



National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED

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State College Electrical & Mechanical, Inc., d/b/a Allied Mechanical & Electrical Contractors, a subsidiary of S&A Custom Built Homes, Inc. and Berrena's Mechanical Services, LLC, a Single Employer (6-CA-34619; 348 NLRB No. 80) State College, PA Nov. 30, 2006. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire applicants David W. Good, Bruce J. Cogan, and Scott M. Sweeney. Contrary to the judge, it found that the record does not establish that the Respondent also unlawfully refused to consider Good, Cogan, and Sweeney for hire. [\[HTML\]](#) [\[PDF\]](#)

The Board reasoned that under *FES*, 331 NLRB 9, 15 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002), in order to establish a refusal to consider violation, the General Counsel has the burden of proving that: (1) the respondent excluded the applicants from the hiring process; and (2) antiunion animus contributed to this decision. Once this is established, the burden shifts to the respondent to show that it would not have considered the applicants even in the absence of their union activity of affiliation. Here, the Board found that the General Counsel failed to satisfy the initial prong of the *FES* burden. To the contrary, it noted that after each of the three discriminatees submitted an application, they were interviewed at length by the Respondent and administered a test to determine his electrician skills. Therefore, the Board reversed the judge and dismissed the refusal-to-consider allegation.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 5; complaint alleged violation of Section 8(a)(1) and (3). Hearing at State College, Feb. 28 and March 1, 2006. Adm. Law Judge John T. Clark issued his decision July 7, 2006.

Kroger Limited Partnership, d/b/a Hilander Foods (33-RC-4715; 348 NLRB No. 82) Rockford, IL Nov. 30, 2006. The Board concluded, contrary to the Acting Regional Director, that the petitioned-for single-facility unit, limited to 150 employees at the Employer's Roscoe, IL store, is appropriate, rather than a multi-facility unit comprised of the Employer's seven facilities in the Rockford, IL area. Unlike the Acting Regional Director, the Board found that the Employer failed to rebut the single-facility presumption. It remanded the proceeding to the Acting Regional Director for further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

The Employer operates five retail grocery stores and a commissary in the Rockford, IL area and one retail grocery store in Cherry Valley, adjacent to Rockford. The stores and commissary comprise Hilander Foods, a division of Kroger Foods. The Petitioner, Food & Commercial Workers Local 1546, is seeking to represent a unit of employees employed at the Employer's store located at 4860 Hononegah Road, Roscoe, IL, which is 8 to 13 miles from the other facilities.

In determining whether a single-facility presumption had been rebutted, the Board examined a number of factors: (1) central control over daily operations and labor relations, including extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) degree of employee interchange; (4) distance between locations; and

(5) bargaining history, if any. It held that the similarity of employee skills and working conditions, centralized personnel and labor relations policies, and limited integration among the seven facilities, is outweighed by significant local autonomy, lack of substantial interchange or functional integration, geographic separation, and absence of bargaining history. In these circumstances, the Board found that the Employer failed to establish that the petitioned-for single-facility unit at Roscoe has been merged into a more comprehensive unit, and, therefore, failed to rebut the single-facility presumption. Accordingly, it reversed the Acting Regional Director's finding that the petitioned-for single-facility unit is not appropriate.

(Chairman Battista and Members Liebman and Walsh participated.)

Road & Rail Services, Inc. (14-CA-27983, 28026; 348 NLRB No. 77) St. Louis, MO Nov. 30, 2006. The Board adopted the administrative law judge's finding that by threatening employees with termination if they did not fulfill their obligation to tender dues to Shopmen's Local 518 by executing dues check-off authorizations, the Respondent violated Section 8(a)(1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

At issue is whether the judge properly dismissed the complaint allegations that the Respondent, a successor employer, violated Section 8(a)(2) and (3) by recognizing the Union and entering into a collective-bargaining agreement with it prior to the hiring of the Respondent's work force and commencement of its operations. The judge found that the Respondent was a "perfectly clear" successor within the meaning of *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and subsequent Board precedent and therefore, did not violate the Act, as alleged.

Members Schaumber and Walsh affirmed the judge's finding. They emphasized that the Respondent never expressed any intention to invoke the right of an "ordinary" *Burns* successor to establish its own initial terms and conditions of employment. Instead, the Respondent expressed its clear intention to staff the facilities with the predecessor's employees and to bargain with the employees' designated representative, thereby securing a skilled and experienced work force and avoiding the uncertainty of attempting to recruit new employees based on unilaterally established employment terms. The majority found that the Respondent met with the Union for the purposes of collective bargaining and executed a contract that included the initial terms to be effective the date the Respondent was to begin operations. The Respondent commenced operations with a work force of 23 employees, 20 of whom (87 percent) worked for its predecessor immediately before the takeover. The majority noted that at no point during the parties' negotiations or these proceedings was there ever evidence of a loss of majority support for the Union or evidence that the negotiations were anything other than bona fide, arm's-length dealings between the parties.

