

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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August 17, 2001

W-2804

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Neshaminy Electrical Contractors, Inc. (4-CA-29716; 334 NLRB No. 126) Trenton, NJ Aug. 8, 2001. The Board adopted the administrative law judge's bench decision dismissing the complaint allegation that the Respondent unlawfully discharged employee Joseph Rearick on August 22, 2000 for union activity. In doing so, it relied on her dispositive finding that the record failed to establish that Rearick was, in fact, discharged. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers (IBEW) Local 269; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, PA, March 19 - 20, 2001. Adm. Law Judge Margaret M. Kern issued her decision April 13, 2001.

* * *

St. Barnabas Hospital (2-CA-31504; 334 NLRB No. 125) New York, NY Aug. 9, 2001. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by terminating four physicians for engaging in protected concerted activity when they threatened to stop performing voluntary on-call work. The judge was persuaded that the physicians believed the performance of on-call work was voluntary, and that they had the right to decline to perform such work, if they chose. He noted that the Respondent's chief of surgery had never informed the employees of a change in policy that on call work would be mandatory. Past practice was paying physicians on a separate basis for performing on-call work. The Board pointed out that "a refusal to perform voluntary work does not constitute an unprotected partial strike." [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Truesdale, and Walsh participated.)

Charges filed by United Salaried Physicians and Dentists; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York, March 17 - 19, 1999. Adm. Law Judge Steven Fish issued his decision Feb. 24, 2000.

* * *

Jet Electric Co. (11-CA-18395; 334 NLRB No. 133) Winston-Salem, NC Aug. 10, 2001. The Board majority of Members Liebman and Truesdale found that the Respondent violated Section 8(a)(3) and (1) of the Act in view of the standard set forth in *FES*, 331 NLRB No. 20, by refusing to hire or consider for hire eight applicants because of their affiliation with the Union, and by changing its hiring practices and policies to deny employment to union-affiliated employees. The majority remanded the case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the discriminatee applicants. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Member Hurtgen said he would deny the General Counsel's Motion for Summary Judgment since the pro se Respondent's response to the complaint constituted a sufficient denial of the amended complaint allegations. The Respondent's response stated: "I deny all complaints directed at me, James A. Jackson, or my company Jet Electric, Inc." Chairman Hurtgen rejected his colleagues' claim that the March 22, 2000 response is legally insufficient because it assertedly does not address each of the factual or legal allegations of the complaint.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Electrical Workers (IBEW) Local 342; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment April 17, 2001.

* * *

Bon Appetit Management Co. (14-CA-25308, 14-RM-712; 334 NLRB No. 130) St.Louis, MO Aug. 10, 2001. The Board, reversing the administrative law judge, overruled the Union's objections alleging non-compliance with *Excelsior* list requirements and certified the election results (21 votes for the Union, 123 against it, and 17 nondeterminative challenged ballots). In the underlying unfair labor practice case, the judge found and the Board agreed, that the Respondent violated Section

8(a)(1) of the Act by interrogating an employee about the employee's union membership, activities, and sympathies; and by threatening that employee with a decrease in wages if she chose to be represented by the Union. [\[HTML\]](#) [\[PDF\]](#)

The judge recommended setting aside the election because the Employer had supplied a corrected *Excelsior* list to the Region on Sept. 30, 1998 -- one day late and nine days before the election. The Employer inadvertently gave the Region a list the day before identifying eligible voters by address, last name, and first name initial -- rather than by their address and complete first and last names as required in *North Macon Health Care Facility*, 315 NLRB 359 (1994).

The Board, however, concluded that "the minimal delay in providing the Union with a complete and accurate list did not interfere with the purposes behind the *Excelsior* rule." In a concurring opinion, Chairman Hurtgen stated:

My colleagues appear to draw a distinction between compliance with the substantive requirements of the *Excelsior* list and compliance with the timeliness of that list. In their view, substantial compliance will satisfy the former but not the latter. In my view, the distinction is not valid. The issue is whether there has been substantial compliance with the *Excelsior* rule.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Service Employees Local 50; complaint alleged violation of Section 8(a)(1). Hearing at St. Louis, March 11 - 12, 1999. Adm. Law Judge Keltner W. Locke issued his decision Feb. 1, 2000.

