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.

Weekly Summary of NLRB Cases

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June 7, 2002 W-2846

CASES SUMMARIZED

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Yellow Freight System, Inc. (26-CA-19502; 337 NLRB No. 87)Memphis, TN May 28, 2002. The Board, in agreement with the administrative law judge, dismissed the complaint allegations that the Respondent took disciplinary action against Kim Burditt because he and another employee engaged in a concerted refusal to work because they reasonably believed that working conditions were unsafe. [HTML] [PDF]

The Board adopted the judge's finding that deferral to an arbitration panel's award is warranted, concluding that the award is susceptible to an interpretation consistent with the Act and satisfies the standards for deferral set forth in *Olin Corp.,* 268

NLRB 573 (1984), and *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955). It found that the arbitration panel determined that Burditt breached established safety procedures on August 17, 1999, by failing to notify supervision promptly of a potential chemical spill and by otherwise failing to follow established procedures pertaining to a potential hazard.

The Board found it unnecessary to rely on the judge's finding that the arbitration panel determined that conditions were not "abnormally dangerous." The arbitration panel made no finding on the issue. Even assuming that Burditt was entitled to seek medical attention because of exposure to a hazardous material, the Board reasoned the arbitration award is susceptible to an interpretation that Burditt failed to follow established safety procedures earlier that day and would have been properly disciplined, in any event, for that misconduct.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by Kim Burditt, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Memphis, Nov. 2, 3, and 6, 2000. Adm. Law Judge Keltner W. Locke issued his decision Dec. 5, 2000.

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Limbach Company (9-CA-34663; 337 NLRB No. 85) Columbus, OH May 30, 2002. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening employee Rosemary Taylor, through sheet metal trade manager James Ziegler, with discharge if she retained her position of union steward and Section 8(a)(3) and (1) by discharging Taylor because of her union activities. [HTML] [PDF]

The Respondent, in exceptions, implied that the judge's rulings, findings, and conclusions demonstrate bias and prejudice because the judge has found Section 8(a)(3) violations in all of the Section 8(a)(3) cases she has decided since January 1973, save one. After careful examination of the decision and the entire record, the Board ruled that the Respondent's contentions are without merit. Assuming arguendo that the Respondent's statistics are accurate, they do not demonstrate bias, the Board observed, noting as the Fourth Circuit has held, a judge should not be "rate[d] by the percentage of time he or she rules on a given side of a case. To evaluate an ALJ's impartiality in this way amounts to judging [his or her] record by mere result or reputation. In reality, such statistics tell us little or nothing." *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996).

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by Sheet Metal Workers Local 24; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Cincinnati, Feb. 23-26, 1999. Adm. Law Judge Nancy M. Sherman issued her decision March 31, 2000.

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Guardian Armored Assets, LLC (7-RC-22204; 337 NLRB No. 90) Southfield, MI May 24, 2002. Members Liebman and Bartlett agreed with the Acting Regional Director's finding that the Petitioner (Michigan Association of Police-911) is not disqualified from representing the Employer's guards simply because it represents police officers in the public sector. Accordingly, the majority denied the Employer's request for review of the Acting Regional Director's Decision and Direction of Election. Member Cowen, in dissent, would grant review. He asserted that the Petitioner's representation of both groups would raise an inherent, irreconcilable conflict in situations where police officers are called upon to investigate the Employer's guards. In his view, by directing an election in this matter without a further development of the factual record, the Board risks facilitating a systematic and widespread violation of the law. [HTML] [PDF]

The issues presented for review were whether the Petitioner was qualified to represent a unit of statutory guards under Section 9(b)(3) of the NLRA notwithstanding: 1) that by the language of its by-laws it may admit associate members who are not statutory guards; 2) an alleged conflict of interest based on its solicitation and receipt of donations and advertising revenue from customers of the Employer; and 3) an alleged conflict of interest based on the Petitioner's representation of units of police and other public law enforcement officers.

Member Cowen raised another issue for granting review regarding the Petitioner's practice of soliciting contributions from

employers covered by the NLRA. He wrote: "As long as the Petitioner remains a union dedicated to representing employees in the public sector, this solicitation of private employers does not present an issue. However, once the Petitioner determines that it will admit to membership and seek to represent employees of employers under the National Labor Relations Act, this practice of soliciting and receiving funds raises serious issues of criminal conduct under Section 302 of the Labor Management Relations Act, 29 U.S.C. Sec. 186." Member Cowen suggested that to the extent the record is unclear, the fault lies with the Petitioner's failure to respond to the Employer's subpoena for information about the Petitioner's membership requirements and fundraising practices. He would grant the request for review and remand to the Regional Director for the enforcement of the Employer's subpoena and a full hearing regarding the Petitioner's membership requirements and fundraising practices.

