

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 22, 2003

W-2909

CASES SUMMARIZED

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ADS Electric Co. (14-CA-27016; 339 NLRB No. 128) Vandalia, IL Aug. 15, 2003. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(1) and (3) of the Act by laying off Dennis Peterson and Ron Seals and failing to recall them to work. [\[HTML\]](#) [\[PDF\]](#)

The Board, noting evidence that Peterson and Seals misrepresented their work experience in their job applications or interviews with the Respondent, provided the Respondent with an opportunity in the compliance stage of this proceeding to establish when it became aware of the employees' asserted misconduct and to show whether this would have provided grounds for termination based on a preexisting, nondiscriminatory company policy. *Arrow Flint Electric Co.*, 321 NLRB 1208, 1210 (1996), et al.

Although Member Walsh agreed that it is appropriate to allow the Respondent to litigate this remedial matter in the compliance stage of this proceeding, he noted that the type of misrepresentation that the discriminatees allegedly committed may not be proper justification for their termination. See *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112-1113 (7th Cir. 2002).

(Members Schaumber, Walsh, and Acosta participated.)

Charges filed by Electrical Workers (IBEW) Local 702; complaint alleged violation of Section 8(a)(1) and (3). Hearing at St. Louis on Oct. 17, 2002. Adm. Law Judge Margaret M. Kern issued her decision Feb. 14, 2003.

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The Big Brass Band, LLC (2-RC-22544; 339 NLRB No. 122) New York, NY, Aug. 11, 2003. Chairman Battista and Member Schaumber, with Member Liebman dissenting, denied the Petitioner's (Actors' Equity Association) request for review of the Acting Regional Director's (ARD) Supplemental Decision and Certification of Results of Election. In his decision, the ARD overruled the Petitioner's objections, one of which asserted that the Employer threatened employees with discharge by placing a casting notice for all roles in *Backstage* theater publication and by limiting those roles to non-union performers. [\[HTML\]](#) [\[PDF\]](#)

The majority, in agreement with the ARD, found that the Employer's advertisement for replacements did not threaten its employees with discharge because it is common for touring shows to advertise for replacement actors even when there are no roles to be filled. Chairman Battista and Member Schaumber found no merit in Member Liebman's speculation that employees might have objectively interpreted the advertisement as a threat to their continued employment should they select the Union to represent them.

The Petitioner contended that the ARD erred in not finding (1) that the Employer threatened employees with discharge by advertising for nonunion replacements, and (2) that the Employer required employees to sign contracts effectively waiving their rights to join a union. With regard to contention (1), the majority noted that an employer may seek prospective replacements to prepare for a possible strike. See *Southland Cork Co.*, 146 NLRB 906, 908 (1964). On the issue of contracts, Chairman Battista and Member Schaumber agreed with the ARD that the work contracts that the Employer required its employees to sign did not interfere with its employees' freedom to choose a bargaining representative and did not require employees to waive their rights to join a union.

Dissenting, Member Liebman would grant review in this proceeding because it raised unusual and troubling issues arising during a union election campaign in the "non-union" theatrical stage industry among employees in a so-called "Non- Equity" production. She asserted: "However legitimate the advertisements may be in the normal course of business, the request for review raises the issue whether on the eve of an NLRB election--unusual in this industry--the message conveyed by the ads--particularly as explained by the Employer--is one that would likely interfere with employees' free choice."

Member Liebman also found troubling "the contractual requirement imposed on employees during the critical period that they effectively must acknowledge the current nonunion status of the Employer and, as a condition of employment, must pledge to undertake obligations that might impair their employment obligations." In her view, it is appropriate to grant review to ascertain whether the stage industry is so unique in its union/nonunion dichotomy that established principles for the protection of union and protected concerted activities are inapplicable to this industry, at least in the context of this election.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Cannelton Industries, Inc.; Princess Beverly Coal Co.; Kanawha Corp.; and Dunn Coal and Dock Co. (9-CA-37785-1, et al.; 339 NLRB No. 124) Fayette and Kanawha Counties, WV August 14, 2003. The Board agreed with the administrative law judge's findings that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Mine Workers with requested information relevant to its collective-bargaining responsibilities. The judge found that the Union's information requests were clearly directed at showing the sharing of functions necessary to prove a single employer or alter-ego relationship between the Respondents and a new company, CC Coal, such that CC Coal was bound under the Respondents' memorandum of understanding with the Union. [\[HTML\]](#) [\[PDF\]](#)

The Board determined that the Union provided the Respondents with specific evidence of their suspected alter-ego or single-

employer relationship with CC Coal, which included evidence that: the Respondents shared a common address with CC Coal; the Respondents and CC Coal shared some of the same officers; the Respondents and CC Coal shared personnel and equipment; and radio communications indicated that coal mined at CC Coal's Skitter Creek operation was being shipped to Cannelton's prep plant and blended with the Respondents' coal. It accordingly held that the Union demonstrated to the Respondents both the relevance of the requested information and the existence of evidence that gave rise to a reasonable belief in the relevance of the information and that the Respondents' refusal to supply the information at that point had no lawful justification.

(Members Liebman, Schaumber, and Acosta participated.)

Charges filed by Mine Workers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Charleston on Dec. 4, 2001. Adm. Law Judge Benjamin Schlesinger issued his decision March 14, 2002.

