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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

Index of Back Issues Online

January 11, 2002 W-2825

CASES SUMMARIZED

SUMMARIES CONTAIN LINKS TO FULL TEXT

OTHER CONTENTS

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Overnite Transportation Co. (16-RD-1468; 337 NLRB No. 19) Laredo, TX Dec. 20, 2001. Members Liebman and Walsh affirmed the Regional Director's administrative determination to hold the instant decertification petition in abeyance pending posting of a notice pursuant to the Board's order in Overnite Transportation Co., 329 NLRB 990 (1999). The 1999 order required that the Respondent post at all its service centers a notice to employees remedying certain unfair labor practices which the Board found had affected employees "on a nation-wide basis." The Employer did not post any notices because it was seeking court review of the Board's Order. [HTML] [PDF]

On December 18, 2001, employee Thomas Moulton filed the petition in this Laredo, Texas unit. By letter dated February 13, 2001, the Regional Director informed the parties that he was holding the petition in abeyance pending compliance with the Overnite decision. The letter stated:

> While the Laredo, Texas service center is not specifically found to be a facility where such unfair labor practices occurred, a reasonable interpretation of the Board Order is that such posting is mandated at the Laredo facility as part of the nation-wide posting ordered by the Board. . . . Accordingly, as no posting has occurred in Laredo, which would remedy the unfair labor practices found by the Board in Overnite Transportation Company, supra, I will hold in abeyance any further processing of the petition in the instant case at this time. It has long been the policy of the Board that no representation election may be held until unfair labor practices, which may affect the outcome of the election have been fully remedied.

In dissent, Chairman Hurtgen would grant the Employer's request for special permission to appeal the Regional Director's decision. Although he agreed that the Board's Order in 329 NLRB 990 required a nationwide posting and thus covered the Laredo facility, he said:

> The instant case is unique in that the Laredo unit did not even exist as of the time of the conduct found unlawful in 329 NLRB 990. Thus, these employees were not coerced by any unlawful conduct. Accordingly, it is not reasonable to hold that a fair election cannot be held among these employees. Indeed, a fair election was held in Laredo in September 1999, i.e., after the unfair labor practices, and the Union prevailed.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

St. Joseph's Hospital (12-CA-20380; 337 NLRB No. 12) Tampa, FL Dec. 20, 2001. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discriminatorily prohibiting Nurse Patricia Elalem from displaying a union-related computer screensaver message on a computer at her workstation and Section 8(a)(3) and (1) by issuing a warning to Elalem for displaying such a message. [HTML] [PDF]

The Board noted that "[t]he judge's finding presents an issue of first impression for the Board; neither the parties' briefs nor our own research has identified any case directly on point." The Respondent argued that the principles applicable to company bulletin boards should govern this case; the General Counsel argued that the principles applicable to the wearing of union insignia should control. The Board said "[w]e need not decide in this case whether a computer located at an employee's workstation is analogous to a company bulletin board or whether a computer screen saver message is similar to a union button. For, even applying the rules governing employee use of bulletin boards, as the Respondent urges, we find, in agreement with the judge, that the Respondent's conduct was discriminatory . . . ."

In agreeing with the judge that the warning issued to Elalem violated Section 8(a)(3) and (1), the Board, unlike the judge, did not engage in a Wright Line analysis, finding it is not appropriate because the Respondent's stated reason for the warning was Elalem's protected activity.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Food & Commercial Workers Local 1625; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tampa on May 10, 2001. Adm. Law Judge Pargen Robertson issued his decision July 31, 2001.

* * *

256 Food Corporation d/b/a Met Food (2-CA-30788, et al.; 337 NLRB No. 14) Bronx, NY Dec. 20, 2001. The Board, in this backpay proceeding, adopted the administrative law judge's determination of the amounts due the discriminatees but modified the recommended Order to include discriminatee Aleida Torres and the amount due her. It also modified the recommended Order to reflect that the Respondent and its Golden State successor Bafter Food Corp. are jointly and severally liable for the backpay remedy. AC Electric, 333 NLRB No. 120 (2001). Accordingly, the Board ordered that the Respondent, with its successor, Bafter Food Corp., make whole the discriminatees by paying the amounts set forth opposite their names, plus interest. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Hearing held at Manhattan, Oct. 4-5, 1999. Adm. Law Judge Steven Davis issued his supplemental decision Feb. 16, 2000.

