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 20, 2001 W-2787

CASES SUMMARIZED

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Contech Division, SPX Corporation (7-CA-39049, et al.; 333 NLRB No. 94) Dowagiac, MI April 9, 2001. The Board affirmed the administrative law judge's finding that by suspending operations at Plant #3 and laying off employees without giving the Union prior notice and an opportunity to bargain over such decisions or over the effects of those decisions on unit employees, and by refusing to provide the Union with relevant and necessary information it requested on December 20, 1996 and February 14, 1997, the Respondent violated Section 8(a)(5) and (1) of the Act. No exceptions were taken to the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) when it failed to grant employee Shirley Stroud a 50-cent wage increase. [HTML] [PDF]

The Respondent argued that under *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981), and *Dubuque Packing Co.,* 303 NLRB 386 (1991), it had no obligation in decision bargaining with the Union. In agreement with the judge, the Board rejected the Respondent's argument that this allegation must be dismissed.

(Chairman Truesdale and Members Liebman and Walsh participated.)

Charges filed by Automobile Workers; complaint alleged violation of Section 8(a)(1), (3) and (5). Hearing at Dowagiac, MI, Aug. 11-13, 1997. Adm. Law Judge George Alemán issued his decision July 31, 1998.

* * *

Pactiv Corporation (9-CA-37226, 37663; 333 NLRB No. 103) Wurtland, KY April 9, 2001. The Board majority of Chairman Truesdale and Member Hurtgen approved a settlement stipulation and ordered that the Respondent take certain affirmative action, including: (a) provide the information requested in the Union's April 26 and May 15, 2000 letters to Respondent, excluding item #5 in the April 26 letter; (b) restore its light duty policy to permit injured employees to work available light duty assignments; and (c) make whole unit employees for any loss of pay they may have suffered by reason of not being given light duty work.

In dissent, Member Walsh noted that "there appears to be an inadvertent error in the stipulated Order because, unlike the notice, it fails to provide that the Respondent will notify and, upon request, bargain with the Union before making changes in the light duty policy." He stated that such a bargaining provision is necessary to remedy the specific 8(a)(5) violation alleged. *Alexander Linn Hospital Assn.,* 244 NLRB 387 fn. 3(1979). Member Walsh would modify the Order so that it conforms to the notice and, consistent with the approach used in *K & W Electric,* 327 NLRB 70 (1998), give the parties an opportunity to opt out of the settlement in the event that there is an objection to the modification.

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

* * *

Yuengling Brewing Company of Tampa (12-RC-8469, 8470; 333 NLRB No. 104) Tampa, FL April 9, 2001. The Board reversed the Regional Director's finding that a separate unit of maintenance employees sought by Petitioner Operating Engineers Local 925 is not an appropriate unit for bargaining. The Regional Director found that a unit composed of all production and maintenance employees was the only appropriate unit for bargaining and dismissed the petition in Case 12-RC-8469. Teamsters Local 79 sought to represent a separate production unit but because it was willing to proceed to an election in any unit found appropriate, the Regional Director directed an election in Case 12-RC-8470. [HTML] [PDF]

The Board noted that the bargaining history favors a finding that the petitioned-for maintenance unit constitutes a distinct and cohesive grouping of employees appropriate for collective-bargaining purposes. It wrote:

> It is the Board's longstanding policy, set forth in *American Cyanamid Co.,* 131 NLRB 909 (1961), to find petitioned-for separate maintenance department units appropriate when the facts of the case demonstrate the absence of a more comprehensive bargaining history and the maintenance employees have the requisite community of interest. In determining whether a sufficient community of interest exists, the Board examines such

factors as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contract and interchange with other employees; and functional integration. *Ore-Ida Foods,* 313 NLRB 1016, 1019 (1994); *Franklin Mint Corp.,* 254 NLRB 714, 716 (1981).

(Chairman Truesdale and Members Liebman and Walsh participated.)

