

**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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July 5, 2002

W-2850

**CASES SUMMARIZED**

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*Pepsi-Cola General Bottlers, Inc.* (9-CA-38197; 337 NLRB No. 109) Cincinnati, OH June 25, 2002. The Board adopted the administrative law judge's dismissal of the complaint on the basis that it was time-barred and held that the Respondent did not violate Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire, Steven C. Saunders. Respondent argued that it made the decision not to hire Saunders in June 2000 and communicated that decision to him on June 22, more than 6 months before the charge was filed on January 11, 2001. The Board deemed it unnecessary to pass on the judge's alternative findings regarding the substantive allegations of the complaint and to consider whether the judge erred by denying admission of the corroborative evidence of Human Resource Manager Handley's contemporaneous notes of a conversation he had with Saunders. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Steven C. Saunders, an Individual; complaint alleged violation Section 8(a)(1) and (3). Hearing in Cincinnati, OH on Aug. 29, 2001. Adm. Law Judge Bruce D. Rosenstein issued his decision Oct. 29, 2001.

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*Spartan Aviation Industries, Inc.* (17-RC-12041; 337 NLRB No. 112) Tulsa, OK June 26, 2002. The Board asserted jurisdiction over Spartan Aviation Industries, which is engaged in the operation of a flight school in Tulsa, Oklahoma, and remanded the proceeding to the Regional Director for resolution of the bargaining unit issues. The UAW is seeking to represent all nonsupervisory flight school employees employed by Spartan. [\[HTML\]](#) [\[PDF\]](#)

In addition to actively recruiting students throughout the United States, the flight school has contracts with several foreign airlines to provide "ab initio," or initial, flight training for airline employees. Spartan contended that the training it provides and its relationship with the airlines bring it within the scope of the Railway Labor Act (RLA) rather than the NLRA and that the case should be referred to the National Mediation Board (NMB).

The Board did not submit the case to the NMB for an advisory opinion before determining whether to assert jurisdiction because the NMB has previously declined jurisdiction in a case that raised a jurisdictional claim in a similar factual situation. Under a two-part test for determining whether a noncarrier is subject to the RLA, the NMB first determines whether the nature of the work performed by an employer is the type of work traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by a common carrier. Both parts must be satisfied to establish that the employer is subject to the RLA. *System One Corp*, 322 NLRB 732 (1996).

The Board concluded that Spartan did not satisfy the first of the NMB's requirements and is not subject to the RLA, citing *Airline Training Center-Arizona*, 19 NMB 330 (1992) (ATCA). In ATCA, which involved a flight school owned by a foreign airline, the NMB held that flight training for an initial commercial license is not work traditionally performed by airline employees. The flight school in ATCA, like Spartan, provided ab initio training for various foreign airlines. The NMB found that although airlines typically provide training on a specific type of aircraft or necessary recurrent training, they do not provide the type of training that qualified individuals for an initial license. In its decision, the Board found that Spartan, which provides only ab initio training and is privately owned, does not perform work traditionally performed by airline employees and therefore, that the Board has jurisdiction under Section 2(2) of the Act.

(Members Liebman, Cowen, and Bartlett participated.)

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*AT&T Corp.* (28-CA-14967; 337 NLRB No. 105) Tucson, AZ June 24, 2002. The Board dismissed the complaint, agreeing with the administrative law judge that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Communications Workers (CWA) or its designee, Charging Party CWA Local 7026, or by failing to provide CWA or Local 7026 with information necessary for purposes of collective bargaining. [\[HTML\]](#) [\[PDF\]](#)

This case involves AT&T's decision in late 1997 to close its Toll Free Directory Assistance (TFDA) facility in Tucson, Arizona, lay off bargaining unit employees, and reassign the work to its other seven TFDA facilities nationwide. On January 5,

1998, AT&T formally notified CWA of its decision and, on January 22, Local 7026 President Michael McGrath and Robert Stuart, AT&T's division manager for TFDA, discussed the decision by teleconference call. During their conversation, McGrath requested that Stuart provide certain information on which AT&T based its decision to close the Tucson facility. The judge found that Stuart orally provided McGrath with "all the information he requested." McGrath told Stuart he disagreed with the decision and would take the matter up with Stuart's superiors at AT&T. Following the conference call, McGrath sought advice from CWA International Vice President Irvine on how to contest the Tucson closure, but did not take the matter up with any other AT&T officials.

