

## 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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September 19, 2003

W-2913

**CASES SUMMARIZED**

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*Abell Engineering & Manufacturing, Inc.* (25-CA-25966(E), 26263(E); 340 NLRB No. 19) Indianapolis, IN Sept. 12, 2003. The Board affirmed the administrative law judge's decision that the General Counsel's position in the underlying unfair labor practice case was substantially justified and denied Applicant Abell Engineering's application for award of fees and expenses under the Equal Access to Justice Act (EAJA). [\[HTML\]](#) [\[PDF\]](#)

In the underlying unfair labor practice proceeding, 338 NLRB No. 42 (2002), there was a dispute over what activity motivated the Applicant to discharge Richard Gist. The Applicant contended that Gist was fired for a single act, i.e., for breaching a duty of loyalty to the Applicant when he solicited welder David Bautista to take a job with a union contractor. The General Counsel contended that Gist was fired for all of his protected union activity, i.e., for attempting to organize the Applicant's sheet metal shop workers. The judge accepted the General Counsel's position and determined that Gist's solicitation of Bautista was an extension of Gist's union organizing and fell within the broad protective ambit of Section 7.

The Board however reversed the judge and dismissed the consolidated complaint, finding that Gist had engaged in unprotected conduct when he attempted to recruit Bautista to work for another employer with the full knowledge that if Bautista took the job the Respondent would lose one of only three unit employees. Accordingly, it held Gist's attempts to induce Bautista to quit were unrelated to organizing the Respondent's employees or improving their working conditions. The Board analyzed Gist's solicitation of Bautista differently than either the parties or the judge. It held that Gist's conduct exceeded the protection of the Act and that the facts were analogous to those in *Clinton Corn Processing*, 194 NLRB 184 (1971), and distinguishable from those in cases where the Board found that the protection of the Act was not lost.

In this supplemental decision, the Board concluded that the General Counsel's reliance on a Wright Line legal theory to prosecute Gist's discharge and his view that Gist's solicitation of Bautista was protected were both reasonable. Although the General Counsel did not attempt to distinguish *Clinton Corn Processing* and instead argued that Gist's solicitation of Bautista was comparable to *M.J. Mechanical Service, Inc.*, 324 NLRB 812, 813 (1997), it did not make his position unreasonable for EAJA purposes, the Board held. It noted that neither *Clinton Corn Processing* nor *M.J. Mechanical Services* is directly on point, but that the Board found certain features of *Clinton Corn Processing* to be more applicable to Gist's situation.

(Members Liebman, Schaumber, and Walsh participated.)

Adm. Law Judge C. Richard Miserendino issued his supplemental decision Jan. 17, 2003.

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*Caritas Good Samaritan Medical Center* (1-CA-39471; 340 NLRB No. 6) Brockton, MA Sept. 8, 2003. The administrative law judge held that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally making changes to health insurance benefits. Contrary to the judge, Chairman Battista and Member Schaumber dismissed the complaint, agreeing with the Respondent that this case should be deferred to the grievance-arbitration procedure contained in the parties' collective bargaining agreement. *Collyer Insulated Wire*, 192 NLRB 837 (1971). Member Liebman dissented. [\[HTML\]](#) [\[PDF\]](#)

The majority wrote:

An application of the *Collyer* factors to the case at hand shows that deferral is appropriate. Here, the Respondent and the Union have enjoyed a bargaining relationship for at least 6 years. There is no claim of animosity on the part of the Respondent toward the employees' exercise of their protected rights. The Respondent has expressed its willingness to arbitrate the dispute, offering to waive any timeliness issue. Moreover, the arbitration clause, by its language, provides for arbitration in a broad range of disputes, including, no doubt, the instant dispute. Most importantly, the instant dispute is well suited to resolution by arbitration because the meaning of the contract is at the heart of the dispute.

The issue in this case is whether the Agreement is free from ambiguity so as to make arbitration unnecessary. In our view, it is not.

The majority retained jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance

of its Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration; or (b) the grievance and arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dissenting, Member Liebman noted that the dispositive issue is whether the collective-bargaining agreement the parties reached in September 2001, unambiguously required the Respondent to bargain with the Union before changing the terms of employees' health coverage. She believes that it did and that the Board should not defer this case to arbitration under the doctrine of *Collyer*.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by SEIU Local 767; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Boston on June 17, 2002. Adm. Law Judge Earl E. Shamwell Jr. issued his decision Sept. 12, 2002.