* * *

Associated Builders and Contractors, Golden Gate Chapter (32-CA-15647; 333 NLRB No. 116) Dublin, CA April 12, 2001. The Board granted the Respondent's and the Charging Parties' joint request to modify its prior decision and order (331 NLRB No. 5 (2000)) and vacated the remedy section of the order and the judge's decision requiring the Respondent and its employer-members to post the Board's notice to employees at their Northern California business offices. In the request to modify, the parties stated that if the Board modified its order and disavowed the portion of the judge's remedy requiring the posting by employer-members, the Respondent would fully comply with all other portions of the order. The General Counsel did not oppose the request. [HTML] [PDF]

The Respondent and certain of its employer-members argued that the order erroneously imposed an unprecedented notice-posting obligation on approximately 300 individual, separately-owned and operated employer-members who were not named in the charge or complaint and who were not found by the judge to be guilty of any wrongdoing.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Mcclain of Georgia, Inc. (10-CA-28231-3, et al.; 333 NLRB No. 111) Macon, GA April 11, 2001. In this backpay proceeding, the Board granted in part and denied in part, the General Counsel's motion for partial summary judgment as to certain allegations of the compliance specification and remanded the proceeding to the Regional Director to schedule a hearing limited to: determining whether discriminatees Lawrence Trice's, Charles Parker's, and James Weldon's backpay periods ended when, if ever, they became unable to perform the duties of their former positions due to illness or disability; resolving disputes pertaining to Trice's medical expenses; resolving the backpay allegations pertaining to discriminatee Aric Evans; and resolving disputes pertaining to interim earnings, interim expenses, and failure to mitigate. [HTML] [PDF]

In the earlier decision, 322 NLRB 367 (1996), enfd. 138 F. 3d 1418 (11th Cir. 1998), the Board ordered the Respondent to take certain affirmative action, including offering reinstatement to certain employees and making them whole for any loss of earnings suffered by reason of the Respondent's discrimination against them.

(Chairman Truesdale and Members Liebman and Walsh participated.)

General Counsel filed motion for summary judgment Aug. 4, 1999.

* * *

Saia Motor Freight (16-RC-10184; 333 NLRB No. 117) Grand Prairie, TX April 11, 2001. Chairman Truesdale and Member Liebman, with Member Hurtgen dissenting in part, adopted the hearing officer's recommendation that the election of April 16, 17, and 18, 2000, in which the revised tally of ballots showed 170 votes for, and 179 against the Petitioner, with 7 challenges, must be set aside and a new election conducted. [HTML] [PDF]

The majority, in agreement with the hearing officer, found that the allegations in Petitioner's Objections 9 and 21 constituted objectionable conduct. These objections alleged that the Employer interfered with the election by refusing to permit employees believed to be supporters of Petitioner to attend meetings at which union representation was discussed and by enforcing and maintaining an invalid and unlawful no-solicitation rule. Chairman Truesdale and Member Liebman deemed it unnecessary to pass on the hearing officer's findings with regard to Objection 4, which Member Hurtgen addresses in his dissenting opinion.

Contrary to the hearing officer, Member Hurtgen did not find that the Employer engaged in objectionable conduct by maintaining and operating a video camera outside its premises during the union organizing campaign and would not rely on this conduct in setting aside the election. He said ". . . the video camera security system was installed and maintained for valid security reasons wholly unrelated to any union organizing campaign, and the fact that there was neither evidence nor claim that the system was used for any other purpose during the organizing campaign, the hearing officer found that the Employer's continued operation of the system during the critical period of objectionable."

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Ziegler, Inc. (18-UC-336; 333 NLRB No. 114) Bloomington, MN April 12, 2001. The Board denied the Union's (Operating Engineers Local 49) request for review of the Regional Director's decision and order dismissing the unit clarification petition; granted the Employer-Petitioner's request for review; and concluded, contrary to the Regional Director, that the existing bargaining unit represented by the Union should be clarified to exclude the "parts and warehouse employees" at Ziergler's six branch facilities who have been historically excluded from the unit of service department employees at its nine facilities, and warehouse employees at two locations. Member Liebman dissented in part. [HTML] [PDF]

The Regional Director declined to clarify the unit as requested by the Employer-Petitioner, relying on *Bethlehem Steel Corp.,* 329 NLRB No. 32 (1999), which held:

> [w]here a position or classification has been historically excluded from or included in the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or classification, regardless of when in the bargaining cycle the petition is filed.

Chairman Truesdale noted that the Board indicated several exceptions to this general principle in Bethlehem Steel, including one in *Williams Transportation Co.,* 233 NLRB 837, where the Board decided that processing of the employer's petition to confirm the historical exclusion of the disputed position was necessary to prevent the enforcement of the contradictory arbitration award. Although this case does not involve an arbitration award, he found *Williams Transportation* supported the processing of the petition since there is a pending grievance alleging that the parties' collective-bargaining agreement covered the disputed employees that ultimately could result in an incongruous arbitration award.

Member Hurtgen, concurring, agreed that *Bethlehem Steel* is distinguishable. He wrote separately to make clear his disagreement with *Bethlehem Steel* and to emphasize his disagreement with "the dissent's contention that the Board should withhold its processes, pending resort to collective bargaining."

