

## 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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October 20, 2000

W-2761

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*Teledyne Advanced Materials* (10-CA-29555, 29908; 332 NLRB No. 53) Huntsville, AL Sept. 29, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by the statements of Supervisor Justice in August 1996 that employees were not to talk to anyone about the Steelworkers or to anyone about who was involved with the Union and that they could be written up if they were caught talking about the Union. [\[HTML\]](#) [\[PDF\]](#)

The Respondent did not except to the judge's findings that it violated Section 8(a)(1) by supervisor Carnegie's statement in September 1996 that elimination of overtime was based on the employees' union activities and violated Section 8(a)(3) when it issued a written "final warning" to employee Edward Norwood on April 24, 1996, based on alleged misconduct which the Respondent had tolerated on the part of other employees.

In a reversal of the judge, Members Fox and Liebman found that the Respondent violated Section 8(a)(3) and (1) by its discharge of Norwood on August 28, 1996. They agreed with the judge that the General Counsel established that Norwood's union activity was a motivating factor in the Respondent's decision to discharge him. Members Fox and Liebman relied on these factors in finding, contrary to the judge, that the Respondent failed to establish that Norwood had been insubordinate and that other employees had been similarly discharged for insubordination. The disciplinary form, on its face, indicates that the discharge decision was based "upon review of [Norwood's] overall work record," an indication that the Respondent did not discharge him for the insubordination alone. Norwood received one discipline in the 3 years that he worked for the Respondent (the final warning found unlawful by the judge; the Respondent does not contest his finding). Given the prefatory language that discharge for insubordination is not mandated, the Respondent failed to establish its claim that an act of insubordination inevitably results in discharge.

Member Hurtgen, dissenting in part, would remand the case to the judge to evaluate evidence that Respondent (through Supervisor Reeves) referred to the unlawful warning on April 24 when he told Norwood that he was discharged and to consider whether Norwood would have been discharged even if there had been no warning.

(Members Fox, Liebman, and Hurtgen participated.)

Charges filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Huntsville, May 1-2, 1997. Adm. Law Judge William N. Cates issued his decision May 2, 1997.

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*Fixtures Manufacturing Corp.* (17-CA-19174, 19366; 332 NLRB No. 55) Kansas City, MO Sept. 29, 2000. Affirming the administrative law judge, the Board found that the Respondent violated the Act in these respects: Acting Plant manager Thomas McCann's statements to employee Robert Sheall and to a group of supervisors, overhead by employee Dennis Evans; interrogating employees about their Union activities; threatening employees with discipline and/or discharge because of their union activities; discriminatorily banning union solicitation and the distribution of union materials during working time; discriminatorily prohibiting the posting of union materials on the employee bulletin board; requesting employees to report to the Respondent employees who harassed them when soliciting them on behalf of the Union; discriminatorily issuing a written warning for insubordination to George Hulse; and discriminatorily discharging Penny Sheridan. [\[HTML\]](#) [\[PDF\]](#)

Contrary to the judge who found that the Respondent violated Section 8(a)(3) and (1) by issuing written warnings for sexual harassment to Sheall and Harold Hoff, Chairman Truesdale and Member Hurtgen found that the Respondent lawfully disciplined Sheall and Hoff under the Respondent's policy against harassment. Member Liebman, dissenting from the reversal, concluded "the Respondent was not interested in investigating the merits of the sexual harassment complaints, but, rather, seized on them as a convenient pretext to justify disciplining two union adherents."

Member Hurtgen dissented from the finding that McCann's statement to a group of supervisors, overhead by employee Evans, constituted an unlawful threat. He explained: "I find that McCann's words [that, in order to deal with the Union, "they needed to verbally kill the chicken and weed out the bad seed"] could not reasonably be understood as a statement that the Respondent would discipline employees for engaging in protected activity. If the statement was nonsensical to the judge (a reasonable

person), it is difficult to understand how another reasonable person (e.g., an employee) would read into the statement the message that employees would be fired for union activities."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Teamsters Local 41; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park, Oct. 29-30 and Nov. 3, 1997. Adm. Law Judge Mary Miller Cracraft issued her decision Jan. 16, 1998.

