

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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October 3, 2003

W-2915

CASES SUMMARIZED

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Desert Aggregates (32-CA-18653, 18726, 340 NLRB No. 38) Ducor, CA Sept. 23, 2003. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by soliciting and promising to remedy employee grievances and did not violate Section 8(a)(1) by granting employee Daniel Harris a wage increase. Unlike the judge, the Board found that the Respondent did not violate Section 8(a)(1) by threatening to replace employees and that the Respondent violated Section 8(a)(3) and (1) by laying off leading union supporters Mark Gregg and Wendy Miller. [\[HTML\]](#)
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The Board denied the General Counsel's posthearing motion to amend the complaint to allege that the Respondent's general

manager, Bruce Bunting, violated Section 8(a)(1) by telling employees during a captive audience meeting that he could make no changes because the union election had not been canceled. And, it found no merit in the Charging Party's exception to the judge's failure to find that the Respondent violated Section 8(a)(1) by holding a captive audience meeting the day before the election and by coercively interrogating employees, noting that the issues are not alleged in the complaint and the General Counsel has not moved to amend the complaint to include them. The Board explained that the Charging Party cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

Although the Board found the layoffs of Gregg and Miller unlawful, it agreed with the judge that a Gissel bargaining order is not warranted in this case and found that traditional remedies will suffice to ensure a fair election and erase the effects of the Respondent's unfair labor practices. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 3; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tulare, April 10-11, 2002. Adm. Law Judge Jay R. Pollack issued his decision May 28, 2002.

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Federated Logistics and Operations, A Division of Federated Corporate Services, Inc. (12-CA-21047, 21242, 12-RC-8539; 340 NLRB No. 36) Tampa, FL Sept. 19, 2003. Members Liebman and Walsh affirmed the administrative law judge's findings that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act during UNITE's organizing drive and also upheld the judge in sustaining the Union's objections to the election held on October 6, 2000. The majority severed and remanded Case 12-RC-8539 to the Regional Director for the purpose of conducting a second election. Chairman Battista dissented in part. [\[HTML\]](#) [\[PDF\]](#)

Members Liebman and Walsh agreed with the judge that certain statements to employees by Managers Joe Vella, Kevin Hart, and Jody Beachy constituted unlawful threats of futility if the employees selected the Union. The majority also agreed with the judge's recommendation of extraordinary remedies, consisting of a broad cease and desist order; a public reading of the notice by a Board agent or responsible management official; and the furnishing of periodic and updated lists of employee names and addresses to the Union.

Members Liebman and Walsh believe these factors justify some of the extraordinary remedies recommended by the judge: 1) when faced with the Union organizing effect among its employees, the Respondent responded with extensive and serious unfair labor practices; 2) some of the Respondent's unlawful conduct pervaded the unit; 3) some of the Respondent's unfair labor practices tended to have a long-term coercive impact on the unit; and 4) many of the violations were committed by high-level management officials.

The majority did not adopt the judge's recommendation to impose other remedies sought by the Union and the General Counsel--Union access to the facility, and notice and equal time for the Union for captive audience meetings and the holding of a second election offsite. It decided that the Respondent's violations may be remedied without allowing the Union special access and equal time to address employees at the Respondent's facility and noted the Board's longstanding policy to defer in most cases to the Regional Director's judgment on the issue of election site.

Contrary to his colleagues and the judge, Chairman Battista did not find that the statements made by Managers Vella and Hart, at their October 2 and 4, 2000 presentations to employees, and Beachy in mid-September, constituted unlawful threats of futility under Section 8(a)(1). Nor did he agree with the majority that extraordinary remedies are warranted in this case because of the "numerous violations of [Sec.] 8(a)(1) and (3)." Chairman Battista noted that he did not agree with all of the violations found, particularly those that were found to be important bases for extraordinary remedies. In his view, there were no unlawful threats of strikes, plant shutdown, and to cut wages. Further, even were he to find all of the violations found by the majority, the Chairman said he would still find that traditional remedies suffice to remedy the unfair labor practices.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by UNITE; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tampa, Sept. 10-12 and Oct. 25, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision March 14, 2002.