Member Liebman, dissenting in part, would affirm the Regional Director's dismissal of the Employer-Petitioner's petition, finding that her colleagues deviated from established and proper unit clarification procedure. She found their reliance on *Williams Transportation* is misplaced because it created a limited exception to the procedure to dismiss petitions involving historically excluded employees-where there is an arbitral ruling that is clearly at odds with Board policy. Member Liebman stated: "No comparable award exists in this case that contravenes Board policy and would take effect if the Board were to follow its normal procedure and dismiss this unit clarification petition. In this context, the collective-bargaining process should be allowed to work."

(Chairman Truesdale and Members Hurtgen and Liebman participated.)

* * *

Briar Crest Nursing Home (2-CA-30131, et al.; 333 NLRB No. 112) Ossining, NY April 12, 2001. Chairman Truesdale and Member Walsh held that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the work schedules for certain employees without bargaining with 1199 National Health & Human Service Employees; and violated Section 8(a)(3) and (1) by eliminating work hours of Patrick Duncan because of his support for the Union, discharging

economic striker Tessie Cherry because of a mistaken belief that she engaged in strike misconduct, and issuing a disciplinary warning to Terry Ransom because of her protected concerted activity. [HTML] [PDF]

Member Hurtgen, dissenting in part, would reverse the judge and dismiss allegations that the Respondent violated the Act by reducing Duncan's hours of work and discharging Cherry. He found Cherry engaged in misconduct which warranted her discharge and that the General Counsel failed to establish that Duncan's loss of hours was motivated by his union activities.

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

Charge filed by 1199 National Health & Human Service Employees; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York, May 18-22, 1998. Adm. Law Judge Raymond P. Green issued his decision Aug. 28, 1998.

* * *

Inn Credible Caterers, Ltd. (34-CA-8845; 333 NLRB No. 110) Bear Mountain, NY April 9, 2001. Agreeing with the administrative law judge, Chairman Truesdale and Member Liebman decided that an affirmative bargaining order is warranted to remedy the Respondent's unlawful refusal to recognize and bargain with Hotel Employees and Restaurant Employees Local 100. The judge found, and the majority agreed, that: the Respondent was a successor employer, the Union demanded recognition and bargaining, the Respondent was obligated to recognize the Union as of April 18, 1999 when a substantial and representative complement was reached, and the May 9, 1999 petition purportedly signed by a number of unit employees did not provide the Respondent with a good-faith doubt as to the Union's majority status. The majority wrote: [HTML] [PDF]

"Having found that the Respondent unlawfully refused to recognize and bargain with the Union as of April 18, the May 6 petition could not have formed the basis for good-faith doubt. Further, regardless of whether the Respondent had properly recognized the Union on April 18, the Respondent could not lawfully have withdrawn recognition on May 6 under an alternative ground. *St. Elizabeth Manor, Inc.,* 329 NLRB No. 36 (1999)." The majority explained:

> The effect of the Board's decision in St. Elizabeth Manor was to return to the principle expressed in *Landmark International Trucks,* 257 NLRB 1375 (1981), enf. denied 699 F.2d 815 (6th Cir. 1983), that a successor employer violates Sec. 8(a)(5) if it withdraws recognition before a reasonable period of time for bargaining has elapsed, whether that withdrawal is based on a good-faith doubt of the union's continuing majority status or evidence of actual loss of majority status. See St. Elizabeth Manor, supra, slip op. at 2. Accordingly, the contrary view, as expressed in *Harley-Davidson Transportation Co.,* 273 NLRB 1531 (1985), is clearly no longer good law after St. Elizabeth Manor.
>
> For the reasons set forth in the majority opinion in St. Elizabeth Manor, we reject our concurring colleague's criticisms of the successor bar doctrine, including his discussion of *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987).

Member Hurtgen, concurring, wrote separately to explain how this case illustrates the problem presented by St. Elizabeth, a representation case in which he dissented. He explained:

> By rendering the May 6 petition a nullity, St. Elizabeth Manor would deprive unit employees from exercising their Section 7 freedom of choice and prevent them from exercising their rights to select a union representative or to have no union represent them. Moreover, St. Elizabeth Manor directly contravenes the rationale of Fall River Dyeing Corp. v. NLRB, 482 U.S. 27, 41 fn. 8 (1987). . . . Thus, under Fall River, employees who no longer want to be represented by the union may file a petition which the successor may consider grounds for a good-faith doubt. That employee right, pronounced by the Supreme Court, has been foreclosed by St. Elizabeth Manor. Thus, if the Respondent had recognized the Union as of April 18, I would have honored the Section 7 rights of the employees to choose nonrepresentation.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Hotel Employees and Restaurant Employees Local 100; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Goshen on Dec. 14, 1999. Adm. Law Judge Howard Edelman issued his decision April 17, 2000.

