

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 30, 2003

W-2897

CASES SUMMARIZED

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Solutia, Inc. (15-CA-16604; 339 NLRB No. 9) Cantonment, FL May 19, 2003. The Board, in agreeing with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by barring off-duty employees from distributing union literature in the employees' parking lot, rejected the Respondent's argument that its misconduct, which occurred on May 11, 2002, was de minimis because the effect of the violation was limited to that date. [\[HTML\]](#) [\[PDF\]](#)

The Board pointed out that the Respondent never effectively repudiated its misconduct and that it was reasonable to infer that the misconduct had a continuing chilling effect on employees' exercise of their Section 7 rights. It noted that the parking lot

distributions were not attempted again until the following week when there was a single instance of distributions by unidentified individuals on May 19, 2002 and the Respondent and Union did not reach agreement on the conditions for further parking lot distributions until May 28, 2002.

The Board agreed that the Respondent failed to establish a business justification for prohibiting the handbilling and disavowed any suggestion that the business-justification defense under *Tri-County Medical Center*, 222 NLRB 1089 (1976), is unavailable if the employer lacks a specific no-solicitation rule. See *Nashville Plastic Products*, 313 NLRB 462 (1993) (rule nonexistent prior to handbilling). Chairman Battista and Member Acosta did not pass on the Respondent's argument that the Board should return to the standard in *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), but they noted that even under that standard, the Respondent's conduct in permitting spouses and outside vendors access to the parking lot, while excluding the off-duty employees involved here violated Section 8(a)(1).

(Chairman Battista and Members Liebman and Acosta participated.)

Charge filed by Electrical Workers IBEW Local 676; complaint alleged violation of Section 8(a)(1). Hearing at Pensacola on Nov. 12, 2002. Adm. Law Judge George Carson II issued his decision Dec. 4, 2002.

* * *

Jack in the Box Distribution Center Systems (19-CA-27597; 339 NLRB No. 5) Algona, WA May 19, 2003. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Scott Miller and Douglas Carnahan because they engaged in union or other protected concerted activity, and Section 8(a)(1) by maintaining a provision in its employee handbook that prohibits employees from providing information or giving testimony to governmental agencies without the Respondent's approval. [\[HTML\]](#) [\[PDF\]](#)

Having found merit in the General Counsel's cross-exceptions to the judge's failure to extend the remedy for the unlawful manual provision to the six additional distribution sites where the same provision was maintained, the Board required that the rescission of the provision and the posting of the notice be coextensive with the Respondent's application of its handbook at all its distribution centers. Specifically, it ordered the Respondent to rescind the provision entitled "Inquiries by Government Representative" in its employee handbook that prohibits employees from providing information or testimony to governmental agencies without approval from the Respondent, to modify the handbook by deleting the unlawful provision, and to post an appropriate Board notice to employees at all its centers where the handbook has been or is in effect.

The Board found no merit to the General Counsel's exception to the judge's failure to find that the statement by Respondent's manager, Greg Martinez, that the Respondent would close the company and deliver out of California if there was a threat of union organizing, violated Section 8(a)(1). The Board noted that counsel for the General Counsel specifically stated at the hearing that this evidence was being offered as background evidence of animus. It added that the statement was neither alleged as a violation of Section 8(a)(1) in the complaint nor was there an amendment to the complaint at the hearing and, accordingly, the Respondent was not put on notice that the conduct was being attacked as unlawful.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Douglas Carnahan, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Seattle, Jan. 28-31, 2002. Adm. Law Judge Lana H. Parke issued her decision April 5, 2002.

* * *

Wal-Mart Stores, Inc. (28-CA-16831, et al.; 339 NLRB No. 10) Las Vegas, NV May 19, 2003. The Board agreed with counsel for the General Counsel that the administrative law judge did not have the discretion to allow Respondent's counsel to retain pretrial statements taken from various Government witnesses, provided pursuant to Section 102.118(b) of the Board's Rules and Regulations or so-called *Jencks* statements, beyond the close of the hearing. *Jencks Act*, 18 U.S.C. 3500 (1957). See also *Jencks v. U.S.*, 353 U.S. 657 (1957). The Board ordered the Respondent's counsel to return to counsel for the General Counsel all copies of the statements and attachments thereto within 14 days of service of its decision. Counsel must certify that all

copies have been returned and must certify the names of those with whom he/she has shared the statements. [\[HTML\]](#) [\[PDF\]](#)

Subsection 102.118(b)(1) of the Board's Rules and Regulations states in relevant part:

. . . after a witness called by the General Counsel or by the charging party has testified in a hearing . . . the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

At the conclusion of the hearing, counsel for the General Counsel requested the judge to order the Respondent's counsel to return all pretrial statements provided to him pursuant to Section 102.118(b). Respondent's counsel claimed it needed the statements for any appeals. The judge closed the hearing, suggested the parties resolve the issue among themselves, and indicated he would entertain a posthearing motion if there were no resolution. The parties did not reach agreement and counsel for the General Counsel filed a motion with the judge seeking the return of the statements.

In his decision, the judge noted that the purpose of producing statements is their use in cross-examination, but he said he did not read Section 102.118(b) "to limit respondent's use of statements to cross-examination." Concluding that he had discretion to allow retention, the judge found on balance that the Respondent's need for continued access to preserve and prosecute its case outweighed the General Counsel's concern for potential misuse if counsel retained the statements. Counsel for the General Counsel filed exceptions to the judge's decision on this issue and a separate motion requesting the immediate return of the statements. The Respondent filed an opposition.