* * *

Brimar Corporation (7-CA-39903; 334 NLRB No. 127) Detroit, MI Aug. 10, 2001. The Board majority of Members Liebman and Truesdale agreed with the administrative law judge that the Respondent violated Section 8(a)(5) of the Act by its promulgation and implementation of new "workstation forms" without giving the Union timely notice and an opportunity to bargain concerning the forms, and by dealing directly with its employees by requiring them to sign the new forms. [\[HTML\]](#) [\[PDF\]](#)

In October 1996, without notice to the Union, the Respondent began to require that employees sign a "workstation form" that, among other things, set forth certain production requirements. The form also recited that by signing the form the employee acknowledged that he or she understood what was expected of them regarding production.

Dissenting on this issue, Chairman Hurtgen would not find that the promulgation and implementation of the workstation forms constituted a material, substantial or significant change in the employees' terms and conditions of employment necessitating bargaining. "The use of forms only memorialized in print what had been a standard practice for at least 11 years," he stated.

The panel disagreed with the judge that the Respondent's 5-day suspension and subsequent discharge of employee Anthony Bolden violated Section 8(a)(5).

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Iron Workers Local 508; complaint alleged violation of Section 8(a)(5), (3), and (1). Hearing at Detroit, March 12, 1998. Adm. Law Judge Robert T. Wallace issued his decision Aug. 7, 1998.

* * *

Robert Orr-Sysco Food Services (26-RC-8160; 334 NLRB No. 122) Nashville, TN Aug. 7, 2001. Affirming the hearing officer's recommendation, the Board sustained the Union's Objection 4, which alleged that the Employer's security-camera surveillance of its employees' handbilling activities near its facility constituted objectionable conduct. Absent exceptions, it adopted the hearing officer's recommendations and overruled the Union's Objection 3 and approved the Union's withdrawal of Objections 5 and 6. The Board set aside the election held June 14, 2000, which Teamsters Local 480 lost 86-76, and directed a second election. [\[HTML\]](#) [\[PDF\]](#)

Four exterior cameras are located at or near the four corners of the Employer's facility. Every Friday morning for the 8 weeks immediately preceding the election, the Employer's prounion employees took part in handbilling southeast of the facility along Centennial Place, a public highway. On those occasions, camera number 1 was pointed at the handbillers. The Employer did not dispute the hearing officer's finding that its camera number 1 was not operating in its customary manner when directed at handbillers. Instead, it claimed a concern for the safety of its employees and the general public, citing *Saia Motor Freight, Inc.*, 333 NLRB No. 87 (2001), where the Board accepted an employer's concern about traffic safety as a legitimate justification for photographing employees engaged in handbilling.

In this decision, the Board noted well-established law that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates Section 8(a)(1) of the Act. Photographing or videotaping also constitutes objectionable conduct and warrants direction of a new election unless the impact on election results is de minimis. These rules apply when videotape is shot with a handheld camera and where, as here, the videotape is created with a rotatable security camera purposefully directed at protected activity. The Board found that the Employer here failed to establish a proper justification for videotaping of its employees' handbilling activities and it explained how this case differs from *Saia*.

