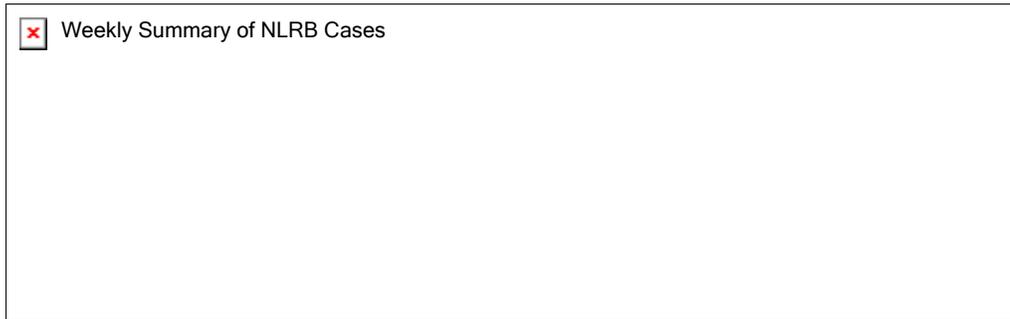


ABOUT THE WEEKLY SUMMARY

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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November 8, 2002

W-2868

CASES SUMMARIZED

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[Laborers Local 113 \(Michels Pipeline Construction, Inc.\)](#), Brownsville, WI
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Laborers Local 113 (Super Excavators, Inc.) (30-CD-160; 338 NLRB No. 50) Menomonee Falls, WI Oct. 31, 2002. Relying on the factors of employer preference, assignment, past practice, area practice, safety and efficiency of operations, Members Cowen and Bartlett decided that the employees of Super Excavators, Inc., represented by Laborers' Local 113, are entitled to perform the operation of the mini-excavator (backhoe) in below ground shaft and tunnel excavations on the sewer project ongoing at the Becher Street Tunnel Project in Milwaukee, Wisconsin. [\[HTML\]](#) [\[PDF\]](#)

Dissenting, Member Liebman would find that Operating Engineers Local 139 did not make a claim to the disputed work and would therefore grant its motion to quash this Section 10(k) proceeding. In her view, the grievances filed by Local 139 were fundamentally different from those at issue in *Super Excavators I*, 327 NLRB 113 (1998), and do not constitute an effective claim for the underground excavation work. Member Liebman said that the grievances sought only that the Employer pay the employee(s) who actually performs the work at the (higher) rate specified in the Local 139 collective-bargaining agreement. According to representatives of Local 139, the grievances were designed to ensure that the Employer "paid the proper wages, fringes, and benefits for the individual that was performing these duties."

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Laborers Local 113 (Michels Pipeline Construction, Inc.) (30-CD-161; 338 NLRB No. 51) Brownsville, WI Oct. 31, 2002. Members Cowen and Bartlett, with Member Liebman concurring, concluded that employees of Michels Pipeline Construction, Inc., represented by Laborers Local 113, are entitled to perform the operation of the mini-excavator/backhoe in the underground shafts and tunnels at the North Shore 6 Project for the Milwaukee Metropolitan Sewerage District. They relied on the factors of employer preference, assignment, and past practice, area practice, safety, and efficiency and economy of operations. [\[HTML\]](#) [\[PDF\]](#)

In her concurring opinion, Member Liebman agreed that the evidence in this case is sufficient to support a finding that Operating Engineers Local 139 has claimed the underground backhoe work. She noted that in her view, the case is distinguishable from *Super Excavators, Inc. (Super Excavators II)*, 338 NLRB No. 50 (2002), where she dissented from the majority's conclusion that Local 139 had made a claim to the backhoe work.

(Members Liebman, Cowen, and Bartlett participated.)

