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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(R-2444) Nancy Krystkiewicz Named Special Assistant in NLRB Division of Operations-Management

Made in France, Inc. (20-CA-29112, et al.; 336 NLRB No. 86) San Francisco, CA Oct. 29, 2001. The Board affirmed the administrative law judge's finding that the Respondent had engaged in certain unfair labor practices during the course of the Union's organizing campaign--including discharging warehouse employees Joseph O'Neil and Pam Nixon for engaging in union activities, and locking the warehouse gate without justification in response to the Union's request for recognition, and directed that a second election be held. The Union lost the first election, held on June 11, 1999, by a vote of 3 for the Union, 10 against, with 1 challenge. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Longshoremen ILWU Local 6; complaint alleged violation of Section 8(a)(1) and (3). Hearing at San Francisco, Sept. 22 - 24, and Oct. 4 - 7, 19 - 22, 1999. Adm. Law Judge Gerald A. Wacknov issued his decision April 7, 2000.

* * *

Pearson Education, Inc. (25-CA-26182; 336 NLRB No. 92) Indianapolis, IN Oct. 31, 2001. The Board agreed with the administrative law judge that the first representation election held on August 13, 1997, which UNITE lost, was properly set aside, and that the Respondent was properly ordered to bargain with the Union based on the results of the second election and the Union's certification. The Board reaffirmed its original Order reported at 327 NLRB No. 17 (1998) finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and directing the Respondent to recognize and bargain with UNITE. It rejected the Respondent's contentions that the voting unit is no longer appropriate due to "changed circumstances," including (1) a change in its ownership; (2) the relocation and consolidation of two facilities into a single facility; (3) the installation of new equipment; and (4) substantial employee, supervisory, and managerial turnover. [HTML] [PDF]

In the underlying representation proceeding, the Regional Director set aside the first election based on the Union's Objection 2, one of eight objections. Neither the Regional Director nor the Board passed on the remaining seven objections. The Board ordered a new election, held on June 11, 1998, which the Union won. The Respondent subsequently refused to recognize and bargain with the Union and, on October 30, 1998, the Board issued its order finding that the Respondent's conduct violated Section 8(a)(5) and (1). The D.C. Circuit granted the Respondent's petition for review of the Board's order and remanded the case for the Board's further consideration. *MacMillan Publishing Co. v. NLRB,* 194 F.3d 165 (D.C. Cir. 1999).

On remand, the Board ordered a hearing before the judge on the Union's original eight election objections. At the outset of the hearing, the Union withdrew four objections and the judge renumbered the others. He did not make a finding on Objection 1 and recommended, with Board approval, sustaining Objections 2, 3, and 4. Renumbered Objection 2 is the same Objection 2 considered previously. The judge found the Respondent's distribution of a promised wage increase, just days before the election, was objectionable and independently sufficient to set aside the election. Objection 3 alleged that the Respondent engaged in impermissible electioneering by displaying an antiunion poster near the polling area on the day of the election. Objection 4 alleged that the Respondent engaged in objectionable conduct by threatening employees that negotiations would "start at zero" if they selected union representation.

In sustaining Objection 3, the Board applied *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 (1982), enfd. 703 F.2d 876 (5th Cir. 1983), which sets forth the factors for evaluating allegations of objectionable electioneering, noting *Peerless Plywood Co.,* 107 NLRB 427 (1953), cited by the judge, does not apply to posters or other campaign literature, but rather prohibits captive-audience campaign speeches within 24 hours of an election.

Chairman Hurtgen, in agreeing with his colleagues' disposition of this case, found it unnecessary to pass on Objections 3 and 4.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge Martin J. Linsky issued his decision Dec. 29, 2000.

