

## 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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February 9, 2001

W-2777

**CASES SUMMARIZED**

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**Note:** General Counsel Memorandum [GC-01-03](#) ("Report on Utilization of Section 10(j) Injunction Proceedings March 3, 1998 through January 15, 2001," dated February 5, 2001) is available by contacting the Division of Information (202-273-1991) or it can be accessed from [here](#).

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*Wayne County Neighborhood Legal Services, Inc.* (7-CA-37894, 7-RC-20650; 333 NLRB No. 15) Detroit, MI Jan. 31, 2001. Reversing the administrative law judge, the Board majority of Chairman Truesdale and Member Hurtgen found the Respondent violated Section 8(a)(2) and (1) of the Act by continuing to recognize the incumbent union Organized Workers of Legal Services Local 2 (OWLS II), after it lost a September 13, 1995 election and failed to garner enough votes to be on the ballot in a runoff election. Of 106 eligible votes, 38 employees voted for the Office and Professional Employees International Union Local 42, 19 voted for OWLS II, and 20 voted for no union. In the runoff election, 17 votes were cast for and 38 against OPEIU, with 6 challenges. In the judge's view, OWLS II had not been decertified before the December 1995 runoff election because not until then would the employees make their ultimate choice between OPEIU Local 42 and no union. He thought the intent of the Act would best be served by maintaining the existing collective-bargaining relationship during the period before the runoff. [\[HTML\]](#) [\[PDF\]](#)

The majority, however, agreed with the General Counsel's exceptions that when OWLS II was eliminated from contention as a result of the first election, the Respondent violated the Act by continuing to recognize the incumbent union and deduct dues. The majority said "an employer may not lawfully continue to recognize a union as the exclusive bargaining representative of its employees when the employer has objective evidence that the union no longer represents a majority of the employees. An employer that continues to recognize a union that has lost its majority status violates Section 8(a)(2)."

In dissent, Member Liebman contended "the wiser course is for the incumbent union to remain the representative of the employees, even if it loses an initial election, until the representation question is resolved and a certification issued. During that interim period, any contract between the employer and the incumbent union would remain in effect." She pointed out that the first vote results were inconclusive and left the question concerning representation unresolved. "The flaw in the majority's reasoning is that a majority of unit employees did not vote against union representation," she said.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges by OPEIU Local 42; complaint alleged violation of Section 8(a)(1) and (2). Hearing at Detroit, April 8, 1996. Adm. Law Judge Robert T. Wallace issued his decision May 1, 1996.

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*Ebenezer Rail Car Services, Inc.* (3-CA-21809; 333 NLRB No. 18) West Seneca, NY Jan. 31, 2001. The Board majority of Chairman Truesdale and Member Liebman upheld the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) by laying off 10 employees without adequate notice to the Union and without affording the Union an opportunity to bargain over the layoff decision and the effects of that decision. Although the judge analyzed the Section 8(a)(5) violation under *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), the Board said, "his recommended remedy is couched in terms of a traditional make-whole remedy for the laid-off employees." Accordingly, the Board modified that remedy, to make it consistent with that ordered in *Lapeer*. The majority explained in a footnote that under *Lapeer*, "the traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff." [\[HTML\]](#) [\[PDF\]](#)

Dissenting in part, Member Hurtgen disagreed with the view of the General Counsel and majority that a statement by manager Grainer to employee Piazza after the Union won the election was threatening and coercive in violation of Section 8(a)(1) of the Act. Piazza had shaken hands with Grainer and said, "It could be worse." Grainer replied: "You are going to regret this all year." Member Hurtgen said Grainer's statement was "ambiguous and far too vague to constitute a threat."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by UAW; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo, July 19-21, 1999. Adm. Law Judge Bruce D. Rosenstein issued his decision Nov. 22, 1999.

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*Belle of Sioux City* (18-CA-14633; 333 NLRB No. 13) Sioux City, IA Jan. 31, 2001. The Board affirmed the administrative law judge's findings that the Respondent, which operates a casino on a boat, engaged in a number of unlawful retaliatory personnel actions against employees for exercising their rights to engage in protected, concerted activity under Section 7 of the Act. The unlawful conduct, included suspending an employee, discharging another employee, interrogating and threatening employees for engaging in communications with other employees about employment terms and conditions. No union was involved in the events underlying the unlawful acts. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Walsh participated.)

