

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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January 26, 2001

W-2775

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Metrocare Home Services, Inc. (2-CA-30301, 31636; 332 NLRB No. 155) New York, NY Dec. 29, 2000. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing a wage reduction on February 12, 1997 and implementing the wage reduction without having reached impasse in negotiations with Community and Social Agency Employees District Council 1707, AFSCME. [\[HTML\]](#) [\[PDF\]](#)

The Board rejected the Respondent's contention in its exceptions that the judge erred in finding an unfair labor practice that was not alleged in the complaint-that the Respondent violated Section 8(a)(5) and (1) by unilaterally announcing a wage reduction on February 12, 1997. The Board wrote, citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990): "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." The Pergament test has been satisfied and the judge properly found the violation, the Board held in the instant case.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Community and Social Agency Employees District Council 1707, AFSCME; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York, Oct. 26, Nov. 3, and Dec. 7, 1998. Adm. Law Judge Eleanor MacDonald issued her decision June 30, 1999.

* * *

Ryder Student Transportation Services (18-RC-16461; 332 NLRB No. 166) St. Paul, MN Dec. 29, 2000. Applying *Atlantic Limousine*, 331 NLRB No. 134 (2000), Chairman Truesdale and Member Liebman affirmed the Regional Director's recommendation to sustain the Petitioner's Objection 1 and direct a second election, finding that the Employer engaged in objectionable conduct by holding a raffle for employees. Member Hurtgen dissented. [\[HTML\]](#) [\[PDF\]](#)

Two days before the election held May 26 and 27, 1999, the Employer announced that it would hold a raffle for employees and award two trips to Disney World or \$1000 in cash (after taxes) if 1450 of the approximately 1690 eligible voters cast ballots in the election. The tally of ballots shows that 664 cast votes for, and 723 against, School Employees Local 284, SEIU, with 49 challenged ballots, an insufficient number to affect the result. Although the election was 14 short of the Employer's prerequisite figure for holding the raffle, it announced in its June 8, 1999 newsletter to employees that it would conduct the raffle at the "Ryder Employee and Family Appreciation Day" scheduled for June 12.

"Eligibility for participating in the Employer's raffle was clearly tied to voting in the election, and thus it violated the first prong of the two-prong disjunctive test set forth in *Atlantic Limousine*," Chairman Truesdale and Member Liebman held. Although the Employer also arguably violated the second prong by "announcing a raffle" within 24 hours before the scheduled opening of the polls, the majority found it unnecessary to make that determination here.

For the reasons set forth in his dissent in *Atlantic Limousine*, Member Hurtgen does not endorse a per se ban on election raffles and would instead adhere to the longstanding multifactor standard set forth in *Sony Corp. of America*, 313 NLRB 420 (1993). Applying the *Sony* standards, he found that the raffle and announcement were not objectionable and would overrule the Petitioner's Objection 1 and certify the results of the election.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Ryder Student Transportation (18-CA-15176; 333 NLRB No. 2) St. Paul, MN Jan. 12, 2001. The Board upheld the administrative law judge's decision that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an unwritten no-access policy that prohibits its employees from having access to and distributing union literature at its terminals unless they worked at them and/or prohibiting employees from entering the property of their own terminal at times when they are not scheduled to work; and telling employees it would not bargain in good faith if School Service Employees Local 284, SEIU was elected and that bargaining would be futile. [\[HTML\]](#) [\[PDF\]](#)

The judge, applying *Tri-County Medical Center*, 222 NLRB 1089 (1976), found the Respondent's policy was not valid because it does not limit access solely to the interior of the plant and other working areas and it has not been clearly disseminated to all employees. He found also that the policy has been applied primarily to employees engaging in union activity and, other than generalized testimony about the reason the policy was promulgated 10 years ago, there was no evidence of any incidents of workplace violence or security/safety problems that would justify such a broad sweeping rule.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by School Service Employees Local 284, SEIU; complaint alleged violation of Section 8(a)(1). Hearing at Minneapolis on April 4, 2000. Adm. Law Judge C. Richard Miserendino issued his decision August 14, 2000.

* * *

American Opera Musical Theatre Co. (2-CA-32154; 332 NLRB No. 173) New York, NY Jan. 8, 2001. Agreeing with the administrative law judge, the Board held that the Respondent withdrew its previously granted recognition of Associated Musicians of Greater New York Local 802 and refused to bargain further with the Union in violation of Section 8(a)(5) and (1) of the Act. The Respondent had alleged there was no proper request for recognition because the Union never specifically requested recognition as the representative of the Respondent's employees and never demonstrated its majority status. The judge rejected both defenses. [\[HTML\]](#) [\[PDF\]](#)

The Respondent excepted to the judge's failure to find that the Union never identified any geographical boundaries for its proposed bargaining unit. Rejecting this argument, the Board noted the judge found appropriate a unit of the Respondent's musicians and the Respondent did not question the Union's demand for recognition in a unit of its musicians at the time the demand was made.

