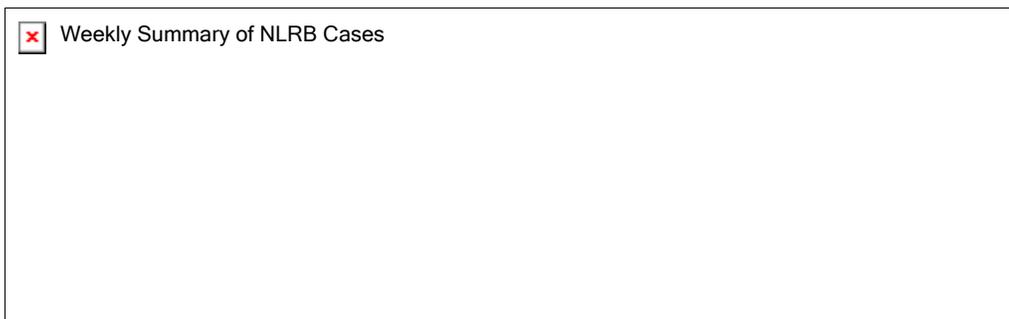


ABOUT THE WEEKLY SUMMARY

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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July 6, 2001

W-2798

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Gallup, Inc. (16-CA-20442; 334 NLRB No. 52) Austin, TX June 27, 2001. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by temporarily closing its Austin, Texas facility, from May 25-30, 2000, because of the Union's organizing efforts; and that the posting of a memorandum on May 26, 2000,

informing employees that the facility was temporarily closed because of the Union campaign was an independent violation of Section 8(a)(1). In its exceptions, the Respondent argued that the judge erred in finding the independent 8(a)(1) violation because the complaint did not allege that the memorandum was unlawful. The Board rejected the argument, citing *Pergament United Sales*, 296 NLRB 333 (1989), *enfd.* 920 F.2d 130 (2d. Cir. 1990), which held that the Board may find and remedy an unfair labor practice not specifically alleged in the complaint "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." [\[HTML\]](#) [\[PDF\]](#)

Agreeing with the judge, the Board found that the Respondent further violated Section 8(a)(1) by engaging in other conduct because of its employees' union activities, including: changing its rule to prohibit personal use of its copy machine; changing its rule to prohibit posting notices except in the break room after dating the notice and securing supervisory approval; issuing a new Interviewing Policies And Procedures Manual on May 29, 2000; and telling employees they cannot distribute union materials inside the building, but outside the Center. The Board emphasized, in finding a violation with respect to the Respondent's promulgation of new work rules, that the Respondent promulgated and implemented the rules immediately after discovering the Union's organizing efforts.

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Austin, Dec. 18-19, 2000. Adm. Law Judge Pargen Robertson issued his decision March 7, 2001.

* * *

Fruehauf Trailer Services, Inc., a wholly owned subsidiary of Wabash National Corp. (19-CA-25715, 26262; 334 NLRB No. 50) Seattle, WA June 25, 2001. The Board held, in agreement with the administrative law judge, that no postsettlement unfair labor practices were committed and, contrary to the judge, that the one presettlement unfair labor practice found by him was encompassed within the scope of the parties' settlement agreement in Case 19-CA-25715. The judge found that the Respondent bypassed the Union and dealt directly with employees on September 18, 1998, in violation of Section 8(a)(5) of the Act. No exceptions were filed to the judge's dismissal of the unlawful withdrawal of recognition and refusal-to-bargain allegation. Citing *Shell Ray Mining*, 286 NLRB 466 (1987), the Board reinstated the settlement agreement and dismissed the consolidated complaint in Cases 19-CA-25715 and 26262. It expressed no view on the merits of the alleged unfair labor practices predating the settlement. See *Ann's Schneider Bakery*, 259 NLRB 1151, 1160 (1982). [\[HTML\]](#) [\[PDF\]](#)

On January 23, 1998, the Union filed a charge in Case 19-CA-25715, alleging that the Respondent violated Section 8(a)(1) by offering employees improved wages and benefits if they decertified the Union, and violated Section 8(a)(5) by bypassing the Union and dealing directly with employees. The charge was subsequently amended and settled by the informal settlement agreement approved by the Regional Director on October 2, 1998. Thereafter, a decertification petition was filed in Case 19-RD-3392. On December 10, 1998, the Union filed a charge in Case 19-CA-26262, alleging that the Respondent violated Section 8(a)(5) by refusing to bargain and violated Section 8(a)(1) by offering financial incentives to employees in order to encourage decertification. On March 31, 1999, the General Counsel set aside the settlement agreement and issued the consolidated complaint in Cases 19-CA-25715 and 19-CA-26262, alleging that the Respondent violated the terms of the settlement agreement, and Section 8(a)(1), by offering employees a wage increase if they decertified Machinists District Lodge 160; committed several presettlement violations of Section 8(a)(1) and (5) by promising employees benefits and dealing directly with them; and committed a postsettlement violation of Section 8(a)(5) and (1) by withdrawing recognition from the Union and refusing to bargain.