Contrary to his colleagues. Chairman Battista found that the Respondent violated Section 8(a)(2) and (3) by recognizing the Union and entering into a collective-bargaining

agreement with it prior to hiring any of the predecessor employer's employees. He contended that when the Respondent began negotiating with the Union, it was not clear that the Union would have majority status. Chairman Battista wrote:

My colleagues appear to say that an employer's plan to offer employment to the predecessor's employees permits that employer to negotiate any changes with the union. However, until those new terms are set, and the predecessor employees accept employment under those terms, it is not perfectly clear that the union will remain the majority representative. Negotiations with a non-majority union are inconsistent with the right of employees to choose or reject union representation. Accordingly, in terms of the analytic test, it is not 'perfectly clear' that predecessor employees will be in the unit under the successor. Thus, recognition of the Union, prior to hire, is premature.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Teamsters Local 604; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing at St. Louis, Jan. 10-11, 2005. Adm. Law Judge George Carson II issued his decision March 7, 2005.

Rockspring Development, Inc. (9-RC-17844; 348 NLRB No. 75) East Lynn, WV Nov. 15, 2006. The Board remanded this case to the hearing officer for further consideration in light *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39, including allowing the parties to file briefs, and, if warranted, reopening of the record to obtain evidence relevant to deciding the case. *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act. [\[HTML\]](#) [\[PDF\]](#)

In an unpublished decision dated Sept. 29, 2006, the Board adopted the hearing officer's recommendations in certain respects and directed the Regional Director to open and count certain ballots and to prepare a revised tally of ballots. The Board found it unnecessary to pass on the Employer's exceptions to the hearing officer's recommendation to sustain the challenges to the ballots of Ernest Bartram, found to be a manager and a supervisor within the meaning of Section 2(11), and Charles Stollings, Andrew Jackson Sharp, and Bobby Lee Stowers, found to be supervisors. It directed the Regional Director to transfer the proceeding back to the Board if the four challenged ballots remained determinative. On Oct. 12, 2006, the Regional Director transferred the proceeding back to the Board for further consideration because the ballots remained determinative.

The Board ordered that the hearing officer prepare a supplemental report on challenged ballots as appropriate on remand.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

T. Steele Construction, Inc. (33-CA-14914; 348 NLRB No. 79) Rock Island, IL Nov. 30, 2006. In affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(1) of the Act by: threatening to force an employee off the job because he was a union organizer; threatening to discharge any employee who signed a union card; threatening to partially close its business if employees selected Operating Engineers Local 150 as their bargaining representative; threatening to refuse employment to individuals because they are union members; creating the impression that employees' union activities were under surveillance; and coercively interrogating an employee about union activities. It also adopted the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily reassigning Joe Farrell because he assisted the Union and discharging Farrell because he assisted the Union and engaged in concerted activities. The Board found it unnecessary to pass on the issue of whether Farrell's discharge also independently violated Section 8(a)(1). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Operating Engineers Local 150; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Peoria, Dec. 20-21, 2005. Adm. Law Judge Paul Bogas issued his decision June 5, 2006.

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 file an answer to the complaint.)

Brooks Ambulance, Inc. (Professional EMT's and Paramedics Boilermakers) (30-CA-17536; 348 NLRB No. 78) Waupun, WI Nov. 30, 2006. [\[HTML\]](#) [\[PDF\]](#)

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Caswell-Massey Co., Ltd. (Steelworkers) (22-CA-27548; 348 NLRB No. 81) Edison, NJ Nov. 30, 2006. [\[HTML\]](#) [\[PDF\]](#)

**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS
IN REPRESENTATION CASES**

*(In the following cases, the Board considered exceptions to and
adopted Reports of Regional Directors or Hearing Officers)*

DECISION AND CERTIFICATION OF REPRESENTATIVE

Quickway Carriers, Inc., Indianapolis, IN, 25-RD-1482, Nov. 29, 2006 (Members Liebman and Kirsanow; Member Schaumber concurring)

DECISION AND DIRECTION OF SECOND ELECTION

Clinical Directors Network, New York, NY, 2-RC-23037, Nov. 30, 2006 (Chairman Battista and Members Liebman and Walsh)

*(In the following cases, the Board adopted Reports of
Regional Directors or Hearing Officers in the absence of exceptions)*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Supervalu, Inc., Perryman, MD, 5-RC-16028, Nov. 28, 2006 (Chairman Battista and Members Liebman and Walsh)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Corzo Contracting Co., Inc., Brooklyn, NY, 29-RC-11098, Nov. 29, 2006
(Chairman Battista and Members Liebman and Walsh)

*(In the following cases, the Board denied requests for review
of Decisions and Directions of Elections (D&DE) and
Decisions and Orders (D&O) of Regional Directors)*

L.N.R. Beatty Lumber Co., Orland Park, IL, 13-RD-2535, Nov. 29, 2006 (Chairman Battista and Members Liebman and Walsh)

Archer Daniels Midland Co., Langhorne, PA, 4-RD-2073, Nov. 29, 2006 (Chairman Battista and Members Liebman and Walsh)

DHL Express, Inc., Wilmington, OH, 9-RC-18108, Nov. 29, 2006 (Chairman Battista and Member Liebman; Member Walsh concurring)

PJC Sanitation Service, Inc. d/b/a Ace Service, Brooklyn, NY, 29-RD-1058, Nov. 29, 2006
(Chairman Battista and Members Liebman and Walsh)

Miscellaneous Board Orders

**DECISION ON REVIEW AND ORDER [reversing Regional Director's
decision with respect to the processing of the unit clarification petition for the
Data Integrator Office position and dismissing Union's petition in this regard]**

GTE d/b/a Puerto Rico Telephone Co., San Juan, PR, 25-UC-224, Nov. 30, 2006
(Chairman Battista and Members Liebman and Walsh)