* * *

Tradesmen International (17-CA-20952; 338 NLRB No. 49) Kansas City, MO Oct. 31, 2002. Members Cowen and Bartlett adopted the administrative law judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by maintaining its no-solicitation rule but reversed and dismissed the judge's determination that the Respondent violated Section 8(a)(1) by maintaining certain provisions of its "Conflicts of Interest" rule and by maintaining the rule prohibiting "slanderous or detrimental" statements. [\[HTML\]](#) [\[PDF\]](#)

The issues presented in this case involved three rules maintained by the Respondent in an employee manual: (1) a no-solicitation rule prohibiting employees from soliciting "during times they are expected to be working"; (2) a "Conflicts of Interest" rule; and (3) a rule prohibiting "statements which are slanderous or detrimental" to the Company or its employees. The majority applied the standard set forth by a Board majority in *Lafayette Park Hotel*, 326 NLRB 824, 834 (1998), and said that under that standard, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." They found that the General Counsel did not meet the burden of proof that the rules can reasonably be interpreted in a way that infringes on Section 7 activity.

Dissenting in part, Member Liebman agreed with her colleagues that the "no solicitation" rule did not violate the Act. However, in agreement with the judge, she found that maintaining the "conflicts of interest" rule, the rule prohibiting "disloyal, disruptive, competitive, or damaging" conduct, and the requirement that employees represent the Company in a "positive" manner would tend to chill employees in the exercise of their Section 7 rights. In Member Liebman's view, the rule prohibiting "slanderous or detrimental" statements fails to define the area of permissible conduct in a manner clear to employees, and consequently has a reasonable tendency to cause employees to refrain from engaging in protected activities rather than risk being disciplined or violating the rule.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Electrical Workers (IBEW) Local 545; complaint alleged violation of Section 8(a)(1). Hearing at Overland Park, KS, May 10, 11, and 30, 2001. Adm. Law Judge Albert A. Metz issued his decision Nov. 27, 2001.

* * *

Citywide Corporate Transportation, Inc. (2-CA-30832; 338 NLRB No. 45) Bronx, NY Oct. 22, 2002. Members Cowen and Bartlett, with Member Liebman concurring, adopted the administrative law judge's recommended order dismissing the complaint alleging that the Respondent violated Section 8(a)(1) of the Act through surveillance, interrogation and threats of unspecified reprisals in July and August 1997 and Section 8(a)(1) and (3) by denying Bernard Quashie employment opportunities. [\[HTML\]](#) [\[PDF\]](#)

Quashie is a driver for the Respondent, a limousine service organized as a New York cooperative corporation. The primary question raised in this proceeding was whether Quashie was entitled to the Act's protection when he engaged in union organizing activities. The Respondent argued that as a shareholder of the Respondent with the rights and privileges set forth in the Respondent's governing documents, Quashie was not covered by Section 7 of the Act. Because Respondent is owned by the drivers and has no employee drivers, the Respondent further argued that Quashie, in his capacity as a shareholder, was akin to a managerial employee and excluded from the Act's coverage.

The judge determined that the drivers worked for themselves, not for an employer with conflicting interests and can, as a group, effectively formulate and determine corporate policy, including labor relations policy. Accordingly, he found that the Respondent's class A drivers, such as Quashie, are not employees protected by the Act.

In her concurring opinion Member Liebman said she wrote separately "to suggest that the Board should soon reexamine its approach, which may have evolved inadvertently, without careful consideration of all its current ramifications." She noted this case presents an example of the difficulty of applying statutory coverage doctrines to changing workplace realities, and under the Board's current law this case is arguably straightforward but the law itself is ripe for reconsideration.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Machinists District 15; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York, April 20-22, 1999. Adm. Law Judge Michael A. Marcionese issued his decision Aug. 11, 1999.

