

## 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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June 29, 2001

W-2797

**CASES SUMMARIZED**

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*M&M Electric, Inc.* (28-CA-16259, -2; 334 NLRB No. 45) Phoenix, AZ June 20, 2001. The Board, on the recommendation of

the administration law judge, dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to call back six electricians who were selected for layoff and by instituting a new application procedure because of the Union's organizing efforts. [\[HTML\]](#) [\[PDF\]](#)

The General Counsel contended that the layoff was a "sham" designed to eliminate union members. Contrary to the General Counsel, the Respondent asserted that the layoff of six employees was motivated by lawful consideration, namely the elimination of the night shift and the resultant combining of the two shifts into 1-day shift. In concluding that the six employees were the least productive, the most expendable, or exhibited other traits or characteristics that warranted their removal, the judge said "[i]t is significant that the group of six included only three union members."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IBEW Local 640; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix on May 30 and 31 and June 1 and 2, 2000. Adm. Law Judge Gerald A. Wacknov issued his decision Sept. 22, 2000.

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*New Silver Palace Restaurant* (2-CA-30820; 334 NLRB No. 44) New York, NY June 18, 2001. The Board adopted the administrative law judge's findings that the Respondent's alleged reasons for not hiring the 23 discriminatees were pretextual and that its refusal to hire the discriminatees was in violation of Section 8(a)(1), (3), and (5) of the Act. The Respondent refused to hire the discriminatees because it contended that they did not meet its requirement that they speak English, failed to submit applications, or had not fully complied with the requirements for submitting applications, which included completing the forms in English and listing prior employment. [\[HTML\]](#) [\[PDF\]](#)

At a postbankruptcy auction on July 24, 1997, the Respondent purchased the assets of the Silver Palace Restaurant, whose employees had been represented by 318 Restaurant Workers Union. After the auction, the Union sent the owners letters on behalf of the former Silver Palace Restaurant employees seeking employment with the Respondent. The Board agreed with the judge's finding that the Respondent deliberately prevented the Union from gaining a foothold in its restaurant by using employment applications to avoid hiring union supporters and to give the impression that its refusal to hire were lawful.

Applying *FES* (A Division of Thermo Power), 331 NLRB No. 20 (2000), the Board held that the Respondent was hiring at the times it refused to hire the discriminatees, the discriminatees had experience or training relevant to the announced or generally known requirements for the positions, and antiunion animus was a motivating factor in the decision not to hire them. Chairman Hurtgen agreed as to the 8(a)(3) violations but did not agree that these violations operated as a forfeiture of a successor employer's right to set new initial terms and conditions of employment. See his dissenting opinion in *Pacific Custom Materials*, 327 NLRB 75 (1998).

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by 318 Restaurant Workers Union; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at New York, NY on various dates between Aug. 5, 1998 and Jan. 28, 1999. Adm. Law Judge Howard Edelman issued his decision Aug. 30, 1999.

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*Regal Cinemas, Inc.* (5-CA-27454, et al.; 334 NLRB No. 41) Knoxville, TN June 20, 2001. Agreeing with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about decisions to lay off unit projectionists and transfer work to nonunit employees and implementing the decisions, Members Liebman and Truesdale emphasized his finding that the reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where, as here, it has an impact on unit work. They upheld the judge's conclusion that the Union did not waive bargaining as to the Respondent's decisions, finding they were not based on technological development and immune from bargaining because of the management-rights clause, as the Respondent argued. Members Liebman and Truesdale also rejected the Respondent's contention that the judge's requirement that the Respondent reestablish the

projectionist position is overly burdensome. The Respondent will be permitted to present new evidence (i.e., facts occurring after the close of the hearing) on the restoration issue at the compliance stage of this proceeding. [\[HTML\]](#) [\[PDF\]](#)

In a reversal of the judge, Members Liebman and Truesdale found that the Respondent did not violate Section 8(a)(5) and (1) by conditioning severance pay for employees represented by Stage Employees IATSE Local 125 on their willingness to sign a release because the evidence failed to establish that the Respondent insisted to impasse in bargaining that severance pay for the employees was conditioned on their agreement to sign a general release.