First, in *Saia* the employer was concerned about potential negligence liability because the employee handbilling took place in the employer's driveway which, in turn, intersected with a public road and handbillers approached trucks as they turned off the public road into the driveway, causing the trucks to slow or stop with their trailers extended into the roadway. By contrast, the handbilling activity here took place entirely on the public highway itself, two turns away from the Employer's driveway. Second, in *Saia*, the Board found it significant that the Respondent began taking photographs only "when it became dissatisfied with the efforts of the police to minimize traffic congestion." *Saia Motor Freight Line*, supra, slip op. at 1. This Employer failed to establish that it was similarly dissatisfied with the way the police responded to the situation and even, according to the Employer's own witness, the police response was prompt and ongoing. The Employer continued to videotape its employees' handbilling activities right up to and including the last Friday morning before the election.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

* * *

Yale University (34-CA-8617; 334 NLRB No. 123) New Haven, CT Aug. 8, 2001. Agreeing with the administrative law judge, the Board held that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint and dismissed allegations that the Respondent unlawfully refused to bargain with Federation of University Employees Local 34, a/w Hotel Employees & Restaurant Employees regarding the terms and conditions of certain employees during the terms of an existing collective-bargaining agreement. [\[HTML\]](#) [\[PDF\]](#)

Yale University operates 10 professional schools including the Yale Medical School, which has maintained an affiliation contract with a completely different entity called the Yale New Haven Hospital (Hospital).

At the hearing, counsel for the General Counsel stated she was not conceding that the Respondent and the Hospital are entirely separate entities or making a claim of single or joint employer status. The General Counsel argued that the Respondent was obligated to bargain over the working conditions for seven former Hospital employees it hired after ending its arrangement with the Hospital to use Hospital employees for support services at a medical clinic operated by the University's Medical School on premises it leased from the Hospital. The General Counsel argued the seven individuals are transferees rather than new hires and, thus, the provisions of the collective-bargaining agreement between the Respondent and the Union relating to "new hires" were not controlling.

The Respondent argued, and the judge agreed, that the seven individuals were new employees, hired into existing bargaining unit jobs, and as such, their terms and conditions of employment were governed by the explicit terms of the collective-bargaining agreement.

(Members Liebman, Truesdale and Walsh participated.)

Charge filed by Federation of University Employees Local 34, a/w Hotel & Restaurant Employees; complaint alleged violation of Section 8(a)(1) and 5. Hearing at Hartford on March 7, 2001. Adm. Law Judge Raymond P. Green issued this decision June

1, 2000.

* * *

SAILA Motor Freight, Inc. (17-CA-20294; 334 NLRB No. 124) Oklahoma City, OK Aug. 7, 2001. The administrative law judge found, and the Board agreed, that the Respondent, in response to the Union's 1999 organizing attempt, violated Section 8(a)(1) of the Act by interrogating its employees concerning their activities and the activities of their co-workers on behalf of Teamsters Local 886, creating the impression of surveillance of its employees' union activities, and threatening them with discharge if they selected the Union as their exclusive collective-bargaining representative. [\[HTML\]](#) [\[PDF\]](#)

The Board found it unnecessary to pass on the judge's finding that Dock Foreman Dale Barnhill was a statutory supervisor within the meaning of the Act because it found that Barnhill is an agent of the Respondent within the meaning of Section 2(13) and that his conduct is therefore imputable to the Respondent. The judge found, and the Board agreed, that Barnhill's interrogation of employees Dubois, Bussey, and Hawkins were coercive and that the interrogation of Dubois was accompanied by an unlawful threat of reprisal as well as a statement that created the impression of surveillance. Barnhill's questions were not just a casual inquiry but were "a pointed attempt to ascertain the extent of the employees' union activities and those of other employees," the Board held.

No exceptions were filed to the judge's findings that the Respondent, by Vice President of Human Relations Reuben Gegenheimer, did not violate Section 8(a)(1) by threatening employees with closure of the facility and with discharge if they selected the Union as their collective-bargaining representative; and that the Respondent did not violate Section 8(a)(3) and (1) by discharging employee Terry Anderson.

(Members Liebman, Truesdale, and Walsh participated.)

Charge filed by Teamsters Local 886; complaint alleged violation of Section 8(a)(1). Hearing at Oklahoma City for 2 days in August 2000. Adm. Law Judge William N. Cates issued his decision Sept. 11, 2000.

