

## 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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December 6, 2002

W-2872

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*Safeway, Inc.* (19-RD-3518; 338 NLRB No. 63) Missoula, MT Nov. 20, 2002. Members Cowen and Bartlett certified the results of a decertification election held March 27, 2002, which resulted in four votes for and six against, Food and Commercial Workers Local 4. Contrary to the hearing officer, the majority found that the Employer's maintenance of a

confidentiality rule, during the critical period prior to the election, was not objectionable conduct and, accordingly, overruled Union Objections 3 and 8. The majority wrote: [\[HTML\]](#) [\[PDF\]](#)

Of primary significance in our consideration of this issue is that the employees were represented by the Union at all times material to this case. . . . There is no indication that the confidentiality rule has ever been enforced, or that it has placed any impediment on the ability of employees to discuss terms and conditions of employment with the Union, or with other employees. . . .

We also stress that the confidentiality rule does not expressly prohibit employees from discussing terms and conditions of employment with each other or with the Union.

Member Liebman, dissenting, sees no basis for deviating from Board precedent that has found objectionable an employer's mere maintenance of confidentiality rules like the one here that a reasonable employee could interpret as prohibiting the sharing of information about working conditions with co-workers or a union. She added: "Sharing such information is protected activities under Section 7 of the Act." See, e.g., *Freund Baking Co.*, 336 NLRB No. 75 (2001); *IRIS U.S.A., Inc.*, 336 NLRB No. 98 (2001). Member Liebman noted that the Employer maintained a confidentiality rule that prohibited, on pain of discharge, disclosure of "business and financial information" including "salary information" and "personnel information," as well as "personnel records" and "payroll data." She agreed with the hearing officer that, consistent with Board precedent, the election must be set aside.

The Board adopted the hearing officer's recommendation that Objections 3 and 8 also be overruled insofar as they allege that the Employer engaged in objectionable conduct by maintaining, in its Code of Business Conduct, rules which allegedly: (1) establish overbroad restrictions on employee communications concerning terms and conditions of employment; and (2) could be read to require employees to participate in investigations of union activity. In the absence of exceptions, the Board adopted pro forma the hearing officer's recommendation that Union Objections 1, 2, 4, 5, 6, and 9 be overruled.

(Members Liebman, Cowen, and Bartlett participated.)

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*Mercy Hospital Mercy Southwest Hospital* (31-CA-25139, 31-RC-7993; 338 NLRB No. 66) Bakersfield, CA Nov. 20, 2002. The Board concluded that the Respondent's April 18 and May 24, 2001 announcements of wage increases for its nurses violated Section 8(a)(1) of the Act and constituted objectionable conduct that warranted setting aside an election held on May 30-31, 2001 in the event the revised tally of ballots shows that a majority of the ballots were not cast for Petitioner SEIU Nurse Alliance Local 535. [\[HTML\]](#) [\[PDF\]](#)

The tally of ballots for the election held in Case 31-RC-7993 shows 210 valid votes were cast: 103 for the Petitioner, 49 for the Intervenor (California Nurses Association), 55 against either labor organization, and nine challenged ballots. The challenges to six ballots were sustained and three were overruled. The Board remanded Case 31-RC-7993 to the Regional Director for further appropriate action. If the revised tally of ballots shows that the election results are inconclusive and no ballot selection received a majority of the votes, a rerun election shall be conducted.

This case involves the Respondent's implementation of wage increases, or the timing of their announcement or implementation, granted to its registered nurses who were the subject of organizing drives by the Petitioner and Intervenor. The Board agreed with the administrative law judge's finding that the Respondent had been planning, in advance of union activity, to implement a system-wide wage survey and corresponding adjustments to the nurses' salaries as a result of its recruitment and retention problems, and that the wage increase itself did not violate Section 8(a)(3). However, it agreed with the judge that the timing of the Respondent's announcements of nurses' wage increases during the critical period violated Section 8(a)(1) and constituted election misconduct.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by the California Nurses' Association; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los

Angeles on October 2, 2001. Adm. Law Judge Lana H. Parke issued her decision Nov. 19, 2001.

