32B-32J) Brooklyn, NY Sept. 27, 2000. 29-CA-22657 et al,; JD (NY)-64-00, Judge Jesse Kleiman.

Food & Commercial Workers Local 919 (an Individual) Wilton, CT Sept. 27, 2000. 34-CB-2292; JD(NY)-65-00, Judge Michael A. Marcionese.

King Soopers, Inc. (Food & Commercial Workers Local 7) Denver, CO Sept. 19, 2000. 27-CA-16475; JD(SF)-58-00, Judge Thomas Michael Patton.

TVI, Inc. d/b/a Savers (Teamsters Local 14) Las Vegas, NV Sept. 18, 2000. 28-CA-16019-2; JD(SF)-61-00, Judge Albert A. Metz.

M&M Electric, Inc. (Electrical Workers (IBEW) Local 640) Phoenix, AZ Sept. 22, 2000. 28-CA-16259, 16259-2; JD(SF)-65-00, Judge Gerald A. Wacknov.