* * *

Saint-Gobain Abrasives, Inc. (1-RC-21388; 337 NLRB No. 8) Worcester, MA Dec. 20. 2001. Affirming the Regional Director's recommendations, Members Liebman and Walsh overruled the Employer's objections, finding, contrary to dissenting Chairman Hurtgen, that the statements of Congressman McGovern (who represents the Congressional District) to employees in support of the Petitioner did not upset the laboratory conditions for a fair election and do not warrant setting aside the election. "[T]he Employer failed to establish that employees 'could not discern the difference between statements about labor relations by an individual member of Congress and statements by the Board and its representatives,'" the majority held. Chipman Union, Inc., 316 NLRB 107, 108 (1995), and cases cited therein. It certified Auto Workers Region 9A as the exclusive representative of all production and maintenance employees who work in the Abrasives branch of the Employer's Glendale complex in Worcester, MA. [HTML] [PDF]

Dissenting Chairman Hurtgen would set aside the election, concluding that this statement by Congressman McGovern, who campaigned vigorously for the Union, in a letter to employees upset the requisite laboratory conditions for a fair election:

> The Company has also refused to debate this important issue, claiming that federal labor laws do not allow a fair debate because the laws restrict what an employer can say. As a United States Congressman with a strong interest in labor law, I can assure you that the law does indeed allow for a fair debate. If the company chooses not to debate, that is their right, but they should not hide behind misstatements about federal regulations. In fact, the laws are structured in such a way as to make it extremely difficult for workers to organize-not the other way around.

Chairman Hurtgen does not question the right of Congresspersons to campaign for one side or the other in connection with an

NLRB election, but he believes they must be especially careful in opining on controversial issues of Federal law given their official position in the U.S. Government. He said Congressman McGovern "ventured into the controversial area of whether Federal labor law, as interpreted by the Board, allows for a 'fair debate' of the campaign issues." While the Chairman offered no opinion on the issue, he noted that there is responsible view to the contrary and that a Congressman should stay away from such an issue in the context of pro-party comments in an ongoing organizing campaign, explaining: "The danger is that employees are likely to view that statement as definitive. Conversely, an employer response would not carry the same weight. As to matters of law, employees are likely to view the response of a Federal official as more reliable than that of a private party to the election." Chairman Hurtgen said he is not suggesting that the Congressman violated the Act or that his opinions were wrong. "I simply conclude that his pro-party comments, made in the course of an ongoing campaign and on a controversial issue of law, upset the laboratory conditions required for a fair election."

The majority found no basis for distinguishing between Congressman McGovern's statements which Chairman Hurtgen found objectionable, and the Congressman's union endorsement and other opinions, which the Chairman agreed are permissible.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Bridgestone/Firestone, Inc. (Woodridge, IL Distribution Center)(13-CA-37351; 337 NLRB No. 20) Woodridge, IL Dec. 20, 2001. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Steelworkers for the prescribed period as set forth in the Settlement Agreement executed by the Respondent and approved by the Regional Director in Case 13-CA-36834; and by withdrawing recognition from the Steelworkers during the period in which the Union enjoyed an irrebutable presumption of majority status. The Board decided that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union. [HTML] [PDF]

The General Counsel contended that the Respondent committed a separate violation of Section 8(a)(5) by withdrawing its last contract proposal on April 14, 1999, and that the Respondent should be required to reinstate the proposal. The Board agreed, noting that the Respondent's April 14 letter to the Union, in which it revoked the last proposal and stated it could not lawfully negotiate with the Union, is the action that breached the settlement agreement and violated Section 8(a)(5). In the letter, the Respondent expressed its erroneous view that it was no longer permitted to bargain. "As such, the Respondent's withdrawal of the offer was part and parcel of its unlawful action of April 14," the Board said.

On another alleged violation, Members Liebman and Walsh held the judge correctly found the Respondent unlawfully implemented a new anti-harassment policy in September 1998, and ordered the Respondent to cease and desist from unilaterally altering terms and conditions of employment. They modified the judge's recommended Order and notice to require the Respondent to restore the status quo by reinstating its former policy and to retract any discipline issue to employees pursuant to the new policy and to make employees whole for any losses they incurred as a result of the implementation of the new policy.