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Elevator Constructors Local One (National Elevator Industry, Inc.) (29-CB-11649; 339 NLRB No. 123) Long Island City, NY August 11, 2003. The Board agreed with the administrative law judge that the Respondent Union, by imposing a monetary fine against Peter McVicker, a supervisor, because he refused Respondent's October 13, 2000 demand that the Employer utilize additional employees to unload an escalator truss at a Secaucus, New Jersey project, and by prohibiting McVicker from working as a mechanic in charge for one year from March 9, 2001, violated Section 8(b)(1)(B) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The Respondent excepted to the judge's finding that McVicker was a Section 2(11) supervisor. The Board noted that it need not rely on the judge's supervisory finding inasmuch as it agreed that McVicker was a Section 8(b)(1)(B) representative. See *NLRB v. Electrical Workers Local 340*, 481 U.S. 573, 584 (1987).

(Chairman Battista and Members Schaumber and Acosta participated.)

Charge filed by National Elevator Industry, Inc.; complaint alleged violation of Section 8(b)(1)(B). Hearing at Brooklyn on Dec. 12, 2001. Adm. Law Judge Steven Davis issued his decision April 16, 2002.

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Pepsi America, Inc. (fka Delta Beverage Group) (26-CA-19686, et al.; 339 NLRB No. 125) Collierville, TN Aug. 13, 2003. The Board adopted, among others, the administrative law judge's finding that by unilaterally changing its attendance policy, the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent, without notice to the Union, eliminated from its attendance policy a provision that enabled employees to earn credits for good attendance that could be used for future paid time off. The change eliminated the employees' existing credits as well as the employees' ability to earn future credits. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended that it could unilaterally change the attendance policy because it unilaterally changed rules concerning employee conduct, including attendance, in the past without union objection and because it was authorized to do so under the management functions article of the parties' collective-bargaining agreement. The judge concluded that the collective-bargaining agreement did not specifically provide the Respondent the right to unilaterally change its attendance policy and that the Respondent failed to establish that the Union had waived its right to bargain over the attendance policy change.

Members Schaumber and Acosta agreed with the judge that the Respondent's unilateral change of its attendance policy violated the Act but did not agree with his rationale. They said: "The portions of the management functions article on which the Respondent relies concern rules governing employee conduct The matter at issue here--the Respondent's attendance credit program-- concerns an employee benefit, not a rule. The program does not regulate attendance; it establishes a reward for good attendance--that is, a benefit or an additional form of compensation. In sum, the management functions provision relied on by the Respondent does not even arguably apply to the attendance credit program."

Member Walsh, concurring, agreed with his colleagues in all respects except for their rationale for affirming the judge's conclusion. Unlike his colleagues, Member Walsh fully agreed with the judge's rationale for finding the violation and asserted that the judge's finding is based on well-established Supreme Court and Board precedent governing resolution of the question of whether a union has contractually or by practice waived its statutory right to bargain about terms and conditions of employment. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Batement Co.*, 295 NLRB 180 (1989).

(Members Schaumber, Walsh, and Acosta participated.)

Charge filed by Teamsters Local 1196; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Memphis, May 21 and 22, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision Oct. 1, 2001.

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Sprint/United Management Co. (17-CA-21603; 339 NLRB No. 127) Overland Park, KS Aug. 15, 2003. The Board adopted the administrative law judge's decision dismissing the complaint allegation that the Respondent unlawfully discharged Jeborah Diebold because she sent an e-mail to employees stating that anthrax had been found in the Respondent's Lenexa, KS Warehouse. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Acosta disagreed with Member Liebman's assertion that this case involved a balancing of the Respondent's legitimate interest in preventing the spread of false information and Diebold's interest in communicating safety-related information to fellow employees. They agreed with the judge that Diebold spread information that was false and was uttered with reckless disregard for truth or falsity. In their view, Diebold had no legitimate interest or right to spread this information, and thus no balancing is required or warranted.

Member Liebman agreed that the Respondent acted lawfully in discharging Diebold under its anthrax-related "zero tolerance" policy after she sent the e-mail message to four co-workers. However, she does not endorse the judge's analysis of this case. Member Liebman questioned whether the policy's application to Diebold's e-mail message unlawfully interfered with the exercise of her Section 7 rights to communicate with fellow workers about a possible anthrax threat. She concluded that the Respondent's interest in preventing the spread of false information and fear about anthrax contamination outweighed Diebold's interest in communicating what was false information, based entirely on an overheard conversation and her own embellishments, to coworkers who did not even work at the warehouse in question. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

(Chairman Battista and Members Liebman and Acosta participated.)

Charge filed by Jeborah Diebold, an Individual. Hearing at Overland Park, Aug. 13 and 14, 2002. Adm. Law Judge Mary Miller Cracraft issued her decision Sept. 30, 2002.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

L & S Mechanical Corp. (an Individual) Woodmere, NY August 11, 2003. 2- CA-34716-1, 35181-1; JD(NY)-42-03, Judge Steven Davis.

New Concept Solutions, LLC (Teamsters Local 557) Baltimore, MD August 12, 2003. 5-CA-30312; JD-81-03, Judge C. Richard Miserendino.

Lenawee Long Term Care, Inc. d/b/a Provincial House of Adrian (Food & Commercial Workers Local 876) Adrian, MI August 14, 2003. 7-CA-45917, 7-RC-22397; JD-84-03, Judge Martin J. Linsky.

Alle-Kiski Medical Center (Food & Commercial Workers Local 23) Natrona Heights, PA August 15, 2003. 6-CA-32751, et al.; JD-85-03, Judge Arthur J. Amchan.

MFP Fire Protection, Inc. (Road Sprinkler Fitters Local 669) Denver, CO August 12, 2003. 27-CA-13246, JD(SF)-51-03;
Judge Albert A. Metz.

Kaiser Foundation Hospital, et al. (Office Employees Local 29) Oakland, CA August 12, 2003. 32-CA-19771-1, 32-CB-5477-
1, JD(SF)-52-03; Judge Clifford H. Anderson.