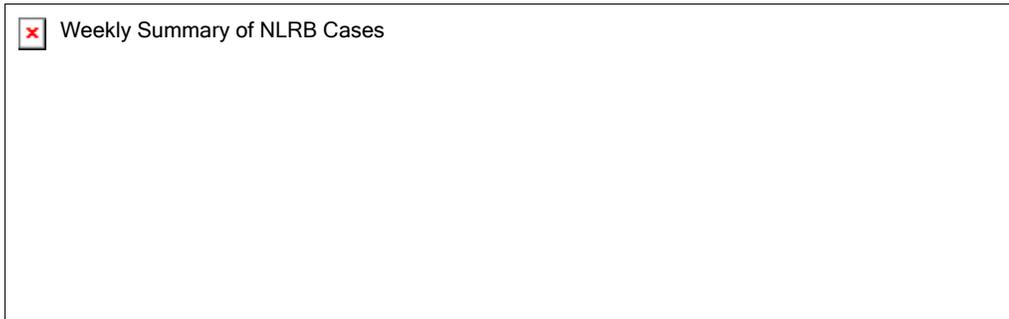


ABOUT THE WEEKLY SUMMARY

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.



[Index of Back Issues Online](#)

July 26, 2002

W-2853

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

[Electrical Workers IBEW Local 98](#), Lititz, PA
[Franklin Home Health Agency](#), Valley Stream, NY
[Lafayette Grinding Corp.](#), Brooklyn, NY
[Medlar Electric, Inc. and Bohrer Reagan Co. Joint Employers](#), Reading, PA
[MV Transportation](#), Peoria, IL
[Paul Mueller Co.](#), Springfield, MO
[South Coast Refuse Corp.](#), Irvine, CA
[United States Postal Service](#), Spokane and Tacoma, WA

OTHER CONTENTS

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

General Counsel Memoranda:

[\(GC 02-05\) Collection Cases - Reaffirmation of GC 95-8](#)

[\(GC 02-06\) Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.](#)

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). Persons who do not have an Internet connection can request a limited number of copies of decisions by writing the Information Division, 1099 14th 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, also 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.

MV Transportation (33-RD-788; 337 NLRB No. 129) Peoria, IL July 17, 2002. The Board overruled its prior decision in *St.*

Elizabeth Manor, Inc., 329 NLRB 341 (1999), and repudiated the successor bar doctrine articulated therein. [\[HTML\]](#) [\[PDF\]](#)

In connection with the assumption of its predecessor's operations, the Employer hired the predecessor's employees and recognized the incumbent union (Amalgamated Transit Union, Local 416) as the bargaining representative of the employees. Thereafter, the Employer and the Union met for bargaining on two occasions, at which time an employee filed a decertification petition.

The Regional Director dismissed the petition in reliance on *St. Elizabeth Manor*, in which the Board held that, once a successor employer's obligation to recognize an incumbent union attaches, the union is entitled to a reasonable period of time for bargaining without challenge to its majority status. The Board granted review of the Regional Director's dismissal and ultimately overruled *St. Elizabeth Manor*. Stating that its decision merely represented a return to longstanding precedent from which the Board imprudently deviated in *St. Elizabeth Manor*—the Board held that an incumbent union in a successorship situation is entitled to only a *rebuttable* presumption of continuing majority status, which will not serve to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status.

The Board concluded that the well-established principle to which it was returning (as initially articulated in *Southern Moldings*, 219 NLRB 119 (1975)), represented the most appropriate balance of the Act's competing purposes of protecting employee freedom of choice and maintaining the stability of bargaining relationships, whereas the successor bar doctrine "promote[d] the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative." The Board noted that the successor employer situation is distinguishable from other contexts in which the Board has granted the union an insulated period during which its majority status is immune from challenge. For example, in a voluntary recognition situation, the union needs the opportunity to demonstrate its effectiveness to the employees without the threat of removal; in a successor employer situation, however, the employees have already had the opportunity to assess the union's effectiveness, by virtue of their longstanding relationship with the union. The Board also noted that although a change in employers may cause instability and, consequently, engender stress or anxiety among the employees, the impact of such instability is uncertain (i.e., it could cause employee disaffection with the union, or it could cause the employees to become stronger adherents of the union). Accordingly, the choice to retain or remove the bargaining representative should be left to the employees, who "are presumably mature individuals who are capable of making rational decisions."