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Food & Commercial Workers Local 1657 (Food World) (10-CB-7863; 340 NLRB No. 60) Huntsville, AL Sept. 26, 2003. Finding that the Respondent Union raised no substantial reason for refusing to provide bargaining-unit employee Richard Hamrick with requested photocopies of an arbitration decision disposing of his grievance, the Board granted the General Counsel's motion for summary judgment and held that the Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended that it fairly represented Hamrick because it offered to give the requested photocopies to Hamrick's attorney if Hamrick signed a confidentiality agreement, it allowed him to visually inspect the arbitration decision on two occasions, and it gave Hamrick a copy of the backpay and benefits settlement, which it reviewed with him and a representative of the Employer.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Richard Hamrick, an individual; complaint alleged violation of Section 8(b)(1)(A). General Counsel filed motion for summary judgment May 14, 2003.

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Loudon Steel, Inc. (7-CA-44080-1, et al.; 340 NLRB No. 40) Millington, MI Sept. 26, 2003. The Board affirmed the administrative law judge's findings, as modified, that the Respondent violated Section 8(a)(1) of the Act, in various respects, including threatening to place employee Daniel Hurren's union activities under surveillance and doing so; threatening Hurren with physical harm and property damage and with discharge if he failed to achieve an unrealistic production quota; engaging in surveillance of employees' union activities by approaching their vehicles as Sheet Metal Workers Local 7 attempted to distribute handbills; and promulgating and maintaining a no-solicitation rule that is overbroad; and violated Section 8(a)(3) and (1) by laying off Donald Davis on May 31, 2001 and failing to recall him, creating an unrealistic production quota on him on May 29, 2001, and constructively discharging Hurren on May 29, 2001. [\[HTML\]](#) [\[PDF\]](#)

The Board granted the General Counsel's conditional cross-exceptions to the judge's failure to conform the recommended Order and notice with the conclusions of law and modified the Order and notice accordingly. It also found merit in the General Counsel's conditional cross-exceptions and found that the Respondent violated Section 8(a)(1) by threatening to discharge Hurren if he did not meet an unrealistic production quota, and Section 8(a)(3) and (1) by imposing the unrealistic quota on Hurren. The Board noted that the violations are alleged in the complaint and were fully litigated and that the findings support the judge's conclusion that the Respondent constructively discharged Hurren in violation of Section 8(a)(3) and (1).

In agreeing with the judge that the Respondent unlawfully interrogated Donald Davis regarding his union sympathies when the Respondent's foreman, Aaron Burrows, asked Davis to sign an antiunion petition, the Board found it unnecessary to pass on the judge's additional finding that the Respondent's second shift supervisor Emory Close also unlawfully interrogated Davis when Close asked Davis if Davis and Hurren were friends. The Board said any such violation would be cumulative and would not affect the remedy or Order.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 7; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Flint on Oct. 23, 2001. Adm. Law Judge Arthur J. Amchan issued his decision April 12, 2002.

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Mediaone of Greater Florida, Inc., an affiliate of AT&T Broadband LLC (12-CA-21220; 340 NLRB No. 39) Jacksonville, FL

Sept. 19, 2003. Chairman Battista and Member Schaumber affirmed the administrative law judge's findings that a provision in the Respondent's handbook limiting employees' access to the Respondent's property violated Section 8(a)(1) of the Act, and that a provision prohibiting disclosure of proprietary information outside the Company is not unlawful. In a reversal of the judge, Chairman Battista and Member Schaumber found that a handbook provision limiting employees' solicitation of other employees did not violate Section 8(a)(1). [\[HTML\]](#) [\[PDF\]](#)

Member Walsh, dissenting in part, would find that the nonsolicitation and nondisclosure provisions of the Respondent's handbook violate Section 8(a)(1). He believes all the rules are unlawful because they have the reasonable tendency to chill the employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

The majority found that the nondisclosure provision of the Respondent's handbook would be understood by employees as protecting from disclosure only the Respondent's proprietary private business information and would not reasonably be construed as restricting discussion or disclosure of employees' own terms and conditions of employment.

