

# National Labor Relations Board



# Weekly Summary of NLRB Cases

Division of Information

Washington, D.C. 20570

Tel. (202) 273-1991

December 26, 2003

W-2927

CASES SUMMARIZED  
VISIT [WWW.NLRB.GOV](http://WWW.NLRB.GOV) FOR FULL TEXT

<a href="#">City Market, Inc</a>	Buena Vista, CO	1
<a href="#">D.A. Nolt, Inc</a>	Philadelphia, PA	1
<a href="#">Jacksonville Urban League, Inc.</a>	Duval County, FL	2
<a href="#">K.O. Steel Foundry &amp; Machine</a>	San Antonio, TX	2
<a href="#">Laborers (E &amp; B Paving, Inc.)</a>	Rochester, IN	3
<a href="#">ServiceNet, Inc.</a>	Northampton, MA	3
<a href="#">Waterfront Services Co</a>	Tahlequah, OK	4

## OTHER CONTENTS

[List of Decisions of Administrative Law Judges](#)

4

Operations-Management Memorandum ([OM 04-15](#)): Recording of Backpay for the Agency Financial Statement

Press Releases ([R-2516](#)): Labor Board Invites Amicus Brief to be Filed on Job Targeting Issues Raised in Two Pending Cases

*The [Weekly Summary of NLRB Cases](#) is prepared by the NLRB Division of Information and is available on a paid subscription basis. It is in no way intended to substitute for the professional services of legal counsel, or for the authoritative judgments of the Board. The case summaries constitute no part of the opinions of the Board. The Division of Information has prepared them for the convenience of subscribers.*

*If you desire the full text of decisions summarized in the [Weekly Summary](#), you can access them on the NLRB's Web site ([www.nlr.gov](http://www.nlr.gov)). Persons who do not have an Internet connection can request a limited number of copies of decisions by writing the Information Division, 1099 14<sup>th</sup> Street NW, Suite 9400, Washington, DC 20570 or fax your request to 202/273-1789. Administrative Law Judge decisions, which are not on the Web site, can be requested by contacting the Information Division.*

*All inquiries regarding subscriptions to this publication should be directed to the Superintendent of Documents, U.S. Government Printing Office, Washington, Dc 20402, 202/512-1800. Use stock number 731-002-0000-2 when ordering from GPO. Orders should not be sent to the NLRB.*

*D.A. Nolt, Inc.* (4-CA-30325-1, -2; 340 NLRB No. 152) Philadelphia, PA Dec. 15, 2003. Members Liebman and Walsh reversed the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to apply the terms of the collective-bargaining agreement negotiated by the Roofing Contractors Association (RCA) and the Union covering employees in the commercial bargaining unit. In dissent, Chairman Battista agreed with the judge that there were “unusual circumstances” justifying a withdrawal from the RCA. [\[HTML\]](#) [\[PDF\]](#)

The General Counsel and the Union argued that the judge erred in finding that the Respondent lawfully withdrew from the RCA because the RCA and the Union had engaged in secret negotiations. The majority found merit in the General Counsel’s and the Union’s exceptions.

The Respondent has been signatory to an agreement which bound it to contracts between RCA and the Union covering commercial roofing. When the Union and the RCA reached a tentative agreement for an 8-year contract, the Respondent voted to “accept.” Based on the Respondent’s acceptance of the multiemployer contract, the majority held that the Respondent was bound to the successor agreement negotiated by the RCA and violated the Act when it refused to apply the terms of that agreement to unit employees.

Dissenting Chairman Battista found that the Union and the employer deliberately kept the Respondent in the dark about the start of negotiations and, under the *Retail Associates* rule (120 NLRB 338 (1958)) (no withdrawal from multiemployer bargaining after negotiations have begun), this collusive activity interfered with the Respondent’s right to withdraw from the association prior to the start of negotiations.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Roofers Local 30; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Philadelphia, Aug. 23 and 24, 2002. Adm. Law Judge Margaret M. Kern issued her decision July 18, 2002.