* * *

McKenzie Engineering Co. (33-CA-12098; 333 NLRB No. 115) Fort Madison, IA April 10, 2001. The administrative law judge found, with Board approval, that the Respondent failed and refused to honor its 8(f) collective-bargaining agreement with the Northwest Illinois and Eastern Iowa District Council of Carpenters with respect to its work on the Crescent Railroad Bridge repair project in Mississippi, a violation of Section 8(a)(5) and (1) of the Act. The Board noted well-settled law that an employer may not repudiate an 8(f) agreement during its term. Also, when an employer consents to be bound by an area 8(f) agreement and its successor agreements, as the Respondent did in this case, the employer's contractual obligations continue, absent timely notification to terminate the agreement and to withdraw delegated bargaining authority. The Board found that the decision of the Eight Circuit court of appeals in Carpenters Fringe Benefit Funds of Illinois v. McKenzie Engineering, 217 F.3d 578 (8th Cir. 2000), which issued subsequent to the judge's decision and to which the Respondent has directed the Board's attention, does not compel a contrary result. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Northwest Illinois and Eastern Iowa District Council of Carpenters; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Davenport, Dec. 4-5, 1997. Adm. Law Judge William J. Pannier III issued his decision April 24, 1998.

* * *

Laro Maintenance Corp. (2-CA-31249; 333 NLRB No. 118) New York, NY April 13, 2001. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its hiring policy with respect to standby employees without giving Service Employees Local 32B-32J sufficient time to bargain, the Board held in agreement with the administrative law judge. It did not pass on the General Counsel's request raised in cross-exceptions that the Board: (1) rule on whether the judge accurately characterized the provisions of a settlement agreement in Cases 2-CA-29598, et al. entered into by the General Counsel and the Respondent which resolved prior unfair labor practice charges involving the same parties; and (2) change the proposed remedy in this case to reflect that the Respondent's rescission of the unilateral change and its return to the status quo ante must be consistent with that settlement agreement. Those issues are left to compliance or other proceedings arising out of this case or in Cases 2-CA-29598, et al. [HTML] [PDF]

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

Charge filed by Service Employees Local 32B-32J; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on April 19, 1999. Adm. Law Judge D. Barry Morris issued his decision July 8, 1999.

* * *

St. Barnabas Hospital (2-CA-32373; 333 NLRB No. 119) Bronx, NY April 13, 2001. Affirming the administrative law judge's decision, the Board found that the General Counsel failed to make a prima facie showing sufficient to support the inference that union activity was a motivating factor in the Respondent's actions and dismissed the complaint allegations that the Respondent unlawfully discharged Jose Rivera, Michael Shaffer, and Rosa Cinquina because of their activities for the Security Personnel, Officers and Guards International. The judge credited the testimony of Respondent's director of security Nicholas Rodelli that the three employees were discharged after the Respondent discovered that they were using the same parking sticker, which is against the hospital's policy that each employee purchase a monthly parking sticker to use its lot. The Union in exceptions to the judge's credibility findings claimed disparate treatment-that management was aware that other employees were sharing parking stickers but did not discipline them. The Board found no basis for reversing the judge's findings. [HTML] [PDF]

(Members Liebman, Hurtgen, and Walsh participated.)

Charge filed by Security Personnel, Officers and Guards International; complaint alleged violation of Section 8(a)(1) and (5). Hearing at New York on May 10, 2000. Adm. Law Judge D. Barry Morris issued his decision Oct. 19, 2000.

