

## 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.



[Index of Back Issues Online](#)

August 24, 2001

W-2805

**CASES SUMMARIZED**

SUMMARIES CONTAIN LINKS TO FULL TEXT

[Bakery Workers Local 334 \(Interstate Brands Corp.\)](#), Biddeford, ME  
[Bolivar Tee's Manufacturing Co.](#), Bolivar, MO  
[Developmental Disabilities Institute, Inc.](#), Smithtown, NY  
[The Earthgrains Co.](#), Gulfport and Meridian, MS  
[Munroe, Inc.](#), Oakmont, PA  
[Observer-Dispatch](#), Utica, NY  
[Overnite Transportation Co.](#), Richmond, VA

**OTHER CONTENTS**

[List of Decisions of Administrative Law Judges](#)

[List of Test of Certification Case](#)

The Weekly Summary of NLRB Cases is prepared by the NLRB Division of Information and is available on a paid subscription basis. It is in no way intended to substitute for the professional services of legal counsel, or for the authoritative judgments of the Board. The case summaries constitute no part of the opinions of the Board. The Division of Information has prepared them for the convenience of subscribers.

If you desire the full text of decisions summarized in the Weekly Summary, you can access them on the NLRB's Web site ([www.nlr.gov](http://www.nlr.gov)). Persons who do not have an Internet connection can request a limited number of copies of decisions by writing the Information Division, 1099 14th Street NW, Suite 9400, Washington, DC 20570 or fax your request to 202/273-1789. Administrative Law Judge decisions, which are not on the Web site, also can be requested by contacting the Information Division.

All inquiries regarding subscriptions to this publication should be directed to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, 202/512-1800. Use stock number 731-002-0000-2 when ordering from GPO. Orders should not be sent to the NLRB.

*Bakery Workers Local 334 (Interstate Brands Corp.)* (1-CD-1017; 334 NLRB No. 142) Biddeford, ME Aug. 17, 2001. Relying on the collective-bargaining agreement between the Employer and Bakery Workers Local 334, the Employer's preference and assignment, and economy and efficiency of operations, the Board decided that the Employer's employees represented by Local 334, rather than those represented by Teamsters Local 340, are entitled to perform the yard work at the Employer's bakery located in Biddeford, Maine. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

\* \* \*

*Bolivar Tee's Manufacturing Co.* (17-CA-19569, 19632; 334 NLRB No. 140) Bolivar, MO Aug. 17, 2001. The Board affirmed the administrative law judge's finding that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. However, it did not agree with the judge that the manner in which Respondent distributed donuts to employees on March 2, 1998 and Charlene Scott's comment that donuts were only for nonunion employees violated Section 8(a)(1). The judge found that Scott was not an agent of the Respondent and no exceptions to that finding having been filed, the Board held that Scott's comment cannot be attributed to the Respondent. [\[HTML\]](#) [\[PDF\]](#)

Contrary to Chairman Hurtgen, Members Liebman and Walsh affirmed the judge's finding that employee Geraldine Housel was constructively discharged on March 6, 1998, in violation of Section 8(a)(3). Citing *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), they said that to establish a constructive discharge, two elements must be proven: (1) the burden imposed upon [the employee] must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities. The majority found, in the 48 hours leading to her discharge, Housel was faced with (1) the Respondent's clear condonation of her harassment by antiunion employee Scott and (2) the Respondent's unlawful, disparate imposition of a stringent production quota with virtually no notice and with a harsh prospective penalty (immediate discharge for Housel at the end of her shift, if she was unable to meet the quota). They upheld the judge's finding that the Respondent's refusal to intervene against Scott's harassment of Housel was motivated by antiunion animus.