Charge filed by Workers Have Rights Too (Fair Deal Unit); complaint alleged violation of Section 8(a)(1) and (4). Hearing at Sioux City, July 14-17 and Aug. 11 and 12, 1998. Adm. Law Judge William J. Pannier III issued his decision April 12, 1999.

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*Pepsi-Cola Company* (22-CA-21941; 333 NLRB No. 9) Piscataway, NJ Jan. 26, 2001. Affirming the administrative law judge's supplemental decision, the Board dismissed the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging shop steward Sean Reilly because of his activities for Teamsters Local 125, and violated Section 8(a)(1) by engaging in unlawful surveillance. In an earlier decision (330 NLRB No. 69 (2000)), the Board remanded the proceeding to the judge for a further analysis under the test enunciated in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Applying that standard, the judge concluded on remand that the Respondent presented sufficient credible evidence that it had an honest belief that Reilly engaged in the misconduct attributed to him (calling for a work stoppage in violation of the collective-bargaining agreement); and that the General Counsel failed to carry his burden of showing that Reilly did not engage in the misconduct. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Adm. Law Judge Raymond P. Green issued his supplemental decision Feb. 1, 2000.

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*Demi's Leather Corp.* (3-CA-17149, et al.; 333 NLRB No. 12) Johnstown, NY Jan. 26, 2001. The Board granted the General Counsel's motion for partial summary judgment as to paragraphs 4, 7, 8(a), 10(a), and 10(b) of the compliance specification and motion to strike the Respondent's affirmative defenses to those paragraphs and its contentions that: (a) it should be credited for unemployment funds discriminatee Anthony Valovic III received and for "income [Gregory Handy received] from other sources which made him financially independent," and (b) discriminatee Alan McArthur's backpay should be limited to the difference between interim earnings and gross backpay for the entire backpay period, rather than computed on a quarterly basis. The Board remanded the proceeding to the Regional Director to schedule a hearing on the issues properly raised by the Respondent's answer to the compliance specification. The Board's decision and order in the underlying unfair labor practice proceeding is reported at 321 NLRB 966 (1996). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Walsh participated.)

General Counsel filed motion for partial summary judgment and to strike certain affirmative defenses on June 24, 1999.

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*Alex R. Thomas & Co.* (20-CA-28296; 333 NLRB No. 17) Ukiah, CA Jan. 31, 2001. Affirming the administrative law judge's decision, the Board dismissed complaint allegations that the Respondent violated Section 8(a)(1) of the Act by laying off Rosa Mireles and her sister Hilda Mireles and refusing to rehire them because of their protected concerted activities in complaining about R. Mireles' box count, overtime rate, and failure to receive a bonus. The Respondent is engaged in the packing of pears. It claimed that the Mireles sisters voluntarily quit at the end of the 1997 harvest season and were not invited to work the 1998 season in accord with company policy not to extend invitations to individuals who voluntarily quit. The judge found that the General Counsel failed to present a prima facie showing sufficient to support the inference that the sisters engaged in concerted

protected activities and, assuming arguendo they did, they were not laid off or otherwise terminated because of such conduct.

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(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Rosa Mireles, an individual; complaint alleged violation of Section 8(a)(1). Hearing at San Francisco, July 1-2 and 9, 1998. Adm. Law Judge Joan Wieder issued her decision Sept. 24, 1998.

