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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April 6, 2001 W-2785

CASES SUMMARIZED

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Levitz Furniture Company of the Pacific (20-CA-26596; 333 NLRB No. 105) South San Francisco, CA March 29, 2001. The Board held that an employer may unilaterally withdraw recognition from an incumbent union only on a showing that the union has actually lost the support of a majority of the bargaining unit employees. The Board overruled *Celanese Corp.,* 95 NLRB 664 (1951), and other decisions that allowed employers to withdraw recognition merely by establishing an objectively based, good-faith reasonable doubt as to unions' majority support. [HTML] [PDF]

The Union and the Respondent were parties to a collective-bargaining agreement that expired on January 31, 1995. About December 1, 1994, the Respondent received a petition bearing what it concluded to be the signatures of a majority of the unit employees, stating that they no longer wished to be represented by the Union. On December 2, the Respondent informed the

Union that it had objective evidence that the Union had lost majority support. The Respondent stated that it would continue to honor the contract until it expired but would withdraw recognition then. On December 14, the Union advised the Respondent that it had objective evidence, which it was prepared to demonstrate, that it had retained majority support. The Respondent, however, reiterated that it would no longer recognize the Union except as required by the contract. When the contract expired, the Respondent withdrew recognition, arguing that it had a good-faith reasonable doubt as to the Union's majority status.

The Board held that the good-faith reasonable doubt standard was fundamentally flawed in that it allowed employers to withdraw recognition from unions that had not, in fact, lost majority support. The Board found the standard inconsistent with the Act's fundamental policies of effectuating employees' free choice of bargaining representative and promoting stability in bargaining relationships. The Board therefore held that an employer that unilaterally withdraws recognition violates Section 8 (a)(5) unless it can show that, at the time it withdrew recognition, the union had actually lost majority support.

Recognizing that Board elections are the preferred means for testing employees' support for unions, the Board eased the standard that employers must meet to obtain RM elections. Henceforth, an employer will be able to obtain an RM election by demonstrating an objectively based, good-faith reasonable uncertainty as to the union's majority status. Cf. *U.S. Gypsum,* 157 NLRB 652 (1966), in which the Board set forth the standard as requiring good-faith doubt or disbelief. In *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998), the Supreme Court held that "doubt" can only mean "uncertainty," not disbelief, which is a more stringent standard. The Board found it appropriate to adopt the lower "uncertainty" standard as an incentive for employers to test unions' majority status in Board elections rather than by withdrawing recognition unilaterally.

Because employers had relied on the more lenient good-faith doubt standard, which had been in effect for some 50 years, the Board found it appropriate to apply the new standard for withdrawal of recognition only prospectively, i.e., not in pending cases. Applying the existing good-faith doubt (uncertainty) standard, the Board found that the Respondent's withdrawal of recognition was lawful. Thus, the Respondent had been presented with a petition indicating that the Union had lost majority support. Although the Respondent did not review the Union's claimed evidence to the contrary, the Board reasoned that, even if it had done so, the conflicting evidence could still have caused a good-faith uncertainty as to the Union's majority status.

Member Hurtgen, concurring, would have adhered to the good-faith uncertainty standard for withdrawing recognition. In his view, RM elections are an ineffective substitute for unilateral withdrawals because unions can prevent or delay elections by filing "blocking charges" and by filing objections and challenging ballots when elections are held. Member Hurtgen agreed with the majority, however, that the good-faith uncertainty standard is appropriate for RM elections. He also agreed with the majority's decision on the merits.

(Chairman Truesdale and Members Liebman, Hurtgen, and Walsh participated.)

Charge filed by Food and Commercial Workers Local 101; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing before an administrative law judge.