Turning to the nonsolicitation provision, the full policy appears on page 69 of the handbook and the policy is briefly paraphrased in the "At a Glance" section on page 45, which also lists the page number where the full policy can be found. The parties do not dispute that the provision on page 69, by itself, is valid on its face. The majority decided that employees would reasonably believe that the Respondent's nonsolicitation rule was that set forth on page 69, and would not reasonably rely on the page 45 material as representing the Respondent's solicitation policy. It wrote: "While we agree with our dissenting colleague that the material on page 45 would be, by itself, overbroad, that material cannot be read in isolation, particularly in light of the fact that it directs the reader to page 69 where the actual policy is set forth in detail."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 177; complaint alleged violation of Section 8(a)(1). Adm. Law Judge George Carson II issued his decision July 11, 2002.

* * *

Missouri and Kansas Bricklayers Local 15 (Jacor Contracting, Inc. and D. H. Restoration, Inc.) (17-CD-367, et al.; 340 NLRB No. 41) Kansas City, MO Sept. 24, 2003. Concluding that this matter was not a jurisdictional dispute within the meaning of Section 10(k), the Board quashed the notice of hearing. It found that the dispute here is not over the assignment of the work to one group of employees instead of a different group but "involves the question of which union will represent the employees who are currently performing the . . . work." The Board found the Employers would like to retain their current employees but prefer that Cement Masons Local 518 represent them. Citing *Carpenters Local 275 (Lymo Construction)*, 334 NLRB 422 (2001), the Board said that it is well established that a dispute within the meaning of Section 8(b)(4)(D) requires a choice between two competing groups and the dispute here is over which union will represent the single group of Jacor or D.H. Restoration employees currently performing the work. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Schaumber and Walsh participated.)

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The Edward S. Quirk Co., Inc. d/b/a Quirk Tire (1-CA-33249, 34383; 340 NLRB No. 33) Watertown, MA Sept. 24, 2003. In the prior proceeding, 330 NLRB 917 (2000), the Board found, among other things, that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing, after reaching impasse, a discretionary wage plan for its commercial operations employees. The Board had adopted the judge's finding that the Respondent's wage proposal allowed the Respondent "broad discretionary power to unilaterally adjust wages and the wage incentive plans without any established criteria," and as such was in contravention of *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. in relevant part 131 F.3d 1026 (D.C. Cir. 1997), cert denied mem. 524 U.S. 937 (1998). [\[HTML\]](#) [\[PDF\]](#)

Subsequently, the Respondent filed a petition for review of the Board's Order with the U.S. Court of Appeals for the First

Circuit and the Board cross-petitioned for enforcement. On February 27, 2001, the court denied enforcement of the Board's order with respect to the unilaterally implemented wage plan. The court noted that "*McClatchy* is based on employer discretion and discretion is a matter of degree." The court remanded the case to the Board for "something more of a reasoned explanation of where it draws the line and why the line has been crossed in this instance."

The Respondent's proposed wage plan stated that the commercial operations employees would "be paid at a base rate of not less than \$8.90 an hour, however, the Company may continue its current pay practices." In this supplemental decision, the Board determined that by including the word "may" in its implemented wage proposal, the Respondent reserved to itself the recurring decision of whether to pay the commercial operations the \$8.90 per hour minimum, or to adjust wage rates to the "current marketplace pay." The Board also wrote that inclusion of the word "may" necessarily precludes any basis for meaningful review of whether a wage change constitutes a departure from the Respondent's unilaterally implemented wage proposal and would allow the Respondent to make recurring unilateral changes in wage rates with unfettered discretion. Accordingly, the Board reaffirmed its earlier finding that the Respondent violated Section 8(a)(5) and (1) of the Act.