The judge found that the Respondent fulfilled its obligation to provide information regarding its plan for Tucson to the CWA or its designee and that Local 7026's inaction in seeking bargaining over AT&T's plan for Tucson prior to its implementation led to the absence of bargaining. He found that Article 24 (Force Adjustment-Layoff, Part-timing, and Recall) of the parties' collective-bargaining agreement, established a contractually based right in AT&T to unilaterally declare prospective layoffs without consulting with CWA, and that the responsibility then shifted to CWA to propose, if it so chose, an alternative to AT&T's layoff plans within 45 days of the announced plan. McGrath never requested article 24 bargaining, the judge said, and even if McGrath was engaged in article 24 bargaining during the conference call, he "dropped the ball" by failing to follow up on his expressed intention to pursue the matter with higher-level officials. The judge found Stuart satisfied McGrath's request for information during the conference call, and that absent a renewed and more specific request, AT&T was not obligated to provide additional information.

The Board pointed out, in addition to the judge's reasoning, that the January 26, 1998 unfair labor practice charge was insufficient to put AT&T on notice that CWA demanded further information, because the charge was silent with respect to any refusal to furnish information until its amendment some 3 months later. In considering whether AT&T failed to bargain with the Union over the Tucson decision, the Board found it unnecessary to decide whether the Respondent had a duty to bargain over its decision to close the Tucson facility, lay off bargaining unit employees, and reassign their work to other unit employees. Nor did it decide whether any such bargaining obligation arose from the Act, as the General Counsel argued, or solely from article 24, as AT&T contended. Instead, the Board found that McGrath's entire course of conduct demonstrated a lack of due diligence in pursuing bargaining about the Tucson decision following the January 22 conference call.

Chairman Hurtgen would apply, as an additional basis for dismissing the failure-to-bargain allegation, the "contract coverage" analysis as set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993). Member Bartlett noted that, in evaluating whether a contract clause waives the union's right to bargain, he has not previously addressed whether to apply the D.C. Circuit's "contract coverage" analysis, rather than the "clear and unmistakable waiver" standard applied under current Board precedent. He also noted that the issue is currently pending before the Board in other cases. As it is not necessary to reach the issue in this case and in order to avoid further delay in issuing the Board's decision, Member Bartlett deferred judgment on the issue to another case.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charge filed by CWA Local 7026; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Phoenix, Sept. 1-3, 1998, and March 23-24 and June 22, 1999. Adm. Law Judge Gerald A. Wacknov issued his decision June 24, 2002.

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*Raley's* (20-CA-24837, 25166; 337 NLRB No. 116) Grass Valley and Yuba City, CA June 28, 2002. The Board adopted the administrative law judge's recommended order and dismissed the complaint allegation that the Respondent refused to recognize and bargain with Food and Commercial Workers Local 588 as the majority representative at the Respondent's stores in Grass Valley and Yuba City, CA. The Union, in its exceptions, contended that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to submit to a card check by a third party neutral. [\[HTML\]](#) [\[PDF\]](#)

The Board rejected the Union's position, noting the complaint does not allege that the Respondent unlawfully failed to submit to a neutral card check and the General Counsel has from the outset disclaimed that the case was litigated on any such theory. The General Counsel's theory of the case is controlling, and a charging party cannot enlarge upon or change that theory, the Board said, citing *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999). See *Paul Mueller Co.*, 332 NLRB No. 145 (2000) (reversing the

judge on due process grounds where the judge found a violation on a theory effectively disclaimed by counsel for the General Counsel.) In this decision, the Board found that the Union has presented no persuasive evidence establishing the existence of an agreement or past practice of submitting the issue of majority status to a third party neutral and therefore, affirmed the judge's denial of the Union's motion to compel a neutral card check.