Dissenting in part, Chairman Hurtgen disagreed with his colleagues' finding that the Respondent violated Section 8(a)(3) by constructively discharging employee Housel. Noting that the General Counsel must establish elements (1) and (2) above, he held as to element (1), the harassment was by employee Scott who is not an agent of the Respondent, and there is no evidence that the Respondent instigated Scott's conduct. Regarding element (2), he does not believe that the quota was so unreasonably high and there is no showing that other employees have been unable to meet that quota. Accordingly, the Chairman would dismiss the constructive discharge allegation.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Sheet Metal Workers Local 146; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Bolivar on June 2-5, 1998. Adm. Law Judge Albert A. Metz issued his decision Sept. 24, 1998.

\* \* \*

*Developmental Disabilities Institute, Inc.* (29-UC-492; 334 NLRB No. 143) Smithtown, NY Aug. 17, 2001. Members Liebman and Truesdale clarified the existing bargaining unit of instructional employees employed by the Employer in its Children's Day Services program in Smithtown, New York to include the newly created position of "therapy assistant/psychology" because they perform the same basic functions historically performed by the unit employees. See *Premcor, Inc.*, 333 NLRB No. 164 (2001). Members Liebman and Truesdale agreed with the Regional Director that the unit should be clarified to include the newly created position, but they disagreed with his application of an accretion analysis and his finding that the therapy assistants/psychology are an "accretion" to the unit, stating: "Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion." [\[HTML\]](#) [\[PDF\]](#)

Chairman Hurtgen, concurring in the result, wants to limit the holding of this case. He agrees that where a new classification clearly falls within the unit description, and the employees in that new classification are employed at the unit facility, the new employees are in the unit, and an "accretion" analysis is not necessary. The Chairman added: "However the mere fact that a new classification performs 'the same basic functions as a unit classification historically had performed' is insufficient to dispense with an accretion analysis. That is too slippery a slope. It would include, for example, employees who work at a different facility, or employees who are functionally similar to unit employees but who do not fit within the unit description." In such cases, Chairman Hurtgen would employ an accretion analysis and he believes a finding of accretion depends upon an

"overwhelming community of interest."

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

\* \* \*

*The Earthgrains Co.* (26-CA-18630, 18717; 334 NLRB No. 139) Gulfport and Meridian, MS Aug. 17, 2001. Members Liebman and Truesdale affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act during the terms of collective-bargaining agreements for two bargaining units by withdrawing recognition from Bakery Workers Local 149, and refusing to process grievances with respect to certain historically represented unit employees; and violated Section 8(a)(3) by constructively discharging employee Neal, a formerly represented employee in one of the facilities where the Respondent unlawfully withdrew recognition after the consolidation of its operations with a recently purchased company (CooperSmith). Chairman Hurtgen dissented concerning the refusal to recognize the Union and the alleged constructive discharge of Neal. [\[HTML\]](#) [\[PDF\]](#)

Members Liebman and Truesdale found substantial record support for the judge's conclusion that the Respondent's consolidation of its existing operations with CooperSmith did not affect the appropriateness of the bargaining units or the Respondent's obligation to recognize the Union as representative of those units, as enlarged by the accretion of CooperSmith employees. They noted that: the Respondent continues to produce and distribute bakery products without substantial changes in operations; employees from the historically represented units comprise a majority in each overall expanded unit; no other labor organization represented the CooperSmith employees; and those employees share a community of interests with the previously represented employees in the consolidated operation.

Affirming the judge's finding of constructive discharge, Members Liebman and Truesdale relied on the Hobson's Choice theory of constructive discharge applicable to employees who, like Neal, quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights. See, e.g., *Intercon I (Zercom)*, 333 NLRB No. 30 (2001); *Control Services*, 303 NLRB 481, 485 (1991). They noted that the Respondent unlawfully refused Neal a promised promotion, refused to process his grievance, and told him, according to Neal's credited testimony, that "if I would leave the union alone and kept my nose clean, I would have got a route." Although the Respondent did not literally threaten to discharge Neal, its statement to him was a clear and unequivocal signal that not only would the Respondent refuse to employ him in the job to which he was entitled but his future in any job was contingent on abandonment of insistence on union representation, the majority held.

