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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November 3, 2000 W-2763

CASES SUMMARIZED

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New York University (2-RC-22082; 332 NLRB No. 111) New York, NY Oct. 31, 2000. The Board held that New York University's graduate assistants are employees under the National Labor Relations Act and entitled to organize and bargain with their employer even though they are enrolled as students. [HTML] [PDF]

Rejecting the university's contention that graduate students cannot be statutory employees because they are "predominately students," the Board concluded:

> The uncontradicted and salient facts establish that graduate assistants perform services under the control and direction of the Employer, and they are compensated for these services by the Employer. Graduate assistants work as teachers or researchers. They perform their duties for, and under the control of, the Employer's departments or programs. Graduate assistants are paid for their work and are carried on the Employer's payroll system.

Relying on the Board's decision in *Boston Medical Center,* 330 NLRB No. 30 (1999) (reversing precedent and finding medical interns and residents to be statutory employees), the NLRB Regional Director in New York City issued a Decision and Direction of Election on April 3, 2000, in which he found NYU's teaching assistants, graduate assistants, and research assistants (but not graduate assistants in the Sackler Institute and research assistants funded by external grants in various science departments), were statutory employees. In agreeing with the Regional Director's finding, the Board stated:

> Stripped to its essence, the argument of the Employer and others is that graduate assistants who work for a college or university are not entitled to the protections of the Act because they are students. The Board's broad and historic interpretation of the Act rejects such a narrow reading of the statute. Accordingly, we will not deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they also are students.

The decision is by Chairman Truesdale and Member Liebman. Member Hurtgen issued a separate concurring opinion in which he distinguishes between residents and interns (house staff) at hospitals, who he believes are not statutory employees (his dissenting position in Boston Medical Center), and graduate students, who he does regard as employees who should have the right to bargain collectively. He noted that house staff have "an educational relationship" with the hospitals where they train and perform their services as a necessary part of their medical education, whereas working as a graduate assistant is not a requirement for completing graduate education.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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NYP Acquisition Corp. and its alter ego *NYP Holdings, Inc.* (2-CA-26935; 332 NLRB No. 97) New York, NY Oct. 31, 2000. The Board majority of Chairman Truesdale and Member Hurtgen found no merit to the charges that gave rise to this case. The complaint alleged that the Respondents Acquisition and Holdings, owned by media magnate Rupert Murdoch, were alter egos, a single employer, and successors to the bankrupt New York Post Co. The complaint also alleged that the Respondents violated Section 8(a)(3) of the Act by terminating and refusing to reinstate striking employees represented by the Union. Finally, the complaint alleged the Respondents violated Section 8(a)(5) by withdrawing recognition from and refusing to bargain with the Union, and by unilaterally changing the terms and conditions of employment. Murdoch set up Acquisition in 1993 to manage the paper, which subsequently was purchased by Holdings. [HTML] [PDF]

The judge found that the Respondents were alter egos, but that Acquisition was not a successor to Post Co.; that therefore Holdings also did not have any duty to bargain with the Guild deriving from its status as an alter ego of Acquisition; and that Holdings had a right to hire a new work force when it purchased the Post Co. assets and did not have a duty to reinstate the strikers. Accordingly, the judge found that the Respondents did not commit the violations alleged and recommended that the complaint be dismissed. The majority agreed with the judge's ultimate conclusion that the complaint should be dismissed. Unlike the judge, however, it found that the Respondents were not alter egos; consequently, the majority found it unnecessary to pass on whether Acquisition was a successor to the Post.

In dissent, Member Fox would find that Acquisition was a successor employer of the Post, that both Respondents were alter egos and therefore violated Section 8(a)(1), (3), and (5) of the Act when, following Holding's purchase of the Post, Holdings withdrew recognition from the Guild, terminated Guild-represented employees who were engaged in a strike, and refused to reinstate them upon their unconditional offer to return to work.

(Chairman Truesdale and Members Fox and Hurtgen participated.)

Charges filed by Newspaper Guild of New York Local 3; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York 14 days between Oct. 16 and Dec. 14, 1995. Adm. Law Judge Eleanor MacDonald issued her decision Dec. 6, 1996.

* * *

Lasher Service Corp. (20-CA-29138; 332 NLRB No. 71) Sacramento, CA Oct. 23, 2000. Affirming the administrative law judge, the Board held the Respondent failed to provide Machinists Lodge 2182, District 190 requested information concerning the parts department bonus plan and the union-security proposals under negotiations in violation of Section 8(a)(5) and (1) of the Act. In her recommended Order, the judge provided for conditional disclosure of the requested information. The Board however agreed with the Union that the Respondent should provide the requested information outright. It also found that the Respondent failed to establish its confidentially claim. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Machinists Lodge 2182, District 190; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Sacramento on Jan. 12, 2000. Adm. Law Judge Joan Wieder issued her decision May 30, 2000.

