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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June 13, 2003 W-2899

CASES SUMMARIZED

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Bloomington-Normal Seating Co. (33-CA-13769; 339 NLRB No. 30) Normal, IL June 3, 2003. Affirming the administrative law judge's findings, as modified, the Board held that the Respondent, by threatening an employee with discharge because of his union activities and by telling employees to inform the Respondent if any employees were harassed about signing a union card, violated Section 8(a)(1) of the Act. [HTML] [PDF]

The Respondent excepted to the judge's "unsupported finding" that it violated Section 8(a)(1) "by requesting employees to report attempts by other employees to solicit union authorization cards on behalf of the Union." The Board agreed that the evidence showed only that the Respondent's production manager, in the course of an antiunion speech, asked the employees to "let [the Respondent] know about it" if they were "threatened or harassed about signing a union card." It also agreed with the judge however that the Respondent thereby invited employees to inform it of protected, although unwanted, authorization card solicitations by other employees. Because of the potential for chilling legitimate union activity, the Board found such conduct unlawful and modified the language of the Order and the notice to conform to the precise allegation of the complaint.

Member Schaumber would add that the request was unlawfully overbroad because it failed to distinguish between solicitation activity that is protected¾even though persistent and subjectively disliked by a targeted employee¾and solicitation activity that is unprotected because it interferes with work or contravenes a legitimate nondiscriminatory rule against workplace harassment.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Laborers Local 362; complaint alleged violation of Section 8(a)(1). Hearing at Peoria on June 11, 2002. Adm. Law Judge David L. Evans issued his decision Aug. 27, 2002.

* * *

Denver Stage Employees IATSE Local 7 (27-CB-4028; 339 NLRB No. 33) Denver, CO June 6, 2003. The Board held, on the recommendation of the administrative law judge, that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by operating an exclusive hiring hall by making referrals without reference to objective criteria, and by failing and refusing to refer Carole Miron without reference to objective criteria. It agreed with the judge's conclusion that the Respondent's hiring hall rules are arbitrary and that Miron was unlawfully denied employment based on discredited reasons. [HTML] [PDF]

Members Schaumber and Walsh denied the General Counsel's request that Respondent be ordered to put newly promulgated, objective hiring hall criteria in writing. Instead, they allowed the Respondent an opportunity to establish referral criteria and standards that conform to the requirements of the Act, without, however, requiring that they also be in writing. See *Stage Employees IATSE Local 646 (Parker Playhouse),* 270 NLRB 1425 (1984).

Member Acosta disagreed only with his colleagues' decision not to grant the General Counsel's request that Respondent be ordered to promulgate and maintain written objective criteria for the operation of its exclusive hiring hall. He said:

> Although the absence of written standards is a factor to be considered when determining whether a hiring hall is operated objectively, I note that the absence is not itself an unfair labor practice. *Stage Employees IATSE Local 646 (Parker Playhouse),* 270 NLRB 1425 (1984). Nevertheless, in the circumstances of this case, I agree with the General Counsel that requiring the Respondent, for a period of years, to establish and maintain written objective criteria for the operation of its hiring hall would be a reasonable exercise of the Board's remedial authority. See *Federated Department Stores,* 287 NLRB 951 (1987).

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Carole A. Miron, an Individual; complaint alleged violation of Section 8(b)(1)(A) and (2). Hearing at Denver, Feb. 20-21, 2001. Adm. Law Judge Albert A. Metz issued his decision July 6, 2001.

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Felix Industries, Inc. (2-CA-29785; 339 NLRB No. 32) Lincolndale, NY June 3, 2003. Members Liebman and Walsh, pursuant to a remand from the U.S. Court of Appeals for the District of Columbia Circuit, found that employee Salvatore Yonta did not lose the protection of the Act by his profane outburst at Supervisor Felix Petrillo during their conversation about Yonta's alleged right to night differential pay under the collective-bargaining agreement, and that Yonta's discharge violated Section 8(a)(1) of the Act. Chairman Battista dissented. [HTML] [PDF]

The Board, in the original decision (331 NLRB 144 (2000)), applied the factors set forth in *Atlantic Steel Co.,* 245 NLRB 814 (1979), for determining whether an employee who is otherwise engaged in protected activity loses the protection of the Act by opprobrious conduct. The four factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employers unfair labor practice. The Board found that none of the factors weighed in favor of Yonta losing the protection of the Act. The court, however, reversed the Board's finding with respect to the third factor, finding that Yonta denounced his supervisor in "obscene, personally-denigrating, [and] insubordinate terms," and remanded the case to determine whether the nature of the outburst sufficiently outweighed the other factors so as to tip the balance in favor of Yonta losing the protection of the Act.