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*Custom Cut, Inc.* (28-CA-18062; 340 NLRB No. 17) Las Vegas, NV Sept. 11, 2003. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by telling employees that they should not discuss their wages among themselves and that the Respondent would not discuss wages with them. It affirmed the judge's finding that the General Counsel failed to prove that the Respondent's refusal to rehire Edward Jim and Joe Milli violated Section 8(a)(1), (3), and (4) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Carpenters Southwest Regional Council; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Las Vegas on Jan. 7, 2003. Adm. Law Judge James L. Rose issued his decision March 5, 2003.

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*Elevator Constructors Local 91 (Otis Elevator Co.)* (34-CD-64; 340 NLRB No. 14) East Hartford, CT Sept. 9, 2003. The Board determined that the employees of Perini Building Company, Inc., represented by Operating Engineers Local 478 instead of employees represented by Elevator Constructors Local 91, are entitled to operate the interior cars used for transporting a combination of workmen and materials (after the cars are turned over but before final inspection and certification for public use) at the hotel tower at the Mohegan Sun Resort in Uncasville, Connecticut. In making the award, the Board relied on the factors of employer preference and collective-bargaining agreements. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

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*La-Z-Boy Midwest, a Div. of La-Z-Boy Inc.* (17-CA-20888, et al.; 340 NLRB No. 10) Neosho, MO Sept. 9, 2003. The administrative law judge found, among others, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing employee John Phillips a verbal warning for engaging in misconduct in the course of his union solicitation activities, basing this finding on the absence of credible evidence that Phillips had engaged in the alleged misconduct. The Board agreed with the judge's conclusion that the Respondent unlawfully disciplined Phillips but held that the judge erred in applying the analytical framework for dual motivation cases established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), because there is no dispute as to the reason for the discipline. [\[HTML\]](#) [\[PDF\]](#)

The Board said that the Respondent's motivation is not at issue, and the *Wright Line* analysis is not appropriate. It wrote that the proper analytical framework is that found in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), where the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by PACE; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Joplin on April 5, 2001. Adm. Law Judge John H. West. issued his decision July 20, 2001.

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*Lenz & Riecker* (22-CA-24921; 340 NLRB No. 21) Totowa, NJ Sept. 12, 2003. The Board reversed the administrative law judge and dismissed the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees in September 2001 and then subcontracting bargaining unit without prior notice to or affording Graphic Communications Local 31 an opportunity to bargain. In the absence of exceptions, the Board adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by contacting bargaining unit members directly and offering them temporary employment after October 1, 2001, when it subcontracted with Interstate Litho Corp. to complete the Respondent's outstanding work. [\[HTML\]](#) [\[PDF\]](#)

The parties do not dispute that the Respondent's decision to terminate its business was not a mandatory subject of bargaining. Members Liebman and Walsh found therefore the Respondent had no duty to bargain over its decision to wind down its operations at the end of September 2001 and ultimately to close its Totowa, NJ facility. They explained that the Respondent had an "effects bargaining" obligation to provide the Union an opportunity to bargain over how it was going to wind down its operations, but that the Respondent did not fail to honor that obligation because it notified the Union of its decision to liquidate and explicitly offered to bargain over the effects of the decision. The Union waived its right to bargain, Members Liebman and Walsh decided.

Chairman Battista, in his concurring opinion, did not pass on whether the Respondent had a duty to bargain over its decision to subcontract because it was an effect of its decision to liquidate its business. Assuming arguendo that there was such a duty, he agreed with the majority for the reasons set forth in its decision that the Union failed to assert its right to bargain and, thus, no violation occurred. Further to the extent that the decision to subcontract was an "effect" of the decision to liquidate, the Chairman concluded that the Respondent had no obligation to bargain because the decision to subcontract was not a mandatory subject of bargaining.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Graphic Communications Local 31; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark on July 22, 2002. Adm. Law Judge Eleanor MacDonald issued her decision Feb. 14, 2003.

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*Observer & Eccentric Newspapers, Inc.* (7-CA-44695; 340 NLRB No. 18) Detroit, MI Sept. 11, 2003. The Board affirmed the administrative law judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it laid off employee Anne Grabda in December 2001. Members Liebman and Walsh agreed with the judge's finding that the Respondent violated Section 8(a)(1) by its interrogation of employee Donna Gregway. Member Schaumber would dismiss the complaint allegation that Respondent's interrogation of Gregway violated the Act. [\[HTML\]](#) [\[PDF\]](#)

The Respondent's interview of Gregway pertained to a private lawsuit. The judge found, with the majority's approval, that the Respondent was obligated to comply with the interview standards set forth in *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), because the lawsuit pertained to protected activities of the potential employee witnesses who were interviewed.