The Board held in granting the General Counsel's motion:

Section 102.118 of the Board's Rules and Regulations is a prohibition on the release of Board and General Counsel files without permission. Subsection 102.118(b)(1) is a specific exception to that prohibition. It provides for the release of a witness statement, after that witness has testified, for use in cross-examination of that witness. The Rule, thus, embraces the *Jencks* requirement. After that limited purpose is served, the exception no longer applies and the prohibition of the Rule is restored.

In our view, the plain meaning of Section 102.118(b) . . . limits the purpose of disclosure to cross-examination. No other purpose is stated, nor is there any hint that disclosure may be for other uses. Had the Board intended for additional uses, it would have stated those uses in the Rule or provided for them through its decision. Further, allowing respondents to retain statements until the close of the hearing should not be construed to expand the stated purpose of disclosure. It merely facilitates the hearing in the event the affiant is recalled.

The Board declined to expand the stated purpose of disclosure provided in Section 102.118(b), finding the Respondent's reasons for retention of the statements were unpersuasive.

(Chairman Battista and Members Liebman and Walsh participated.)

* * *

Southwest Regional Council of Carpenters (28-CD-257; 339 NLRB No. 8) Las Vegas, NV May 19, 2003. The Board decided that employees of Benly, Inc. represented by the Southwest Regional Council of Carpenters, and not Painters Local 159, are entitled to the work at the Mandalay Bay Convention Center, Las Vegas, NV, of the touch up and preparation of glass-reinforced gypsum (GRG) and wood product work. [\[HTML\]](#) [\[PDF\]](#)

The Board based its award on the factors of employer preference, employer past practice, area practice, and economy and efficiency of operation. Regarding the latter factor, the Employer's project manager testified that employees represented by the Carpenters can be cross-utilized to perform all the tasks which must be performed in installing the products. In contrast, the

witness testified employees represented by the Painters have historically been used for only one task-faux finishing (or, if light touch up and preparation is included, at most two tasks). The Employer contended that, if the disputed work was assigned only to Painters-represented employees, not only would the painters frequently be idle, when not performing the faux finish work, but also the Employer would frequently need to hire additional employees represented by the Carpenters to perform various tasks that Painters-represented employees are unable or unauthorized to perform.

(Chairman Battista and Members Liebman and Acosta participated.)

* * *

Reliant Energy aka Etiwanda, LLC (31-CA-25155, 31-RC-8023; 339 NLRB No. 13) Etiwanda, CA May 22, 2003. The Board denied the Respondent's motion seeking to file a supplemental brief in a pending case, based on a recent decision by a United States court of appeals and clarified its current practice on this issue, explaining: [\[HTML\]](#) [\[PDF\]](#)

[W]e will permit parties in unfair labor practice cases and in representation cases to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed. A party may promptly advise the Executive Secretary by letter, with a copy to all other parties. The letter should set forth the case citations and state the reasons for them, and refer to the pages, paragraphs, and lines of the brief to which the citations apply. The body of the letter must not exceed 350 words. The other parties may file a similarly limited response. That response must be filed in unfair labor practice cases no later than 14 days, and in representation cases no later than 7 days, after service of the letter, and no extensions will be granted to file the response.

By adopting this procedure, we do not suggest that, in appropriate situations, the Board no longer will grant special leave for supplemental briefs. Nor does it in any way affect the Board's discretion to solicit the filing of supplemental briefs, sua sponte, for any reason it deems appropriate.

The Board modeled this procedure after Rule 28(j): Citation of Supplemental Authorities of the Federal Rules of Appellate Procedure, which states:

If pertinent and significant authorities come to a party's attention after the party's brief has been filed-or after oral argument but before decision-a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

The Board invited the Respondent to resubmit its citation of additional authority in conformity with its clarified procedure. In denying the Respondent's motion to file a supplemental brief, it saw no circumstances to warrant "special leave" to file such a brief. See Section 102.46 of the Board's Rules and Regulations.

(Chairman Battista and Members Liebman and Schaumber participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Carpenters Locals 1827, 1506, and 209 and Mountain West Regional Council of Carpenters (UPS) Las Vegas, NV May 9, 2003. 28-CC-933, et al.; JD(SF)-30-03, Judge Lana H. Parke.

Disneyland Park and Disney's California Adventure (Iron Workers Local 433) Anaheim, CA May 15, 2003. 21-CA-35222; JD(SF)-31-03, Judge Lana H. Parke.

Climatemp Air Conditioning Co., Inc. (Sheet Metal Workers Local 44) Kingston, PA May 21, 2003. 4-CA-31251, 31514; JD-

57-03, Judge Eric M. Fine.

Croft Metals, Inc. (an Individual and Boilermakers) McComb, MS May 22, 2003. 15-CA-16520, 16698; JD(ATL)-34-03, Judge John H. West.

Leading Edge Aviation Services, Inc. (an Individual) Greenville, SC May 22, 2003. 11-CA-19783; JD(ATL)-35-03, Judge Margaret G. Brakesbusch.

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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 file an answer to the complaint.)

Shelbyville Mixing Center, Inc. (Teamsters Local 89) (9-CA-39593; 339 NLRB No. 11) Shelbyville, KY May 20, 2003.