Chairman Hurtgen would remand to the judge for further analysis of the Respondent's allegedly unlawful refusal to recognize and bargain. Although his colleagues' said the judge found that the CooperSmith employees were an accretion to the Respondent's existing units, he noted the judge's failure to provide any "accretion" analysis. Chairman Hurtgen believes that accretion requires a finding of "overwhelming community of interests" whereas his colleagues' found accretion because the CooperSmith employees share a "community of interests" with the previously represented employees. See his dissent in *The Sun*, 329 NLRB 854 (1999), and the cases cited therein.

Dissenting from the finding of constructive discharge, Chairman Hurtgen said "the Respondent's actions surely did not make Neil's employment considerations so intolerable as to force him to resign" and, at worst, Neil was faced with a denial of a promotion. He pointed out that Neil could have continued his existing employment and filed a charge over being denied a promotion, stating: "Here, in effect, under the majority's holding, an employee who is unlawfully denied a new benefit can quit and be deemed a constructive discharge. Surely, in this context, an employee is not forced to resign."

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charges filed by Jeff Gordey, an Individual and Bakery Workers Local 149; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Jackson, Aug. 30-31 and Sept. 1, 1999. Adm. Law Judge Pargen Robertson issued his decision Dec. 1, 1999.

\* \* \*

*Munroe, Inc.* (6-CA-29269; 334 NLRB No. 136) Oakmont, PA Aug. 16, 2001. The Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Christ Pappas because he threatened to and subsequently filed a grievance. Pappas protested the Respondent's failure/refusal to grant him a pay increase in accordance with the terms of the collective-bargaining agreement in effect between the Respondent and Boilermakers Local 154. [\[HTML\]](#) [\[PDF\]](#)

The Respondent's training program, detailed in Article XX of the collective-bargaining agreement, provides in relevant part:

A training program is established for the purpose of training qualified shop employees.

The Corporation will have the right to employ trainees from time to time at an entry-level position. The rates of pay for these trainees will be as follows:

- 1st level 2,000 hr. at 60 percent of base rate.
- 2nd level 2,000 hr. at 70 percent of base rate.
- 3rd level 2,000 hr. at 80 percent of base rate.
- 4th level 2,000 hr. at 90 percent of base rate.

Each trainee will be reviewed on a semiannual basis. At which time, based on his performance and skill level, he will continue in the program or be terminated.

The Board noted "Article XX of the contract gave Pappas the right to be reviewed for promotion after completing 2000 work hours but not an absolute right to be promoted. Thus, by threatening to file a grievance, Pappas was in effect requesting an immediate review of his performance. By insisting on an immediate evaluation, he rejected any further opportunity offered by the Respondent to prove himself. Forced to evaluate Pappas, the Respondent made a determination consistent with its view expressed before the threat to file a grievance and the provisions of Article XX that Pappas should be terminated for not meeting the required performance standard."

The Board held that the Respondent established Pappas was discharged because of his unsatisfactory work performance after he had rejected an opportunity by the Respondent to defer the evaluation and further prove his capabilities, and not because he threatened to and did file a grievance.

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Christ Pappas, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Pittsburgh on Feb. 26 and 27, 1998. Adm. Law Judge Robert M. Schwarzbart issued his decision Aug. 18, 1998.

\* \* \*

*Observer-Dispatch, a Division of Gannett Satellite Information Network, Inc.* (3-CA-21337; 334 NLRB No. 132) Utica, NY Aug. 14, 2001. Affirming the administrative law judge's recommendation, the Board dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute the collective-bargaining agreement covering a bargaining unit of pressroom employees and by withdrawing recognition of the Union. [\[HTML\]](#) [\[PDF\]](#)

At issue is what occurred at the fifth and last negotiation meeting on February 24, 1998. The Respondent tendered a final offer in the form of a complete typed contract that remained to be accepted. The judge held that the agreement was characterized as "tentative," i.e., an agreement subject to the condition of bargaining unit member ratification. On this point, the judge noted that before the Union responded to this last offer, employee Stephen Lanter, who considered himself to be a member of the union committee, expressed personal approval of the Respondent's offer but explicitly deferred final acceptance to the ratification of his coworkers. The judge found that the union negotiators waived their authority to come to a final agreement by deferring to Lanter's representational capacity and his imposition of the condition of ratification to a final agreement.