* * *

Electrical Workers (IBEW) Local 48 (Kingston Constructors, Inc.) (36-CB-2052; 333 NLRB No. 122) Portland, OR April 13, 2001. The Board granted the General Counsel's motion for clarification, modified its Order and Notice in the underlying decision (332 NLRB No. 161 (2000)), and ordered that the Respondent: (1) make available to the Board or its agents for examination and copying, all records, including any stored in electronic form, necessary to analyze the amounts of dues to be refunded under the terms of the Orders, and (2) sign and return to the Regional Director copies of the notice for posting by employers, if willing, who are signatory to the collective-bargaining agreement with the Respondent, at all places where notices to employees are customarily posted. The Board substituted an attached Notice to Employees and Members for the Notice to Employees, which issued on December 15, 2000. [HTML] [PDF]

In the earlier decision, the Board found that the Respondent violated Section 8(b)(1)(A) of the Act by threatening to have Charging Party Patrick Mulcahy and other employees discharged pursuant to the union-security provision of the Union's collective-bargaining agreement if they did not pay dues to support the Union's market recovery program (MRP) that were owing from their employment on projects covered by the Davis-Bacon Act, 40 U.S.C. Sec. 276a et seq. It ordered the Union to reimburse the affected employees for MRP dues they paid as a result of the unlawful threats.

(Chairman Truesdale and Members Liebman and Hurtgen participated.)

* * *

Matanuska Electric Association (19-CA-25303; 333 NLRB No. 130) Palmer, AK April 13, 2001. On a stipulated record, the Board dismissed the complaint, finding that the Respondent (MEA), a nonprofit electrical cooperative, did not violate Section 8(a)(1) of the Act by amending its bylaws to provide that a member of the local union that represents the Respondent's employees, as well as anyone who lives with and is financially interdependent with the union member, cannot become or remain a member of its board of directors. "[E]ven assuming MEA's amended bylaw restricts the Section 7 rights of employees, it does not violate the Act because it serves MEA's legitimate interest in ensuring that it has the undivided loyalty of those who direct its operations," the Board said. [HTML] [PDF]

The Board agreed with the Respondent that the members of its board of directors are its agents within the meaning of Section 2 (13) of the Act. It noted that the board of directors is limited in number (seven), exercises control over the business affairs of MEA, and maintains considerable control over the labor relations of MEA by ratifying any collective-bargaining agreement tentatively reached by a negotiating team. Agreeing with the Respondent that its bylaw is a lawful means of ensuring the undivided loyalty of its agents, the Board wrote:

> The bylaw does not prohibit all union members from serving on the board of directors. The bylaw only prohibits board members from holding membership in a union that is on the other side of the bargaining table from MEA. Similarly, MEA's barring from the board of directors those who live with and are financially interdependent with members of a union representing MEA's employees is a narrow provision implementing its legitimate interest in having as its agents only those persons who it trust to act with undivided loyalty.

The Board wrote in finding no merit to the Union's contention that the bylaw is not rationally related to the goal of preventing a conflict of interest because nonmembers can be on the Respondent's board of directors, even if they are represented by the Union: "Nonmembers, unlike members, are not subject to the Union's disciplinary control. Thus, they do not pose a risk that a person on the board of directors could be disciplined by the Union for acting contrary to the Union's wishes."

(Chairman Truesdale and Members Hurtgen and Walsh participated.)

Charge filed by Electrical Workers (IBEW) Local 1547; complaint alleged violation of Section 8(a)(1). Parties waived their right to a hearing before an administrative law judge.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Wisconsin Porcelain Company, Inc. (Machinists Lodge 121) Sun Prairie, WI April 9, 2001. 30-CA-14582; JD-47-01, Judge Robert M. Schwarzbart.

The Guard Publishing Company d/b/a The Register Guard (Teamsters Local 206) Eugene, OR April 5, 2001. 36-CA-8721, 36-CA-8759; JD(SF)-23-01, Judge Albert A. Metz.

Scapino Steel Erectors, Inc. (Iron Workers Local 292) Niles, MI April 10, 2001. 7-CA-43137; JD-49-01, Judge Jerry M. Hermele.

Weldun International, Inc. (Steelworkers) Bridgman, MI April 11, 2001. 7-CA-34343, 7-CA-34805; JD-52-01, Judge Paul Bogas.

Interparking Incorporated (Hotel & Restaurant Employees Local 27) Washington, DC April 12, 2001. 5-CA-28844; JD-51-01, Judge William G. Kocol.

Neshaminy Electrical Contractors, Inc. (Electrical Workers [IBEW] Local 269) Philadelphia, PA April 13, 2001. 4-CA-29716; JD-50-01, Judge Margaret M. Kern.

Teamsters Local 107 (Individuals) Philadelphia, PA April 13, 2001. 4-CB-8273, 4-CB-8486; JD-37-01, Judge George Aleman.

* * *

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the ground that the respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding. The case did not present any other issues.)

St. George Warehouse, Inc. (Teamsters Local 641) (22-CA-24362; 333 NLRB No. 113) Kearny, NJ April 10, 2001.