* * *

Wright Electric, Inc. (18-CA-12820, et al.; 334 NLRB No. 129) Plymouth, MN Aug. 9, 2001. Affirming the administrative law judge's supplemental decision, the Board ordered that the Respondent pay to Louis J. Lutz the sum of \$5,132 to make him whole for losses suffered as a result of the Respondent's unlawful refusal to hire him for a job because of his union membership. The decision in the underlying unfair labor practice proceeding is reported at 327 NLRB 1194 (1999), enf'd. 200 F.3d 1162 (8th Cir. 2000). [\[HTML\]](#) [\[PDF\]](#)

The backpay period began in the second quarter of 1994, when the Respondent unlawfully refused to hire Lutz, and ended in the second quarter of 2000, when Lutz accepted the Respondent's offer of employment and began work. The Respondent claimed Lutz failed to make a reasonable effort to secure employment during a 7-week period in the second quarter of 1994 and that it owes nothing to him.

The Board noted Lutz followed his usual practice of obtaining work during his 16 years as a union member through the Union's hiring hall and registered for work with the Union on March 3, 1994, and re-registered each month thereafter. By following his usual practice, Lutz found employment for the entire 6-year backpay period except for the 7-week period that he was unemployed in the second quarter of 1994. The Board found Lutz did what is legally required to mitigate his damages, stating: "He diligently (and for the most part successfully, as it turns out) followed his usual method of obtaining work over a 6-year period, including the 7-week period on which the Respondent focuses. The Respondent's showing that Lutz's efforts were unsuccessful during an isolated portion of the backpay period is not sufficient to satisfy its burden of establishing that he failed to diligently seek interim employment during the backpay period as a whole."

(Members Liebman, Truesdale, and Walsh participated.)

Adm. Law Judge Jerry M. Hermele issued his supplemental decision Feb. 14, 2001.

* * *

Monterey Newspapers, Inc., a wholly owned subsidiary of Knight-Ridder, Inc. (32-CA-16323; 334 NLRB No. 128) Monterey, CA Aug. 9, 2001. Chairman Hurtgen and Member Truesdale, with Member Liebman dissenting, reversed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and to provide San Jose Newspaper Guild Local 98 with an opportunity to bargain about the rates of pay to be offered applicants for employment; and dismissed the complaint. [\[HTML\]](#) [\[PDF\]](#)

The Respondent acquired Monterey Newspapers, Inc. (MNI), publisher of the *Monterey County Herald* newspaper, from E.W. Scripps on August 24, 1997. On August 28, 1997, the Respondent recognized the Union as the exclusive bargaining representative of the unit employees. There were no exceptions to the judge's finding that the Respondent was a successor employer obligated to recognize and bargain with the Union. Prior to acquiring MNI, the Respondent established, as part of its initial terms and conditions of employment, a separate pay system applicable only to new employees hired after the acquisition of MNI. Under this system, the Respondent created a pay band for each job classification, which it used in determining wage rates offered to job applicants. The Board agreed with the judge that the wage rates that job applicants were offered by the Respondent are mandatory subjects of bargaining.

Chairman Hurtgen and Member Truesdale said the fact that wage rates to be offered job applicants are mandatory subjects of bargaining does not take them outside of *Burns*. They held, contrary to the judge, that the Respondent did not incur a bargaining obligation merely because, by establishing a new pay system for new employees, it created what could be characterized as a dual compensation system. "Dual compensation systems are not excepted from the *Burns* rule allowing successor employers to set initial employment terms," the majority held. It noted, as the judge found, that the Respondent lawfully established its pay system for new hires as part and parcel of its initial terms and conditions of employment under the *Burns* doctrine, stating: "Thus, to find, as the judge did, that the Respondent, as a lawful *Burns* successor, could establish the pay system for new hires as part of its initial terms of employment but could not offer a starting wage to any job applicant under that system without bargaining with the Union, deprived the Respondent of the rights to which it was entitled under *Burns*."