(Chairman Battista and Members Liebman and Walsh participated.)

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Sierra Bullets, LLC (17-CA-20255, 20368; 340 NLRB No. 32) Sedalia, MO Sept. 19, 2003. The Board reversed the administrative law judge's unfair labor practice findings and dismissed the complaint in its entirety. [\[HTML\]](#) [\[PDF\]](#)

No party excepted to the judge's dismissal of the allegation that the Respondent discharged employee Eddie Nevils in violation of Section 8(a)(3). The judge found that the Respondent violated Section 8(a)(5) of the Act by implementing its "best and final" contract proposal, that the Respondent's failure to provide relevant information pursuant to the Steelworkers' request further precluded it from lawfully declaring impasse, that the strike following the Respondent's implementation of its contract proposal was an unfair labor practice strike from its inception, and that the Respondent unlawfully refused to reinstate the strikers upon their unconditional offer to return to work and unlawfully threatened employees with permanent replacement if they continued to engage in an unfair labor practice strike.

The Board rejected the judge's finding--based on the theory that the parties were not at impasse--that the Respondent unlawfully implemented its final contract offer. It noted that the General Counsel expressly choose to litigate only the narrow *Decker Coal*, 301 NLRB 729 (1991), theory of the violation, i.e., that impasse was precluded by the Union's outstanding information request. In finding an 8(a)(5) violation on the broader theory that the parties were not at impasse, the judge deprived the Respondent of due process, the Board said. It rejected the Union's argument that the complaint was sufficient to inform the Respondent that the broader impasse issue would be litigated, and that the judge was free to resolve the 8(a)(5) allegation on any theory regardless of whether it was advanced by the parties.

The Board found also that the record did not support the judge's alternative finding of an 8(a)(5) violation based on the Respondent's implementation of its final offer while an outstanding information request was pending and, accordingly, that this case is distinguishable from *Decker Coal*, on which the judge relied. It ruled that the Respondent's implementation of its final contract proposal did not violate Section 8(a)(5) and that the strike was therefore not caused or prolonged by any unfair labor practice. Since the strikers were economic and not unfair labor practice strikers, the Respondent did not violate Section 8(a)(1), as alleged, by informing its employees that they could be permanently replaced while on strike. Nor did it violate Section 8(a)(3) by failing immediately to reinstate the economic strikers upon their unconditional offer to return to work.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by the Steelworkers; complaint alleged violation of Section 8(a) (1) and (5). Hearing at Sedalia on Feb. 9, 2000. Adm. Law Judge Pargen Robertson issued his decision May 8, 2000.

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Teamsters Local 500 (Acme Markets, Inc.) (4-CB-8863; 340 NLRB No. 35) Philadelphia, PA Sept. 19, 2003. Affirming the

administrative law judge's decision, the Board held that the Respondent violated Section 8(b)(3) of the Act by refusing to furnish Acme Markets, Inc. with the information requested in the Employer's letter dated January 22, 2002. [\[HTML\]](#) [\[PDF\]](#)

The Employer's letter referenced the "most-favored nations" clause in the parties' collective-bargaining agreement and requested copies of all current collective-bargaining agreements to which the Respondent was a party; all rules and policies that the Respondent negotiated with other employers or allowed other employers to implement; and, all arbitration decisions and grievance settlement agreements since July 3, 1997, that involved the interpretation of the language of the collective-bargaining agreement. The "most-favored nations" clause in the parties' agreement states:

Union will not enter into any Agreement or have any understanding with any carrier of any type which gives to such carrier any better terms as to wages, hours or working conditions than those expressed in this Agreement.