Member Hurtgen set forth some other views regarding the unit's composition such as the General Counsel's allegation the unit included musicians, contractors, and librarians. There was no evidence that the Respondent employs librarians, Member Hurtgen noted. And, at the time of recognition, there was a contractor, who was in charge of seeking out musicians for hire; there is no contention that she was a supervisor. Although the Respondent now contends that "student musicians"-who are retained when the Respondent's opera company travels to other cities- must be a part of an appropriate unit, it alleges no evidence to support this view, he explained.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Associated Musicians of Greater New York Local 802; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on Dec. 1, 1999. Adm. Law Judge Joel P. Biblowitz issued his decision March 1, 2000.

* * *

RGC (USA) Mineral Sands, Inc. (12-CA-19258, et al.; 332 NLRB No. 172) Green Cove Springs, FL Jan. 10, 2001. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by assigning certain of its maintenance mechanics to a rotating 24-hour shift in October and December 1997 after employees rejected the Respondent's shift-assignment proposal that eliminated seniority; that an employee strike in August 1998 was an unfair labor practice strike because the unlawful shift assignments were integrally linked with the breakdown in negotiations and a contributing factor in the employees' decision to strike; and that the Respondent's refusal to reinstate the strikers on their unconditional offer to return to work violated Section 8(a)(3) and (1), as alleged. The Respondent argued that the shift

assignments in October and December 1997 were too remote in time to be considered a cause of the strike in August. [\[HTML\]](#) [\[PDF\]](#)

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by threatening an employee with legal action because of his concerted activity, telling employees it was improper to make safety complaints, interrogating an employee about his filing an unfair labor practice charge, creating an impression of surveillance of employees' union activities, preventing a union steward from coming onto the Respondent's property to investigate potential grievances and working conditions, conducting an interview with an employee and refusing the employee's request to consult with a union representative, and refusing to accept employee. There were also no exceptions to the judge's findings that the Respondent unlawfully issued disciplinary warnings to employees Howard Knowles, Jr. and Jeffrey Tillis, and that the Respondent unlawfully suspended and terminated Knowles.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Machinists District 112; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Jacksonville, May 24-27, 1999. Adm. Law Judge Howard I. Grossman issued his decision Nov. 5, 1999.

* * *

FES (a Division of Thermo Power) (5-CA-26276; 333 NLRB No. 8) York, PA Jan. 19, 2001. The Board, concluding that the Respondent's exceptions lack merit because they raise no issue not previously considered, affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire nine union applicants for employment. [\[HTML\]](#) [\[PDF\]](#)

In a prior decision, the Board set forth the framework for analysis of refusal-to-consider and refusal-to-hire allegations, affirmed the judge's finding that the Respondent unlawfully refused to consider the nine applicants for employment, and remanded the case for further consideration of the refusal-to-hire allegations applying the new framework. It rejected, as did the judge, the Respondent's "wage compatibility" criterion as a defense. The Board limited consideration of the criterion to those facts already found by the judge and did not allow reopening of the record on the issue. 331 NLRB No. 20 (2000).

In his supplemental decision, the judge found, based on all-party stipulations, that there was an available job opening for each applicant. The Respondent stipulated that it rejected the applicants based on the lack of "wage compatibility" and that it would raise no new defenses. The judge, citing the Board's decision, would not reopen the record to receive further evidence on the issue. In its exceptions, the Respondent argued that the judge erred in limiting the evidence it could present in support of its wage compatibility defense.

The Board limited its review of the judge's supplemental decision to the issues raised by the Respondent's exceptions, stating: "We do not necessarily agree with the judge's discussion of what other defenses (apart from the 'wage compatibility' defense) he would have entertained. In the absence of exceptions, we do not pass on this aspect of the judge's rationale."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Adm. Law Judge Arthur J. Amchan issued his supplemental decision Nov. 8, 2000.