Chairman Hurtgen would find the violation, but he would not require the Respondent now withdraw its new rules, explaining: "That would leave Respondent with no rules at all pertaining to harassment on bases other than sex. Instead, I would require Respondent to bargain with the Union about possible changes to the new rules and disciplinary consequences."

Turning to another issue, the Board disagreed with the judge's view that the Respondent's refusal to bargain warrants extending the certification year for another full year. Under all the circumstances, including the fact that the Respondent bargained with the Union in apparent good faith for about 4 months, the Board concluded that a 6-month extension of the certification year is appropriate.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Chicago, Oct. 12-13, 1999. Adm. Law Judge James L. Rose issued his decision Dec. 23, 1999.

* * *

Laborers Local 1184 (Golden State Boring & Pipejacking) (21-CD-638; 337 NLRB No. 25) Ontario, CA Dec. 20, 2001. Relying on the factors of collective-bargaining agreements, Employer preference, and current assignment, the Board decided that employees of Golden State Boring & Pipejacking, Inc., represented by Laborers Local 1184 rather than those represented by Operating Engineers Local 12, are entitled to perform the operation of the directional drilling machine, which includes the operator, locator, and labor work performed in connection with the Level 3 (Kiewit) project in San Diego County, CA. [HTML] [PDF]

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Kim/Lou, Inc. d/b/a Bell Convalescent Hospital (21-RC-20316; 337 NLRB No. 30) Bell, CA Dec. 20, 2001. Contrary to the hearing officer, the Board found that the stipulated election agreement clearly and unambiguously reflects the parties' intent to exclude central supply/patient supplies/nurse aide Liguya Figueroa from the bargaining unit, and sustained the challenge to the ballot she cast in an election held March 22, 2001. The election resulted in 33 for and 32 against the Union, with 2 determinative challenged ballots. In the absence of exceptions, the Board adopted pro forma the hearing officer's recommendation to sustain the challenge to the ballot of Young Koopark. As the tally of ballots shows that Service Employees Local 399 received a majority of the valid ballots cast, the Board issued the appropriate certification of representative. [HTML] [PDF]

The stipulated unit included "[a]ll full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, cooks, dietary aides, activities aides, housekeeping, maintenance, and laundry employees working at the Employer's facility located at 4900 East Florence Avenue, Bell, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act."

The hearing officer, finding the stipulation ambiguous, applied community-of-interest principles and recommended that the challenge to Figueroa's ballot be overruled and that she be included in the bargaining unit as a dual function employee. The Board said in agreeing with the Union that the hearing officer erred in overruling the challenge: "The stipulation reflects a clear intent on behalf of the parties to include 'nursing assistants' and to exclude 'all other employees.' Figueroa's title 'central supply/patient supplies/nurse aide' clearly does not fit the express language of the stipulation. Furthermore, the use of the language 'all other employees' in the stipulation's exclusion serves as further evidence of the parties' clear intent to exclude Figueroa from the unit."

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Public Service Co. of New Mexico (28-CA-16420; 337 NLRB No. 31) Albuquerque, NM Dec. 20, 2001. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with Electrical Workers IBEW Local 611 about the decisions or effects of the decisions it made (1) requiring employees to wear uniforms, and (2) the elimination of the meter service technician (MST) position. [HTML] [PDF]

The Board agreed with the judge's application of the "clear and unmistakable waiver" standard of Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), in determining that the management-rights clause of the parties' collective-bargaining agreement did not privilege the Respondent's unilateral conduct in this case. Members Liebman and Walsh would reach the same result even under the "contract coverage" test applied by the Chairman and discussed below.