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*Victoria Packing Corp.* (29-CA-22386; 332 NLRB No. 58) Brooklyn, NY Sept. 29, 2000. Members Fox and Liebman affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet, bargain, and deal with Business Agent John Pierman, the Union's designated representative; and by unilaterally abrogating the visitation provisions in article 26 of the parties' collective-bargaining agreement by refusing to permit Pierman access to the Respondent's facility. The Respondent asserted in exceptions that the latter violation was neither alleged in the complaint nor litigated at the hearing. [\[HTML\]](#) [\[PDF\]](#)

Contrary to the Respondent's exception and the position of their dissenting colleague, Members Fox and Liebman found that the violation was both alleged and litigated, and has been properly found. Member Hurtgen, without reaching the merits of the issue, found that as a procedural matter, the "unilateral abrogation" issue was neither raised by the complaint nor litigated by the parties. He would modify the judge's decision and recommended Order accordingly.

(Members Fox, Liebman and Hurtgen participated.)

Charge filed by Food and Commercial Workers Local 174; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on Oct. 19, 1999. Adm. Law Judge Raymond P. Green issued his decision Dec. 23, 1999.

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*Kohler Mix Specialties* (18-CA-13040; 332 NLRB No. 61) White Bear Lake, MN Sept. 29, 2000. Chairman Truesdale and Member Liebman, with Member Hurtgen dissenting, denied the Respondent's motion for summary judgment, arguing that the Board should defer to an arbitrator's decision and dismiss the complaint. The case was remanded to the Regional Director for further appropriate action. The majority wrote in finding deferral inappropriate because the arbitrator did not adequately consider the unfair labor practice issue: [\[HTML\]](#) [\[PDF\]](#)

The issue before the Board is whether the Respondent, by failing and refusing to bargain with the Union about its decision, and the effects of its decision, violated its statutory obligation to bargain set forth in Section 8(d) and enforceable through Section 8(a)(5). Resolution of this issue requires a determination of whether the decision is a mandatory subject of bargaining, whether the Union has waived a statutory right to bargain about the decision or its effects, and whether the Respondent has already satisfied its obligation, if any, to bargain. The issue decided by the arbitrator, however, was only whether any provision of the parties' contract affirmatively prohibited the Respondent's unilateral decision to subcontract its over-the-road delivery operation. Finding no such prohibition, the arbitrator concluded that there had been no breach of contract.

The majority agreed with the General Counsel that *Armour & Co.*, 280 NLRB 824 fn. 2 (1986), is dispositive of the deferral issue. It found distinguishable such cases as *Southern California Edison Co.*, 310 NLRB 1229 (1993), relied on by the Respondent; and *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), cited by the dissent.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Teamsters Local 471; complaint alleged violation of Section 8(a)(1) and (5). Respondent filed motion for summary judgment Jan. 22, 1998.

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*United Insurance Co. of America* (12-CA-19979, 20016; 332 NLRB No. 57) St. Petersburg, FL Sept. 29, 2000. The Board agreed with the administrative law judge that the Respondent lawfully issued warning notices to Edward Russell and Jeffrey Lastinger and placed them on probation for one year for failing to follow company rules when Russell signed an application for insurance coverage on Lastinger's mobile home and Lastinger wrote a policy for life insurance on his father, Robert Lastinger. It dismissed the complaint alleging that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by taking the actions against the two employees because they joined and assisted the Food and Commercial Workers International and engaged in concerted activities, because they gave testimony to the Board in the form of affidavits, and because Lastinger filed an unfair labor practice charge against the Respondent in Case 12-CA-19391. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by the Food and Commercial Workers International; complaint alleged violation of Section 8(a)(1), (3), and (4). Adm. Law Judge William N. Cates issued his decision March 6, 2000.

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*PNEU Electric, Inc./Nan Ya Plastics Corp.* (15-CA-14050; 332 NLRB No. 60) Lafayette, LA Sept. 29, 2000. The administrative law judge found, and the Board agreed, that the Respondents discharged, and caused the discharge of employees Clifford Zylkes and Andras Aycock because of their union organizational activities in violation of Section 8(a)(3) and (1) of the Act. The Board found that the "focus of their discharges was, as the judge found, the content of their conversations--the union--and their union solicitation of other employees." [\[HTML\]](#) [\[PDF\]](#)