The Board found that the Respondent's contention that the matter should be deferred to the parties' contractual grievance/arbitration procedures, which the Respondent raised for the first time in its poststipulation brief to the judge, was untimely. Chairman Battista noted that no party makes the argument that the "most-favored nations" clause is nonmandatory or unlawful. See *Dolly Madison Industries*, 182 NLRB 1037 (1970), distinguishing *Mine Workers v. Pennington*, 381 U.S. 657 (1965).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Acme Markets, Inc.; complaint alleged violation of Section 8(b) (3). Parties waived their right to a hearing. Adm. Law Judge Paul Bogas issued his decision Dec. 2, 2002.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Pimalco, Inc. (Steelworkers) Chandler, AZ September 9, 2003. 28-CA-18462; JD(SF)-60-03, Judge John J. McCarrick.

Jupiter Medical Center Pavilion (Service Employees Local 199) Jupiter, FL September 22, 2003. 12-CA-22478, et al.; JD(ATL)-66-03, Judge Keltner W. Locke.

SuperValu Holdings, Inc. d/b/a Bigg's Foods (Food & Commercial Workers Local 1099) Cincinnati, OH September 26, 2003. 9-CA-39206, et al.; JD-104-03, Judge Arthur J. Amchan.

Bellaire General Hospital, LP, d/b/a Bellaire Medical Center (Individuals) Houston, TX September 25, 2003. 16-CA-22556, et al.; JD(ATL)-67-03, Judge Margaret G. Brakebusch.

Kvaerner Songer, Inc. (Laborers Local 334) Washington, PA September 25, 2003. 7-CA-45463, et al., 7-CB-13451; JD-105-03, Judge Arthur J. Amchan.

Brandeis Machinery and Supply Co., A Wholly Owned Subsidiary of Bramco, L.L.C. (Operating Engineers Local 150) South Bend, IN September 25, 2003 25- CA-28201-1, JD-103-03, Judge C. Richard Miserendino.

Glenn's Trucking Co., Inc. (Mine Workers) Hazard, KY September 25, 2003. 9- CA-35666; JD(ATL)-64-03, Judge Lawrence W. Cullen.

Chinatown Carting Corp. (Teamsters Local 813 and an Individual) Elmsford, NY September 25, 2003. 2-CA-343613, et al.; JD(NY)-51-03, Judge Raymond P. Green.

Sunbelt Cranes, Construction & Hauling, Inc. (Operating Engineers Local 925) Tampa, FL September 26, 2003. 12-CA-22406; JD(ATL)-65-03, Judge John H. West.

Doubletree Guest Suites Santa Monica (Hotel & Restaurant Employees Local 11) Santa Monica, CA September 19, 2003. 31-CA-26242; JD(SF)-64-03, Judge Jay R. Pollack.

International Transportation Service, Inc. (ITS) (Longshoremen Local 63) Long Beach, CA September 10, 2003. 21-CA-34968; JD(SF)-62-03, Judge Gregory Z. Meyerson.

Food & Commercial Workers Local 648 (an Individual) San Francisco, CA September 16, 2003. 20-CB-11846-1; JD(SF)-63-03, Judge James M. Kennedy.

Mike Campbell & Associates, Ltd., Inc. (Food & Commercial Workers Local 1428) Chino, CA September 22, 2003. 31-CA-25753, 31-RC-8129; JD(SF)-65-03, Judge Mary Miller Cracraft.

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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.)

James B. Day & Co. (Sign, Display, Pictorial Artists & Allied Workers Local 830) (13-CA-40366; 340 NLRB No. 34) Carpentersville, IL September 23, 2003.

Falcon Wheel Division L.L.C. (Teamsters Local 692) (21-CA-34692, 34772; 340 NLRB No. 42) Gardena, CA September 26, 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.)

All American Service and Supplies, Inc. (Operating Engineers Local 12) (21- CA-35833; 340 NLRB No. 37) Corona, CA September 18, 2003.