Member Schaumber said that the few short questions asked Gregway did not violate Section 8(a)(1) under the *Rossmore House*, 269 NLRB 1176 (1984), totality-of-the- circumstances test. In his view, the questions asked Gregway were substantively nonobjectionable as they were asked in a neutral and nonpejorative manner; did not constitute an "interrogation" unlawful under the Act; and represented the kind of natural dialogue to be expected between employer and employee on a topic of mutual interest and fully protected by Section 8(c) of the Act.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Anne Grabda, an individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, June 18-19, 2002. Adm. Law Judge Arthur J. Amchan issued his decision Sept. 3, 2002.

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*SKD Jonesville Division L.P.* (7-CA-42244; 340 NLRB No. 11) Hillsdale, MI Sept. 10, 2003. The Board reversed the administrative law judge's dismissal of the complaint, finding that the Respondent violated Section 8(a)(1) of the Act by threatening Pamela Cole with unspecified retaliation if she engaged in union activities and by warning her in writing not to speak to her fellow employees about work-related matters, on pain of discipline or discharge. Chairman Battista and Member Schaumber agreed with the judge that the Respondent did not violate the Act in any other respects. [\[HTML\]](#) [\[PDF\]](#)

Unlike her colleagues, Member Liebman would also find that the Respondent, by supervisor Kevin Varney, unlawfully interrogated Cole and gave the impression that her union activities were under surveillance.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Pamela J. Cole, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Hillsdale on Feb. 9, 2000. Adm. Law Judge Arthur J. Amchan issued his decision March 24, 2000.

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*Skyline Builders, Inc.* (12-CA-21783, 12-RC-8695; 340 NLRB No. 13) Pampano, FL Sept. 10, 2003. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union support and activities, and by threatening not to hire employees because they supported the Union and engaged in union activities; and Section 8(a)(3) and (1) by discharging Mike Solano and David Richardson because they joined, supported and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. [\[HTML\]](#) [\[PDF\]](#)

It adopted, in the absence of exceptions, the judge's recommendation that Objections 3 through 7 to the election held on October 7, 2001 be overruled and that Objection 8 be sustained. The Board found it unnecessary to pass on his recommendation that Objections 1 and 2 be sustained.

The judge, without conducting an investigation into the 22 determinative challenged ballots, set aside the election and remanded the representation case to the Regional Director for further appropriate action. Contrary to the judge, the Board remanded Case 12-RC-8695 to the Regional Director for a hearing on the eligibility of the challenged voters and a supplemental report on challenged ballots because resolution of the challenged ballots may result in a Union victory, which would make it unnecessary to set aside the election based on the Union's objections.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Carpenters South Florida Regional Council; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Miami, Oct. 28-29, 2002. Adm. Law Judge John H. West issued his decision Jan. 14, 2003.

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*Sun Transport, Inc., a wholly owned subsidiary of Marine Investment Corp., et al.* (4-CA-26705; 340 NLRB No. 8) Philadelphia, PA Sept. 8, 2003. Contrary to the administrative law judge, the Board dismissed the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by offering less severance pay to the employees represented by the Union than it offered to other employees. The judge claimed that the Respondent made this offer in response to protected activity, specifically in retaliation against the Union's past bargaining positions. [\[HTML\]](#) [\[PDF\]](#)

When the Respondent divested itself of its marine transport business, it applied the Involuntary Termination Plan (a severance package) to terminated unrepresented employees which provided, among other benefits, two weeks of severance pay for each year of service up to 20 years, and offered the represented employees one week of severance pay per year of service. The severance package was rejected and the employees represented by the Union received no severance pay.

Unlike the judge's finding, the Board held that the General Counsel failed to show that the Respondent was motivated by antiunion animus when it offered lower severance pay to employees represented by the Union. It agreed that the judge correctly noted the Board has long held that employers may offer different benefits to represented and unrepresented groups of employees as part of its bargaining strategy. *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948). The Board wrote: "the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive. Although an employer is not free to discriminatorily afford represented employees less benefits than unrepresented employees, . . . the record does not establish that the Respondent engaged in such conduct here."

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Sun Marine Licensed Officers Assn.; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, Jan. 20 and 21 and June 15, 2000. Adm. Law Judge Robert A. Giannasi issued his decision Oct. 3, 2000.

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*Teamsters Local 174 (Airborne Express, Inc.)* (19-CD-483, 484; 340 NLRB No. 20) Seattle, WA Sept. 12, 2003. The Board found reasonable cause to believe that all of the elements of Section 8(b)(4)(D) of the Act have been shown and that there is no agreed-upon method for resolving the jurisdictional dispute. Relying on the factors of employer preference, economy, and efficiency of operations, relative skills and experience, and avoidance of loss of jobs, it determined that employees of Wick's Airfreight represented by Teamsters Local 174, rather than employees of Airborne Express represented by Local 174, are entitled to perform the work of ground transportation of freight from Cutter & Buck to an ABX Air, Inc. regional hub.