Dissenting Member Liebman agreed with the judge that because the pay band system provided for considerable discretion in determining the amounts to be paid each applicant, the Respondent must offer to bargain with the Union over the amounts. She wrote in finding appropriate the judge's analogy between the discretion exercised by the Respondent in determining applicant pay rates and that exercised by employers in deciding merit pay increases under an existing merit pay system after a union becomes the bargaining representative of a group of employees: "My colleagues disagree with this analogy, finding that 'the setting of initial terms by a lawful *Burns* successor stands on different footing than decisions made by an incumbent employer.' I find the analogy apt. Just as the incumbent employer may continue its merit pay system, the successor may establish the pay band system as an initial term. In both cases, however, they must bargain over the amounts actually to be paid."

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by San Jose Newspaper Guild Local 98; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Monterey on Aug. 12, 1998. Adm. Law Judge William L. Schmidt issued his decision Sept. 30, 1998.

* * *

Garage Management Corp. (2-CA-29633; 334 NLRB No. 116) New York, NY Aug. 3, 2001. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by filing a baseless lawsuit against Charging Party Gordon Pace in the New York State Supreme Court on August 12, 1996, in retaliation for his protected, concerted activities. The judge also found that the Respondent filed the lawsuit in retaliation for Pace's filing various charges, grievances and complaints with the Board and other agencies against Respondent in violation of Section 8(a)(4) of the Act but rescinded this finding one day after the issuance of his decision. [\[HTML\]](#) [\[PDF\]](#)

Although Pace's unfair labor practice charge alleged that the lawsuit violated Section 8(a)(4) and (1), the 8(a)(4) allegation was inadvertently omitted from the complaint, the General Counsel contended. Citing *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), the General Counsel asserted that the 8(a)(4) violation is closely connected to the subject matter of the complaint and has been fully litigated and requested the Board find that the lawsuit also violated Section 8

(a)(4). The Board agreed, finding both allegations focus on the same set of facts, i.e., the Respondent's purpose for filing the state court lawsuit against Pace, and that the ultimate issue in both allegations is the same: whether the Respondent filed the lawsuit for reasons that are unlawful under the Act. The Board noted the issue of the Respondent's purpose in filing the lawsuit was fully litigated. It ordered that Respondent reimburse Pace for all legal and other expenses incurred in the defense of the Respondent's lawsuit.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Gordon Pace, an individual; complaint alleged violation of Section 8(a)(1). Hearing at New York City on various dates between Aug. 10-13, 26-28 and Sept. 8 and 15-18, 1998. Adm. Law Judge Steven Davis issued his decision Feb. 17, 1999.

* * *

Engineered Storage Products Co., a division of CST Industries, Inc. (33-RC-4605; 334 NLRB No. 138) DeKalb, IL Aug. 10, 2001. The Board denied the Employer's request for review of the Regional Director's decision and direction of election, holding that the petitioned-for unit constitutes an appropriate unit. The issue presented for review was whether the Regional Director erred in finding appropriate a unit of Employer's solely employed employees, excluding employees supplied by Tandem Staffing Agencies. [\[HTML\]](#) [\[PDF\]](#)

The Board did not rely on the Regional Director's finding that the agency-supplied temporary employees do not share a community of interest with the petitioned-for unit. It determined that since the temporary employees and the regular employees work side by side at the same facility performing the same work, under the same supervision, and under common working conditions, they may share a community of interest. Even so, the Board found that they do not share such a strong community of interest that their inclusion in the unit is required. Contrary to the Employer's contentions, the fact that the jointly employed employees supplied by Tandem Staffing may share a community of interest with the petitioned-for employees does not mean that they must be included in the unit or that the petitioned-for unit is inappropriate.

Citing *Overnite Transportation Co.*, 322 NLRB 723, 726 (1996), the Board stated that the test is whether the community of interest the temporary employees share with the solely employed employees is so strong that it requires or mandates their inclusion in the unit. Because Tandem Staffing hires and fires the employees it supplies to the Employer and sets their wages and benefits (which are lower than those of the Employer's regular employees), the facts do not meet this test, the Board said. It held the facts support a finding that the jointly employed temporary employees supplied by Tandem Staffing do not share such a strong community of interest that their inclusion in the unit found appropriate is required.