\*\*\*

*Dillon Companies, Inc. d/b/a City Market, Inc.* (27-CA-17679, et al.; 340 NLRB No. 151) Buena Vista, CO Dec. 15, 2003. The administrative law judge found and Chairman Battista and Member Walsh agreed, that the Respondent violated Section 8(a)(1) of the Act during the organizing campaign when it promulgated a no-solicitation rule. The majority said that although that rule was facially valid, the Respondent instituted it specifically in response to its employees’ union organizing activities. Chairman Battista and Member Walsh held that the Respondent failed to show that it promulgated the rule to maintain production and discipline. [\[HTML\]](#) [\[PDF\]](#)

Dissenting in part, Member Schaumber asserted that the Respondent’s no-solicitation policy was entirely lawful. He agreed with the judge and his colleagues that the Respondent promulgated its “Solicitation Policy” when it posted the policy in the employees’ breakroom. However, Member Schaumber wrote that there is no evidence to support an inference that the Respondent intended to

interfere with its employees' right to organize when it posted its solicitation policy and that evidence supports the Respondent's argument that it posted the solicitation policy in order to maintain production and discipline at the store.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Food & Commercial Workers Local 7; complaint alleged violations of Section 8(a)(1). Hearing at Buena Vista, Oct. 8-10, 2002. Adm. Law Judge Thomas M. Patton issued his decision May 23, 2003.

\*\*\*

*Jacksonville Urban League, Inc.* (12-RC-8983; 340 NLRB No. 156) Duval County, FL Dec. 18, 2003. The Employer's request for review of the Acting Regional Director's Decision and Direction of Election was denied by the Board as it raised no substantial issues warranting review. In denying review, the Board adhered to its holding in *Management Training Corp.*, 317 NLRB 1355 (1995) and rejected the Employer's argument that the Board should overrule *Management Training* and apply *Res-Care, Inc.*, 280 NLRB 670 (1986). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

\*\*\*

*K.O. Steel Foundry & Machine, A Division of Tic United Corp.* (16-CA-21170, 21182; 340 NLRB No. 153) San Antonio, TX December 16, 2003. Chairman Battista and Member Schaumber affirmed the administrative law judge's recommended dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his union activities and violated Section 8(a)(1), (3), and (4) by issuing written warnings to employees Rudy Ruelas and Jose Portillo. Member Liebman dissented, stating that this case "implicates credibility determinations." The majority, however, observed that "credibility is the essential basis for resolving this case," adding

For example, on the issue of whether Portillo resigned or was discharged, the judge chose to credit the testimony of four witnesses whose testimony was consistent with a resignation, and to discredit the contrary and uncorroborated testimony of Portillo, who claimed that he was discharged. The judge observed all five witnesses as they testified and he chose to credit the four and to discredit Portillo. [\[HTML\]](#) [\[PDF\]](#)

In her dissenting opinion, Member Liebman wrote that she would remand the case to the judge for further consideration. She said that the judge's credibility determinations rested in large part on his view of the inherent probabilities, as opposed to the demeanor of the witnesses, and that the judge failed to address evidence that casts doubt on his findings. Due to the factually complex case, Member Liebman believes that the judge should have permitted the General Counsel to file a post-trial brief and that his failure to do is a reason why this case should be remanded to the judge.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Electronic Workers (IUE); complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing in San Antonio, Jan. 17, 18, 22, 23, and 24, 2002. Adm. Law Judge Keltner W. Locke issued his decision April 1, 2002.

\*\*\*

*Laborers (E & B Paving, Inc.)* (13-CD-688-1; 340 NLRB No. 150) Rochester, IN Dec. 15, 2003. In this Decision and Determination of Dispute, the Board determined that the employees of E & B Paving, Inc., represented by the Laborers, are entitled to perform the concrete pavement work and related preliminary functions on behalf of E & B Paving, Inc., at the I-65 highway construction project in Lake County, Indiana. In making the award, the Board relied on the factors of collective-bargaining agreements, employer preference, employer past practice, and economy and efficiency of operations. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Schaumber and Walsh participated.)