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*Southwestern Bell Telephone Co.* (17-CA-21366; 338 NLRB No. 67) Overland Park, KS Nov. 20, 2002. Members Cowen and Bartlett, with Member Liebman dissenting, affirmed the administrative law judge's dismissal of a Weingarten violation based on the conclusion that Roy Paz could not have had a reasonable belief that an August 27, 2002 meeting with management would result in discipline and, accordingly, found that the Respondent's refusal to permit Paz to have a union representative at the meeting did not violate Section 8(a)(1) of the Act. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). [\[HTML\]](#) [\[PDF\]](#)

Paz had a history of mental instability and had been referred to the Respondent's Employee Assistance Program (EAP) twice, in 1987 and 1998. A disciplinary action accompanied the 1998 referral: Paz had made a threat determined to be in violation of the Respondent's Workplace Violence Policy (WVP). He was warned that another threat in violation of the policy would cause his immediate discharge.

On August 1, 2001, Paz had a monthly production meeting with his supervisor, Samuel Perry, who told Paz that he had 6 weeks to improve his poor productivity. Paz later told another supervisor, Caskey, "the job sucked and he was about to snap." Caskey reported this statement to her immediate supervisor, Melvin Wilson, the Respondent's area manager. Wilson was aware of Paz' mental health problems and decided to meet with Paz to personally evaluate the situation. On August 27, Petty told Paz that Paz would be meeting with Wilson that day. He asked if a union representative could accompany him to the meeting. Petty told Paz that it would not be necessary and denied knowledge of what the meeting was about. During the meeting, which concerned Paz' remark to Caskey and his low productivity, Paz made a separate remark that was perceived as a threat in violation of the WVP and was discharged for it.

Member Liebman concluded that Paz was entitled to a union representative at the August 27 meeting, explaining: "Under the circumstances-Paz' history of mental instability, prior warnings to him involving a threat he had made and his more recent poor productivity, his fresh statement to a supervisor that he was 'about to snap,' and the unusual intervention of a high-level manager-Paz would have been foolish *not* to think that discipline was possible. Accordingly, I cannot agree with the judge and my colleagues that there was no violation of Section 8(a)(1) here."

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Communications Workers Local 6333; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Overland Park on Feb. 21, 2002. Adm. Law Judge Mary Miller Cracraft issued her decision April 26, 2002.

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*Superior of Missouri, Inc.* (14-CA-25421; 338 NLRB No. 69) St. Louis, MO Nov. 20, 2002. The Board, in an earlier proceeding, 327 NLRB 1208 (1999), found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit. The Board ordered the Respondent to bargain with the Union and, thereafter, petitioned the U.S. Court of Appeals for the Eighth Circuit for enforcement of its order. The court denied enforcement and on November 7, 2000, remanded this matter for an evidentiary hearing on three objections filed by the Respondent in the underlying representation proceeding, Case 14-RC-11946. [\[HTML\]](#) [\[PDF\]](#)

In this supplemental decision and order, the Board agreed with the administrative law judge's findings, as modified, and overruled the objections in their entirety. The Board also affirmed the certification of representative issued on Nov. 30, 1998 and its earlier decision reported at 327 NLRB 1208 (1999). Unlike his colleagues, however, Member Cowen would not reaffirm the Board's original decision finding that the Respondent violated Section 8(a)(5) and (1) at a time when, as subsequently found by the court, the Board had erroneously certified the union as the bargaining representative without affording the Respondent an evidentiary hearing on its election objections.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Teamsters Local 682; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis on December 12, 2001. Adm. Law Judge Robert A. Pulcini issued his decision May 2, 2002.

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*American Golf Corporation, d/b/a Mountain Shadows Golf Resort* (20-CA-26942, et al.; 338 NLRB No. 73) Rhonert Park, CA Nov. 20, 2002. The Board, contrary to the administrative law judge, dismissed the complaint allegations that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Eli Jensen. [\[HTML\]](#) [\[PDF\]](#)

In his earlier decision, the judge concluded that Jensen was unlawfully discharged for contacting a competitor of the Respondent by telephone and for circulating a flyer the following day that disparaged the Respondent's operation of a municipal golf course and openly solicited for the Respondent's competitors to take over the Respondent's contract with the city. The Respondent claimed that both the telephone call and the flyer were disloyal and grounds for discharge under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). The Board, in a decision reported at 330 NLRB 1238 (2000), held that Jensen's unprotected distribution of the flyer could be a cause for lawful discharge and remanded the case to the judge for further consideration.

The judge in his supplemental decision affirmed his earlier finding that Jensen was unlawfully discharged and concluded Jensen would not have been terminated in the absence of his protected activity. The Board disagreed, finding that Jensen would have been discharged for cause within the meaning of Section 10(c) because of his disloyalty.

