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

Index of Back Issues Online

June 27, 2003 W-2901

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

OTHER CONTENTS

weekly note

Buckeye Electric Co. (9-CA-39021; 339 NLRB No. 42) Dayton, OH June 18, 2003. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with more onerous working conditions because of their support of the Union and Section 8(a)(3) and (1) by discriminatorily discharging Tim McCoy because of his support of and membership in the Electrical Workers IBEW Local 1105. [HTML] [PDF]

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Electrical Workers IBEW Local 1105; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Dayton on May 30, 2002. Adm. Law Judge Earl E. Shamwell Jr. issued his decision July 31, 2002.

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Chemical Workers Local 6-0682 (7-CB-13325; 339 NLRB No. 37) Kalamazoo, MI June 16, 2003. The Board agreed with the administrative law judge that the Respondent Union violated Section 8(b)(3) of the Act by failing and refusing to bargain in good faith with the Charging Party Employer. It found it unnecessary to pass on the judge's alternative holding that the Union worded its March 18, 2002 notice to amend the collective-bargaining agreement so broadly that it actually constituted a notice to terminate the contract. [HTML] [PDF]

The Union sought to have all complaint allegations resolved pursuant to the grievance-arbitration procedure of its collective-bargaining agreement with the Employer. The judge rejected the Union's contention that the Board's decision in *Tri-Pak Machinery, Inc.,* 325 NLRB 671 (1998), compels a finding of deferral in this case. The Board noted that in Tri-Pak, unlike here, the charging party union had a right to invoke the parties' broad arbitration procedure, thereby ensuring that a mutually agreed-upon dispute resolution procedure existed to arbitrate the contract dispute. By contrast, as noted by the judge, deferral here was inappropriate because the Employer had no ability to invoke the grievance procedure to resolve the contract dispute.

(Chairman Battista and Members Liebman and Acosta participated.)

Charge filed by Checker Motors Corp.; complaint alleged violation of Section 8(b)(3). Hearing at Kalamazoo on Oct. 3, 2002. Adm. Law Judge William N. Cates issued his decision Dec. 12, 2002.

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Townley Sweeping Service, Inc. (22-AO-00001; 339 NLRB No. 41) Elizabeth, NJ June 16, 2003. The Board denied Petitioners Abdul Saquar and Tony "Jamal" McRiney's petition for advisory opinion as to jurisdiction over the subject matter of a complaint filed with the Superior Court of New Jersey alleging wrongful termination and defamation by the Employer. In denying the petition for advisory opinion, the Board said: [HTML] [PDF]

> Sections 102.98 and 102.99 of the Board's Rules and Regulations permit a state or territorial agency or court, but not parties to state proceedings, to file a petition for an advisory opinion with the Board on the limited question whether the Board would decline to assert jurisdiction based either on its commerce standards or because the employer is not within the jurisdiction of the Act. Those sections do not provide for advisory opinions on: one, whether particular conduct is protected or prohibited by the Act; or two, whether a State court lacks jurisdiction over a dispute under the principles of *Garmon* [*San Diego Bldg. Trades Council v. Gamon,* 359 U.S. 236 (1959)] preemption.
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> Under the aforementioned Rules, the individual petitioners cannot petition on their own behalf for an advisory opinion. To the extent the individual petitioners here are acting at the behest of the Superior Court of New Jersey, we need not reach the issue as to whether such a petition is cognizable under our Rules as the petition must be denied in any event. The jurisdictional commerce facts set forth in the petition raise an issue repeatedly addressed in numerous prior Board opinions and decisions, so no advisory opinion is necessary. To the extent the Superior Court, through the parties, seeks an opinion on whether their dispute is cognizable under the Act, and/or whether the court lacks jurisdiction over the dispute under the principles of *Garmon* preemption, we adhere to the position that such issues are not properly addressed by the Board in an advisory opinion.

The Employer filed an answer to the complaint and motion for summary judgment in the state court proceeding, contending, among others, that the Petitioners' State court action was preempted by the NLRA under the principles set forth in Garmon. On September 18, 2002, the court issued an order dismissing the complaint in its entirety without prejudice and provided that the Petitioners would have 45 days to file a request for advisory opinion with the Board.

The Petitioners contended that the wrongful discharge and common law defamation claims are not preempted by Federal labor law. In its response, the Employer requested that the Board issue an opinion that jurisdiction would lie with the NLRB based on the facts.

(Members Liebman, Schaumber, and Walsh participated.)