The majority said it need not, and did not, decide at this point whether Section 302 would provide a basis to deny the Petitioner the benefits of certification. It noted that the Employer did not raise the Section 302 issue and its denial of review does not by itself foreclose the Employer from raising the issue in subsequent proceedings. While the majority did not condone the Petitioner's failure to follow Board procedures by either complying with or petitioning to revoke the Employer's subpoenas, it agreed with the Acting Regional Director's finding that the Petitioner's failure to comply with the subpoenas at this stage of the proceeding was not prejudicial.

(Members Liebman, Cowen, and Bartlett participated.)

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Electrical Workers (IBEW) Local 702 (F.W. Electric, Inc.) (14-CD-1026; 337 NLRB No. 89) Benton, IL May 30, 2002. The Board determined that the employees of F.W. Electric represented by Electrical Workers Local 702 rather than those represented by Laborers Local 227 are entitled to perform the work in dispute. The disputed work is all flagging, concrete pouring, operation of power-concrete saws and hand tampers, and digging with shovels, trowel, or other hand tools necessary for the installation of traffic signals at the highway construction site located at Reed Station Road and Highway 13 in Carbondale, Illinois. In making its award, the Board relied on the factors of collective-bargaining agreements, employer preference and current assignment, employer past practice, relative skills and training, and economy and efficiency of operations. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

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Colden Hills, Inc. (3-CA-22657; 337 NLRB No. 86) Buffalo, NY May 28, 2002. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act by informing Brian Urquhart that as a union worker he would not be able to work for the Respondent because he could not work for a company that was not union; informing Urquhart that his application was not taken seriously because he was a union organizer; and refusing to consider for employment and refusing to hire Urquhart because of his membership in and activities on behalf of the Union. [HTML] [PDF]

In his decision, the judge cited two statements by the Respondent's vice president, Patricia Kester, which he found violated Section 8(a)(1). In one of the statements, Kester told Urquhart that she presumed that, as a union worker, he would not work for the Respondent because he could not work for a nonunion company. Urquhart asked Kester whether it made a difference to her that "I'm union and you're not union." In response Kester said to Urquhart:

I don't think that if you were a regular union worker that you'd even be able to work for our firm, 'cause usually, you're union, you can't work . . . for a company that's not union, from what I understand. Some people who have come here and applied for jobs in the past, if they've been union, found out that we weren't union, they weren't even able to consider us as employment.

The Board disagreed with the judge and did not find the statement coercive. Taken in its factual context, the Board said "Kester's statement conveys her belief that union rules, rather than employer action, precluded Urquhart's employment with the Respondent."

The General Counsel, in cross-exceptions, requested that the Respondent be required to reimburse Urquhart "for any extra Federal and/or state income taxes resulting from the lump sum payment of the backpay award." The Board declined to order

this relief, finding that such remedial relief sought by the General Counsel would involve a change in Board law and it is not appropriate to consider such a change in the absence of a full briefing by the parties. *Kloepfers Floor Covering, Inc.,* 330 NLRB 811; Ishikawa Gasket America, Inc., 337 NLRB No. 29 (2001); *Cannon Valley Woodwork,* 333 NLRB No. 97 (2001).

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by Asbestos Workers Local 30; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Buffalo on April 21, 2001. Adm. Law Judge Eric M. Fine issued his decision July 26, 2001.