Chairman Hurtgen noted that the judge, in rejecting the Respondent's argument that it acted lawfully pursuant to the management rights clause in its contract with the Union, employed the "clear and unmistakable waiver" analysis of Metropolitan Edison. In Chairman Hurtgen's view, the "contract coverage" analysis, set forth by the D.C. Circuit in NLRB v. Postal Service, 8 F.3d 832 (1993), is the appropriate test. See his partial concurrence in Mt. Sinai Hospital, 331 NLRB No. 111

(2000), enfd. 8 Fed. Appx. 111, 2001 WL 533552 (2nd Cir. May 17, 2001). Under a "contract coverage" analysis, Chairman Hurtgen agreed that the Respondent's conduct was not privileged. Unlike the situation in Mt. Sinai Hospital, he found that in the instant matter, the judge correctly determined that, whether analyzed as a change in unit scope or as a unilateral transfer of unit work, the Respondent's actions with respect to the MST classification were unlawful.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 611; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Albuquerque, March 13-15, 2001. Adm. Law Judge Albert A. Metz issued his decision Aug. 3, 2001.

* * *

Stevens International, Inc. (9-CA-36335; 337 NLRB No. 23) Hamilton, OH Dec. 20, 2001. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of its decision to close its Hamilton, Ohio facilities and refusing to provide information regarding the work performed after July 2, 1998, including receiving records and pulling parts in preparation for shipment and duties of management personnel still at the plant. Members Liebman and Walsh, with Chairman Hurtgen dissenting, also found that the Respondent violated the Act by failing to bargain concerning the decision to transfer unit work to nonunit supervisors. [HTML] [PDF]

The Respondent and Chairman Hurtgen relied on article 3 of the parties' contract entitled "Management Rights," which provides in relevant part that the Respondent has "the right to assign work and maintain performance records for all employees." While noting that the collective-bargaining agreement gives the Respondent the right to assign work, Members Liebman and Walsh held that the contractual language also clearly provides that such assignment will be made only to "employees," stating:

> Article 1 of the contract . . . defines the term 'employee' as including all production and maintenance employees and categorically excludes, inter alia, supervisors. There is no provision that gives the Respondent the right to assign unit work to supervisors. Therefore, by the terms of the contract the Respondent's right to assign work was limited to assignment of work to employees. Certainly, under these provisions, there is no basis for finding that the Union waived its right to bargain under the Board's 'clear and unmistakable' waiver standard. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

Chairman Hurtgen contended that article 3 sets forth a broad array of management rights and that these rights were not subject to the contractual grievance procedure. He found merit in the Respondent's exception concerning the right to assign work to supervisors and agreed with the Respondent that the "contract coverage" analysis, as set forth in NLRB v. Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993) is the appropriate test, rather than the "clear and unmistakable waiver" analysis, for determining whether the Respondent was obligated to bargain over this subject. Mt. Sinai Hospital, 331 NLRB No. 111, slip op. at 2 (2000) (dissenting opinion). In his view, article 3 makes it plain that the Respondent was lawfully entitled to assign work as it chose.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Auto Workers Local 1688; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Cincinnati, June 4 and 22, 1999. Adm. Law Judge Richard H. Beddow, Jr. issued his decision Sept. 7, 1999.

* * *

Reichenback Ceiling & Partition Co. (7-RC-21935; 337 NLRB No. 17) State of MI Dec. 20, 2001. The Board, finding that the Employer and the Intervenor (Bricklayers Local 9) entered into a 9(a) bargaining relationship, affirmed the Acting Regional Director's decision that the instant petition filed by Cement Masons Local 9 on December 28, 2000 (over 2 years after the Intevenor gained 9(a) status and 6 months after its current contract covering the unit employees became effective) is barred and must be dismissed. VFL Technology Corp., 329 NLRB No. 49 (1999) (reiterating the Board's policy that "a 9(a) contract will bar any petition filed outside the window period of that contract"). Chairman Hurtgen wrote a separate concurring opinion.

[HTML] [PDF]

The Intervenor was party to a 1997-2000 collective-bargaining agreement with a multiemployer association, the Michigan Council of Employers of Bricklayers & Allied Craftworkers (MCE), and on September 29, 1998, the Employer agreed to be bound as a non-association member. The Employer did not serve notice to terminate or to withdraw from the 1997-2000 contract prior to its expiration and, accordingly, under the roll-over provision became bound to a successor agreement between the Intervenor and MCE, effective from June 22, 1000 to August 1, 2003.