In the earlier decision reported at 336 NLRB No. 30 (2001), Chairman Hurtgen dissenting, the Board found that: (1) section 1.1 of the parties' bargaining agreement waives the Respondent's right to insist on a Board-conducted election; (2) the two disputed stores (Grass Valley and Yuba City) are within the scope of Section 1.1; and (3) the Respondent was therefore obligated to recognize Local 588 on its demonstration of majority support at those stores. The case was remanded to the judge to "allow the parties to litigate the Union's claim of an authorization card majority at these two stores and any other remaining issues relevant to Respondent's obligation to recognize Local 588."

In Chairman Hurtgen's view, the Respondent did not waive its right to a Board conducted-election and, thus, a card check of any kind was inappropriate. Accepting the majority view as the law of the case, he agreed that the complaint herein should be dismissed. Member Cowen, who did not participate in the prior decision, expressed no view as to that decision.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

Charges filed by Food & Commercial Workers Local 588; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Francisco on Feb. 19, 2002. Adm. Law Judge Jay R. Pollack issued his supplemental decision March 6, 2002.

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*Bashas', Inc.* (28-RC-5973; 337 NLRB No. 113) Chandler, AZ June 26, 2002. The Board held, contrary to the Regional Director, that the petitioned-for multifacility unit of meat department and wall-deli department employees in the Employer's 17 "Food City" stores located in Maricopa County, Arizona is not an appropriate unit for bargaining. The Regional Director relied on the fact that all 17 stores are located in Maricopa County. The petitioning union is Food and Commercial Workers Local 99. [\[HTML\]](#) [\[PDF\]](#)

The Employer, headquartered in Chandler, Arizona, operates 101 grocery stores, primarily in the State of Arizona, including the 17 Maricopa County stores. The grocery stores are organized into separate administrative divisions based largely on marketing format. Twenty-two stores currently operate under the Food City format. Four stores, located in southeastern Arizona, operate as "Bashas' Mercado" and will soon be added to the Food City format. These 26 stores comprise the Food City division, which is headed by a single vice-president. Two stores operate in Pinal County, which is adjacent to Maricopa County: the Casa Grande store, which the Petitioner does not seek to represent, and the Apache Junction store. South of Pinal County is Pima County, the location of the Tucson store. The remaining two Food City stores are located in Mohave County, in northwestern Arizona, along the California border, in the towns of Bullhead City and Lake Havasu.

In reaching its conclusion, the Board found that the evidence failed to establish that the petitioned-for Maricopa County unit employees share a sufficient community of interest based solely on the fact that they are in the same county. It noted that the 17-store unit found appropriate does not conform to any administrative function or grouping, that the stores share no common supervision, that there is no substantial functional integration or significant interchange among the 17 stores, and that the stores are not a geographically coherent group in light of the exclusion of the nearby Casa Grande store. The Board found it unnecessary to decide the appropriate unit or units, since the Petitioner has not indicated a willingness to proceed to an election in a unit different than the one found appropriate by the Regional Director. The case was remanded to the Regional Director for further appropriate action.

On October 5, 2001, the Board denied the Employer's request for review of the Regional Director's findings that the single store units in Apache Junction (Case 28-RC-5974) and Tucson (Case 28-RC-5975) are appropriate and that the meat and wall-deli departments constitute an appropriate unit.

(Chairman Hurtgen and Members Liebman and Cowen participated.)