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Interstate Warehousing of Ohio (9-RC-17485; 333 NLRB No. 83) Hamilton, OH March 27, 2001. Applying its decision in *M.B. Sturgis,* 331 NLRB No. 173, the Board majority of Chairman Truesdale and Member Walsh in the instant case found appropriate a bargaining unit of the Employer's solely-employed permanent employees and its jointly-employed temporary employees. In denying review of the Regional Director's unit finding, the Board agreed with the Regional Director that the temporary employees share a community of interest with the Employer's permanent employees to be included in the same unit. The majority cited these factors in reaching its conclusion: [HTML] [PDF]

> The temporary employees work side-by-side and are largely interchangeable with the permanent employees. The temporary employees share the same job classifications as the Employer's permanent employees, perform common work functions, and share common work hours and supervision. The duration of their employment is indefinite. Further, the Employer does not dispute that since January 1, 2000, it has obtained all of its permanent employees by hiring from its temporary employees. Hence, the temporary employees are akin to probationary employees whom the Board includes in units with employees with more permanent tenure. *Johnson's Auto Spring*

Service, 221 NLRB 809 (1975).

In dissent, Member Hurtgen expressed "substantial doubts" whether the Employer's own employees and the temporary employees share a community of interest, stating: "Where, as here, the suppliers (e.g., CBS) set the economic conditions of the temporary employees, and the user (Employer) sets the economic conditions of the regular employees, I have grave questions as to whether the two groups share a community of interests." Member Hurtgen also maintained that a unit of temporary and regular employees poses substantial bargaining difficulties.

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

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Aneco, Inc. (12-CA-15738; 333 NLRB No. 88) Orlando, FL March 29, 2001. The Board ordered that the Respondent pay $47,349.29 in lost earnings to Winson Cox for the full backpay period, as set forth in the compliance specification. The previous Board decision and orders in this case are reported at 325 NLRB 400 (1998) and 330 NLRB No. 152 (2000). The General Counsel admitted that, due to an inadequate job search by Cox, there is no backpay liability for 9 of the 20 calendar quarters encompassed in the gross backpay period between July 12, 1993 (the date of the Respondent's discriminatory refusal to hire Cox) and April 1, 1998 (the date Cox accepted the Respondent's remedial job offer and began working for it). [HTML] [PDF]

Contrary to the administrative law judge, the Board found that the Respondent failed to carry its burden of showing that Cox would only have worked 5 weeks in 1993, or that Cox would have ceased working at any subsequent point prior to April 1, 1998. The judge had found that the backpay period should run from July 12, 1993 to August 19, 1993 because 5 weeks after accepting the Respondent's remedial job offer in 1998, Cox, a paid union organizer, declared an unfair labor practice strike and ceased work in accordance with the Union's organizing strategy as set forth in its manual. Although he found that a determination of how long Cox would have worked if the Respondent had hired him in July 1993 was "somewhat speculative," the judge concluded that there was "no better indication" than Cox's actual length of service in 1998 and, thus, Cox would not have remained employed with the Respondent in 1993 for more than 5 weeks.

(Chairman Truesdale and Members Liebman and Walsh participated.)

Hearing at Orlando, March 20, 21, and 23, 2000. Adm. Law Judge Keltner W. Locke issued his decision April 28, 2000.

* * *

Archer Daniels Midland Company (17-UC-230; 333 NLRB No. 81) North Kansas City, MO March 26, 2001. The Board denied Bakery Workers Local 16G's request for review of the Regional Director's decision to exclude employees employed at the Employer's soybean oil refinery located at 80 W. 18th Avenue from the existing bargaining unit of production and maintenance employees at the 200 W. 19th Avenue processing plant. It was the Union's position that the refinery employees must be accreted to the established processing plant unit. [HTML] [PDF]

The Union has represented the production and maintenance employees at the processing plant for over 30 years. Construction of the refinery began in April 1998 and was complete by January 2000. Operation of the refinery began in late January 2000.

The Regional Director found that the employees at the two facilities are subject to separate wage structures, terms and conditions of employment, work schedules, and work rules and, therefore, held that the employees at the two facilities are clearly separate bargaining units. In his view, the employees in the refinery are not an accretion to the existing bargaining unit of employees employed at the processing plant. He found, contrary to the Union, that "the Board has followed a restrictive policy in finding accretions to existing units because the Board seeks to insure that the right of employees to determine their own bargaining representatives is not foreclosed." *United Parcel Service,* 303 NLRB 326 (1991).