The majority found that Yonta was provoked by Petrillo's overt hostility, which included a threat of termination for engaging in protected activity, and held that substantial weight must be given to the circumstances that provoked Yonta's outburst. Prior to this outburst, there was no basis to find that Yonta engaged in any inappropriate conduct in discussing the merits of his wage claim. Accordingly, they found that Yonta did not lose the protection of the Act during his conversation with Petrillo, and reaffirmed the Board's original finding that his discharge violated Section 8(a)(1).

In his dissenting opinion, Chairman Battista stated that Yonta's outburst constitutes outrageous conduct, and outweighs the other factors. He said "an analysis of the *Atlantic Steel* factors shows that Yonta engaged in outrageous misconduct and that the nature of his outburst weighs heavily towards Yonta losing the protection of the Act. Although two *Atlantic Steel* factors--have subject matter of the discussion and the provocation by unfair labor practices--have been found to weigh in favor of the Act's protection, they are insufficient to overcome the substantial weight given to Yonta's outburst." Accordingly, he found that the Respondent's discharge of Yonta did not violate Section 8(a)(1).

(Chairman Battista and Members Liebman and Walsh participated.)

* * *

Property Markets Group, Inc. (2-CA-34269; 339 NLRB No. 31) New York, NY June 6, 2003. In agreement with the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by threatening Nadya Gervitz with discharge because of her activities on behalf of SEIU Local 32B-32J; and Section 8(a)(3) and (1) by refusing to allow Gervitz to cover for absent employees, to the extent previously allowed, issuing Gervitz and Kazimierz Jagielo warning letters, compelling Jagielo to work a double shift, and refusing to grant Gervitz and Jagielo Christmas bonuses, all because of their union membership and activities in support of the Union. [HTML] [PDF]

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Kazimierz Jagielo, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York, July 15-16, 2002. Adm. Law Judge Jesse Kleiman issued his decision Nov. 13, 2002.

* * *

Terracon, Inc. (13-CA-39181, et al.; 339 NLRB No. 35) Naperville, IL June 6, 2003. The Board concluded that the Respondent did not voluntarily recognize Operating Engineers Local 150 as the bargaining representative of its employees and, therefore, reversed the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(5) of the Act by withdrawing recognition from the Union and unilaterally changing the work hours of the employees without bargaining with the Union. [HTML] [PDF]

The principal issue in this case is whether the Respondent, through the words and conduct of two alleged supervisors (office

manager Maroun Mousallem and Illinois regional manager Keith Jefferis) voluntarily recognized the Union as the bargaining representative of its drillers and helpers.

Relying on *Richmond Toyota,* 287 NLRB 130 (1987), the judge found that Mousallem, in reviewing materials proffered by the Union and his remarks that Jefferis would meet with them, demonstrated a "commitment to bargain" with the Union. He found that Jefferis' subsequent discussions with the Union reaffirmed the Respondent's commitment to bargain and constituted actual bargaining with the Union. The Board disagreed, noting that it is undisputed that neither Mousallem nor Jefferis conceded the Union's majority status or made any express remarks connoting an intent to recognize the Union. It found that the Respondent's actions simply represented its efforts to educate itself about the Union's purported purpose and to assess whether or not it should grant recognition to the Union.

The judge dismissed, with Board approval, that portion of the complaint alleging that the Respondent violated Section 8(a)(1) by denying employee Eliezer Rodriquez' request for the presence of another employee, Hector Caballero, at an interview, that according to the General Counsel had the potential to result in discipline. The judge relied on the Respondent's witnesses' credited testimony that Rodriquez in fact had not requested the presence of Caballero at the interview. Finding no basis to reverse the judge, the Board affirmed his finding and dismissal of the 8(a)(1) allegation.

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by interrogating employees about their membership in, or activities on behalf of the Union, warning employees that their union activities would be futile, and threatening them that the Respondent would close its Naperville, Illinois facility, because of their union activities.

(Chairman Battista and Members Liebman and Acosta participated.)

Charge filed by Operating Engineers Local 150; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Chicago, Jan. 28-Feb 1, 2002. Adm. Law Judge David L. Evans issued his decision on May 21, 2002.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Carpenters Local 897 (an Individual) Las Vegas, NV May 29, 2003. 28-CB-5791; JD(SF)-36-03, Judge James L. Rose.

H & N Fish International d/b/a H & N Fish Co. (Teamsters Local 853) San Francisco, CA May 28, 2003. 20-CA-30480, et al.; JD(SF)-32-03, Judge John J. McCarrick.

Suntory Water Group, Inc. d/b/a Crystal Springs Water Co. (Teamsters Local 385) Orlando, FL June 4, 2003. 12-CA-22468-1; JD(ATL)-39-03, Judge William N. Cates.

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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 issues that are litigable in the unfair labor practice proceeding.)

City Wide Insulation of Madison, Inc. d/b/a Builders' Insulation, Inc. (Milwaukee & Southern Wisconsin Regional Council of Carpenters) (30-CA-16393-1; 339 NLRB No. 34) Germantown, WI June 3, 2003.