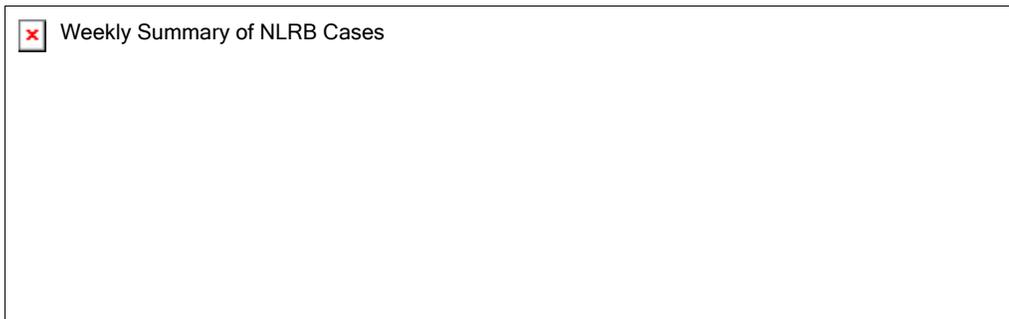


ABOUT THE WEEKLY SUMMARY

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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August 1, 2003

W-2906

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

Arlington Masonry	Shelby Township, MI
Kaiser Aluminum & Chemical Corp.	Houston, TX
PPG Industries, Inc.	Huntsville, AL
Recon Refractory & Construction	Carson, CA

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[\(R-2502\)](#) NLRB Memphis, TN Office Reopens after Power Restored



Industrial, Professional & Technical Workers SIUNA (Recon Refractory & Construction, Inc.) (21-CD-635, 637; 339 NLRB No. 97) Carson, CA July 24, 2003. The Board quashed the notice of hearing after concluding that the real dispute in this case is a contractual dispute between Charging Party Bricklayers Local 4 and Charging Party Recon. It wrote: "When a dispute is fundamentally one between an employer and a union, and concerns the union's attempt merely to preserve the work it previously had performed, the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making." [\[HTML\]](#) [\[PDF\]](#)

Recon is a party to a collective-bargaining agreement called the National Refractory Agreement (NRA), with the Bricklayers and Craftworkers (BAC). Under the NRA, signatory refractory contractors are required to assign refractory work to BAC-represented bricklayers. The dispute resulted from Recon's alleged breach of the NRA agreement, and it concerned Local 4's efforts to preserve the work it previously had performed. Local 4-represented bricklayers performed the disputed work pursuant to the terms of the successive NRAs for a decade prior to January 2000. When Recon assigned the work in dispute to Industrial, Professional & Technical Workers-represented laborers at the Arco Refinery in Carson, CA, it was the first time

that Recon had failed to assign refractory work in southern California to Local 4-represented bricklayers.

(Members Schaumber, Walsh, and Acosta participated.)

* * *

Kaiser Aluminum & Chemical Corp. (32-CA-17041; 339 NLRB No. 100) Houston, TX July 25, 2003. At the request of the Charging Party, the Board has decided to publish a previously unpublished Order in the bound volumes of its decisions.

[\[HTML\]](#) [\[PDF\]](#)

The Board, in its unpublished Order of September 7, 2001, granted Charging Party Steelworkers' request for special permission to appeal the administrative law judge's ruling denying the Charging Party's petition to revoke the subpoena duces tecum served on it by the Respondent. The subpoena demanded production of the position statements submitted by the Charging Party to the Region and to the General Counsel's Office of Appeals.

On appeal, Chairman Hurtgen and Member Liebman, with Member Walsh concurring, reversed the judge's ruling. They found that the work product doctrine as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure applies to unfair labor practice proceedings, and specifically to a position statement submitted by a charging party's counsel to the General Counsel in support of its charge during the General Counsel's investigation; and that a charging party does not waive the work product privilege by submitting such a position statement to the General Counsel.

Chairman Hurtgen and Member Liebman held that the Respondent had not demonstrated a substantial need for the position statement and quashed the subpoena to the extent it sought the Charging Party's position statements. They authorized the judge to review in camera, any and all attachments to the position statements sought by the subpoena to determine whether they are also exempt from disclosure based on the work product privilege.

Member Walsh joined his colleagues in reversing the judge's ruling. He said that the confidentiality interests and policy considerations set forth in *NLRB v. Robbins Tire Co.*, 437 U.S. 214 (1978), and *H. B. Zachry Co.*, 310 NLRB 1037 (1993), apply to the Charging Party's position statements provided to the Agency, as well as to witness statements that similarly cannot be obtained by subpoena from the Agency. Member Walsh concluded that the Respondent cannot compel disclosure by the Union of the position statements that are the subject of the subpoena in question here.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

PPG Industries, Inc. (10-CA-32813; 339 NLRB No. 98) Huntsville, AL July 23, 2003. The Board, in the earlier proceeding reported at 338 NLRB No. 68, remanded the case to the administrative law judge to resolve certain evidentiary issues. Among others, the Board found that the judge failed to act on the Respondent's petition to revoke the General Counsel's subpoena for documents concerning the administration of the Respondent's attendance policy. [\[HTML\]](#) [\[PDF\]](#)

In the instant matter, the judge granted the Respondent's petition to revoke and reaffirmed his recommendation to dismiss the complaint allegation that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by suspending and discharging Randall Martin. The Board determined that the judge abused his discretion in granting the petition and, therefore, reversed the judge's ruling and remanded this proceeding back to the judge to direct the Respondent to comply fully with the terms of the subpoena.

