

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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May 16, 2003

W-2895

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J.K. Pulley Co. (14-RC-12367; 338 NLRB No. 178) St. Louis, MO May 5, 2003. The Board concluded that Robert Soehngen was ineligible to vote in the election held on July 26, 2002 among the Employer's maintenance and production employees, sustained the challenge to Soehngen's ballot, and certified the Petitioner Machinists International as the exclusive collective-bargaining representative. The tally of ballots shows 14 for and 12 against, the Petitioner, with 2 challenged ballots. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the challenge to the ballot of Randy

Sneed and that it is not necessary to count Sneed's ballot as it is not determinative. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the hearing officer that Soehngen, a high school student who began working for the Employer 4 days before the petition was filed, was ineligible to vote because he was a temporary employee who was not included in the unit on the eligibility date. There was no evidence that, at the time he was hired, Soehngen's employment was to continue into the next school year, or even that this prospect was considered or discussed.

The hearing officer also recommended sustaining the challenge to Soehngen's ballot because his status as the nephew of J.K. Pulley President Brian Koch precluded him from sharing a community of interest with other employees. The Board found that this issue was not properly before the hearing officer and that he erred by considering Soehngen's eligibility on this basis.

(Members Liebman, Schaumber, and Acosta participated.)

* * *

Mail Handlers Local 30, a Div. of Laborers (7-CB-12192(P); 338 NLRB No. 179) Detroit, MI May 7, 2003. Members Walsh and Acosta affirmed the administrative law judge's finding that the Respondent violated Section 8(b)(1)(A) of the Act when it failed to inform Vicky Lynn Kaseta of the time of her grievance hearing, and reversed his finding that the Respondent also violated Section 8(b)(1)(A) by charging Kaseta for photocopies of her union files. They wrote: "Contrary to the judge, we find that the Union's action of charging Kaseta for what it believed were duplicative copies of her union files, and imposing the copying charge without first establishing a formal policy for imposing such charges did not breach its duty of fair representation." [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista, concurring, agreed that the Respondent breached its duty of fair representation (DFR) by failing to notify Kaseta of the grievance hearing. The Union argued that, in Section 301 hybrid cases (alleging breach of DFR by union and breach of contract by employer), the plaintiff must show that the grievance outcome was affected by the breach of the DFR. The Chairman noted that Kaseta asked to be notified of the grievance meeting (which resulted in her discipline being upheld albeit reduced from 14 to 8 days) and that the Union failed to explain the lack of notification. After Kaseta complained about exclusion, another meeting was held that Kaseta attended, but the 8-day discipline was still imposed. Chairman Battista wrote in finding the violation:

I believe there is wisdom in harmonizing the law of DFR in Board cases with the law of DFR in hybrid Section 301 cases. However, even accepting that principle, I note that the Union, having breached its DFR in regard to the first meeting was the wrongdoer. It therefore had the duty to disentangle the consequences of its unlawful conduct. The Union has not shown that the result that was reached at the second meeting was not affected by the result reached at the first meeting.

(Chairman Battista and Members Walsh and Acosta participated.)

Charge filed by Vicky Lynn Kaseta; complaint alleged violation of Section 8(b)(1)(A). Hearing at Detroit, April 25-26, 2000. Adm. Law Judge C. Richard Miserendino issued his decision Dec. 26, 2000.

* * *

ATC/Vancom of California, L.P. (31-CA-24875, 25022, 31-RD-1434; 338 NLRB No. 180) Santa Clara, CA May 7, 2003. Affirming the administrative law judge's decision, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act and interfered with the decertification election held in Case 31-RD-1434 by barring Teamsters Local 572 from posting notices on its bulletin board that was established for the Union's use by the parties' collective-bargaining agreement. The judge found that the Employer undermined the Union as the employee bargaining representative, repudiated a contractual clause designed to provide an information system from the Union to the employees, and unilaterally changed its employees' terms and conditions of employment. [\[HTML\]](#) [\[PDF\]](#)

The Board set aside the election held on January 3, 2001 that resulted in 76 votes for the Intervenor (United Transportation

Union), and 10 for Local 572; and remanded Case 31-RD-1434 to the Regional Director to conduct a second election.