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*MTR Sheet Metal, Inc.* (19-CA-27617; 337 NLRB No. 110) Kent, WA June 28, 2002. The Board adopted, in the absence of exceptions, the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging and transferring employees to lower paying jobs, and giving them written warnings for excused absences, all because of their union or other protected concerted activity; and Section 8(a)(1) by threatening employees with business closure, discharge or transfer to lower paying jobs because of their activities for Sheet Metal Workers Local 66, soliciting employees to engage in surveillance of other employees' union activity, creating the impression that employees' union activity is under surveillance, and telling employees not to wear union T-shirts. [\[HTML\]](#) [\[PDF\]](#)

The Board granted the General Counsel's exceptions concerning the judge's inadvertent omission of expunction language from the recommended Order and notice and corrected the order and notice accordingly. It also corrected the judge's omission of reinstatement language from the affirmative portion of his recommended Order and notice with respect to the unlawful transfers of Saul Heikkila and Kevin Moltz.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Sheet Metal Workers Local 66; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Seattle on Feb. 12, 2002. Adm. Law Judge James L. Rose issued his decision March 28, 2002.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*National Association of Special Police and Security Officers* (Andrew Marvil, President, USEC Services Corporation) Washington, DC June 21, 2002. 5-CB-9029; JD-67-02, Judge C. Richard Miserendino.

*American Postal Workers* (an Individual) Toa Baja, PR June 24, 2002. 24-CB-2037; JD(NY)-39-02, Judge D. Barry Morris.

*Wild Oats Markets, Inc.* (Food & Commercial Workers Local 371) Westport, CT June 24, 2002. 34-CA-9586, et al.; JD(NY)-37-02, Judge Steven Fish.

*Eagle Ottawa, LLC* (Individuals) Rochester Hills, MI June 24, 2002. 7-CA-44392(1)(2); JD-68-02, Judge Karl H. Buschmann.

*Association of Community Organizations for Reform Now (ACORN)* (Individuals) Dallas, TX June 24, 2002. 16-CA-21007-1, et al.; JD(ATL)-32-02, Judge Jane Vandeventer.

*Northeastern Land Services, Ltd. d/b/a The NLS Group* (an Individual) Providence, RI June 27, 2002. 1-CA-39447; JD(NY)-40-02, Judge Joel P. Biblowitz.

*Dish Network Service Corp.* (Communications Workers Local 1108) Farmingdale, NY June 27, 2002. 29-CA-24670; JD(NY)-38-02, Judge Steven Davis.

*Riverbay Corporation, d/b/a Co-op City* (Co-op City Police Benevolent Association) Bronx, NY June 28, 2002. 2-CA-32617; JD(NY)-41-02, Judge Michael A. Marcionese.

*Bogner Construction Company* (Bricklayers Local 40) Wooster, OH June 28, 2002. 8-CA-32560; JD-66-02, Judge George Alemán.

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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.)*

*Tru-Link Commercial, Inc.* (Pedro Lopez) (13-CA-39621; 337 NLRB No. 108) Chicago, IL June 26, 2002.

*Sterling Packaging Corporation* (Chemical Workers Local 2-0326) (6-CA-32228; 337 NLRB No. 114) Jonestown, PA June 28, 2002.

*Stutz Plumbing, Inc.* (Construction & General Laborers' District Council of Chicago & Vicinity) (13-CA-39708-1; 337 NLRB No. 104) Forest Park, IL June 21, 2002.

*Malik Roofing Corporation* (Sheet Metal Workers Local 18) (30-CA-15752-1; 337 NLRB No. 103) Whitewater, WI June 21, 2002.

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### **NO ANSWER TO COMPLIANCE SPECIFICATION**

*(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)*

*Doug-A Daily North America, Inc.* (Korean Immigrant Workers Advocates) (31-CA-24127; 337 NLRB No. 111) Chicago, IL June 27, 2002.

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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.)*

*International Maintenance Corporation* (Operating Engineers Local 406) (15-CA-16374; 337 NLRB No. 107) Baton Rouge, LA June 26, 2002.