The General Counsel's subpoena for documents concerned the Respondent's attendance policy for a 27-month period. In response to the subpoena the Respondent provided employee disciplinary notices for all employees who received discipline for violating the absenteeism policy and a printout providing the complete attendance history of nonsupervisory employees at the facility and discipline of employees for any absence-related offenses for a 21-month period.

The judge contended that the General Counsel had the necessary documents to determine whether the Respondent applied its

absenteeism policy in a disparate manner. He determined that the Employee Action and Absence with Notes records did not include any relevant information with respect to absenteeism and/or failing to report off that was not already contained in the documents produced by the Respondent. The judge also found that the Respondent's limitation on the timeframe for disciplinary records provided was appropriate and that compelling production of the additional records was unnecessarily cumulative, duplicative, and/or would pose an undue burden on the Respondent. Contrary to the judge, the Board found that requiring production of the Employee Action and Absence with Notices records is necessary because the judge's finding is speculative as he never examined the unproduced documents.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Randall Martin, an Individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Adm. Law Judge William N. Cates issued his supplemental decision Feb. 13, 2003.

* * *

Arlington Masonry Supply, Inc. (7-RC-22225; 339 NLRB No. 99) Shelby Township, MI July 21, 2003. The Board sustained the challenges to the ballots of Lawrence Smith, Robert Hanson, and Dana Justice; overruled the challenge to the ballot of Michael Yax; and directed the Regional Director to open and count the ballots of Yax, Lee Roy Cox, and Brandon Faircloth and to issue a revised tally of ballots and the appropriate certification. Member Walsh would overrule the challenge to Justice's ballot. [\[HTML\]](#) [\[PDF\]](#)

The tally of ballots for the election held May 23, 2002 shows 4 for and 2 against Teamsters Local 247, with 6 challenged ballots. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the challenges to the ballots of Cox and Faircloth. The hearing officer found, and the Board agreed, that Yax is a regular part-time employee under the Act and should be included in the unit.

The Board also affirmed the hearing officer's finding that the record failed to establish that Smith and Hanson were eligible to vote as dual function employees. Chairman Battista and Member Schaumber did not rely on *Oxford Chemicals*, 286 NLRB 187 (1987), cited by the hearing officer, to the extent that it holds that if it can be shown that an employee regularly performs unit work for a sufficient period, it is inappropriate to evaluate other community of interest factors in determining whether that employee should be included in the unit. Member Walsh adhered to the well-established precedent of *Oxford Chemical*, saying it correctly holds that if a dual-function employee regularly performs a substantial amount of unit work, he is eligible to vote, and "it is both unnecessary and inappropriate to evaluate other aspects of the dual function employee's terms and conditions in a kind of second tier community-of-interest analysis." Id. at 188.

Chairman Battista and Member Schaumber disagreed with the hearing officer's finding that Dana Justice, who has the title of "maintenance supervisor" of the Employer's vehicle maintenance garage, is not a supervisor within the meaning of Section 2(11) of the Act. They found that the Employer met its burden of proving that Justice possessed supervisory authority, after concluding that the testimony of the Employer's general manager Cox is sufficient to establish that Justice possessed the authority to assign work utilizing independent judgment. They also relied upon Justice's authority to create the work schedule, grant time off, and assign hours and overtime, but they found it unnecessary to rely upon Justice's alleged authority to issue reprimands and recommend suspension and discharge.

Contrary to his colleagues, Member Walsh concluded that the Employer failed to meet its burden of proving that Justice possessed supervisory authority. He found that Cox's testimony was "purely conclusionary and failed to offer any specific instances or examples of Justice's exercise of independent judgment."

(Chairman Battista and Members Schaumber and Walsh participated.)

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

FedEx Freight East, Inc. (an Individual) Chicago Heights, IL July 22, 2003. 13- CA-40188; JD-76-03, Judge David L. Evans.

Palace Sports & Entertainment, Inc., d/b/a St. Pete Times Forum f/k/a Tampa Bay Ice Palace (Stage Employees [IATSE]) Tampa, FL July 22, 2003. 12-CA-21696, et al.; JD(ATL)-50-03, Judge George Carson II.

Doubled D Construction Group, Inc. (Iron Workers Local 272) Miami, FL July 24, 2003. 12-CA-21951; JD(ATL)-51-03, Judge Keltner W. Locke.

Millennium Maintenance & Electrical Contracting, Inc. (Electrical Workers IBEW Local 3) New York, NY July 22, 2003. 2-CA-35054; JD(NY)-41-03, Judge Joel P. Biblowitz.

Pacific States Industries, Inc. d/b/a Redwood Empire (Farm Workers) Cloverdale & Philo, CA July 21, 2003. 20-CA-31006; JD(SF)-48-03, Judge Mary Miller Cracraft.

Tarah Asphalt Products, Inc. (an Individual) Calexico, CA July 18, 2003. 21- CA-35280; JD(SF)-49-03, Judge Gregory Z. Meyerson.

* * *

NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Secoma Glass & Aluminum Co. (Glassworkers Local 188, a/w Painters District Council #5) (19-CA-28244; 339 NLRB No. 95) Federal Way, WA July 21, 2003.

Pastelle Co., Inc. d/b/a St. Regis Hotel (Operating Engineers Local 547, Hotel & Restaurant Employees Local 24) (7-CA-45206(3), 45638; 339 NLRB No. 96) Detroit, MI July 21, 2003.