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Be-Lo Stores (11-CA-14586 (formerly 5-CA-21583), et al.; 336 NLRB No. 89) Norfolk, VA Oct. 29, 2001. The Board adopted the administrative law judge's recommended order that the Respondent pay Kelly Boone and Jamie Wischmann a total of $36,183.98 plus interest in backpay and $15,020.55 for 401(k) plan moneys plus accrued earnings. In its prior decision and order reported at 318 NLRB 1 (1995), the Board found Boone and Wischmann were unlawfully discharged by the Respondent. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge Jane Vandeventer issued her supplemental decision Sept. 7, 2000.

* * *

Union de Obreros de Cemento Mezclado (Betteroads Asphalt Corp.) (24-CB-1808, 1900; 336 NLRB No. 91) San Juan, PR Oct. 31, 2001. The Board in this matter concluded that the Union violated Section 8(b)(1)(A) of the Act when it failed to represent laid-off employee Manuel Almanzar in a fair and impartial manner before the arbitrator because of his protected concerted activity of engaging with other employees in an effort to change both the shop steward and the union's leadership. [HTML] [PDF]

When Almanzar returned to the bargaining unit after a brief stint in a supervisory position, the Employer notified him that he would occupy his former position with his prior seniority. The Union, however, insisted that, under the contract, Almanzar could not retain his old seniority because he had "resigned" when he accepted the supervisory position. The Employer then changed its position and denied Almanzar his prior seniority. Subsequently, the Employer laid off Almanzar and eight other unit employees. (It is undisputed that Almanzar would not have been laid off had he not been denied 10 years of seniority.) Almanzar filed a grievance over his layoff, and the grievance was processed to arbitration.

The judge stated that at the arbitration hearing, "the Union and the company both took the position that because Almanzar accepted a position as supervisor in June 1996, he 'resigned' as that term is used in the collective bargaining agreement and therefore lost all of his past seniority." The Board, however, contends that rather than taking the same position as the Employer, the Union took no position on the merits of Almanzar's grievance. The Board said "[i]t is well established that a union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees' employment conditions which is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171 (1967).

The Board found the Union's position that Almanzar "resigned" when he moved from a unit position to a supervisory position was an unreasonable interpretation of the contract which the Union continued during the processing of Almanzar's grievance, stating: "Although, by the time the grievance reached arbitration, the Union did not take a formal position on the merits of the grievance, the Union, by its silence, cannot escape responsibility for all of its preceding conduct. . . . [B]y remaining silent before the arbitrator, the Union did not adopt a truly neutral stance on the merits of the grievance, but, rather, perpetuated the unreasonable contract interpretation it had advanced since the beginning of the dispute because of its ill will toward Almanzar."

Chairman Hurtgen does not necessarily agree that the resignation argument was unreasonable. He agreed however that the Union was motivated by Almanzar's Section 7 activities within the Union.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Manuel Almanzar, an individual; complaint alleged violation of Section 8(b)(1)(A). Hearing in Puerto Rico, Oct. 6, 1999. Adm. Law Judge Raymond P. Green issued his decision Jan. 7, 2000.

* * *

Cable Car Advertisers, Inc., d/b/a Cable Car Charters (20-CA-25377, 25789; 336 NLRB No. 85) San Francisco, CA Oct. 29, 2001. The Board, in this supplemental decision and order, adopted the administrative law judge's recommendations and ordered the Respondent to pay the discharged employees the amounts set forth opposite their names for a total of $141,479.06

plus interest. It ordered that backpay for Rudy Galindo Ortiz be paid to the Regional Director and held in escrow for a period not to exceed 1 year from the Respondent's compliance or the date the supplemental decision becomes final, including enforcement, whichever is later. If Ortiz is not located within that time period, his backpay shall be returned to Respondent. Member Walsh did not participate in the decision on the merits. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge Jay R. Pollack issued his supplemental decision March 7, 2001.

* * *

Cassis Management Corp. (2-CA-29311; 336 NLRB No. 90) Freeport, NY Oct. 31, 2001. The Board affirmed the administrative law judge's rulings in this second supplemental decision and order but modified the total amount of backpay due the six discharged employees. It ordered the Respondent to pay a total of $197,666.24 plus interest, but held that the amounts set forth reflect the backpay due through the first quarter of 1999. Finding that the Respondent has not made a valid offer of reinstatement to Charles Allien, Louis Cioffi, Nicolas Michel, or Charles Morrow, the Board asserted that their backpay periods will continue to run until the Respondent makes such an offer. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Adm. Law Judge Howard Edelman issued his decision Nov. 10, 1999.