* * *

Double D Construction Group, Inc. (12-CA-21951, 12-RC-8709; 339 NLRB No. 48) Miami, FL June 17, 2003. In the absence of exceptions, the Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Dean Martindill and Section 8(a)(1) by engaging in various threatening and coercive conduct and statements. It set aside the results of the second election in Case 12-RC-8709, severed the representation case from the unfair labor practice proceeding, and remanded Case 12-RC-8709 to the Regional Director for further appropriate action. [HTML] [PDF]

The General Counsel excepted to the judge's failure to find that the Respondent violated Section 8(a)(1) by virtue of a statement made to employee Tomas Sanchez (Respondent's thrice-repeated statement "Remember your bills delivered with finger-pointed emphasis) and the judge's dismissal of the 8(a)(3) allegation that the Respondent unlawfully discharged Sanchez.

Members Liebman and Acosta, with Member Acosta writing a separate concurring opinion, reversed the judge and held that the statement made to employee Tomas Sanchez violated Section 8(a)(1). With respect to Sanchez' discharge, they said the judge erred in discrediting Sanchez on the basis of his use of a false Social Security number alone and failed to take into account Sanchez' later acquisition of a valid number. The majority did not adopt the judge's finding that the Respondent lacked knowledge of Sanchez' participation in protected union activity and ordered that he reconsider his alternative basis for dismissing the 8(a)(3) allegation: his finding that Sanchez suffered no adverse employment action. They remanded to the judge the matters of credibility as they relate to the 8(a)(3) allegation involving Sanchez and directed that he issue a supplemental decision on the merits of that allegation. The majority ordered that the final disposition of all other issues be held in abeyance pending receipt of a supplemental decision from the judge.

In his concurring opinion, Member Acosta said he wrote separately to express his disagreement with the judge's reasoning to discredit Sanchez' testimony and to emphasize the consequences that could result were the judge's holding permitted to stand. Citing *Sure-Tan, Inc v. NLRB,* 467 U.S. 883, 892 (1984), he said undocumented workers are statutory employees entitled to the rights guaranteed by Section 7 of the Act. He found the judge's reasoning would deny undocumented workers their Section 8 protections and effectively discredit the testimony of any once-undocumented worker, who to obtain work provided a false Social Security number.

Dissenting in part, Member Schaumber disagreed with his colleagues that a judge errs if he discredits the testimony of an employee, "solely" because the employee provided fictitious numbers as a social security number to obtain a job. He said that a judge has the discretion pursuant to the Federal Rules of Evidence which govern our procedures and consistent with extant Board law, to disregard the testimony of witness for a prior act of falsification.

Member Schaumber believes the rule the majority adopted, while well intentioned, threatens to lower the bar on the degree of truth and honesty to be expected in Board proceedings. He deemed: (I) the majority's decision inconsistent with the longstanding principle of judicial restraint; (II) the remand order is unnecessary because the General Counsel failed to satisfy his burden of proof under Wright Line without regard to Sanchez' discredited testimony; (III) the judge did not rely solely on Sanchez' providing a false Social Security number to discredit his testimony as the majority claims; and (IV) the credibility determination the majority reverses constituted a proper exercise of judicial discretion by the judge. Accordingly, Member Schaumber dissented from the majority's decision reversing the judge's credibility determination and remanding the 8(a)(3) allegation involving Sanchez for him to consider.

(Members Liebman, Schaumber, and Acosta participated.)

Charge filed by Ironworkers Local 272; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Miami on July 29, 2002. Adm. Law Judge Keltner W. Locke issued his decision Sept. 10, 2002.

* * *

Metaldyne Corp. (8-RC-16460; 339 NLRB No. 43) Twinsburg, OH June 20, 2003. The Board, agreeing with the hearing officer, set aside an election held on October 31, 2002 on the basis of the portion of Petitioner's Objection 11 alleging that, during the critical period, the Employer solicited grievances and promised to remedy them. Teamsters Local 507 lost the election by a 110-54 vote. [HTML] [PDF]

Objection 11 also alleged that the Employer engaged in objectionable conduct by promulgating and enforcing an overly broad solicitation/distribution rule. The hearing officer did not find the rule overly broad, but she found that the Employer engaged in objectionable conduct by discriminatorily enforcing an "otherwise lawful" solicitation/distribution rule. No exceptions were filed to the hearing officer's finding that the rule was "otherwise lawful." The Board agreed with the hearing officer that the discriminatory enforcement of the policy was objectionable. In rejecting the Employer's argument that its discriminatory enforcement of the solicitation/distribution rule was de minimis and did not warrant setting aside the election, the Board relied on the standard set forth in *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995), and found that the Employer's misconduct, taken as a whole, warranted a new election because it had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election."

The Board found it unnecessary to pass on the hearing officer's findings and recommendations regarding that portion of Objection 1 relating to alleged promises of 401(k) benefit improvements. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the portion of Objection 1 relating to an alleged threat of plant closure.

(Chairman Battista and Members Schaumber and Walsh participated.)