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Arlington Electric, Inc. (12-CA-17156; 332 NLRB No. 74) Stuart, FL Oct. 24, 2000. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act when admitted Supervisor Jack Briggs asked David Svetlick whether he was the person mentioned in a union flyer and how he could be working a nonunion job as a union member; and violated Section 8(a)(3) and (1) by discharging Svetlick because of his protected, concerted activity. In agreeing with the judge that Svetlick's circulation of a flyer constituted protected, concerted activity, the Board cited *Furr's Cafeteria,* 292 NLRB 749 (1989) and *Emarco, Inc.,* 284 NLRB 832 (1987). The flyer urged hospital patrons and employees not to use the hospital because the Employer (a subcontractor of the hospital) did not provide paid family health care. The Board rejected the Respondent's assertion that a consumer boycott is permitted only during "labor disputes," which occur only when the employees first raise their concerns with the employer, because "[t]he language of Section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 13-14 (1962). [HTML] [PDF]

Contrary to the judge, the Board found that Medina was not a statutory supervisor at the time he told Svetlick that he would probably be fired for distributing a flyer and it dismissed the allegation that the Respondent violated Section 8(a)(1) through Medina's statement.

(Chairman Truesdale and Members Fox and Liebman participated.)

Charge filed by Electrical Workers (IBEW) Local 728; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Miami, Jan. 21-22, 1997. Adm. Law Judge Howard I. Grossman issued his decision July 16, 1997.

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Terry Machine Co., Division of S.P.S. Technologies, Inc. (7-RC-21581; 332 NLRB No. 75) Waterford, MI Oct. 24, 2000. The Board certified Auto Workers Local 155 as the exclusive collective-bargaining representative of all production and maintenance employees, including tool room employees, quality control employees, shipping and receiving employees and drivers working for the Employer at its Waterford, Michigan facility. [HTML] [PDF]

The tally of ballots for the August 5, 1999 election shows 76 for and 66 against the Union, with 12 challenged ballots. The challenged ballots, including those of employees designated as area coordinators, were sufficient to affect the election results. In election objections, the Employer contended that the area coordinators were supervisors within the meaning of Section 2(11)

of the Act and that their prounion activities during the organizing campaign tainted the election and the Union's showing of interest supporting the petition.

In affirming the hearing officer's recommendation to overrule the Employer's objections, the Board did not rely on his characterization of the area coordinators as "low level or line" supervisors. Instead, it assumed, for purposes of analysis, that the area coordinators are statutory supervisors with the authority to punish and reward employees as contended by the Employer. The Board found however that the prounion activities of the seven coordinators could not have reasonably coerced the employees so as to warrant setting aside the election or dismissing the representation petition. In the absence of exceptions, the Board adopted the hearing officer's recommendation to sustain the challenges to the ballots of the seven area coordinators. The five remaining challenged ballots are not longer determinative. It adopted the hearing officer's recommendation to approve the Employer's withdrawal of Objections 5 and 6.

(Chairman Truesdale and Members Fox and Liebman participated.)

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Glenn's Trucking Co. (9-CA-35666; 332 NLRB No. 87) Hazard, KY Oct. 25, 2000. The Board affirmed the administrative law judge's decision that the Respondent violated Section 8(a)(3) and (1) of the Act by delaying the employment of, or denying employment to, the 23 alleged discriminatees. The Board agreed with the judge that the General Counsel met her initial evidentiary burden under *Wright Line,* 251 NLRB 1083 (1980), with respect to the Respondent's refusal to hire, or delay in hiring, the discriminatees. The judge implicitly found a "blatant disparity" in the Respondent's treatment of applicants, noting the "extreme" union versus nonunion hiring ratios. The statistical evidence thus can be used as an element of animus, the Board held. It also found that the General Counsel established the falsity of the Respondent's contention that the discriminatees were unqualified or less qualified than the employees it hired and that they had been passed over during an "honest random selection process." Having concluded that the Respondent's asserted business reasons were pretextual, the Board found the Respondent failed to satisfy its burden of showing that it would not have hired the discriminatees or delayed in hiring them or offering them jobs in the absence of their union sympathy, citing *FES* (A Div. of *Thermo Power, Inc.*), 331 NLRB No. 20, slip op. at 4. [HTML] [PDF]

(Members Fox, Liebman, and Hurtgen participated.)

Charge filed by Mine Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hazard, Jan. 19-21, 1999. Adm. Law Judge David L. Evans issued his decision May 26, 1999.