* * *

Avante at Boca Raton, and Avante Terrace at Boca Raton, Inc., Joint Employers (12-CA-18720, 18996; 332 NLRB No. 174) Miami, FL Jan. 10, 2001. The administrative law judge concluded, and the Board agreed, that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by warning, suspending, and discharging Certified Nursing Assistant (CNA) Evanette Cyriague because she engaged in union and other protected concerted activities and appeared at a Board representation hearing. Under the framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), the judge found that the Respondent's actions against Cyriague were pretextual and motivated by union animus and that the Respondent failed to establish that it would have taken the same actions in the absence of Cyriague's protected activities. [\[HTML\]](#) [\[PDF\]](#)

The judge concluded, contrary to the Respondent's contention that Cyriague was discharged for dishonesty, that she was "pretextually terminated" for a purported lie she never uttered after the Respondent saw her with a union representative. He concluded Administrator Manzo singled out Cyriague and suspended her for 3 days because of her leadership in the CNA's concerted work stoppage and her involvement in "selling" Avante to the Union, and not for insubordination, as the Respondent contended. Manzo also directed that Cyriague be issued a warning "any way" after he observed her in the parking lot-even though he knew she was on break and did not need permission to be outside the facility-in retaliation for her appearance on the Union's behalf at the representation hearing.

The judge determined, with Board approval, that the General Counsel did not prove that the evidence supported a finding that the Respondent engaged in surveillance of employee union activities, and dismissed that portion of the complaint.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Service Employees Local 1115-Florida East; complaint alleged violation of section 8(a)(1), (3), and (4). Hearing at Miami, Feb. 8-9, 1999. Adm. Law Judge George Carson II issued his decision March 31, 1999.

* * *

Reese M. Garab d/b/a South Alabama Plumbing (15-CA-14342; 333 NLRB No. 4) Atmore, AL Jan. 18, 2001. The Board, after considering the Respondent's affirmative defenses on their merits, agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating an 8(f) contract in April 1997 and withdrawing recognition from Plumbers Local 119. The judge had dismissed the Respondent's two affirmative defenses, commenting that the Respondent should have filed unfair labor practice charges but had not. Citing *Chicago Tribune Co.*, 304 NLRB 259 (1991), the Board noted that it must consider a party's affirmative defenses despite the fact that the General Counsel has considered the same evidence and refused to issue complaint. [\[HTML\]](#) [\[PDF\]](#)

In its affirmative defenses, the Respondent asserted that the contract contains an illegal union-security provision, establishes a virtual closed shop, and is, therefore, unenforceable. It alleged also that the contract does not comply with Section 8(f) because it is not limited to construction work, claiming that certain words in the "Trade or Work Justification" clause of the contract encompasses nonconstruction work such as, among other things, "manufacture," "drawings," "adjusting," and "fabrication" of plumbing work.

The Board disavowed the judge's "unnecessary" remarks about the possibility of indexing the Board's discretionary jurisdictional standards to the rate of inflation. And, it amended his remedy to provide that the Respondent is liable for honoring the July 15, 1996-July 14, 1998 collective-bargaining agreement for its term, as well as any automatic renewal or extension of the contract. The Charging Party contended in its cross-exceptions that the Respondent is bound to the successor contract expiring on July 14, 2000. The Board left the issue for resolution at the compliance stage of this proceeding. There the Respondent will be permitted to show that the contract contains an illegal union-security clause that should be excised. Although the Board made no final determination, it questioned whether the clause is in fact a union-security provision, noting that the Respondent is located in a right-to-work State.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Plumbers Local 119; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Mobile, May 6-7, 1998. Adm. Law Judge Richard J. Linton issued his decision Oct. 16, 1998.

* * *

Beverly Health and Rehabilitation Services, Inc., et al. (15-CA-14269, 14297; 332 NLRB No. 170) Montgomery, AL Dec. 8, 2000. By direction of the Board and in a published order signed by the Associate Executive Secretary, the joint motions of the Respondent and Charging Party to vacate the Board decisions and orders 328 NLRB No. 145 (July 23, 1999) and 328 NLRB No. 122 (June 30, 1999) were granted. The motions are based on a non-Board agreement that resolves several unfair labor practices. The Respondent and Charging Party agree also that execution of collective-bargaining agreements by the parties

effectively remedy the Respondent's failure to provide information as found by the Board in the two decisions. The Order stated that the General Counsel's objections were insufficient to warrant denial of the joint motion. [\[HTML\]](#) [\[PDF\]](#)