The Acting Regional Director found the Employer's agreement on September 29 to be bound as a non-association member to the MCE contract constituted an unequivocal acceptance of the Intervenor's unequivocal demand for recognition as the petitioned-for unit employees' 9(a) representative, and that any challenge to the Intervenor's 9(a) status must have been made within the 6-month period following September 28, 1998. Because the Petitioner did not challenge the Intervenor's majority status until the filing of the instant petition on December 28, 2000, the petition is barred and must be dismissed. Even if the Petitioner's challenge to the Intervenor's majority status was timely, the Acting Regional Director reasoned, the Petitioner submitted no evidence to rebut the Intervenor's majority status. The mere filing of the petition does not itself challenge the Intervenor's majority status.

In a separate concurrence, Chairman Hurtgen wrote:

> I agree that the agreement here contains language, which establishes a 9(a) relationship. However, in my view, that agreement and language are binding only on the parties thereto. The Petitioner is not a party thereto. Accordingly, if the petition had been filed within 6 months of the recognition, the Petitioner would have been free to assert that such recognition was not majority-based. However, inasmuch as the petition was filed more than 6 months after the recognition, such an assertion is untimely. A contrary view would mean that stable relationships, assertedly based on Section 9(a) would be vulnerable to attack based on stale evidence. That is not permitted with respect to unions in nonconstruction industries. And, under John Deklewa & Sons, 282 NLRB 1375 fn. 53 (1987), unions in the construction industry are not to be treated less favorably than unions in nonconstruction industries. Thus, such an attack should not be permitted with respect to unions in the construction industry.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Hospital Dr. Susoni, Inc. (Unidad Laboral De Enferemeras (OS)Y Empleados de la Salud) Arecibo, PR December 27, 2001. 24-CA-8204, 8524; JD-161-01, Judge William G. Kocol.

Guardian Automotive Trim, Inc. (Electrical Workers [IUE]) Evansville, IN December 28, 2001. 25-CA-27095-1, 25-RC-9933; JD-163-01, Judge Robert A. Pulcini.

Kentucky Tennessee Clay Co. (Boilermakers) Langley, SC December 28, 2001. 11-CA-18925, 18968; JD(ATL)-77-01, Judge Lawrence W. Cullen.

Imperial Hotel LLC d/b/a Imperial Court Hotel (Individuals) New York, NY December 28, 2001. 2-CA-32946, et al.; JD (NY)-63-01, Judge Eleanor MacDonald.

Dallas & Mavis Specialized Carrier Co. (Teamsters Local 142) Kenosha, WI December 31, 2001. 13-CA-39115, et al.; JD-167-01, Judge John H. West.

American Armored Car, Ltd. (United Federation of Security Officers, Inc.) New York, NY December 31, 2001. 2-CA-33316, et al.; JD-153-01, Judge Margaret M. Kern.

Cossentino Contracting Co., Inc. (Operating Engineers Local 37) Baltimore, MD December 31, 2001. 5-CA-29607; JD-168-01, Judge Arthur J. Amchan.

PPG Industries, Inc. (an Individual) Huntsville, AL December 31, 2001. 10-CA-32813; JD(ATL)-80-01, Judge William N. Cates.

HealthSouth Conference Center (an Individual) Birmingham, AL December 31, 2001. 10-CA-33084; JD(ATL)-79-01, Judge William N. Cates.

Food & Commercial Workers Local 204 (an Individual) Winston-Salem, NC January 2, 2002. 11-CA-18090; JD(ATL)-1-02, Judge George Carson II.

Electrical Workers Local [IBEW] 236 (an Individual) Schenectady, NY January 2, 2002. 3-CA-23141; JD(NY)-65-01, Judge Joel P. Biblowitz.

The Budd Company (Auto Workers Local 2383) Shelbyville, KY December 20, 2001. 9-CA-38113; JD-165-01, Judge Earl E. Shamwell Jr.

Webco Industries, Inc. (Steelworkers) Tulsa, OK December 28, 2001. 17-CA-19047, 19120; JD(SF)-102-01, Judge Albert A. Metz.

Food & Commercial Workers Local 368A (Albertson's Inc.) Caldwell ID October 19, 2001. 27-CB-4216; JD(SF)-85-01, Judge Mary Miller Cracraft.