Chairman Hurtgen, concurring in part, agreed that the Respondent unlawfully failed to bargain with the Union, but he would analyze this case under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), not under *Fibreboard v. NLRB*, 379 U.S. 203 (1964), and *Torrington Industries*, 307 NLRB 809 (1992), the cases applied by the judge. Agreeing that the Union retained its bargaining rights with respect to the Respondent's decision to lay off projectionists and reassign their work to nonunit personnel, he wrote:

To the extent that this conclusion is based on an analysis of the management-rights clause relied on by the Respondent, however, I would not, as the judge did, apply the 'clear and unmistakable' standard. I would, however, find that under a 'contract coverage' analysis, the Respondent's conduct was not privileged. See *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Central Illinois Public Service Co.*, 326 NLRB 928, 935 fn. 23 (1998) (concurring in the finding that the respondent unlawfully discontinued employee benefits during a lockout because, under a 'contract coverage' analysis, rather than a 'waiver' analysis, the contract did not privilege the respondent's conduct).

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Stage Employees IATSE Locals 370, 125, and 364; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Richmond, VA, Nov. 19-20, 1998, at Fort Wayne, IN, Dec. 14-15, 1998, and at Cleveland, OH, Jan. 19-20, 1999. Adm. Law Judge Richard H. Beddow Jr. issued his decision April 12, 1999.

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*The Park Associates, Inc. d/b/a Hill Park Health Care Center* (3-CA-20898-3, et al.; 334 NLRB No. 55) Syracuse, NY June 20, 2001. Members Liebman and Truesdale agreed with the administrative law judge that the Respondent, a successor to Hill Haven Nursing Home under Burns International Security Services, 406 U.S. 272 (1972), violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Service Employees Local 200A. Relying on the "successor bar" rule adopted by the Board in *St. Elizabeth Manor, Inc.*, 329 NLRB No. 36 (1999), which issued after the judge's decision in this case, the majority affirmed his finding that the Respondent unlawfully relied on a decertification petition when it refused to recognize and bargain with the Union on September 14, 1997. The majority, citing *Caterair International*, 322 NLRB 64 (1996), held that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition.

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The majority also affirmed the judge's findings that the Respondent violated Section 8(a)(1) by posting a wage and benefits package that on its face limited eligibility to nonunion employees and by distributing a pamphlet notifying employees of a "1-800 hotline" for purpose of raising employment-related concerns. The majority wrote: "While the Act does not prohibit an employer from making statements of existing benefits to his employees before a representation election, it does prohibit promises, implicit or explicit, to induce employees to vote to be unrepresented. Contrary to our dissenting colleague, we find that the latter is involved here." With regard to the "1-800 hotline," the majority said the distribution of the pamphlet during the critical period "signaled to employees that the Union might not be necessary given the Respondent's willingness to listen to and give consideration to their employment-related concerns. Contrary to our dissenting colleague, we start from the premise that the pamphlet was distributed during the critical period, not that the hotline was instituted during the critical period."

Chairman Hurtgen, dissenting in part, would dismiss allegations that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union on September 4. For the reasons stated in the dissenting opinion in *St. Elizabeth Manor*, he disagrees with the holding in that case and believes his colleagues' conclusion that the Respondent lawfully could not have

refused to bargain with the Union because a reasonable period had not passed, even though such refusal was based on the untainted employee petition, "demonstrates the enormity of the majority's error in St. Elizabeth Manor." Chairman Hurtgen would dismiss allegations that the Respondent violated Section 8(a)(1) by posting a document entitled "Benefits for Non-Union Employees." He found the dissemination of this information about extant benefits to unrepresented employees is protected under Section 8(c) and the limitation of the benefits to nonunion employees does not establish illegality. Finding that there was neither an implied or express promise to remedy employee grievances, Chairman Hurtgen would also dismiss allegations that the Respondent violated Section 8(a)(1) by publicizing its existing "1-800 hotline" whereby employees could obtain answers to employment-related questions.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Service Employees Local 200A; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Syracuse, June 9-10, 1998. Adm. Law Judge Karl H. Buschmann issued his decision Dec. 10, 1998.

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*Lutheran Home at Moorestown* (4-CA-30047; 334 NLRB No. 47) Moorestown, NJ June 22, 2001. Finding that the Respondent raised no issue properly litigable in this unfair labor practice proceeding, the Board granted the Acting General Counsel's motion for summary judgment, and found that the Respondent illegally refused to bargain with the Communications Workers (CWA) following its certification as exclusive collective-bargaining representative of the Respondent's Registered Nurses (RNs) and Licensed Practical Nurses (LPNs). The Board issued cease-and-desist and bargaining orders. The Respondent admitted its refusal to bargain, but asserted the case should be held in abeyance pending the Supreme Court's decision in *Kentucky River Community Care v. NLRB*, 193 F.3d 444 (6th Cir. 1999), cert. granted 121 S.Ct. 27 (2000) because the supervisory status of RNs and LPNs is common to both cases. The Respondent also contended that the Board should deny the motion because the complaint issued at a time when there was no properly appointed General Counsel. The Acting General Counsel was appointed pursuant to 5 U.S.C. Sec. 3345(a), as amended by the Federal Vacancies Reform Act of 1998, an "alternative procedure" for temporarily occupying an office. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by CWA; complaint alleged violation of Section 8(a)(1) and (5). Acting General Counsel filed motion for summary judgment March 5, 2001.