The Board upheld the judge's finding that the Respondent's final offer of February 24, 1998, had not been accepted and could

not have been accepted until the unit member ratification vote. That vote did not occur until after the Respondent timely and lawfully withdrew its recognition on April 13. *Auciello Iron Workers, Inc. v. NLRB*, 517 U.S. 781 (1996).

(Chairman Hurtgen and Members Liebman and Truesdale participated.)

Charge filed by Graphic Communications Local 259-M; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Utica on June 22, 1999. Adm. Law Judge Thomas R. Wilks issued his decision Nov. 2, 1999.

\* \* \*

*Overnite Transportation Co.* (18-CA-13394-63 (formerly 9-CA-32770), et al.; 334 NLRB No. 134) Richmond, VA Aug. 16, 2001. Members Truesdale and Walsh affirmed the administrative law judge's decision in this case (*Overnite II*), including his finding that Gissel bargaining orders are warranted at seven of the Respondent's service centers on the basis of specific unfair labor practices committed at each of the locations and the national violations established in *Overnite Transportation Co.*, 329 NLRB No. 91 (1999), enfd. 240 F.3d 325 (4th Cir. 2001) (*Overnite I*), petition for rehearing en banc granted and panel decision vacated July 5, 2001. No exception was filed to the judge's finding that Gissel relief was not appropriate with respect to an eighth service center because the Union's majority status had not been proven. Chairman Hurtgen, dissenting, would defer ruling on this case until after the court rules en banc on the Respondent's petition for review and the Board's cross-application for enforcement in *Overnite I*. [\[HTML\]](#) [\[PDF\]](#)

*Overnite I* and *Overnite II* arise in the context of a campaign conducted by the Teamsters International and its affiliated locals (collectively the Union) to organize the Respondent's approximately 175 service centers throughout the U.S. On July 29, 1995, the parties formally settled most of the 8(a)(1) violations alleged in the proceedings and the 8(a)(3) allegations for which the only remedies required were cease-and-desist orders and the posting of a notice. They also settled certain 8(a)(3) allegations that concerned the Respondent's failure to implement a March 1995 wage and benefit package at four service centers where the Union recently won elections and was certified by the Board. As part of the settlement, the Respondent made the employees whole for the monetary losses suffered and agreed to post a notice at all its service centers, in which it pledged not to violate the Act.

The unresolved issues were the so-called "national allegations," which related to all of the Respondent's facilities, and other allegations that, in the General Counsel's view, supported bargaining orders under Gissel at many of the Respondent's service centers. The parties agreed to litigate a sampling of the Gissel cases because a limited decision by the judge would assist them in determining how to proceed with the remaining issues. In his *Overnite I* decision, the judge found that the Respondent committed unfair labor practices affecting employees on both a nationwide and unit-specific basis and committed additional unfair labor practices at four contested service centers and that the Union had established its majority status at the centers. The judge's decision in *Overnite II* closely tracks his findings in *Overnite I*.

In this decision, the majority rejected the Respondent's contention that the "principal error" in the judge's *Overnite II* decision is his reliance on the national violations he found in *Overnite I*, stating: "For the reasons we found the national violations in *Overnite I* to be sufficient to warrant the issuance of the bargaining orders in that case, we find those same national violations sufficient to warrant bargaining orders at the service centers at issue in *Overnite II*. Further, for the reasons stated by the judge, we adopt his findings that the Respondent committed numerous unit-specific unfair labor practices at the seven contested service centers and that the Union had established its majority status at these service centers."