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by Machinists District Lodge 160; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Seattle, June 2-3, 1999. Adm. Law Judge Steven M. Charno issued his decision June 3, 1999.

* * *

Orange County Publications, an Unincorporated Division of Ottoway Newspaper, d/b/a The Times-Herald Record (34-CA-

8304, 8517; 334 NLRB No. 48) Middletown, NY June 26, 2001. Agreeing with the administrative law judge, the Board found that, during a 1998 captive audience speech to employees, the Respondent's publisher, James Moss, threatened employees that they would receive less benefits than nonunion employees if they voted in favor of union representation in violation of Section 8(a)(1) of the Act. Contrary to the judge, Members Liebman and Walsh found that Moss' statement about a possible change in the Respondent's distribution system, also constituted an unlawful threat of job loss if employees selected Communications Workers Local 1120 to be their collective-bargaining representative. "By linking a possible change in the distribution system, including the loss of full-time positions, to unionization, and the Union's attempts to exert pressure on the Respondent, Moss implicitly threatened employees with loss of their jobs if they voted in favor of the Union," they held. Chairman Hurtgen would dismiss this 8(a)(1) allegation, finding Moss' statement "was not a threat of retaliatory action, but rather a statement of economic reality which would not be altered because of the presence or absence of a union." [\[HTML\]](#) [\[PDF\]](#)

The Board affirmed the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by restructuring its delivery operations.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Communications Workers Local 1120; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Goshen, March 1-2, 1999. Adm. Law Judge Michael A. Marcionese issued his decision June 29, 1999.

* * *

Avanté at Boca Raton, Inc. and Avanté Terrace at Boca Raton, Inc., Joint Employers (12-CA-18860, 18893; 334 NLRB No. 56) Boca Raton, FL June 27, 2001. Upholding the administrative law judge's decision, the Board found that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the certified Union following the affiliation between its parent organization, 1115 District Council, and the Service Employees International (SEIU). The Board agreed with the judge, for the reasons stated in his decision, that there was substantial continuity of representation following 1115 District Council's affiliation with the SEIU. It also agreed that the lack of notice to or participation by the unit employees in the affiliation process was not a basis for justifying the Respondent's refusal to bargain with the Union. [\[HTML\]](#) [\[PDF\]](#)

The Board disagreed with the judge's finding that the unit employees were denied minimal due process, noting that as nonmembers, the unit employees were not entitled to participate in the internal union affiliation process. It pointed out that the Union's policy did not allow employees to become members until after their employer had entered into a collective-bargaining agreement with the Union. That precondition for membership had not occurred regarding these unit employees and therefore they were not eligible to become members, the Board observed. Nonmembers do not have a right to participate in internal union matters such as affiliation votes. See *Santa Barbara Humane Society*, 302 NLRB 833, 836 (1991); *Potters' Medical Center*, 289 NLRB 201, 202 (1988), where the Board found, in circumstances similar to those here, that the general lack of participation by nonmembers in affiliation decisions does not justify an employer's refusal to bargain.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by 1115 District Council, SEIU; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Miami, Aug. 10-11, 1998. Adm. Law Judge Keltner W. Locke issued his decision Oct. 8, 1998.

* * *

Dynamic Science, Inc. (5-RC-15189; 334 NLRB No. 57) Aberdeen Proving Grounds, MD June 27, 2001. The Board granted the Employer's request for review of the Regional Director's Decision and Direction of Election as it raised substantial issues warranting review in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001); and affirmed the Regional Director's finding that the petitioned-for artillery test leaders are not supervisors within the meaning of Section 2(11) of the Act. In its request for review, the Employer contended that the test leaders are statutory supervisors because they use independent judgment in responsibly directing other employees. The petitioning union is Machinists District Lodge 12, Local Lodge 2424. [\[HTML\]](#) [\[PDF\]](#)

In *Kentucky River*, which was issued subsequent to the Regional Director's decision, the Supreme Court upheld the Board's rule that the burden of proving statutory supervisory status rests with the party asserting it. Although the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards, it recognized the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold.

Agreeing with the Regional Director that the Employer failed to sustain its burden of establishing that the test leaders possess statutory supervisory authority in their direction of other employees, the Board found the test leaders' role in directing employees "is extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures" and, thus, the degree of judgment exercised by the test leaders "falls below the threshold required to establish statutory supervisory authority." See *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *Kentucky River*.

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

* * *

Doug Wilson Enterprises, Inc. (12-CA-20155, 12-RC-8357; 334 NLRB No. 51) Cape Canaveral, FL June 28, 2001. By laying off William Jay Baumgardner and Mark Oropez because they engaged in union activities, and laying off Michael Diamond and William Mutter to legitimize the pretextual reasons advanced for the layoffs, the Respondent violated Section 8(a)(3) and (1) of the Act, the Board held in agreement with the administrative law judge. Affirming the judge's recommendation, the Board sustained the Union's election objection to the unlawful termination of bargaining unit employees; set aside the election held in Case 12-RC-8357 on June 11, 1999, which resulted in 2 votes for, and 3 against Carpenters Local 1765, with one challenged ballot; and directed a second election. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Carpenters Local 1765; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Cocoa on May 8, 2000. Adm. Law Judge Howard I. Grossman issued his decision Nov. 27, 2000.