* * *

Guard Publishing Co. d/b/a The Register-Guard (36-CA-8919-1; 339 NLRB No. 47) Eugene, OR June 20, 2003. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing new sales commissions for employees selling two types of newspaper advertisements during negotiations for a new collective-bargaining agreement in the absence of overall impasse on the entire agreement. The Board held that the new commissions represented a change in employee wages, and therefore were a mandatory subject of bargaining and that the Respondent's unilateral change was unlawful because it was material, substantial, and significant. It wrote: [HTML] [PDF]

> Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes in terms and conditions of employment "extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse in bargaining for the agreement as a whole." *RBE Electronics of S.D., Inc.,* 320 NLRB 80, 81 (1995), see also *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).
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> The Board has recognized two limited exceptions to this rule: "when economic exigencies compel prompt action," and when a union, "in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." Bottom Line, supra at 374 (quoting *M&M Contractors,* 262 NLRB 1472 (1982), review denied 707 F.2d 516 (9th Cir. 1983)); see also RBE supra at 81. The Respondent does not argue that economic exigencies required it to implement the new commissions, and the evidence does not show that the Union engaged in delay tactics.

The Board rejected the Respondent's defenses that the new commissions were a continuance of past practice and therefore did not change the status quo, that the dispute is solely a matter of contract interpretation, and that the allegations are time-barred by Section 10(b).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Eugene Newspaper Guild, CWA Local 37194; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Eugene on April 30, 2002. Adm. Law Judge Jay R. Pollack issued his June 27, 2002.

* * *

Teamsters Locals 391 and 71 (11-CB-3101, 3102; 339 NLRB No. 46) Concord, NC June 19, 2003. The Board adopted the administrative law judge's recommendation and dismissed the complaint allegations that the Respondents violated Section 8(b)(1)(A) and 8(b)(2) of the Act by refusing to refer three individuals to jobs pursuant to an exclusive hiring hall arrangement, operating its exclusive hiring hall in an arbitrary and discriminatory manner, and failing fairly to represent the individuals. [HTML] [PDF]

In exceptions, the General Counsel argued that the Respondent unlawfully refused to refer Jim Seitz, Raymond Andel, and Hazel Maddocks to work on the Employer's Concord, N.C. pipeline project and, alternatively, even if the Respondents operated a non-exclusive hiring hall on that project, the Respondents unlawfully refused to refer the alleged discriminatees because Seitz had engaged in protected activity. The Board found that the evidence failed to establish that the Respondents operated an exclusive hiring hall on the Employer's project or that the parties agreed that the Respondents would be the sole source of any specific percentage of referrals. It noted there was no exception filed to the judge's finding that there was no collective-bargaining agreement between the parties that provided for an exclusive hiring hall.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Jim Seitz, an Individual; complaint alleged violation of Section 8(b)(1)(A) and 8(b)(2). Hearing at Concord, Oct. 24 and 25, 2002. Adm. Law Judge Jane Vandeventer issued her decision Feb. 26, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Joseph Chevrolet, Inc. (Operating Engineers Local 324) Millington, MI June 16, 2003. 7-CA-45211; JD-67-03, Judge Bruce D. Rosenstein.

Inter-Regional Disposal & Recycling, Inc., a successor to Denville Disposal, t/a Carmine Forgione & Sons, Inc. (Teamsters Local 945) Riverdale, NJ June 16, 2003. 22-CA-25305; JD(NY)-29-03, Judge D. Barry Morris.

Roger D. Hughes d/b/a Roger D. Hughes Drywall (Carpenters Local 751) Santa Rosa, CA June 13, 2003. 20-CA-30729, et al.; JD(SF)-41-03, Judge Burton Litvack.

Hospital General Menonita (Federacion Central de Trabajadores Local 481) Cayey, PR June 17, 2003. 24-CA-9051, et al.; JD-66-03, Judge David L. Evans.

Downtown Hartford YMCA (Service Employees Local 32BJ, District 531) Hartford, CT June 19, 2003. 34-CA-10011, et al.; JD(NY)-26-03, Judge Michael A. Marcionese.

J. F. Kiely Construction Co. (Utility Workers Local 409) Long Branch, NJ June 20, 2003. 22-CA-25376; JD(NY)-32-03, Judge D. Barry Morris.

Labinal, Inc. (an Individual) Pryor Creek, OK June 20, 2003. 17-CA-22024; JD(ATL)-44-03, Judge John H. West.

Lincoln Center for the Performing Arts, Inc. (Hotel & Restaurant Employees Local 100) New York, NY June 20, 2003. 2-CA-32983; JD(NY)-31-03, Judge Steven Fish.

European Motors, Ltd. d/b/a Mercedes-Benz of San Francisco (Machinists District Lodge 190, Local Lodge 1414) San Francisco, CA June 19, 2003. 20-CA-30623, 30865; JD(SF)-38-03, Judge Mary Miller Cracraft.