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The Board noted the "unusual" fact pattern in this case involving two groups of employees in separate bargaining units represented by the same local union but working for two different employers. In finding that Airborne's local truckdrivers represented by Local 174 and Wick's line haul truckdrivers represented by Local 174 are competing groups of employees, it relied on: the Board's holdings that employees qualify as different competing groups under

Section 8(b)(4)(D) in these circumstances and that employees demonstrate a competing claim to disputed work by performing it, and the Board's rejection of the argument that local truckdrivers and over-the-road drivers are in the same trade, craft, or class (truckdrivers).

(Chairman Battista and Members Schaumber and Walsh participated.)

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*U.S. Steel, a Div. of USX Corp.* (4-CA-27695-1, -2; 340 NLRB No. 22) Fairless Works, PA Sept. 12, 2003. The Board affirmed the administrative law judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging active union representatives Brian Koontz and Stanley Zuczek on June 4, 1998 because of their union and other protected concerted activities. The judge said "[t]he real issue here is whether [Koontz' and Zuczek's] failure to return [their] pagers would have resulted in their [June 4] termination if not for Koontz' and Zuczek's history of union and protected concerted activity." Member Schaumber agreed with the judge and his colleagues that the answer is "no," saying: "I write separately to explain why the Respondent's argument-- that given Koontz' and Zuczek's history of insubordination, the answer should be 'yes,' an argument to which I am not sympathetic, must fail." [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Steelworkers Local 5092; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, June

6-7, Aug. 14-18, and Sept. 6, 2000. Adm. Law Judge Michael A. Marcionese issued his decision July 25, 2001.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*The Painting Co.* (Tri-State Building & Construction Trades Council) Columbus, OH September 8, 2003. 9-CA-33482, et al.; JD-99-03, Judge Joseph Gontram.

*ACE Electric and Plumbing Inc.* (Plumbers Local 68) Greenville, TX September 9, 2003. 16-CA-22807; JD(ATL)-61-03, Judge Lawrence W. Cullen.

*Coronet Industries, Inc.* (Teamsters Local 79) Plant City, FL September 5, 2003. 12-CA-22715 (formerly 2-CA-35194); JD(ATL)-58-03, Judge Michael A. Marcionese.

*South Fulton Medical Center* (an Individual) East Point, GA September 10, 2003. 10-CA-34290; JD(ATL)-59-03, Judge Lawrence W. Cullen.

*Wal-Mart Stores, Inc.* (Food & Commercial Workers) Aiken, SC September 10, 2003. 11-CA-19105, 19121; JD(ATL)-60-03, Judge John H. West.

*Sheet Metal Workers Local 7* (Andy J. Egan Co., Inc.) Grand Rapids, MI September 10, 2003. 7-CC-1767; JD-98-03, Judge Ira Sandron.

*The Courier-Journal, a division of Gannett Kentucky Limited Partnership* (Communications Workers Local 3310) Louisville, KY September 10, 2003. 9- CA-39958; JD(ATL)-62-03, Judge William N. Cates.

*Miller Waste Mills, Inc. d/b/a RTP Co.* (UAW) Winona, MN September 11, 2003. 18-CA-16411-1; JD-95-03, Judge Martin J. Linsky.

*Smurfit-Stone Container Corp., Container Division* (Electrical Workers [IBEW] Local 1924) Fernandina Beach, FL September 11, 2003. 12-CA-20804 (formerly 26- CA-19908); JD(ATL)-63-03, Judge Margaret G. Brakebusch.

*Libro Shirt MFG. Co., Park Shirt Co., and Leventhal LTD., a single employer* (UNITE Mid-Atlantic Regional Joint Board) Luykens, PA September 12, 2003. 6- CA-33171; JD-96-03, Judge Benjamin Schlesinger.

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### 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.)*

*Highlanders, Alloys, LLC* (Steelworkers) (9-CA-40004; 340 NLRB No. 12) New Haven, WV September 10, 2003.

*Siena-Meadco, LLC d/b/a United Memorial Gardens* (Steelworkers) (7-CA-45738; 340 NLRB No. 15) Plymouth, MI September 9, 2003

*Choctaw Manufacturing Co., Inc., Debtor-in-Possession* (UNITE) (15-CA-16906; 340 NLRB No. 16) Silas, AL September 11, 2003.

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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.)*

*Fairfield Ford (Machinists Local 34) (9-CA-40308; 340 NLRB No. 9) Fairfield, OH September 5, 2003.*