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Tecumseh Corrugated Box Company and Teamsters Local No. 436 (8-CA-29868, 8-CB-8624; 333 NLRB No. 1) Hebron, OH Jan. 12, 2001. Affirming the administrative law judge's recommendations, the Board dismissed the complaint allegations that Tecumseh violated Section 8(a)(1) and (2) of the Act by rendering unlawful aid, assistance, and support to the Teamsters and that the Teamsters violated Section 8(b)(1)(A) by accepting Tecumseh's assistance and support, and by obtaining and accepting its recognition. [\[HTML\]](#) [\[PDF\]](#)

Tecumseh is engaged in the manufacture and sale of corrugated paper and boxes at various locations in Ohio, including a plant in Hebron, Ohio, the facility at issue here. Since the 1970s, Tecumseh has maintained a collective-bargaining relationship with the Charging Party Paperworkers International (PACE) under which it represented Tecumseh's employees at its Tecumseh, Michigan, and Twinsburg, Perrysburg, and Vanwere, Ohio plants. Prior to its acquisition by Tecumseh, the Hebron plant was separately owned and operated as Custom Cartons.

The General Counsel cited four factors to support a finding that Tecumseh was not a neutral party but instead unlawfully aided and assisted the Teamsters. The General Counsel's arguments, rejected by the judge, are that Tecumseh (1) could have reasonably expected that the former Custom Carton employees would likely be interested in joining the bargaining unit represented by PACE at its other plants; (2) solicited the Teamsters to organize the employees; (3) implicitly conveyed its preference for the Teamsters; and (4) immediately granted recognition to the Teamsters after performing its own card check.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by the Paperworkers International (PACE). Hearing at Cleveland, June 9, 1999. Judge George Aleman issued his decision October 22, 1999.

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J.I.T. Steel, Inc. (32-CA-17346; 332 NLRB No. 167) Tulare, CA Jan. 8, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning to employee Danny Romero on April 8, 1999. Although Romero had a history of absenteeism and tardiness, the judge found that the timing of this warning leads to a strong inference that Romero's union activities and the union's filing of an unfair labor practice charge and a representation petition were the motivating factors for the disciplinary warning. He found that the Respondent failed to establish that it would have issued the warning in the absence of Romero's protected activities, noting that Romero did not engage in any intervening misconduct between a lawful warning on March 15, 1999 and the warning of April 8. "The only intervening fact was the filing of the charge and petition," the judge wrote. [\[HTML\]](#) [\[PDF\]](#)

The judge determined that the General Counsel made a prima facie showing that the Respondent, in issuing a warning to Rudy Ramirez, was motivated by unlawful considerations. He also found that the Respondent established that Ramirez was disciplined for making an error in receiving commercial steel as structural steel and would have been disciplined absent his union activities.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by the Steelworkers; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Clovis, CA Oct. 19-22, 1999. Adm. Law Judge Jay R. Pollack issued his decision Sept. 11, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Dial One Hoosier Heating & Air Conditioning Co., Inc. an its Successor, American Residential Services of Indiana, Inc. (Sheet Metal Workers' Local 20) Indianapolis, IN January 16, 2001. 25-CA-24178, et al., JD-5-01, Judge Bruce D. Rosenstein.

American Axle & Manufacturing, Inc. (Individual) Hamtrack, MI January 16, 2001. 7-CA-42633; JD-6-01; Judge David L. Evans.

Smucker Company (Electrical Workers Local 98) (IBEW) Smoketown, PA January 17, 2001. 4-CA-28672; JD-7-01, Judge Benjamin Schlesinger.

Tradesmen International, Inc. (Carpenters, et al.) Linthicum, MD January 12, 2001. 5-CA-26411, et al.; JD-8-01, Judge Martin J. Linsky.

Alcorn Erectors, Inc. (Tri-State Building and Construction Trades Council) Huntington, WV January 17, 2001. 9-CA-37684; JD-10-01, Judge Jerry M. Hermele.

BP Amoco Chemical-Chocolate Bayou (PACE Local 4-449) Austin, TX January 8, 2001. 16-CA-20258, et al.; JD(ATL)-1-01, Judge Keltner W. Locke.

Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital (Health Care Workers Local 250, Service Employees) King City, CA January 11, 2001. 32-CA-17687-1, 32-RC-4664; JD(SF)-1-01, Judge Mary Miller Cracraft.

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TEST OF CERTIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the ground that the respondent has not raised any representation issues that are litigable in these unfair labor practice proceedings.)

Gorham House, Inc. (Service Employees Local 1989) (1-CA-38372; 332 NLRB No. 151) Gorham, ME Dec. 28, 2000.

Coastal Lumber Company (Steelworkers) (6-CA-31698; 332 NLRB No. 169) Hazelton, WV Jan. 5, 2001.