* * *

Corrections Corporation of America d/b/a Servicios Correccionales de Puerto Rico (24-RC-8187; 338 NLRB No. 53) Guayama, PR Oct. 28, 2002. Members Cowen and Bartlett, concluding that it would be a waste of the Board's resources to determine the merits of the Employer's objection to an election held August 3, 2001, issued the instant Notice to Show Cause why the Employer's motion to dismiss the petition should not be granted on the ground that the Employer no longer employs the employees at issue. The majority said that the issuance of this Notice gives the Petitioner (Asociacion de Miembros de la Policia de Puerto Rico) the opportunity to refute the Employer's assertion regarding the status of the unit employees (guards employed at a prison in Guayama, Puerto Rico). [\[HTML\]](#) [\[PDF\]](#)

The proceeding has been pending before the Board on the Employer's exceptions to the hearing officer's recommendation to

overrule the Employer's objection. On June 24, 2002, the Employer filed a motion to dismiss the petition based on the announcement by the Corrections Administration for the Commonwealth of Puerto Rico that, effective August 6, it was cancelling the management services agreement with the Employer covering the prison facility where the unit employees performed guard services.

Dissenting, Member Liebman said that the merits of the Employer's election objection must be decided before ruling on the Employer's motion. She asserted "[i]f the objection lacks merit, then the Board may not dismiss the petition as moot. This is so because, if the Petitioner was properly certified, then its status as the guards' exclusive representative, and the Employer's corresponding bargaining obligation, dates back to August 3, 2001. . . . If, on the other hand, the Employer's objection is meritorious, then the petition arguably may be subject to dismissal. But this just confirms that the Board must assess the merits of the Employer's objection before ruling on its motion to dismiss."

(Members Liebman, Cowen, and Bartlett participated.)

* * *

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Nor-Cal Ready Mix, Inc. d/b/a Antioch Rock & Ready Mix (Machinist District Lodge 190, Local 1173 and Operating Engineers Local 3) Antioch, CA October 21, 2002. 32-CA-19294-1; JD(SF)-83-02, Judge Clifford H. Anderson.

St. Barnabas Medical Center (New Jersey Nurses (CWA) Local 1091) Livingston, NJ October 29, 2002. 22-CA-24632; JD(NY)-65-02, Judge Joel P. Biblowitz.

St. George Warehouse (Teamsters Local 641) Newark, NJ October 30, 2002. 22-CA-23223, et al.; JD-116-02, Judge Margaret M. Kern.

Sunshine Piping, Inc. (Plumbers Local 366) Panama City, FL November 1, 2002. 15-CA-16530; JD(ATL)-63-02, Judge George Carson II.

Pieper Electric, Inc., PPC Holdings, Inc. (Single Employer) (Electrical Workers [IBEW] Local 494) Milwaukee, WI November 1, 2002. 30-CA-15504; JD-117-02, Judge Bruce D. Rosenstein.

Gem Management Co., Inc. (Plasterers Local 67) (Bricklayers Local 1) Detroit, MI November 1, 2002. 7-CA-44509; JD-119-02, Judge Eric M. Fine.

Food & Commercial Workers Locals 342-50 and 174 (Pathmark Stores Inc.) Brooklyn, NY November 1, 2002. 29-CB-11732, 11732-2; JD(NY)-64-02, Judge Howard Edelman.

The Electric Materials Co. (TEMCO) (Electrical Workers (UE) Local 684) North East, PA November 1, 2002. 6-CA-31356, et al.; JD-115-02, Judge Benjamin Schlesinger.

* * *

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 answer the complaint.)

Atlas Insulation, Inc. (Asbestos Workers Local 114) (15-CA-16365; 338 NLRB No. 47) Jackson, MS October 30, 2002.

Four J Food Corp., d/b/a Park Avenue Gourmet (UNITE Employees Local 169) (2-CA-34203; 338 NLRB No. 46) New York, NY October 28, 2002.

* * *

TEST OF CERTIFICATION

(In the following cases, 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.)

Baker Concrete Construction, Inc. (Carpenters Local 551) (16-CA-22119; 338 NLRB No. 48) Houston, TX October 28, 2002.

Trimm Associates, Inc. (Glaziers Local 252, Painters District 21) (4-CA-31353; 338 NLRB No. 52) Media, PA October 30, 2002.