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*J.B. Hunt Transport, Inc.* (4-CA-29035; 334 NLRB No. 54) Philadelphia, PA June 22, 2001. By direction of the Board, the Associate Executive Secretary granted the Respondent's motion to set aside the Board's Decision and Order issued in this case on May 23, 2001, and vacated the decision reported at 334 NLRB No. 19 for all purposes, including precedential effect. See *Caterpillar, Inc.*, 332 NLRB No. 101 (2000). The Board had considered the Respondent's timely filed exceptions and the General Counsel's answering brief timely filed on May 16, 2001 when the decision issued only 7 days following the filing of the answering brief. Section 102.46(h) of the Board's Rules and Regulations, however, provides all parties the right to file a reply brief within 14 days from the due date for answering briefs. In its motion, the Respondent requested that the decision be set aside pending submission and consideration of its reply brief. The decision having prematurely issued, the motion was granted and the parties were afforded 14 days from the date of the supplemental order to file a reply brief to the General Counsel's answering brief. [\[HTML\]](#) [\[PDF\]](#)

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## LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Watkins Engineers & Constructors, Inc.* (Boilermakers) Jacksonville, FL June 15, 2001. 12-CA-18146; JD(ATL)-39-01, Judge George Carson II.

*Adair Express L.L.C.* (Teamsters Local 396) Van Nuys, CA June 18, 2001. 31-CA-24291, 24484; JD-79-01, Judge Karl H. Buschman.

*Dole Fresh Vegetables, Inc.* (Operating Engineers Local 20) Springfield, OH June 19, 2001. 9-CA-38067-1, et al.; JD(ATL)-40-01, Judge Lawrence W. Cullen.

*Diamond Electric Manufacturing Corporation* (Auto Workers) Dundee, MI June 20, 2001. 7-CA-41236, 41918; JD-75-01, Judge John H. West.

*The Mead Corporation* (an Individual) Chillicothe, OH June 20, 2001. 9-CA-38055; JD-82-01, Judge Karl H. Buschmann.

*KSM Industries, Inc.* (Industrial Workers Local 7-0779) Germantown, WI June 20, 2001. 30-CA-14887; JD-83-01, Judge Robert M. Schwarzbart.

*Framan Mechanical Inc.* (Plumbers Local 9) Freehold, NJ June 21, 2001. 22-CA-23845, 24031; JD(NY)-28-01, Judge Raymond P. Green.

*Numark Security, Inc.* (International Guards Union) Gary, IN June 22, 2001. 9-CA-37419, et al.; JD-86-01, Judge Arthur J. Amchan.

*Tenet Healthsystem Philadelphia, Inc. d/b/a City Avenue Hospital* (Health Professionals /AFT) Philadelphia, PA June 22, 2001. 4-CA-28083; JD-84-01, Judge C. Richard Miserendino.

*Smithfield Foods, Inc. and Smithfield Packing Co., Inc.* (Food & Commercial Workers Local 204) Wilson, NC June 22, 2001. 11-CA-18415, 18606; JD(ATL)-42-01, Judge George Carson II.

*Witt Heat Transfer Division of Ardco, Inc.* (Steelworkers) Scottsboro, AL June 22, 2001. 10-CA-31940; JD(ATL)-41-01, Judge Richard J. Linton.

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### **NO ANSWER TO COMPLAINT**

*(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to answer the complaint.)*

*Black's Railroad Transit Service* (Individuals) (33-CA-13425, 13481; 334 NLRB No. 49) Galesburg, IL June 20, 2001.

*2000-2020 Davidson Avenue Realty Corporation* (Service Employees Local 32E) (2-CA-33097; 334 NLRB No. 46) Bronx, NY June 21, 2001.

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### **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 the unfair labor practice proceeding. The case did not present any other issues.)*

*R & S Truck Body Company, Inc.* (Firemen and Oilers [SEIU]) (9-CA-38372; 334 NLRB No. 58) Allen, KY June 22, 2001.