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Newspaper and Mail Deliverers' Union of New York (New York Post) (2-CC-2429, 2-CE-183; 337 NLRB No. 91) New York, NY May 31, 2002. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(e) of the Act by entering into and enforcing section 11-A.1 of its collective-bargaining agreement with NYP Holdings, Inc., publisher of the New York Post; violated Section 8(b)(4)(ii)(A) by resorting to arbitration with an object of forcing or requiring Holdings to enter into an agreement prohibited by Section 8(e); and violated Section 8(b) (4)(ii)(B) by resorting to arbitration with an object of forcing or requiring Holdings to cease doing business with United Media or its successor, D.S.A. Section 11-A.1 provides that [t]o the extent permitted by law, the Publisher shall not distribute its newspapers or any of its other publications through any wholesaler or news company making distribution in any part of the Metropolitan area, as herein defined, unless such wholesaler is under written collective agreement with the Union or is willing to enter into written collective agreement as provided for in this section. [HTML] [PDF]

The judge found, and the Board agreed, that section 11-A.1 seeks to regulate the labor policies of other entities over which Holdings has no right to control. At issue is the distribution of the New York Post in Nassau and Suffolk Counties on Long Island. Historically, members of the bargaining unit had not performed the work and it was not fairly claimable by the Union. The Union's attempt to obtain the work for the employees of C & S, a union signatory employer, accordingly had an unlawful secondary objective and was not an attempt to retain or recapture unit work, the Board held. And, the union brought its grievance to the impartial chairman to accomplish an unlawful object-preventing Holdings from subcontracting delivery work to a nonunion company.

The Board, deciding an issue the judge did not consider, found that the Union also violated Section 8(b)(4) by attempting to enforce section 3-E as a basis for its grievance against Holdings. It noted that the Union admitted that it relied on section 3-E before the impartial chairman and, as the judge found, the Union had a secondary objective in pursuing its grievance. Section 3-E provides that [s]ubject to the side letters and memoranda attached hereto, the methods and extent of direct delivery and combined delivery through wholesalers or news companies as they exist within the Metropolitan Area at the time of the effective date hereof are to be continued, and no change can be made except by application to and with the approval of the Joint Conference Committee.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charge filed by NYP Holdings, Inc., d/b/a New York Post; complaint alleged violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e). Hearing at New York on 5 days between March 28 and July 5, 2000. Adm. Law Judge Eleanor MacDonald issued her decision Feb. 22, 2001.

* * *

Tim Foley Plumbing Service (25-CA-25652, 25730, 25-RC-9699; 337 NLRB No. 88) Muncie, IN May 31, 2002. The Board affirmed the administrative law judge's finding, applying the framework set forth in FES, 331 NLRB No. 20 (2000), that the Respondent unlawfully refused to hire six job applicants for journeyman plumber positions because of their union affiliation. Although the judge mischaracterized the practical differences between refusal-to-hire cases and refusal-to-consider cases, the Board decided that he properly analyzed all of the elements of a discriminatory refusal-to-hire violation. It also affirmed the judge's finding that the General Counsel failed to show that a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), is a necessary remedy, but it did not adopt all of the judge's rationale. The Board directed a second election.

[HTML] [PDF]

The cases arose from unfair labor practice charges and objections to a September 1997 representation election. In a decision reported at 332 NLRB No. 158 (2000), the Board affirmed the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider the six applicants for journeyman plumber positions and changing its hiring policies in order to exclude union applicants; violated Section 8(a)(1) by threatening employees with unspecified reprisals because they wore union t-shirts; and violated Section 8(a)(1), though its agent, Kenneth Harper, by interrogating employees about their activities for Indiana State Pipe Trades Association Local 661 and threatening them with plant closure, loss of wages, and other benefits. The Board agreed with the judge that the violations committed by the Respondent and its agents during the course of the union campaign warranted setting aside the election. It did not order a second election but instead directed the judge to reconsider on remand the propriety of a *Gissel* bargaining order after he considered the Board's decision and the refusal-to-hire allegations under the *FES* framework.

In deciding that the General Counsel failed to show that a *Gissel* bargaining order is warranted, the Board, contrary to the judge, did not rely on the fact that Supervisor Harper no longer works for the Respondent. It wrote: "Harper was a spokesman for Foley's views and the employees viewed Harper as an 'extension' of owner Tim Foley. As Foley still remains the owner and highest management official of the Respondent, Harper's departure is of no consequence."

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Adm. Law Judge Arthur J. Amchan issued his supplemental decision March 26, 2001.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Torromeo Trucking Company Inc., Kingston Ready-Mix (Teamsters Local 633) Kingston, NH May 23, 2002. 1-CA-38981, 39051; JD(NY)-32-02, Judge Steven Davis.

Kraft Foods North America, Inc. (Office Employees Local 1295) Woburn, MA May 24, 2002. 1-CA-39068; JD-59-02, Judge Martin J. Linsky.