

## 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.



[Index of Back Issues Online](#)

February 2, 2001

W-2776

**CASES SUMMARIZED**

SUMMARIES CONTAIN LINKS TO FULL TEXT

[A.S.I., Inc.](#), Bakersfield, CA  
[Rochester Telephone Corp.](#), Rochester, NY  
[Donald Sullivan & Sons, Inc.](#), Plantsville, CT  
[Techno Construction Corp. & Janco Contracting Corp.](#), Staten Island, NY

**OTHER CONTENTS**

[List of Decisions of Administrative Law Judges](#)

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*Rochester Telephone Corp.* (3-CA-20004-2; 333 NLRB No. 3) Rochester, NY Jan. 20, 2001. Affirming the administrative law judge's conclusion that the parties reached a bargaining impasse, the Board dismissed the complaint alleging the Respondent violated Section 8(a)(5) and (1) of the Act by prematurely declaring in April 1996 that its negotiations for a successor collective-bargaining agreement with Communications Workers Local 1170 had reached an impasse, and unilaterally implementing its last bargaining proposal. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the judge that the Union's counterproposal of April 8, 1996, under all the circumstances, did not create a "reason to believe that further bargaining might produce additional movement" by either party, citing *Hayward Dodge, Inc.*, 292 NLRB 434 (1989). It repudiated his suggestion that the "central inquiry" in determining the existence of an impasse is "whether the Union made sufficient progress in meeting the Company's perceived needs and goals" by its counterproposals and

by other actions. The Board agreed with the judge that *Serramonte Oldsmobile*, 318 NLRB 80 (1995), enf. denied in part 86 F.3d 227 (D.C. Cir. 1996), is distinguishable from this case, and it did not rely on his analysis and application of that decision to the facts here. Contrary to the judge, it did not rely on the fact that the Union was engaged in a campaign to generate public support for its bargaining positions as evidence of an impasse.

Member Hurtgen believes that whether an impasse exists requires a multifactor test, which is highly fact and circumstances driven. He does not agree that the selective criteria set forth in this decision's footnote are necessarily determinative of the issue. See his dissent in *Grinnell Fire Protection Systems Co.*, 328 NLRB No. 76, slip op. at 4-7 (1999).

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Communications Workers Local 1170; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Rochester, May 19-23 and June 16-18, 1997. Adm. Law Judge Robert T. Snyder issued his decision Oct. 30, 1998.

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*Techno Construction Corp. and Janco Contracting Corp.* (29-CA-20330, et al.; 333 NLRB No. 5) Staten Island, NY Jan. 23, 2001. The Board agreed with the administrative law judge that the Respondents are a single employer and that, based on its Section 8(f) relationship with Teamsters Local 282, the Respondent did not violate Section 8(a)(5) of the Act by withdrawing recognition from the Union at the time of the 1996 collective-bargaining agreement; and that the Respondent did not violate Section 8(a)(1) by informing employees of the intended withdrawal. [\[HTML\]](#) [\[PDF\]](#)

Chairman Truesdale and Member Walsh affirmed, under a different rationale, the judge's finding that the Respondents violated Section 8(a)(3) by temporarily laying off drivers Fred Shaaf, Earl Eddy, Thomas Kish, and Richard Marotta. The judge found the layoff constituted an unlawful "defensive" lockout because the Respondent locked out its drivers in anticipation of a strike or concerted work stoppage. Chairman Truesdale and Member Walsh agreed however with the General Counsel that the Respondents temporarily laid off the drivers in retaliation for their expression of desire for continued representation.

Member Hurtgen disagreed, finding nothing in the Respondent's June 28, 1996 discussion with its drivers, the catalyst that prompted the temporary layoff, established the requisite unlawful motive. He concluded the "Respondent's lawful condition of employment was that there would be no Union; the employees were unwilling to work under that condition. Faced with this, the Respondent lawfully laid them off."

Chairman Truesdale and Member Walsh noted that the employees did not quit and did not insist on the Respondent's recognition of the Union as a condition for continuing to work. "There is no evidence that the Respondent viewed the employees' statements in the manner suggested by the dissent," they wrote, adding: "Instead, as accurately summarized by the judge, [Techno's co-owner] Mutino testified 'that he understood their responses as being ambiguous and indicating that there might be a general strike.' We have found that the Respondent's reliance on the professed apprehension of a strike-the only reason offered by the Respondent for its layoff action-was pretextual."