The Board agreed with the judge in finding no merit to the Respondent's argument that it was bound by California Government Code Sec. 16645 and thus was required to remove the Union's notices to maintain strict neutrality. It noted that the Respondent's unlawful conduct occurred before the statute went into effect and, in light of this finding, found it unnecessary to pass on the judge's other reasons to reject the Respondent's affirmative defense.

The Respondent would be required to restore the Union's access to the bulletin board in order to comply with the Board's standard cease-and-desist order and in connection with the second election. The Board explained that if, in the future, the Respondent is sued under the cited California statute, based on its actions in compliance with the Board's Order, it may seek reconsideration of the Order and, at that time, amicus briefs would be appropriate. Accordingly, the Board denied the Attorney General of California's motion for leave to file memorandum as amicus curiae, and the General Counsel's motion for leave to file a supplemental memorandum.

(Chairman Battista and Members Liebman and Acosta participated.)

Charges filed by Teamsters Local 572; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles on Oct. 22, 2001. Adm. Law Judge James M. Kennedy issued his decision Dec. 14, 2001.

* * *

Virginia Concrete Corp. (5-RD-1253; 338 NLRB No. 183) Springfield, VA May 9, 2003. Chairman Battista and Member Schaumber overruled *Ellicott Machine Corp.*, 54 NLRB 732 (1944), and held that the withdrawal of an unfair labor practice charge does not operate as a waiver of a party's right to file objections based on the same conduct, stating: [\[HTML\]](#) [\[PDF\]](#)

[W]e find *Ellicott* is inconsistent with current Board law and practice. In *Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118, 1119-1120 (1952), the Board overruled an entire line of cases applying the type of waiver analysis used in *Ellicott*. Specifically, the Board stated that it had 'reconsidered the question whether and when a party should be permitted to object to an election on the basis of conduct of which it had knowledge before the election, if it neither filed charges nor otherwise protested such conduct to the Board until after the election was over.' The Board announced that it would no longer apply a 'rule of estoppel.' Instead, in determining whether to set aside the election, the Board would consider any substantial interference during the critical preelection period, whether or not unfair labor practice charges were filed. The Board plainly stated that the absence of unfair labor practice charges regarding preelection conduct would not operate as a waiver of a party's right to object to that conduct. *Id.* at 1120-1121. The Board explicitly overruled several cases that had found such a waiver, and stated that it was also overruling 'other cases to the same effect.' *Id.* at fn. 6. Although *Ellicott* was not one of the cases listed as being overruled, we consider it a case 'to the same effect.' We now explicitly overrule *Ellicott*

Turning to the facts of this case, Chairman Battista and Member Schaumber overruled the Union's objections and certified the results of a second decertification election held on August 15, 2001, which Teamsters Local 639 lost 97-81. Member Walsh, dissenting in part, joined his colleagues in overruling *Ellicott*, but he disagreed with their overruling of Objection 1, which alleges that the Employer interfered with the election by unilaterally granting a 50-cent wage increase. He would sustain this objection, order a third election, and find it unnecessary to pass on the Union's other objections.

The Union lost the first decertification election and filed objections. While the objections were pending, the Employer unilaterally announced and implemented a 50-cent wage increase. The Union filed and later withdrew an unfair labor practice charge, alleging that the wage increase violated Section 8(a)(1). The Employer sent a letter to employees notifying them of the Union's charge. The Board sustained two of the Union's objections to the first election and ordered a second election. 334 NLRB No. 105 (2001). The Employer distributed a memorandum notifying employees of the Board's decision and urging them to vote no in the second election. The Union filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(1) by telling employees that the Union had filed charges to take away the pay increase, but it withdrew this charge shortly before the second election.

In his original report, the administrative law judge recommended sustaining four of the Union's objections to the second election, overruling two others, and ordering a third election. The Board remanded the case the judge to consider the Employer's posthearing brief, which was timely filed but never received by the judge. In a supplemental report, the judge affirmed his original findings, including that the Employer interfered with the election by bypassing the Union in granting the 50-cent wage increase, failing to recognize the Union as the exclusive bargaining representative (Objection 5), telling employees that the Union had filed charges to take away their wage increase (Objection 2), and sending an electronic "Vote No" message to employees' trucks within 24 hours before the election (Objection 4).