Member Liebman, dissenting, asserted that "the Board's newly-constituted majority reverse[d] course needlessly and without institutional experience under the previous rule" set forth in *St. Elizabeth Manor*. "*St. Elizabeth Manor* was sound policy, consistent with the Act, and fairly adapted to 'needs in a volatile, changing economy'" replete with corporate mergers and acquisitions. "By providing a limited period of repose during which a question of representation may not be raised, *St. Elizabeth Manor* provides a framework that best accommodates the economic realities of the 21st Century."

(Chairman Hurtgen and Members Liebman, Cowen, and Bartlett participated.)

* * *

Medlar Electric, Inc. and Bohrer Reagan Co. Joint Employers (4-RC-20249; 337 NLRB No. 133) Reading, PA July 18, 2002. The Board granted the Joint Employers' request for review of the Regional Director's supplemental decision and certification of representative and, reversing the Regional Director, overruled the challenge to the ballot cast by heavy equipment operator Bruce Brooks. The Board found that Brooks is a dual function employee who regularly performs unit work for a sufficient period of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. The case was remanded to the Regional Director to open and count Brooks' ballot and to issue a revised tally of ballots and the appropriate certification. [\[HTML\]](#) [\[PDF\]](#)

In August 2001, the Acting Regional Director issued a decision and direction of election in which he found the petitioned-for unit of the Joint-Employer's full-time and part-time truckdrivers to be an appropriate unit for collective bargaining. The Acting Regional Director included Gary Adams, a warehouse employee who spends approximately 30 to 40 percent of his time driving a pick-up truck to transport supplies or equipment. He excluded three others: Brooks and warehouse employees Eric Saunders and Thomas Luckenbill, whose driving duties constitute only 10 to 5 percent of their worktime. On September 9, 2001, the Board denied the Joint Employers' request for review alleging that the Acting Regional Director erred in excluding

Brooks, Sanders, and Luckenbill, but it amended the decision to permit Brooks to vote under challenge.

The tally of ballots for the election held September 20, 2001 shows three for and two against, Teamsters Local 429 (the Petitioner), with three determinative challenged ballots cast by Brooks, Sanders, and Luckenbill. On October 11, 2001, the Regional Director issued the supplemental decision on challenged ballots and certification of representative in which she sustained the challenges to all three ballots, affirming the earlier decision to exclude Brooks and noting that the Board denied review of the finding that Sanders and Luckenbill were ineligible voters.

In its decision on review, the Board held that Brooks, like the unit truckdrivers who transport equipment and materials between the Joint Employers' warehouse and various jobsites, performs similar unit work when he tows or hauls tools and equipment to jobsites to be used both in his construction excavation work and by the Joint Employers' other employees in their electrical and mechanical construction work. The Board said Brooks performs unit work at least 25 to 30 percent of his time and that he, like dual-function driver Adams, has a substantial interest in the unit's working conditions to be included in the unit.

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

* * *

Lafayette Grinding Corp. (29-CA-23593, 23895; 337 NLRB No. 134) Brooklyn, NY July 19, 2002. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally stopped making payments to the Union's health and welfare fund, dealt directly with employees over their health insurance, and granted and rescinded a wage increase without giving Electrical Workers IUE Local 485 an opportunity to bargain; and violated Section 8(a)(1) by informing employees that the wage increase was being rescinded because of the possibility that the Union would file an unfair labor practice charge. [\[HTML\]](#) [\[PDF\]](#)

In exceptions, the Respondent contended that because it had not signed the 1997-2000 collective-bargaining agreement, it did not violate the Act, when, upon expiration of the agreement, it stopped making payments to the Union's health and welfare fund; and that it did not unlawfully make changes in employee working conditions in October 2000 because the parties had reached a valid impasse. In rejecting these arguments, the Board explained:

The Respondent admits that its practice of making monthly fund payments continued virtually uninterrupted during the 1997-1999 period. As an established practice, the fund contributions became an implied term and condition of employment based on the mutual agreement of the parties. . . . Having established a 3-year practice of making monthly fund payments, the Respondent changed an implied term and condition of employment when it unilaterally stopped making payments to the Union's health and welfare fund. It is immaterial that the Respondent had not signed the 1997-2000 draft contract, because the Respondent's obligation to maintain the status quo is not based on the draft contract but on the Respondent's own past practice.