(Members Liebman, Truesdale, and Walsh participated.)

* * *

United States Coachworks, Inc. (29-CA-20894, 20910; 334 NLRB No. 118) Bohemia, NY Aug. 6, 2001. Members Truesdale and Walsh affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Robert Bauer and ceasing to assign him overtime work because of his union activity. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended it discharged Bauer because it acquired knowledge of a prior conviction. Contrary to Chairman Hurtgen, the majority asserted that the evidence does not demonstrate the Respondent discharged Bauer because he "was a dangerous and unreliable person to have as an employee." Instead, they found that the proffered reasons for Bauer's discharge were pretextual and rejected the Respondent's assertion that it would have discharged Bauer even in the absence of his protected conduct.

Chairman Hurtgen, dissenting in part, asserts that Bauer's discharge was lawful. The Respondent testified that Bauer was terminated because of his behavior on the job, his criminal history, the fact that he lied on his employment application, and the general knowledge of the nature of the Pagans, a motorcycle gang to which Bauer belonged. In the Chairman's view, the reasons given at the hearing were quite consistent with those set forth in the memorandum prepared at the termination meeting

Respondent held with Bauer. He found that because the reasons for Bauer's termination were substantial, legitimate, and not "shifting," the Respondent has shown that it would have terminated him even in the absence of his protected activity. He does not agree with the judge's conclusion concerning the incident in which William Gravitt, Respondent's president and owner, told Bauer "I know you are the one that is disbursing Union cards out." Chairman Hurtgen found there is not a sufficient basis to conclude that Gravitt's statement was unlawful and would dismiss this allegation as well.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Auto Workers Local 259; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn Apr. 6, 2000. Adm. Law Judge D. Barry Morris issued his decision Nov. 25, 1998.

* * *

Vencare Ancillary Services, Inc. (25-CA-26096-2; 334 NLRB No. 119) Saginaw, MI Aug. 6, 2001. The Board reversed the administrative law judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by discharging employees Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler because they engaged in a protected concerted work stoppage on June 23, 1998. [\[HTML\]](#) [\[PDF\]](#)

The judge dismissed the complaint based on the Respondent's argument, raised for the first time in its posthearing brief, that the employees had failed to provide Respondent with 10-day written notice of an intent to strike pursuant to Section 8(g) of the Act. The judge found that Hermitage was a health care facility as defined in Section 2(14) of the Act. Relying on *Betances Health Unit*, 283 NLRB 369 (1987), he found that the five employees constituted a labor organization within the meaning of Section 2(5) of the Act because they held several meetings, decided on a course of action, selected a leader, and embarked upon the work stoppage. He therefore concluded that Section 8(g) applied, that the employees were required to give the Respondent 10-day written notice prior to engaging in the work stoppage, and because they failed to do so, they forfeited their status as employees under Section 8(d) of the Act, and the Respondent properly terminated them.

The Board found as a preliminary matter that the Respondent failed to timely raise the 8(g) issue. It agreed with the judge's conclusion that the employees' concerted refusal to see patients until the Respondent's upper management responded to their memo (voicing their dissatisfaction with their wage cuts) was a short-term, single work stoppage protected by Section 7 of the Act. However, the Board said the five employees did not meet the statutory definition of a labor organization and thus, did not lose their protected status as employees by failing to give 10 days advance notice of their work stoppage pursuant to Section 8(g). Even assuming that the defense was timely raised, the Board would find that it is without merit because the five employees did not meet the statutory definition of a labor organization, were not required to comply with the notice provisions of Section 8(g) prior to engaging in the work stoppage, nor were they subject to the sanctions of Section 8(d). Contrary to the judge, the Board found that *Betances Health Unit*, supra, is distinguishable from this case.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Martha J. Severs, an individual; complaint alleged violation of Section 8(a)(1). Hearing at Owensboro, Feb. 22 and 23, 1999. Adm. Law Judge Jerry M. Hermele issued his decision May 28, 1999.