The majority denied the Respondent's motion to supplement the record with additional evidence of employee and supervisory turnover that was unavailable at the close of the hearing, and issued a final Order directing the Respondent to bargain with the Local Unions at the seven centers (Dayton, OH, Richfield, OH, Nitro, WV, Parkersburg, WV, Nashville, TN, Rockford, IL and Parkersburg, PA). Even accepting the facts asserted by the Respondent concerning turnover, the majority held the effects of the Respondent's unlawful conduct are not likely to be sufficiently dissipated by turnover to ensure a fair second election. The majority denied the Respondent's motion to supplement the record with evidence of union violence and intimidation as to three service centers (Richfield, Nitro, and Parkersburg) where little or no strike misconduct is alleged to have occurred; and directed a hearing to determine if the union's alleged misconduct warranted revocation of the bargaining orders at the remaining four service centers.

(Chairman Hurtgen and Members Truesdale and Walsh participated.)

Charges filed by Teamsters Locals 957, 515, 175, 24, 480, and 325; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Dayton, Chattanooga, Nashville, St. Albans, Parkersburg, Cleveland, Atlanta, Rockford, and Philadelphia for 30 days between June 29, 1998 and Feb. 18, 1999. Adm. Law Judge Benjamin Schlesinger issued his decision July 13, 1999.

\* \* \*

### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Electrical Workers (IBEW) Local 126* (Utilities Collections Limited d/b/a Commerce Service Corporation) Collegeville, PA August 13, 2001. 4-CB-8507; JD-113-01, Judge Robert A. Pulcini.

*Carrier Corporation* (an Individual) Los Angeles, CA August 10, 2001. 28-CA-16727; JD(SF)-59-01, Judge Lana H. Parke.

*Schrock Cabinet Company, a wholly owned subsidiary of Masterbrand Cabinets, Inc.* (Steelworkers Local 5163) Richmond, IN August 14, 2001. 25-CA-27296-1, 27378-1; JD-110-01, Judge Benjamin Schlesinger.

*Emergency One, Inc. a wholly owned subsidiary of Federal Signal Corporation* (Steelworkers) Ocala, FL August 16, 2001. 12-CA-20820-1, et al.; JD-115-01, Judge David L. Evans.

*American Commercial Barge Line Co. and Hines American Line* (Masters, Mates and Pilots (ILA)) Jeffersonville, IN August 16, 2001. 26-CA-18659, 18664; JD(ATL)-54-01, Judge Lawrence W. Cullen.

*Shaw's Supermarkets, Inc.* (Food and Commercial Workers Local 791) Methuen, MA August 17, 2001. 1-CA-38399; JD-112-01, Judge Martin J. Linsky.

*Cibao Meat Products* (UNITE Local 169) New York, NY August 17, 2001. 2-CA-32811; JD(NY)-41-01, Judge Howard Edelman.

*Associated Builders, Inc.* (an Individual) Anchorage, AK August 9, 2001. 19-CA-26595; JD(SF)-47-01, Judge Thomas Michael Patton.

*Postal Workers Local 339* (an Individual) Fresno, CA August 10, 2001. 32-CB-4876(P); JD(SF)-65-01, Judge Mary Miller Cracraft.

*CEC, Inc.* (Elevator Constructors (IUEC)) Omaha, NE August 10, 2001. 17-CA-20850; JD(SF)-63-01, Judge Albert A. Metz.

*Clear Channel Broadcasting, Inc., d/b/a AMFM, Inc. and AMFM* (an Individual) Sacramento, CA August 13, 2001. 20-CA-29753-1; JD(SF)-64-01, Judge Clifford H. Anderson.

\* \* \*

### TEST OF CERTIFICATION

*(In the following case, the Board granted the General Counsel's motion for summary judgment based 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.)*

*Massachusetts Society for the Prevention of Cruelty to Children* (1-CA-39151; 334 NLRB No. 141) Boston, MA. August 16, 2001.