\*\*\*

*ServiceNet, Inc.* (1-CA-39682; 340 NLRB No. 148) Northampton, MA Dec. 15, 2003. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on the health insurance and duration-clause proposals which were nonmandatory subjects of bargaining. [\[HTML\]](#) [\[PDF\]](#)

During negotiations for a successor agreement, the Respondent presented, on a package basis, a contract proposal that included two clauses: Article 19—Health and Welfare (provided that a committee of up to five bargaining unit members will meet with ServiceNet prior to any changes made in the group health insurance plan); and Article 37—Duration and Renewal (provided that upon expiration of the agreement, if agreement has not been reached on a successor agreement, that the all terms and provisions of the agreement shall be kept in full force and effect until a successor collective bargaining agreement is agreed upon and ratified by the parties). The Union refused to enter into an agreement containing these clauses.

Regarding Article 19, the Board held that it is a nonmandatory subject of bargaining because the proposal allows the Respondent to circumvent the Union and negotiate directly with the employees over a term or condition of employment, namely, the company health insurance plan. While duration clauses are generally treated as mandatory subjects of bargaining, the Board deemed Article 37 different because unlike the typical clause, it does not simply govern the duration of the agreement during its term but also requires adherence to the contract—including any no-strike and no-lockout undertakings—*after* it has expired and while negotiations for a new agreement are ongoing.

No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(5) and (1) by entering negotiations with a fixed intention of reaching agreement only on its terms, or by engaging in surface bargaining.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by SEIU Local 285; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Northampton on Oct. 21, 2002. Adm. Law Judge Wallace H. Nations issued his decision March 25, 2003.

\*\*\*

*Waterfront Services Co.* (14-CA-27001-1, et al.; 440 NLRB No. 154) Tahlequah, OK Dec. 19, 2003. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities; Section 8(a)(1) and (3) by discharging Louie Housman and Frank Davis; and Section 8(a)(1), (3), and (4) by discharging Daniel Stucker and Timothy Brown. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Individuals and Laborers Local 773; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at St. Louis, Oct. 15 and 16, 2002. Adm. Law Judge Margaret M. Kern issued her decision Dec. 11, 2002.

\*\*\*

#### **LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES**

*Health Midwest and Menorah Medical Center* (Nurses United for Improved Patient Care) Overland Park, KS December 9, 2003. 17-CA-21954, 21982; JD(SF)-80-03, Judge Thomas M. Patton. [\[HTML\]](#) [\[PDF\]](#)

*Providence Health System - Southern California, d/b/a Holy Cross Medical Center* (Health Care Employees [SEIU] Local 399) Mission Hills, CA December 12, 2003. 31-CA-26230; JD(SF)-89-03, Judge William L. Schmidt. [\[HTML\]](#) [\[PDF\]](#)

*Valley Shurry Seal Co.* (Laborer Local 185) Sacramento, CA December 12, 2003. 20-CA-30721-1, et al.; JD(SF)-91-03, Judge Burton Litvack. [\[HTML\]](#) [\[PDF\]](#)

*Hubert Distributors, Inc.* (Teamsters Local 1038) Detroit, MI December 16, 2003. 7-CA-31719(6); JD-129-03, Judge Ira Sandron. [\[HTML\]](#) [\[PDF\]](#)

*Septix Waste, Inc.* (Union de Tronquistas de Puerto Rico, Local 901) Ponce, PR December 17, 2003. 24-CA-9230, 9346; JD-137-03, Judge Karl H. Buschmann. [\[HTML\]](#) [\[PDF\]](#)

*Meeker Cooperative Light and Power Association* (Electrical Workers [IBEW] Local 160) Litchfield, MN December 17, 2003. 18-CA-16924; JD-139-03, Judge Bruce D. Rosenstein. [\[HTML\]](#) [\[PDF\]](#)

*Regional Typographers, Inc.* (Graphic Communications Local 51-23M) Freeport, NY December 19, 2003. 29-CA-25760; JD(NY)-58-03, Judge Steven Davis. [\[HTML\]](#) [\[PDF\]](#)

*Mashuda Corp.* (an Individual) Pittsburgh, PA December 19, 2003. 6-CA-33414; JD-142-03, Judge Eric M. Fine. [\[HTML\]](#) [\[PDF\]](#)