* * *

DMI Distribution of Delaware, Ohio, Inc. (8-CA-29860, et al.; 334 NLRB No. 59) Delaware, OH June 29, 2001. The Board affirmed the administrative law judge's decision, as modified, and held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Carl Williamson on April 27, 1998 for allegedly violating company policy by failing to punch out when he left the Respondent's premises during worktime on April 24; and that the Respondent committed certain Section 8(a)(1) violations in an attempt "to nip in the bud" its employees organizing activities before an election scheduled for June 4, 1998, including promising benefits and threatening employees with plant closure. [\[HTML\]](#) [\[PDF\]](#)

The Board reversed the judge's finding that, in a December 7, 1998 meeting with the Respondent's drivers, owner Duaine Moore unlawfully promised a brand new tractor to any driver who wanted to become an owner-operator "with the obvious intention of removing these drivers from any future bargaining unit" and as "a clear tactic to undermine further the Union's efforts at his facility." The Board held "the Respondent had a business justification for raising the issue of the drivers becoming owner-operators of their own tractors with the Respondent's help and that the drivers would reasonably have understood this." Agreeing with the judge that the Respondent violated Section 8(a)(1) by giving cash bonuses to Chester Bennett and Ken Brown for extra work they performed 5 days before the scheduled election, the Board found the Respondent did not have an established past practice of giving cash bonuses for extra work because "there is no evidence that such events occurred on a continuing or regular basis." See *B & D Plastics*, 302 NLRB 245, fn. 2 (1991). Since owner Diana Moore gave the cash bonuses only a few days before the election and Bennett and Brown were aware that the election was scheduled for June 4, the employees would reasonably have understood that Moore gave them the bonuses to influence their votes in the election, the Board held.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Teamsters Local 284; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Delaware, July 11-13 and Feb. 12, 1999. Adm. Law Judge Jerry M. Hermele issued his decision April 16, 1999.

* * *

Teamsters Local 179 (USF Holland, Inc.) (13-CD-591; 334 NLRB No. 53) Joliet, IL June 26, 2001. Relying on the factors of employer preference, and economy and efficiency of operations, the Board decided that employees of USF Holland, Inc. represented by Teamsters Local 179, rather than those represented by Machinists Local 701, are entitled to perform the fueling and transporting of vehicles between the terminal and garage at the Employer's Joliet facility. Since October 1, 2000, the Employer has assigned the work to employees represented by Local 179 and it has indicated that it prefers to continue to do so. The Board found the Employer's economy of operation will be maximized by allowing employees represented by Local 179 who are already in the vicinity of the vehicles, and who can perform the work without incurring overtime, to perform the work. It rejected Local 701's argument that the work could be performed less expensively by hiring employees classified under its collective-bargaining agreement as "helpers." Citing *Longshoremen ILA Local 1242 (Rail Distribution Center)*, 310 NLRB 1, 5, fn. 4 (1993), the Board noted that it does not consider wage differentials as a basis for awarding work. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Tara, Inc., d/b/a AAA Limousine (Teamsters Local 78 successor to Local 296) Santa Clara, CA June 19, 2001. 32-CA-17977-1; JD(SF)-48-01, Judge Gerald A. Wacknov.

Stemilt Growers, Inc. (Teamsters Local 760) Wenatchee, WA June 20, 2001. 19-CA-26777; JD(SF)-49-01, Judge Jay R. Pollack.

Amalgamated Transit Union Local 1433 (an Individual) Phoenix, AZ June 22, 2001. 28-CB-5097; JD(SF)-52-01, Judge Burton Litvack.

Dino and Sons Realty Corporation (an Individual) New York, NY June 22, 2001. 2-CA-29306; JD(NY)-29-01, Judge Joel P. Biblowitz.

Horizon House Developmental Services, Incorporated (Hospital and Health Care Employees District 1199) Philadelphia, PA June 27, 2001. 4-CA-29830; JD-85-01, Judge Bruce D. Rosenstein.

Starcon, Inc. (Boilermakers) Manhattan, IL June 27, 2001. 13-CA-32719; JD-87-01, Judge William G. Kocol.

All Seasons Construction, Inc. (Carpenters Local 764) Shreveport, LA June 29, 2001. 15-CA-14793; et al.; JD(ATL)-43-01, Judge Jane Vandeventer.

St. Francis Healthcare Centre (Health Care and Social Services District 1199, SEIU) Great Springs, OH May 3, 2001. 8-CA-29739; JD-89-01, Judge John T. Clark.