The issue raised in the request for review was whether the Regional Director erred in refusing to extend the holding of *The Sun,* 329 NLRB No. 74 (1999), to the facts of this case in which the unit was described as "all production and maintenance

employees employed at the Company's plant located at 200 West 19th Avenue, North Kansas City, Missouri" and thereby improperly clarifying the unit to exclude the new refinery workers from the existing bargaining unit. The Board did not rely on the Regional Director statement that The Sun does not apply to this case because there is no transfer of bargaining unit work job classification outside of the bargaining unit. Rather, they relied on his finding that The Sun does not apply because the bargaining unit at issue is not functionally described.

(Chairman Truesdale and Members Liebman and Walsh participated.)

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Goad Company (14-CA-25782, 25793; 333 NLRB No. 82) Ellisville and Independence, MO March 26, 2001. The Board adopted the recommended order of the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with Steamfitters Local 420 unless Local 562 Business Agent Daniel P. Murphy ceased to act as the Union's agent. [HTML] [PDF]

On June 24, 1998, Plumbers General President Martin Maddaloni informed Company President Curtis Goad that effective July 1, 1998, jurisdiction over Local 420 in Philadelphia would be transferred to Local 562 in Philadelphia. Contending that the exclusive collective-bargaining representative continued to be Local 420, the Respondent refused to bargain with Local 562. The judge determined that even if Murphy had been a bona fide agent of Local 420, Board precedent establishes that, in the absence of unusual circumstances such as schism or defunctness, a local union's action in transferring its representational rights to another local constitutes a disclaimer of interest. *Sisters of Mercy Health Corp.* 277 NLRB 1353 (1985); Teamsters Local 595 (*Sweetener Products*), 268 NLRB 1106 (1984). The Board, in affirming the judge's decision, relied on his conclusion that Local 420 did not simply enlist the aid of an agent, but transferred its representational responsibilities to Local 562.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charges filed by Plumbers and by Steamfitters Local 420; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis, Jan. 27, 2000. Adm. Law Judge George Carson II issued his decision March 10, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Moses Electric Service (Electrical Workers [IBEW] Local 480) Jackson, MS March 29, 2001. 26-CA-17100, et al.; JD(ATL)-22-01, Judge Pargen Robertson.

Carter's Inc. (Food & Commercial Workers Local 876) Petosky, MI March 28, 2001. 7-CA-43097, 7-RC-21554; JD-42-01, Judge Jerry M. Hermele.

D.L. Baker, Inc., et al. (Electrical Workers [IBEW] Local 26) Vienna, VA March 28, 2001. 5-CA-24131, 24190; JD-38-01, Judge Thomas R. Wilks.

Exxon Chemical Company (Teamsters Local 877) Newark, NJ March 28, 2001. 22-CA-23546; JD(NY)-12-01, Judge Howard Edelman.

Americlean Restoration and Maintenance Corp. (Painters Local 466) Glens Falls, NY March 27, 2001. 3-CA-21350; JD(NY)-11-01, Judge Joel P. Biblowitz.

Watkins Contracting, Inc. (Laborers Local 882) San Diego, CA March 23, 2001. 21-CA-33379; JD(SF)-20-01, Judge Jay R. Pollack.

Marriott International, Inc. d/b/a San Francisco Marriott Hotel (Hotel & Restaurant Employees Local 2 and an Individual)

San Francisco, CA March 20, 2001. 20-CA-28111, et al.; JD(SF)-19-01, Judge Mary Miller Cracraft.

Tim Foley Plumbing Service, Inc. (Plumbers Local 661) Muncie, IN March 26, 2001. 25-CA-25652, et al.; JD-39-01, Judge Arthur J. Amchan.

Forklift & Equipment Services, Inc. (an Individual) Savage, MN March 26, 2001. 18-CA-15578; JD-40-01, Judge William J. Pannier III.

The McBurney Corporation (Boilermakers) Norcross, GA March 30, 2001. 26-CA-17564, et al.; JD-43-01, Judge Karl H. Buschmann.