The Employer filed exceptions arguing, among others, that conduct, which is the subject of a withdrawn unfair labor practice charge, cannot be the basis for an objection, relying on *Ellicott*, in which the Board stated: "[W]here charges are withdrawn without prejudice to facilitate the determination of a representation proceeding, we shall treat the withdrawal of the charges without prejudice as an automatic waiver by the petitioning union of the right to use the subject matter of those charges as a basis for objections to the election." *Id.* at 735.

(Chairman Battista and Members Schaumber and Walsh participated.)

* * *

Somerville Construction Co., a sole proprietorship, and its alter ego HI-TK, LLC, et al. (25-CA-25276; 338 NLRB No. 182) Indianapolis, IN May 9, 2003. The Board held that Respondent Somerville Construction Co., a sole proprietorship, and Respondent HI-TK, LLC, are alter egos and a single employer within the meaning of the Act and that they constitute a single integrated business enterprise that is jointly and severally liable to remedy the unfair labor practices that Respondent Somerville committed as found at 327 NLRB 514 (1999)). It ordered that Respondents Somerville and HI-TK, LLC pay to the individuals set forth in Appendix A of the administrative law judge's decision a total of \$2,852,389 (\$1,499,941 in backpay and \$1,352,448 in fringe benefits). [\[HTML\]](#) [\[PDF\]](#)

The judge, in his supplemental decision, set forth findings of fact and a recommended Order based on the parties' joint stipulation resolving all issues in the compliance specification. The Board modified the judge's findings of fact and recommended Order to provide, in accordance with the parties' agreement (1) that Somerville and HI-TK are alter egos and a single employer within the meaning of the Act and that, as a single-integrated business enterprise, they are jointly and severally liable for Somerville's unfair labor practices; and (2) that, in the event any of the individual discriminatees cannot be located within 1 year from the date of the judge's decision, the money due such individuals, will be distributed to the other discriminatees named in Appendix A consistent with the Board's standard practice and procedure.

(Members Schaumber, Walsh, and Acosta participated.)

Hearing at Indianapolis on Nov. 12, 2002. Adm. Law Judge Robert A. Pulcini issued his supplemental decision Jan. 15, 2003.

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Folsom Ready Mix, Inc. (32-CA-19801; 338 NLRB No. 181) Rancho Cordova, CA May 9, 2003. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (3) of the Act by engaging in a number of coercive and threatening activities, including an attempt by vice president and operations manager Randy Barnes to hit two union organizers with his pick-up truck when they were leafleting on the sidewalk near the driveway entrance to the Respondent's plant. The Respondent also terminated truck driver Robert Lahn for union activities and engaged in unlawful surveillance of union activities. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Walsh and Acosta participated.)

Charge filed by Teamsters Local 150; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Sacramento on Dec. 17, 2002. Adm. Law Judge John J. McCarrick issued his decision Feb. 10, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Dolgenercorp, Inc. a wholly owned subsidiary of Dollar General Corporation (Teamsters Local 833) Columbia, MO May 2, 2003. 17-CA-21851; JD(SF)-29-03, Judge Albert A. Metz.

Production and Maintenance Union Local 101 (an Individual) Chicago, IL May 5, 2003. 13-CB-17108-1; JD-53-03, Judge Robert A. Giannasi.

Promedica Health Systems, Inc. (Auto Workers [UAW]) Toledo, OH 8-CA-31818, 32345, 8-RC-16175, 16176; JD-52-03, Judge Earl E. Shamwell.

CCC Group, Inc. (Operating Engineers Local 925) Bartow, FL May 7, 2003. 12-CA-21800; JD(ATL)-30-03, Judge John H. West.

Robert Orr/Sysco Food Services, LLC (Teamsters Local 480) Nashville, TN May 9, 2003. 26-CA-20384, et al.; JD(ATL)-12-03, Judge Jane Vandeventer.

Hospital Dr. Susoni, Inc. (Unidad Laboral de Enfermeras (os) Empleados de la Salud) Arecibo, PR May 9, 2003. 24-CA-9160; JD(ATL)-22-03, Judge William N. Cates.