The Board found that the parties did not reach a good-faith impasse in October 2000 because the unremedied unfair labor practice the Respondent committed in January 2000 of unilaterally ceasing to make any health and welfare fund payments contributed to the parties' inability to reach agreement.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charges filed by Electrical Workers IUE Local 485; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn, March 28, April 6, and May 1, 2001. Adm. Law Judge Eleanor MacDonald issued her decision July 30, 2001.

* * *

Paul Mueller Co. (17-CA-20003, 20266; 337 NLRB No. 124) Springfield, MO July 16, 2002. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by reducing employee James Hulse from master craftsman and lowering his pay. It reversed the judge's dismissal of the Section 8(a)(5) allegation that the Respondent unilaterally subcontracted certain fabrication work to T and C Stainless. The judge held that the Section 8(a)(5) allegation was barred by Section 10(b) because in his view, the subcontracting began in November 1996, and that the Union

knew of it sometime prior to 1998, more than 6 months before the filing of the charge on August 6, 1999. [\[HTML\]](#) [\[PDF\]](#)

In reversing the judge's dismissal of the 8(a)(5) allegation on 10(b) grounds, the Board relied on both the insufficiency of the evidence as to the Union's earlier knowledge of the subcontracting, as well as the Respondent's waiver of its 10(b) defense. The Board wrote: "Section 10(b) is a statute of limitations and is not jurisdictional in nature. Rather, it is an affirmative defense which is waived if not timely raised. . . . Specifically, the 10(b) limitations period must be raised either in the pleadings or at hearing." Applying these standards, the Board noted that the Respondent did not raise the 10(b) defense either in its answer or at the hearing. Instead, the Respondent first raised the 10(b) defense in its post-hearing brief to the judge. The Board decided that the Respondent waived the 10(b) defense, explaining: "The Respondent's failure to plead or specifically litigate this defense at the hearing clearly handicapped the General Counsel in responding to the judge's dismissal, since he had no occasion to bring out the fact on this issue."

The Board considered the merits of the subcontracting allegation and found that the Respondent violated Section 8(a)(5), as alleged. It noted that the Respondent stipulated at the hearing that subcontracting fabrication work was a mandatory subject of bargaining and that it had neither given prior notice to the Union nor afforded it an opportunity to bargain. The Respondent thus has essentially admitted that it violated Section 8(a)(5) by its unilateral action.

(Chairman Hurtgen and Members Liebman and Bartlett participated.)

Charges filed by Sheet Metal Workers Local 208; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing in Springfield on Nov. 2, 1999. Adm. Law Judge Pargen Robertson issued his decision Jan. 12, 2000.

* * *

Electrical Workers IBEW Local 98 (The Farfield Co., Inc.) (4-CD-1070; 337 NLRB No. 131) Lititz, PA July 18, 2002. The Board, finding no competing claims to the disputed work, concluded that no jurisdictional dispute existed and, accordingly, quashed the notice of hearing. The charge filed by The Farfield Co. alleged that the Respondent violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Farfield and/or Bruce Industrial Company (Bruce), to assign certain work to employees represented Iron Workers Local 161 rather than to unrepresented employees of Bruce. [\[HTML\]](#) [\[PDF\]](#)

Farfield's contract with Southeastern Pennsylvania Transportation Authority (SEPTA) was to remove and replace switchgear equipment at three substations providing electrical power for the operation of SEPTA trains located in Philadelphia. Farfield subcontracted Hake, Inc. whose employees were represented by Iron Workers Local 161, to do the type of work performed by riggers at the Mr. Vernon substation. When agents of the IBEW started picketing the worksite, Hake's employees stopped working and left the site. Farfield then entered into a new subcontracting agreement with Bruce, whose employees are not represented by a labor organization, to do the work abandoned by Hake's employees. On September 19, 2001, members of the Iron Workers came to the site and physically prevented the Bruce employees from installing the switchgear equipment because they were nonunion employees. No claim was made by the IBEW for work on the jobsite.