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*Glass & Pottery Workers (Olympian Precast, Inc.)* (19-CD-481; 333 NLRB No. 16) Seattle, WA Jan. 30, 2001. The Board determined that Olympian's employees represented by Glass & Pottery Workers rather than those represented by Cement Masons Local 528 are entitled to perform the warranty and repair work (includes sandblasting, concrete cutting, patching, etching, and related tasks) on architectural precast concrete building components supplied by Olympian Precast at the Washington State convention center being built in Seattle, Washington. In making its award, the Board relied on the Glass & Pottery Workers and Olympian's collective-bargaining agreement, Employer's preference and current assignment, past practice, economy and efficiency of operations, and skills and training. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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*BKN, Inc.* (31-RC-7716; 333 NLRB No. 14) Los Angeles, CA Jan. 31, 2001. Affirming the Regional Director, the Board held that the Employer's freelance writers, artists, and designers are employees within the meaning of Section 2(3) of the Act. Along with various designers and artists who are permanent employees, the Union is seeking to represent writers, artists, and designers who, the Employer contended, are "freelance" and independent contractors. [\[HTML\]](#) [\[PDF\]](#)

In determining whether an individual is an employee or an independent contractor under Section 2(3), the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity. *Roadway Package System*, 326 NLRB 842 (1998). The Board asserted that the multifactor analysis set forth in Restatement (Second) of Agency, Section 220 includes factors to be examined and that no single factor is controlling in making this determination. In the instant case regarding the writers, the Board wrote:

Here, the Regional Director found that there is no doubt that the work tasks performed by the writers are governed by the Employer, and that the BKN production team is responsible for the supervision of the script writing. The Regional Director noted it was the norm in this industry for the writers to work out of their homes and to be paid on a project-by-project basis. He concluded that given the frequency of the "freelance" working arrangement in the animation entertainment industry, and "the Board's public policy interest in not disenfranchising workers simply because of the peculiarities of their trade," the "Restatement scales" tipped in favor of finding the writers to be statutory employees.

(Chairman Truesdale and Members Liebman and Walsh participated.)

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*Foreign and Domestic Car Service, Inc.* (14-RC-12171; 333 NLRB No. 11) Venice, IL Jan. 31, 2001. In deciding the matter of jurisdiction, the Board held that Foreign and Domestic Car Service (FDSC) is engaged in interstate common carriage to bring it within the jurisdiction of the National Mediation Board (NMB) under Section 201 Title II of the Railway Labor Act (RLA). The Board dismissed the petition filed by Teamsters Local 604, relying on the NMB's opinion that the work in question is traditionally done by carriers and that Norfolk Southern Corporation (NSC), a carrier, exercises "substantial control" over FDSC and its employees, and in its view, FDSC is subject to the RLA. [\[HTML\]](#) [\[PDF\]](#)

The Teamsters sought to represent all rail loaders, unloaders, and scanners employed by FDSC at NSC's Venice facility. FDSC

asserted it provides rail loading services to NSC, a common carrier subject to the jurisdiction of the RLA, that the services it provides are those traditionally done by railroad employees, and that the Board lacks jurisdiction under Section 2(2) of the National Labor Relations Act.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

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### **LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES**

United States Postal Service (an Individual) Phoenix, AZ January 23, 2001. 28-CA -16082(P), 16325(P); JD(SF)-02-01, Judge James L. Rose.

Valeo Sylvania, L.L.C. (Steelworkers) Seymour, IN January 31, 2001. 25-CA-26769-2, 26769-3: JD-12-01, Judge C. Richard Miserendino.

The Baltimore Sun Company (Washington-Baltimore Newspaper Guild Local 35) Baltimore, MD January 31, 2001. 5-CA-28862; JD-14-01, Judge Richard H. Beddow, Jr.

Precoat Metals and Steelworkers Local 3911-09 (Individuals) Chicago, IL January 31, 2001. 13-CA-37256, et al., 13-CB-15838, et al.; JD-17-01, Judge William J. Pannier III.

USF Logistics, Inc. (an Individual) Philadelphia, PA February 1, 2001. 4-CA-28907, JD-13-01, Judge Bruce D. Rosenstein.

Curwood, Inc. (Graphic Communications Local 77-P) Oshkosh, WI February 2, 2001. 30-CA-15245-1, 30- RC-6203-04; JD-19-01, Judge Robert A. Giannasi.

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### **NO ANSWER TO COMPLIANCE SPECIFICATION**

*(In the following case, the Board granted the General Counsel's motion for summary judgment based on the respondent's failure to file an answer to the compliance specification.)*

*Environmental Construction, Inc.* (17-CA-19890; 333 NLRB No. 10) Blue Springs, MO January 29, 2001.