The Board, citing *FES*, 331 NLRB No. 20 (2000), agreed with the judge that Respondent PNEU violated Section 8(a)(3) and (1) by failing to consider for employment applicants Kendrick Russell, Donald Longupee, and Roland Goetzman when they sought to apply for work on June 25, 1996. Finding, as did the judge that applicants Russell, Longupee, and Goetzman were affirmatively misled about the availability of applications, the Board wrote:

Respondent PNEU's departure from its normal practice of taking applications was a meaningful act because it excluded the three applicants from the process by which employees are considered for job opportunities with Respondent PNEU. We agree with the judge that the disparate treatment of Anderson, whose union affiliation was unknown, and the three applicants wearing union organizer buttons warrants the inference that Respondent PNEU's refusal to consider the union applicants for employment was motivated by their union affiliation. Further, Respondent PNEU failed to show that it would not have considered them even in the absence of their union affiliation.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Electrical Workers IBEW Local 995; complaint alleged violation of Section 8(a)(1) and (3) of the Act. Hearing at Baton Rouge, Sept. 22-24, 1997. Adm. Law Judge Robert C. Batson issued his decision Feb. 9, 1998.

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*Clinton Electronics Corp.* (33-CA-11536, 11725 (1-2); 332 NLRB No. 47) Loves Park, IL Sept. 29, 2000. Affirming the administrative law judge, the Board majority of Chairman Truesdale and Member Liebman found the Respondent had engaged in certain unfair labor practices, including disciplining union supporter Lee for soliciting employees at work and home about joining the union; a statement by supervisor Prock to employee Smith that employees could lose their jobs if the Union succeeded; and an interrogation by supervisor Krueger of employee Williams. Dissenting Member Hurtgen would not find a violation in the remarks on the shop floor between Prock and Smith, which was overheard by a second employee, because they "were made in the context of a conversation between friends, and was a response to Smith's asking for Prock's opinion regarding the Union." Member Hurtgen also did not agree with the majority that Krueger's questioning of Williams about attending a Union meeting constituted an unlawful interrogation. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Steelworkers; complaint alleged violation of Section 8(a)(1) and (3) of the Act. Hearing at Rockford, Feb. 11-14, 1997. Adm. Law Judge William J. Pannier III issued his decision Sept. 18, 1997.

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*Jonbil, Inc.* (11-CA-16707, et al.; 332 NLRB No. 63) Chase City, VA Sept. 29, 2000. The Board ordered a second election be held among the Respondent's employees in the unit found appropriate and that the Respondent supply to the Union the names and addresses of all current unit employees. The Board declined to impose a Gissel bargaining order given the long delay in the decision's issuance. The first election (134 for and 143 against union representation) was held on September 15, 1995. In a footnote, Member Liebman said she thought additional remedial measures, such as having a Board agent read the notice to employees in the presence of a responsible management official, and providing the Union access to company bulletin boards, were necessary "to dissipate\_ the lingering atmosphere of fear created by the Respondent's pervasive unlawful conduct\_." [\[HTML\]](#) [\[PDF\]](#)

Member Hurtgen, in declining to grant a bargaining order, pointed out in a footnote that three management officials who had been responsible for a number of the unfair labor practices, no longer were employed by the Respondent. He also noted there has been a 44 percent turnover of employees (154 of 352 employees) between the time of the events at issue here, more than 4 years ago, and the end of the hearing in this case on July 11, 1996.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Needletrades Employees [UNITE]; complaint alleged violation of Section 8(a)(1) and (3) of the Act. Hearing at Boydton, May 4-6 and July 9-11, 1996. Adm. Law Judge Philip P. McLeod issued his decision Jan. 21, 1997.

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*U.S. Postal Service* (3-CA-19545-1(P), et al.; 332 NLRB No. 62) Albany, NY Sept. 29, 2000. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing or otherwise failing to provide the Union with requested information or by unnecessarily delaying its responses to the Union's requests, including its request for Supervisor Frank Appio's attendance records and EAP Coordinator Lisa Lynch's report assessing Supervisor Guerin's relationship with the employees under his supervision. [\[HTML\]](#) [\[PDF\]](#)

Chairman Truesdale and Member Fox agreed with the judge that the Respondent violated Section 8(a)(5) and (1) by its negative response to the Union's request for any investigative reports made by Supervisor Frank Fuschino. "Unlike our dissenting colleague, we do not find it a defense to our finding of a violation that, during the entire period that the Respondent neither responded to the Union's request nor produced the document, both the Union and the Respondent were acting under a misapprehension: both were unaware that the report at issue had already been turned over to the Union as part of a response to an earlier Union request." Member Hurtgen found, in these circumstances here, where there is a material mistake of fact, there was no violation and, if there was, there is no need for a remedial order.