The IBEW argued that the Board lacked jurisdiction on this matter because there is no evidence that it ever claimed the riggers' work for employees it represented or employees represented by Iron Workers. In agreement, the Board held that IBEW engaged in area standards picketing and sought to represent Farfield's current employees. It found neither objective constitutes a claim for the assignment of work to one group of employees rather than another within the meaning of Section 8(b)(4)(D).

(Chairman Hurtgen and Members Cowen and Bartlett participated.)

* * *

United States Postal Service (19-CA-25636(P); 337 NLRB No. 130) Spokane and Tacoma, WA July 19, 2002. On a stipulated record, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the National Association of Letters Carriers, Branch No. 442 with requested information relevant to the processing of a grievance the Union had filed over the Respondent's denial of unit employee Debra Dixon's transfer request from its Spokane facility to

its Tacoma facility. [\[HTML\]](#) [\[PDF\]](#)

The Board found without merit the Respondent's affirmative defenses that: (1) the issue is moot because either some or all of the information requested has been provided or has been provided in an alternative form; (2) the complaint fails to state a claim for which relief could be granted "because the information requested is neither relevant nor necessary to the Union's bargaining responsibilities"; (3) the allegation respecting NALC are mooted "by the election of that organization to pursue the underlying grievance the underlying grievance without the requested information"; and (4) the unfair labor practice proceeding should be deferred to arbitration.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by National Association of Letter Carriers, Branch No. 442; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing before an administrative law judge.

* * *

Franklin Hospital Medical Center d/b/a Franklin Home Health Agency (29-RC-9819; 337 NLRB No. 132) Valley Stream, NY July 19, 2002. Members Liebman and Cowen ruled that the Employer's request for review of the Regional Director's Decision and Direction of Election raised no issues warranting review and denied the Employer's request to stay the election as moot. Member Bartlett concurred in the result. [\[HTML\]](#) [\[PDF\]](#)

The Employer provides home health care to individuals at their residences. The petitioning union is the New York State Nurses Association. The Employer contracts with 16 outside agencies to supply all but seven of the 170 to 226 personal care aides and home health care aides who assist in providing patient care.

The Employer contended that its staff nurses (RNs) are not statutory employees because they supervise all of the aides. Alternatively, it claimed the RNs supervise the seven in-house aides. The Regional Director noted that it is well established that an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, to qualify as a supervisor under Section 2(11). He found no evidence that the field nurses are authorized to transfer, suspend, lay off, recall, promote, discharge or reward employees, or to adjust their grievances, or to effectively recommend any of these personnel actions. Thus, the Regional Director held that the Employer failed to establish that its staff RNs are statutory supervisors. Having found that the RNs are employees within the meaning of the Act, and since the parties stipulated that the petitioned-for unit is otherwise appropriate, the Regional Director found the following unit is appropriate for collective bargaining:

All full-time, regular part-time, and per diem registered nurses in the classifications of Regional Nurse ("RN")-Field, RN-Case Manager, RN-Managed Care Coordinator, and RN-Performance Improvement, employed by the Employer in its Home Care Division at and out of its 14 Brooklyn Avenue, Valley Stream, New York, location, but excluding all other employees, guards, confidential employees and supervisors defined in the Act.

The parties stipulated that those per diem RNs meeting the following formula shall be eligible to vote: all per diem nurses who perform an average of at least four patient visits per week in the 13 week period immediately preceding the Direction of Election. The Employer submitted that this eligibility formula should be specifically set forth in any certification of the Union.