(Members Liebman, Cowen, and Bartlett participated.)

Adm. Law Judge William L. Schmidt issued his supplemental decision April 13, 2001.

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*PPG Industries, Inc.* (10-CA-32813; 338 NLRB No. 68) Huntsville, AL Nov. 20, 2002. Members Liebman and Bartlett determined that the administrative law judge, in making his findings and dismissing the complaint, failed to resolve certain evidentiary issues. In this regard, the majority found that the judge failed to act on the Respondent's petition to revoke the General Counsel's subpoena for documents concerning the administration of the Respondent's attendance policy; or to rule on the General Counsel's request that an adverse inference be drawn from the Respondent's failure to produce two classes of documents in response to the subpoena. Accordingly, they remanded the proceeding to the judge to consider: (1) whether to grant the Respondent's petition to revoke and (2) if the petition to revoke is denied in whole or in part and the Respondent fails to produce the relevant documents, whether an adverse inference should be drawn. [\[HTML\]](#) [\[PDF\]](#)

Member Cowen, dissenting, would adopt the judge's dismissal of the complaint. He does not believe that a remand is appropriate because it was the General Counsel's responsibility to ensure that the judge ruled on the petition to revoke the subpoena at the original hearing. Member Cowen said that an adverse inference should not be drawn unless the General Counsel has sought court enforcement of the subpoena, and because in any event the Respondent has already provided the General Counsel with documents relevant to the disparate treatment issue on which the General Counsel's subpoena is focused.

(Members Liebman, Cowen, and Bartlett participated.)

Charge filed by Randall Martin, an Individual; complaint alleged violation of Section 8(a)(1), (3) and (4). Hearing at Huntsville in Dec. 2001. Adm. Law Judge William N. Cates issued his bench decision Dec. 31, 2001.

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*Brylane, L.P.* (25-RM-597; 338 NLRB No. 65) Plainfield, IN Nov. 20, 2002. Citing *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), Members Liebman and Bartlett denied the Employer-Petitioner's request for review of the Regional Director's decision to dismiss the Employer's petition for an election. They agreed with the Regional Director that the Union's request for a neutrality and card check agreement did not constitute a demand for recognition within the meaning of Section 9(c)(1)(B) of

the Act. [\[HTML\]](#) [\[PDF\]](#)

In her concurring opinion, Member Liebman said that she joined Member Bartlett in denying review but wrote separately to make certain observations regarding Member Cowen's contentions that were not raised or litigated by the parties.

Dissenting, Member Cowen would grant review and remand the case to the Regional Director to reinstate and process the petition. Member Cowen believes that the Union has clearly made a demand for recognition by requesting that the Employer enter into a neutrality/card check agreement and by making this request, the Union sought to determine the method by which the Employer's employees will express their choice regarding union representation. In his view, a request by a union that seeks to deal with an employer concerning a topic that otherwise would be a topic of mandatory bargaining is, in fact, a demand for recognition within the meaning of Section 9(c)(1)(B) of the Act.

(Members Liebman, Cowen, and Bartlett participated.)

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*Golub Corp.* (3-CA-22379-4, -6; 338 NLRB No. 62) Voorheesville, Waterford, Colonie, and Rotterdam, NY Nov. 20, 2002. Members Liebman and Bartlett affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening employee Arthur Crandall with discipline if he were to engage in union solicitation on the Respondent's property. [\[HTML\]](#) [\[PDF\]](#)

Dissenting, Member Cowen does not find that Loss Prevention Specialist Gary Beeble violated Section 8(a)(1) by instructing Crandall not to stop cars or trucks on the Respondent's property. Contrary to his colleagues, he found that the Respondent was legitimately concerned that Crandall's union solicitation activities would cause traffic congestion on the Respondent's property, and his purpose in instructing Crandall not to stop cars on its property was not to interfere with Crandall's Section 7 rights, but rather to insure an uninterrupted traffic flow into and out of its parking lot.

In the absence of exceptions, the majority adopted the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) and (3) when it suspended Crandall and Section 8(a)(1) by interrogating employees about their union activities and threatening to retaliate against employees for engaging in union actions.

(Members Liebman, Cowen, and Bartlett participated.)

Charges filed by Food & Commercial Workers Local One; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Albany on Sept. 11 and 12, 2000. Adm. Law Judge Bruce D. Rosenstein issued his decision Jan. 2, 2001.