Turning to other alleged violations, the Board agreed with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to direct the Union to section 513.364 of the Employment and Labor Manual (ELM) and to explain why Dorothy Holveg's absence documentation was insufficient; failing to respond to additional requests related to Holveg's absence; and failing to explain why Holveg was scheduled to report to work on September 28, 1996 and not paid. Member Hurtgen disagreed with his colleague's conclusion that the Respondent violated the Act by simply advising the Union to see sec. 513 of the ELM when the Union asked why Holveg's absence documentation did not meet that section's criteria. If the Union needed more information after reading sec. 513, it could have asked the Respondent for a clarification, he observed.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by American Postal Workers Local 390 and Mid Hudson Area Local; complaint alleged violation of Section 8(a)

(1) and (5). Hearing at Albany, June 9-10, 1997. Adm. Law Judge Howard Edelman issued his decision Dec. 31, 1997.

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*Watkins Construction Co.* (27-RC-8038; 332 NLRB No. 70) Gillette, WY Oct. 4, 2000. The Board, disagreeing with the hearing officer that there are grounds for questioning the fairness of an election held by mail ballot between May 19 and June 2, 2000, certified that a majority of the valid ballots have not been cast for Pipeliners Local 798. "The procedural errors that were committed, although regrettable, could not have affected the outcome of the election," it said. [\[HTML\]](#) [\[PDF\]](#)

Before the ballot count at 1 p.m. on June 2, the Union's observer, Randy Evans, challenged three ballots, including the ballot of Andres Flores. The Board agent mistakenly opened Flores' ballot. The tally was 10-10, with 2 challenges. Evans later agreed to voluntarily withdraw the remaining two challenges. The final tally was 10 for and 12 against the Union. The parties learned at the hearing that one of the counted ballots had arrived at the regional office on June 2 at 10:19, after the 10 a.m. deadline. The Union filed several objections to the election. In the absence of exceptions, the Board adopted, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objections 3 through 5.

The hearing officer found that the counting of Flores' ballot and the failure to give the Union the opportunity to challenge the tardy ballot caused reasonable doubt as to the fairness and validity of the election and that it was impossible to determine how the two ballots affected the election results. The Board disagreed. It noted that the parties litigated the Union's contention (raised in Objection 4) that Flores' ballot should not be counted because the Employer assisted him in completing his ballot and that the Union did not except to the hearing officer recommendation that the objection be overruled. With respect to the tardy ballot that arrived 2 hours and 41 minutes before the count began, the Board pointed out that it has held that even where the record does not disclose a reason for the late mailing of a ballot that is received after the deadline for receipt, such a ballot should be counted if it is received before the count begins. In certifying the election results, it explained:

Had Flores' ballot and the tardy ballot been properly segregated and the subject of a hearing to resolve challenges, it is clear that the challenges would have been overruled, and the ballots would have been counted, resulting in the 10-10 tie vote reflected in the initial tally. Because the remaining two challenged ballots have been opened and counted, we know that these ballots were cast against the Union. Thus, even assuming the Union had pursued all four possible challenges, there is no scenario under which the election results could have been favorable to the Union.

(Chairman Truesdale and Member Liebman and Hurtgen participated.)

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*The Newspaper and Mail Deliverers' Union of New York and Vicinity* (The New York Times Company) Flushing, NY Oct. 10, 2000. 29-CB-11022; JD(NY)-58-00, Judge Steven Davis.

*Pinnacle Metal Products Co., f/k/a The Wilkie Co.* (Machinists Local 670) Muskegon, MI Oct. 6, 2000. 7-CA-42013, et al.; JD-133-00, Judge Thomas R. Wilks.

*Mountain View Nursing Center, Inc., d/b/a Integrated Health Services at Mountain View* (Service Employees District 1199) Greensburg, PA Oct. 11, 2000. 6-CA-30645; JD-134-00, Judge Karl H. Buschmann.