

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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March 16, 2001

W-2782

CASES SUMMARIZED

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Waterbury Hotel Management LLC and Waterbury Hotel Equity LLC, subsidiaries of New Castle Hotels LLC (34-CA-7815, 7879; 333 NLRB No. 60) Waterbury, CT March 9, 2001. Chairman Truesdale and Member Liebman affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire its predecessor's employees and discharging employees because they wore union buttons at work; and violated Section 8(a)(5) and (1) by unilaterally setting initial terms and conditions of employment for its hires without bargaining with Hotel Employees and Restaurant Employees Local 217 and promulgating, maintaining, and enforcing a rule prohibiting employees from wearing Union buttons at the Hotel. They denied the Respondent's request for de novo review of the unfair labor practice issues, alleging the judge engaged in misconduct, manifested prejudice, and denied it due process by his verbatim incorporation of the General Counsel's posthearing brief in his decision. [\[HTML\]](#) [\[PDF\]](#)

Member Hurtgen, concurring in part and dissenting in part, found the Respondent's rule prohibiting employees from wearing Union buttons was unlawful because it was discriminatorily enforced. He disagreed with the judge's conclusion that the rule would be unlawful even if it were uniformly applied because he would not find a violation if the rule had been evenly enforced as the Respondent's hotel dealt with the public. Member Hurtgen also disagreed with the judge's finding that, based on the 8(a)(3) refusal-to-hire violation, the Respondent violated the Act by setting the initial terms and conditions of employment for its hires. See his dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75 (1998), and *Jennifer Matthew Nursing & Rehabilitation Center*, 332 NLRB No. 27 (2000).

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Hotel Employees and Restaurant Employees Local 217; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hartford for 20 days on various dates between Jan. 21 and March 2, 1999. Adm. Law Judge Wallace H. Nations issued his decision Aug. 9, 1999.

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Heritage Hall, E.P.I. Corp. (9-CA-33459-1, et al.; 333 NLRB No. 63) Lawrenceberg, KY March 6, 2001. Agreeing with the administrative law judge that the Respondent's licensed practical nurses (LPNs) are not supervisors within the meaning of Section 2(11) of the Act, the Board found that the Respondent, as the party asserting supervisory status, failed to meet its burden of establishing the LPNs' supervisory status by claiming that the LPNs they assign work to, responsibly direct, and discipline nurses' assistants (NAs). Recognizing that this case arose in the Sixth Circuit, which has disagreed with the Board's allocation of proof in establishing supervisory status and interpretation of the term "independent judgment" in Section 2(11), the Board noted the Supreme Court has granted certiorari in a case that raises the same issues--*Kentucky River Community Care v. NLRB*, 193 F.3d 444 (6th Cir. 1999), cert. granted 121 S.Ct. 27 (2000). [\[HTML\]](#) [\[PDF\]](#)

Turning to the alleged violations, the Board affirmed the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging Barbara Tyler because she refused to support its antiunion campaign and to commit unfair labor practices in furtherance of the Respondent's cause, discharging Robin Ransdell whom it considered a union "ringleader, and suspending Brenda Norman because of her union support; and violated Section 8(a)(1) in several respects, including threats, coercive interrogation, creating the impression that its employees' union activities were under surveillance, and conducting its own election after Laborers Local 575 filed the initial unfair labor practice charge here blocking the Board representation election. Regarding the latter finding, the Board stressed that under *Struksnes Construction Co.*, 165 NLRB 1062 (1967), the Respondent "was prohibited from lawfully conducting its own election while the Union's election petition was pending even if the Respondent had complied with the procedural safeguards set forth in that case."

In a reversal of the judge, the Board found the Respondent did not violate Section 8(a)(1) when its administrator, Jennifer Steer, informed LPNs that they were supervisors and unable to vote in the election or engage in union activities, concluding that the incorrect comment about the LPNs' supervisory status did not constitute interference with their Section 7 rights.

(Chairman Truesdale and Members Liebman and Walsh participated.)

Charges filed by Laborers Local 575; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Lexington, April 30, May 1-2 and 7-8, 1996. Adm. Law Judge Karl H. Buschmann issued his decision April 30, 1997.

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Women and Infants' Hospital of Rhode Island (1-RC-21289; 333 NLRB No. 65) Providence, RI March 8, 2001. Chairman Truesdale and Member Walsh denied the Employer's request for review of the Regional Director's decision and direction of election, agreeing that exclusionary language in the unit description of the parties' collective-bargaining agreement does not constitute a bar to a self-determination election for the Employer's respiratory therapists to express an interest in representation by Petitioner SEIU Local 1199 in the existing unit of technical employees. The majority noted that Board precedent fully supports the Regional Director's finding that exclusionary language in a unit description does not constitute an implied promise not to represent employees in the excluded classifications. And, there is no express promise by the Petitioner not to seek to

represent the respiratory therapists, it added. See *Cessna Aircraft Co.*, 123 NLRB 855 (1959). [\[HTML\]](#) [\[PDF\]](#)

In his dissent, Member Hurtgen noted that although his colleagues' position "has support in extant Board law," the approach "may well elevate form over substance." He wrote: "I am not saying that extant Board precedent should be reversed. That precedent may reflect values which should be preserved. However, there are also values in giving effect to the plain meaning of a contractual exclusion. In order to fully weigh these competing values, I would grant review."