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*MGM Mirage d/b/a The Mirage Casino-Hotel* (28-RC-5871; 338 NLRB No. 64) Las Vegas, NV Nov. 20, 2002. Members Liebman and Bartlett found, contrary to the Regional Director, that the combined unit of carpenters and upholsterers petitioned for by Carpenters Southern California-Nevada Regional Council is an appropriate unit for bargaining. The majority relied on longstanding precedent that allows, in certain limited circumstances, the creation of a craft unit from an overall maintenance department. See *Burns & Roe*, 393 NLRB 1307 (1994); *E. I. du Pont & Co.*, 162 NLRB 413 (1966); *Fremont Hotel*, 168 NLRB 115 (1967). Members Liebman and Bartlett wrote: [\[HTML\]](#) [\[PDF\]](#)

Given the size of this Employer's engineering department, the journeymen status of the carpenters, the separate supervision, the assignment of work along craft lines, the lack of material overlap and interchange, and the significant area practice, we find that this case presents such limited circumstances. We see no reason why our decision today, limited to these particular facts, will lead to an explosion of small craft units at this or any other hotel, as feared by our dissenting colleague.

The Regional Director dismissed the petition because the Petitioner did not wish to represent the employees in an overall engineering department. The Regional Director determined that the petitioned-for combined unit of carpenters and upholsterers

and the alternative separate units of carpenters and upholsterers were inappropriate for bargaining after concluding that the two groups (1) did not constitute functionally distinct groups with common interest separate and apart from the Employer's other engineering employees and (2) did not represent a traditional craft unit entitled to separate representation.

Members Liebman and Bartlett noted, in finding the petitioned-for unit appropriate, the absence of bargaining history on a more comprehensive basis, the area practice of separate carpenter-upholsterers units, the separate craft identity, the separate functions, skills, and supervision, and the absence of significant overlap in duties of interchange. Accordingly, they remanded the case to the Regional Director for further processing.

In dissent, Member Cowen would affirm the Regional Director's decision finding that the petitioned-for unit and the proposed alternative units, inappropriate for bargaining. Unlike his colleagues, he would find significant evidence of permanent interchange between the carpenters and other crews and held that the record strongly favors an overall engineering department unit, not a separate craft unit. He said "there is interchange with other departments at significant levels, overlapping duties with other departments, and common policies, benefits, and break areas. These facts outweigh any others that tend to support the appropriateness of the petitioned-for unit."

(Members Liebman, Cowen, and Bartlett participated.)

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*D & K Drywall, Inc.* (Carpenters Southwest Regional Council) Las Vegas, NV November 21, 2002. 28-CA-17434, -2; JD(SF)-86-02, Judge Mary Miller Cracraft.

*T-West Sales & Service, Inc. d/b/a Desert Toyota* (Machinists Local 744) Las Vegas, NV November 13, 2002. 28-CA-17904, 18065; JD(SF)-92-02, Judge Lana Parke.

*Wal-Mart Stores, Inc.* (Food & Commercial Workers) Wasilla, AK November 8, 2002. 19-CA-27720; JD(SF)-89-02, Judge Burton Litvack.

*Bay Harbor Electric, Inc.* (an Individual and Electrical Workers [IBEW] Local 306) Erie, PA November 25, 2002. 6-CA-32166 (formerly 8-CA-32378-1), et al.; JD-118-02, Judge David L. Evans.

*Aramark Services, Inc.* (an Individual) Sterling Heights, MI November 26, 2002. 7-CA-43748; JD-130-02, Judge Karl H. Buschmann.

*Aramark Services, Inc.* (Food & Commercial Workers Local 1064) Livonia, MI November 29, 2002. 7-CA-44831; JD (ATL)-67-02, Judge Margaret G. Brakebusch.

*Bulkmatic Transport Co.* (Teamsters Local 407) Cleveland, OH November 29, 2002. 8-CA-33405; JD (ATL)-68-02, Judge Margaret G. Brakebusch.

*B. A. Mullican Lumber & Manufacturing Co.* (Mine Workers) Norton, VA November 27, 2002. 11-CA-19451, 19547; JD (ATL)-69-02, Judge George Carson II.

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### NO ANSWER TO COMPLAINT

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

*Falcon Wheel Division L.L.C.* (Teamsters Local 692) (21-CA-34646, 338 NLRB No. 70) Gardena, CA November 20, 2002.