

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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April 25, 2003

W-2892

CASES SUMMARIZED

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Duane Reade, Inc. and UNITE Local 340-A (2-CA-32871-1, et al., 2-CB-17982-1, et al.; 338 NLRB No. 140) New York, NY April 14, 2003. The Board affirmed the administrative law judge's findings that the Company violated Section 8(a)(2) and (1) of Act by providing unlawful assistance and recognition to Local 340 (UNITE) and that UNITE violated Section 8(b)(1)(A)

and (2) by accepting the same. It agreed with the judge's findings that the Company and UNITE, by entering into, maintaining, and enforcing collective-bargaining agreements, including union-security clauses, violated Section 8(a)(3) and 8(b)(2) respectively. [\[HTML\]](#) [\[PDF\]](#)

The Company recognized two unions, Allied Trades Council (ATC) and UNITE as its employees' bargaining representatives at its various stores. Citing *Tecumseh Corrugated Box Co.*, 333 NLRB No. 1 (2001), the Company asserted that the assistance was not coercive. The Board, however, held that unlike the employer in *Tecumseh*, the Company did more than simply provide meeting space to UNITE on company time and voluntarily grant UNITE immediate recognition.

The Board noted that the Company assisted UNITE in numerous ways, e.g. despite its no-solicitation policy prohibiting union organization visits, the Company invited UNITE into its stores for the purpose of organizing its employees; directed its employees to meet with UNITE representatives on store premises during paid work time for the purpose of signing authorization cards; and the store managers were present at most of these meetings and in one store, the store manager was not only present, but informed the employees that UNITE was the only union with whom the Company was affiliated, that they had to sign UNITE's authorization cards, and they were forbidden from signing with any other union. The Company denied ATC equal access to its employees in seven stores and in at least three stores, it ordered ATC representatives to leave under threat of arrest.

(Members Schaumber, Walsh, and Acosta participated.)

Charges filed by Allied Trades Council; complaint alleged violation of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2). Hearing at New York, Dec. 19 and 20, 2001 and Feb. 5 and 6, 2002. Adm. Law Judge Howard Edelman issued his decision May 17, 2002.

* * *

MJM Studios of New York, Inc. (34-RC-1881; 338 NLRB No. 147) Rock Tavern, NY April 18, 2003. The Board in this supplemental decision reversed the hearing officer's findings, sustained the challenges to six laid-off temporary employees, and certified the results of the election held on May 9, 2001. The tally of ballots showed four ballots cast for and four ballots cast against the Petitioner (Stage Employees Local 311), with nine determinative challenged ballots. In the absence of exceptions, the Board adopted the hearing officer's recommendation to sustain the challenges to the ballots of three other temporary employees. [\[HTML\]](#) [\[PDF\]](#)

At issue is whether the hearing officer properly recommended overruling the challenges to the ballots of six employees who were laid off before the election. The Board's test for determining whether laid-off employees are eligible to vote is whether they have a reasonable expectancy of reemployment in the near future and involves consideration of four objective factors: (1) the employer's past practice of layoff and recall; (2) the employer's future plans; (3) the circumstances surrounding the layoff; and (4) what employees were told about the likelihood of recall. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). After review of the objective factors, the Board held, contrary to the hearing officer, that the six laid-off temporary employees had no reasonable expectation of recall. The evidence showed that the Employer was struggling with a decline in contracts, coupled with diminished revenues, that required downsizing in its administrative and managerial staffs.

In its earlier decision, 336 NLRB No. 129 (2001), the Board affirmed the Regional Director's decision to conduct an election and remanded the proceeding for further appropriate action.

(Chairman Battista and Members Liebman and Walsh participated.)

* * *

Laborers Local 81 (Kenny Construction Co.) (13-CD-629-1; 338 NLRB No. 146) Gary, IN April 17, 2003. The Board determined that the employees of Kenny Construction Co. represented by Laborers Local 81 instead of employees represented by Ironworkers Local 395 are entitled to perform the disputed work: the handling, placement, and installation of reinforcing steel rods and wire mesh for the construction of the tunnel and shaft and facilities associated with the shaft and tunnel

construction at the Borman Park Tunnel Project for Indiana American Water Company in Gary, Indiana. In making the award, the Board relied on the collective-bargaining agreement, the Employer's preference and past practice, and economy and efficiency of operations. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

* * *

Daimler-Chrysler Corp. (7-RC-22246; 338 NLRB No. 148) Auburn Hills, MI April 18, 2003. A Board majority of Members Liebman, Walsh, and Acosta agreed with the Regional Director's conclusion that a ballot containing an "X" in the "YES" square but also including a handwritten question mark (?) immediately adjacent to the "YES" square counted as a valid "YES" vote for the Petitioner (Auto Workers); and certified the Petitioner as the exclusive collective-bargaining representative in the appropriate unit. The tally of ballots showed 18 ballots for and 17 against the Petitioner, with no challenged ballots. [\[HTML\]](#) [\[PDF\]](#)

The majority believe that whatever the reason the voter may have had for placing the question mark, the voter deliberately decided to express a preference by placing an "X" in the "YES" square--and, absent a clear negation of this preference, the Board should honor that expression.

Dissenting, Chairman Battista and Member Schaumber held that the test of whether a ballot is to be counted or not is whether the ballot, considered as a whole, *clearly* expresses the voter's intent. Contrary to their colleagues, they find that it does not. If the ballot "clearly expresses the voter's intent," it is to be counted. If there is doubt as to the voter's intent, the ballot is not to be counted. Here, they concluded that there is a reasonable doubt as to the voter's intent and that the ballot is void.

(Full Board participated.)

* * *

Meyers Transport of New York, Inc. (29-CA-23523; 338 NLRB No. 144) Melville, NY April 14, 2003. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (2) of the Act by soliciting, instructing and ordering its employees to sign authorization cards on behalf of Trade Unions Local 713; threatening its employees with discharge if they did not sign authorization cards for Local 713; and promising its employees wage increases, medical benefits, and other improvements in their terms and conditions of employment, in order to induce them to sign authorization cards for Local 713. [\[HTML\]](#) [\[PDF\]](#)

The Board also affirmed the judge's findings that the Respondent violated Section 8(a)(1) and (3) by discharging or laying off employees Dwight Meldendez, Anthony Smith, Raymond Albanese, Thomas Winkler, and Robert Aprile because of their activities on behalf of and support for Teamsters Local 707; and Section 8(a)(1), (2), and (3) by recognizing Local 713 as the collective-bargaining representative of its employees and subsequently executing a collective-bargaining agreement with Local 713, which contained a union security clause, at a time when Local 713 did not represent an uncoerced majority of the Respondent's employees.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 707; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing held Feb. 6-8, 2001. Adm. Law Judge Steven Fish issued his decision Sept. 5, 2001.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Glasforms, Inc. (Individuals and Steelworkers) Birmingham, AL April 15, 2003. 10-CA-33715, et al.; JD(ATL)-24-03, Judge Lawrence W. Cullen.

Electrical Workers IBEW Local 429 (an Individual) Nashville, TN April 15, 2003. 26-CB-4240; JD(ATL)-26-03, Judge Keltner W. Locke.

HCL, Inc. a/k/a A.B., Inc. (Laborers Local 576) Louisville, KY April 17, 2003. 9-CA-39526; JD-45-03, Judge Arthur J. Amchan.

Riverbay Corp., d/b/a Co-Op City and Marion Scott Real Estate, Inc. (Individuals) Bronx, NY April 17, 2003. 2-CA-33290, 33830; JD(NY)-17-03, Judge Eleanor MacDonald.