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All Country Electric Co., Speer Electric Co., Scharff-Burns Co. (18-RM-1344, et al.; 332 NLRB No. 72) Waterloo, IA Oct. 25, 2000. Members Fox and Liebman, with Member Hurtgen dissenting, denied the Employer-Petitioners' request for review of the Regional Director's Decision and Order dismissing the Employer-Petitioners' petitions seeking elections in units of all employees employed in their electrical construction, installation, maintenance, and repair business. The Employer-Petitioners (All County Electric Co. and its divisions, Speer Electric Co. and Scharff-Burns Co.) contend that their employees are unrepresented and that Electrical Workers IBEW Local 288 made a claim for representation by filing a grievance seeking to cover the employees under collective-bargaining agreements nominally between the Union and CCT Corp. d/b/a Black Hawk Electric Co. [HTML] [PDF]

Members Fox and Liebman agreed with the Regional Director that All County Electric Company was created with a purpose to evade Black Hawk's collective-bargaining obligations. And, even absent a finding of such motive, they found that the evidence established that All County Electric was an alter ego of Black Hawk and its successor CCT Corp. d/b/a Black Hawk Electric. Addressing the dissent's concern about whether issues of motive may appropriately be considered in a representation proceeding, citing *Texas Meat Packers,* 130 NLRB 279 (1961), Members Fox and Liebman said: "[T]he cited case nor any other Board decision that we are aware of suggests that such questions are outside the scope of representation proceedings. Indeed, it is quite common for the Board to consider questions of motive or intent in representation proceedings." As for the dissent's claim that Section 10(b) precludes the Board from considering the circumstances surrounding establishment of the

alleged alter ego, Members Fox and Liebman noted that Section 10(b) is not applicable to representation proceedings.

Member Hurtgen would review whether it is appropriate for the Board, in a representation case, to consider issues of discriminatory motive and whether, or to what extent, the Board should rely on evidence of events occurring in the early 1980s (when alter ego All County was created) to decide an issue of a party's motivation. Contrary to his colleagues, he found *Texas Meat Packers* is "very relevant" to the instant case because there, as here, there is no unfair labor practice allegation that the alleged alter egos were created for discriminatory motives. Thus, the Board should not, in a representation case, declare that there was such a motive, Member Hurtgen explained. He found the cases cited by his colleagues are distinguishable, noting that they do not involve the issue of discriminatory motive and that only one of the cases comes close to the issue.

(Members Fox, Liebman, and Hurtgen participated.)

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Ukiah Valley Medical Center (20-RC-17458; 332 NLRB No. 59) Ukiah, CA Sept. 29, 2000. The Board denied the Employer's request for review of the Regional Director's Order Denying Motion to Transfer Proceeding and Reopening the Hearing in which he found that asserting jurisdiction over the Employer did not violate either the First Amendment of the Constitution or the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1. The Employer is an acute care hospital operated and managed by the Seventh Day Adventist Church. The California Nurses Association seeks to represent a unit of the Employer's registered nurses (RNs). The Employer argued that the teachings of the Adventist faith prohibit Adventist institutions such as Ukiah from recognizing or bargaining with unions; that the Church prohibits its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions; and that the Church strictly adheres to these prohibitions and was prepared to divest itself of another health care facility if the employees voted to unionize. The Board held: [HTML] [PDF]

> As the Regional Director noted, the Seventh Day Adventist Church owns and operates many health care institutions throughout the United States, employing thousands of employees, many of whom are not Church members. Application of the National Labor Relations Act to these institutions is the least restrictive means of accomplishing the goals of the Act: ensuring the right of those employees to self-organization and to have representatives of their choosing, and promoting industrial peace and avoiding disruptions to the delivery of vital health care services through the practice and procedure of collective bargaining. Conversely, as the Regional Director noted, granting an exemption to the Employer and to other Church-operated health care institutions would defeat Congress' intent in enacting the National Labor Relations Act, by denying many thousands of employees the opportunity to self-organize and choose bargaining representation, as well as by putting vital health care services in jeopardy.

(Members Fox, Liebman, and Hurtgen participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Wolgast Corporation (Carpenters Local 706) Saginaw, MI Oct. 25, 2000. 7-CA-42474; JD-140-00, Judge Martin J. Linsky.

Automatic Bedding Corp., and its successor Advanced Bedding Corp. (Electrical Workers, (IUE) Local 76B) Brooklyn, NY Oct. 26, 2000. 29-CA-17617, et al.; JD(NY)-67-00, Judge Steven Davis.

US West Communications, Inc. (Communications Workers) Denver, CO Oct. 3, 2000. 27-CA-16631, 16887; JD(SF)-66-00, Judge James L. Rose.

Tech Electric, Inc. (Electrical Workers (IBEW) Local 532) Livingston, MT Oct. 13, 2000. 27-CA-13950, 14011; JD(SF)-68-00, Judge Michael D. Stevenson.

The Bakersfield Californian (Bakersfield Typographical Union 439, Communications Workers) Bakersfield, CA Oct. 17,

2000. 31-CA-23978, 23979; JD(SF)-70-00, Judge Frederick C. Herzog.