* * *

BFI Waste Systems (1-RC-21194; 334 NLRB No. 110) Auburn, MA Aug. 3, 2001. The Board majority of Members Truesdale and Walsh agreed with the hearing officer's finding that a raffle sponsored by the Employer on June 20, 2000, shortly before a representation election, was a benefit that improperly influenced employee choice. Accordingly, the majority directed that a second election be held. The Union lost the first election by a vote of 31 to 53, with 4 challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

The majority, affirming the hearing officer, rejected the Employer's defense that the raffle was part of a district-wide inspection program implemented before the union campaign began. The Employer's district manager, Bruce Stanas, arranged for a cookout to be held at the trash collection facility in Auburn, MA on June 20. On June 21, the Employer posted a notice that, for the first time, advised employees that it intended to give away five televisions. The notice listed as eligible to win a television only those

22 employees who, from a total of 92 bargaining unit employees, scored an "excellent" in the inspection. There is no evidence that the Employer ever informed employees that such raffles had been conducted elsewhere and would be conducted at all facilities when Stanas participated in inspections. The total value of the televisions was \$890. A drawing occurred between June 23 and June 28, and five employee winners received televisions during this time period. The election was held on June 30.

In examining whether the raffle amounted to an objectionable promise or grant of benefit, the hearing officer applied the test set out by the Board in *B & D Plastics*, 302 NLRB 245 (1991). The hearing officer recommended sustaining the Union's objection because the raffle conducted by the Employer was a "benefit of the type that would improperly influence employee free choice in the election." Specifically, the hearing officer concluded that: the total value of the raffle prizes (\$890) was substantial; that 22 of 92 bargaining unit employees, or approximately 24 percent of the bargaining unit, were eligible to participate in the raffle; that employees could reasonably believe that the real purpose of the raffle was to influence the election outcome because the raffle was open only to bargaining unit employees, and because employees never received notice from the Employer connecting the raffle to Stanas' participation in the district-wide inspection program; and that the timing of the raffle--no more than seven days before the election--was telling. The hearing officer also concluded that the Employer had failed to advance a legitimate business reason for holding the raffle so close in time to the election.

In dissent, Member Hurtgen would find that the Employer's preelection raffle did not interfere with the election under the test of *Sony of America*, 313 NLRB 420 (1993), which was overruled in *Atlantic Limousine*, 331 NLRB No. 134 (2000). He said, "there is no evidence that the Employer used the raffle to determine how and whether employees voted, or conditioned participation in the raffle on how employees voted or on the result of the election."

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Just Jenn, Inc., d/b/a Jordan Electric Company (Electrical Workers [IBEW] Local 113) Denver, CO August 2, 2001. 27-CA-16410, 16687; JD(SF)-61-01, Judge Thomas M. Patton.

Tower Automotive, Inc. (Steelworkers Local 9457) Milan, TN August 7, 2001. 26-CA-19981; JD(ATL)-53-01, Judge Lawrence W. Cullen.

Merit Contracting, Inc. (Operating Engineers Local 66) Monongahela, PA August 8, 2001. 6-CA-28848, et al.; JD-107-01, Judge Richard H. Beddow, Jr.

Village Manor Health Care, Inc. (New England Health Care Employees District 1199) Plainfield, CT August 8, 2001. 34-CA-8974, et al.; JD(NY)-39-01, Judge Michael A. Marcionese.

Aroostook County Regional Ophthalmology Center (an Individual) Westbrook, MA August 8, 2001. 1-CA-29433, 29434; JD-109-01, Judge Eric M. Fine.

Public Service Company of New Mexico (Electrical Workers [IBEW] Local 611) Albuquerque, NM August 3, 2001. 28-CA-16420; JD(SF)-62-01, Judge Albert A. Metz.

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NO ANSWER TO COMPLAINT

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

AJM Printing Co. (Auto Workers Local 2179) (2-CA-32714; 334 NLRB No. 112) New York, NY August 2, 2001.