In the absence of a request for review regarding the unit description, Member Cowen adopted, pro forma, the Regional Director's denial of the Employer's request to amend the unit description to reflect that only those per diem nurses who meet the eligibility formula have a sufficient community of interest to be included in the unit. He agreed that the formula itself should not be in the unit description, and noted that the adjective "regular" is frequently used to describe those employees in a particular category who are to be included in the unit.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

South Coast Refuse Corp. (21-CA-32555, et al.; 337 NLRB No. 136) Irvine, CA July 19, 2002. The Board granted the General Counsel's motion for partial summary judgment on compliance specification with respect to: 1) paragraphs 1, 3, 5, and 7 concerning the identity of the discriminatees, the starting date of the backpay period for all 32 discriminatees, the invalidity of the Respondent's previous reinstatement offers, and the continuation of the backpay period until the Respondent tenders a valid reinstatement offer; 2) paragraphs 56, 92, 98, 122, and 134 concerning the dates of reinstatement for five discriminatees; 3) all paragraphs setting forth the hours that all of the discriminatees would have worked, except as may be affected by litigation of issues concerning backpay periods; and 4) all paragraphs setting forth the gross backpay formulas for the discriminatees.

[\[HTML\]](#) [\[PDF\]](#)

The Board granted the General Counsel's motion to strike the Respondent's first affirmative defense contending that the Regional Director has no basis to obtain the relief it seeks, and denied the Charging Party's request for expenses and attorneys' fees. The proceeding was remanded to the Regional Director for a hearing limited to the determination of the backpay periods for 27 of the discriminatees, interim earnings for all of the discriminatees, and the Respondent's net backpay liability.

A controversy having arisen over the amount of backpay due the discriminatees under the terms of the Board's July 21, 2000 order, and enforced by the Ninth Circuit on January 31, 2001, the Regional Director issued a compliance specification alleging the amounts due. The Respondent's answer to the allegations consisted of one word: "Denied." The Board agreed with the General Counsel that a general denial is not sufficient to refute the allegations pertaining to the gross backpay calculations and the duration of the five discriminatees' backpay periods. It decided that the Respondent, by denying the allegations in paragraphs 1, 3, 5, and 7, is seeking to relitigate matters already decided in the underlying unfair labor practice proceeding. The Board also noted that the Respondent subsequently agreed that these issues are not subject to litigation in the compliance proceeding.

(Chairman Hurtgen and Center Members Liebman and Cowen participated.)

General Counsel filed motion for partial summary judgment and to strike affirmative defenses May 11, 2001.

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Hotel Employees and Restaurant Employees Local 2 (Castagnola, Inc. of San Francisco d/b/a Castagnola's Restaurant) San Francisco, CA July 11, 2002. 20-CB-11531; JD(SF)-49-02, Judge Burton Litvack.

LMC Industrial Contractors, Inc. (Iron Workers Local 33) New York, NY July 16, 2002. 3-CA-23073(E); JD-74-02, Judge Margaret M. Kern

Saginaw Control and Engineering, Inc. (Steelworkers) Saginaw, MI July 17, 2002. 7-CA-43177(1), et al.; JD-76-02, Judge Earl E. Shamwell Jr.

Overnite Transportation Company (Teamsters Local 667) Memphis, TN July 17, 2002. 26-CA-19037, et al.; JD-75-02, Judge Leonard M. Wagman.

D.A. Nolt, Inc. (Roofers Local 30) Philadelphia, PA July 18, 2002. 4-CA-30325-1, -2; JD-56-02, Judge Margaret M. Kern.

California Forensic Medical Group, Inc. (an Individual) Santa Rosa, CA July 16, 2002. 20-CA-29647-1; JD(SF)-48-02, Judge Mary Miller Cracraft.

Teamsters Local 557 (General Motors) Baltimore, MD July 18, 2002. 5-CC-1247; JD-77-02, Judge William G. Kocol.

Wal-Mart Stores, Inc. (Food & Commercial Workers Local 1167) Los Angeles, CA July 17, 2002. 21-CA-34515; JD(SF)-50-02, Judge Lana Parke.

Wilshire at Lakewood (an Individual) Lee's Summit, MO July 18, 2002. 17-CA-21564; JD(SF)-51-02, Judge Gregory Z. Meyerson.