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

* * *

Kaiser Foundation Health Plan of Colorado (27-RC-7964; 333 NLRB No. 66) Denver, CO March 9, 2001. Chairman Truesdale and Member Liebman granted the Petitioner's request for review, reversed the Regional Director's dismissal of the petition filed by Food & Commercial Workers Local 7 seeking a unit consisting of 29 technical employees in three job classifications at this non-acute-care health facility, and remanded the case. The majority found that a unit consisting of 41 employees in the Employer's eyecare department (the 29 employees sought by the Petitioner and an additional 12 technical optical employees) constitutes an appropriate residual unit to the existing SEIU non-professional unit. On remand, it directed the Regional Director to ascertain the Petitioner's interest in representing a residual unit that differs from the petitioned-for unit and to determine whether it possesses the requisite showing of interest in such unit. [\[HTML\]](#) [\[PDF\]](#)

The Employer's eyecare department includes 66 technical, service, and clerical employees who are represented by the SEIU as part of the broad nonprofessional unit and 31 professional employees who are represented by the Petitioner in one of its professional units. The 29 technical employees (certified optical dispensers, optical dispensers, and a team leader whom the Petitioner sought to represent) and 12 technical optical employees who work in the laboratory or stockroom at the support facility, are the Employer's only unrepresented healthcare employees.

In light of the findings in *St. Mary's Duluth Clinic Health System*, 332 NLRB No. 154 (2000), the majority held that a nonincumbent union may petition for an appropriate residual unit of employees at a non-acute-care health facility. In *St. Mary's*, the Board overruled its decision in *Levine Hospital of Hayward, Inc.*, 219 NLRB 327 (1975), which held that a nonincumbent union could not appropriately represent a residual unit of employees at an acute-care hospital. In the instant decision, the majority explained: "Although the instant case is not governed by the Health Care Rule-since the Employer is not an acute-care provider-the principles and analyses articulated in *St. Mary's* are equally applicable to petitions for residual units at non-acute care health facilities." Consistent with *St. Mary's*, in the event the Regional Director ultimately directs an election among a unit of residual employees, the incumbent union will be afforded the opportunity to appear on the ballot if it so desires, without having to demonstrate the traditional showing of interest.

Member Hurtgen, in dissent, noted that he also disagreed with the majority opinion in *St. Mary's*. He stated: "I dissented because my colleagues' decision violated Section 103.30(c) of the Health Care Rule, it was inconsistent with Board precedent, and it was at odds with the Congressional admonition against undue proliferation of units in the health care industry."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Overnite Transportation Co. (18-CA-15496; 333 NLRB No. 62) Blaine, MN March 8, 2001. The Board majority of Chairman Truesdale and Member Liebman granted the General Counsel's motion for summary judgment, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Teamsters Locals 89, 299, 375, and 651. [\[HTML\]](#) [\[PDF\]](#)

The Respondent claimed that after the Unions were certified, the International called a nationwide strike to protest the Respondent's alleged unfair labor practices that "has been plagued with serious, premeditated violence and other intimidation." Citing *Laura Modes Co.*, 144 NLRB 1592 (1963), the Respondent contended that "the Teamsters' campaign of violence and intimidation should vitiate the certifications previously issued at the four locations involved here." It argued that under the Board's rules it is entitled to a hearing to prove Teamsters misconduct and its coercive impact on employees. The Respondent

moved to reopen the record, to remand for hearing, and to consolidate this proceeding with any cases alleging that the strike misconduct violated Section 8(b)(1)(A) of the Act.

In the General Counsel's view, the Respondent has not presented sufficient evidence to warrant the relief it seeks and the strike misconduct issue should be examined in the pending 8(b)(1)(A) cases, not in the instant refusal-to-bargain case. The Board majority found that the strike-related misconduct alleged to have occurred is not of such a character as to justify the "extraordinary sanction" of depriving the employees of their elected collective-bargaining representatives and withholding the bargaining orders required to remedy the Respondent's unfair labor practices. Rather, it found that this case falls within the category of union picket line misconduct that the Board has found, with court approval, does not preclude an otherwise appropriate bargaining order.

Member Hurtgen, dissenting, would grant the Respondent a hearing with respect to its *Laura Modes* contentions. He noted that the issue is not whether the Locals can be held responsible for any Section 8(b)(1)(A) misconduct by the International but whether the Locals can secure the benefits of a bargaining order in circumstances where a related entity has engaged in substantial misconduct on their behalf.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Teamsters on behalf of Locals 89, 299, 375, and 651; complaint alleged violation of Section 8(a)(5) and (1). The General Counsel filed a motion for summary judgment on March 7, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Onyx Precision Services, Inc. (Paper, Allied-Industrial, Chemical and Energy Workers) Buffalo, NY March 6, 2001. 3-CA-22488; JD-21-01, Judge George Aleman.

Gallup, Inc., (Steelworkers) Austin, TX March 7, 2001. 16-CA-20442; JD(ATL)-16-01, Judge Pargen Robertson.

Magna International Inc. (Auto Workers) Detroit, MI March 9, 2001. 7-CA-43093(1) et al.; JD-29-01, Judge Arthur J. Amchan.

TCI Cablevision of Montana, Inc., (Electrical Workers (IBEW) Local 44) Missoula, MT February 28, 2001. 19-CA-26874; JD(SF)-03-01, Judge William L. Schmidt.