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Robert W. Lockhart, d/b/a Lockhart Concrete (8-CA-31765; 336 NLRB No. 88) Akron, OH Oct. 31, 2001. The Board granted the General Counsel's motion for summary judgment, denied the Respondent's motion for leave to file an answer, and found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by: failing to recall and then discharging Curtis B. Hough and John D. Wright because they joined and assisted the Union and engaged in concerted activities, and failing to bargain with the Union regarding the recall of employees from seasonal layoff, the agreement reached regarding the recall, or the unilateral actions taken by the Respondent regarding the recall. [HTML] [PDF]

The Respondent failed to answer the complaint allegations within the allotted time. After issuance of the Board's Notice to Show Cause why the General Counsel's motion for summary judgment should not be granted, the Respondent, pro se, filed a motion for leave to file an answer, claiming that due to financial constraints, he attempted to handle the case without counsel but would retain legal representation if given leave to file an answer. In a March 22, 2001 answer, the Respondent provided no explanation sufficient to constitute good cause for its failure to file a timely answer. On March 27, through counsel, the Respondent stated that the Respondent and a company known as Lockhart Construction are separate companies with one counsel and that counsel was busy on a Chapter 11 bankruptcy filing for Lockhart Construction. As a result, the Respondent argued the need for filing an answer was overlooked.

Citing *Kenco Electric & Signs,* 325 NLRB 1118 (1998), and *A.P.S. Production/A. Pimental Steel,* 326 NLRB 1296, 1297 (1998), the Board said that "when determining whether to grant a Motion for Summary Judgment, the Board has shown some leniency toward respondents who proceed without benefit of counsel." However, it held "[w]here a pro se respondent fails to respond to the complaint until after the Notice to Show Cause has issued?despite having been reminded in writing to do so?and has provided no good cause explanation for its failure to do so, subsequent attempts to answer the complaint will be denied as untimely."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Machinists Local 1363, District 54; complaint alleged violation of Section 8(a)(1), (3) and (5). Acting General Counsel filed motion for summary judgment Feb. 5, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

The Post-Tribune Company (Newspaper Guild Local 34014) Merrillville, IN October 26, 2001. 13-CA-39228-1; JD(ATL)-69-01, Judge William N. Cates.

Pepsi-Cola General Bottlers, Inc. (an Individual) Cincinnati, OH October 29, 2001. 9-CA-38197; JD-139-01, Judge Bruce D. Rosenstein.

Hotel Employees and Restaurant Employees Local 26 (an Individual) Boston, MA October 30, 2001. 1-CA-37883; JD(NY)-50-01, Judge Raymond P. Green.

R.J. Corman Railroad Company/Material Sales (Operating Engineers Local 150) Gary, IN October 31, 2001. 13-CA-38677; JD-143-01, Judge Leonard M. Wagman.

Norton Healthcare, Inc. d/b/a Norton Audobon Hospital (Nurses Professional Organization AFSCME) Louisville, KY October 31, 2001. 9-CA-37404, 37933; JD-145-01, Judge Irwin H. Socoloff.

Church Homes, Inc. d/b/a Avery Heights (Health Care Employees District 1199) Hartford, CT November 1, 2001. 34-CA-9168; JD(NY)-55-01, Judge Michael A. Marcionese.

Five Cap, Inc. (an Individual and Teamsters Local 406) Scottsville, MI November 2, 2001. 7-CA-43295, 43408; JD-144-01, Judge Earl E. Shamwell Jr.

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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.)

New York Law Publishing Company (Typographical Union No. 6, CWA Local 14156) (2-CA-33808-1; 336 NLRB No. 93) New York, NY November 2, 2001.