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

Charges filed by Teamsters Local 282; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Brooklyn, March 4-6, 1997. Adm. Law Judge Raymond P. Green issued his decision June 20, 1997.

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*Asbestos Services, Inc., d/b/a A.S.I., Inc.* (31-CA-23691; 333 NLRB No. 6) Bakersfield, CA Jan. 22, 2001. The Board affirmed the administrative law judge's recommended dismissal of the complaint alleging that the Respondent interrogated Wayde Nelson about his union activities, threatened employees with layoff and plant closure because Nelson had filed complaints with government agencies, and discharged and refused to reinstate Nelson to his former position. [\[HTML\]](#) [\[PDF\]](#)

The judge found that the Respondent would have discharged Nelson even in the absence of his protected concerted activity for

several reasons, including working at an unprofitable level, stealing from the property of customers, failing to inform management as required of any safety hazards, disturbing relationships with customers that could significantly affect Respondent's business, and complaining to the legal department at Vandenburg Air Force Base about the Respondent's alleged noncompliance with the Davis-Bacon Act. The Board noted that the judge discredited Nelson's claim that he spoke to other employees and although Nelson's activity at Vandenburg AFB may have been protected, it was not concerted. *Meyers Industries*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 987), cert. denied sub nom. *Meyers Industries v. NLRB*, 487 U.S. 1207 (1988).

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Wayde Torrey Nelson; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Bakersfield, CA, Feb. 28-29, 2000. Adm. Law Judge Frederick C. Herzog issued his decision Sept. 11, 2000.

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*Donald Sullivan & Sons, LLC* (34-CA-8799-1, -2; 333 NLRB No. 7) Plantsville, CT Jan. 18, 2001. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees John Ceraldi and Brian Ostroski because on February 5, 1999, they had applied for membership with Plumbers Local 777. The Respondent contended that the employees were not discharged but voluntarily quit their jobs on February 12. [\[HTML\]](#) [\[PDF\]](#)

Ceraldi and Ostroski were never disciplined during the approximately 3 years they were employed by the Respondent. Applying *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), the judge determined that the General Counsel made a prima facie showing sufficient to support the inference that union animus was the reason for the discharges. Additionally, the judge asserted that the proximity of the discharges in relation to the employees' union activities, and owner Martin Sullivan's words to Ceraldi and Ostroski on February 12 fully summarizes Respondent's motivation: "You joined the union, you're done."

(Members Liebman, Hurtgen, and Walsh participated.)

Charges filed by John Ceraldi and Brian Ostroski; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Hartford, Sept. 18, 19, and 21, 2000. Adm. Law Judge Margaret M. Kern issued her decision Oct. 6, 2000.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Specialty Sands, Inc.* (Individuals) Nunica, MI January 12, 2001. 7-CA-42928, 1, 2; JD-03-01, Judge Nancy M. Sherman.

*J.F. Sobieski Mechanical Contractors, Inc.* (Sheet Metal Workers Local 19) Elsmere, DE January 12, 2001. 5-CA-28932; JD-09-01, Judge Richard A. Scully.

*Walker Stainless, Inc.* (Sheet Metal Workers Local 18) New Lisbon, WI January 26, 2001. 30-CA-14842, 14905; JD-11-01, Judge John H. West.

*El Paso Times, Inc.* (Communications Workers No. 14630, El Paso Typographical Union No. 370) El Paso, TX January 10, 2001. 16-CA-20287; JD(ATL)-02-01, Judge George Carson II.

*Smithfield Foods, Inc.* (Food and Commercial Workers Local 204) Wilson, NC January 23, 2001. 11- CA-18316, et al.; JD (ATL)-03-01, Judge Pargen Robertson.

*Rogers Corporation* (an Individual) Rogers, CT January 26, 2001. 34-CA-9117; JD(NY)-02-01, Judge Michael A. Marcionese.

*Pratt Towers, Inc.* (Service Employees Local 32B-32J) Brooklyn, NY January 25, 2001. 29-CA-23012, 23137; JD(NY)-03-01, Judge Jesse Kleiman.