



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

Washington, D.C. 20570
273-1991

Tel. (202)

--

November 10, 2006

3077

W-

VISIT WWW.NLRB.GOV FULL TEXT
CASES SUMMARIZED

Avante at Wilson, Inc.	Wilson, NC	1
Extendicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center	Owensboro, KY	2
SNE Enterprises, Inc.	Huntington, WV	2
St. George Warehouse, Inc.	Kearny, NJ	4

OTHER CONTENTS

List of Decisions of Administrative Law Judges	4
No Answer to Compliance Specification Case	5
Test of Certification Case	5

List of Unpublished Board Decisions and Orders in Representation Cases	5
<ul style="list-style-type: none">• Requests for Review of Regional Directors' Decisions and Directions of Elections and Decisions and Orders• Miscellaneous Board Orders	

Press Release ([R-2608](#)): NLRB Reports on Case Production in FY 2006

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. As of August 1, 2003, Administrative Law Judge decisions are on the Web site.

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.

Avante at Wilson, Inc. (11-RC-6495, 6496; 348 NLRB No. 71) Wilson, NC Oct. 31, 2006. The Board concluded, contrary to the Regional Director, that the Employer failed to establish that the petitioned-for licensed practices nurses (LPNs) and registered nurses (RNs) (staff nurses) at its Wilson, NC facility possess Section 2(11) authority with respect to disciplining certified nursing assistants (CNAs) by sending them home or adjusting CNA grievances. It reinstated the petitions filed by Food and Commercial Workers Local 204 and remanded the cases to the Regional Director for further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

The Employer and Petitioner are parties to a collective-bargaining agreement that covers a unit of service and maintenance employees, including the CNAs. A facility administrator heads the Employer's overall operations, and a director of nursing (DON) reports to the facility administrator. Two unit managers report to the DON. The staff nurses report to the unit managers, and the CNAs are subordinate to the staff nurses.

The Regional Director, in dismissing the petitions, found that the staff nurses are supervisors within the meaning of Section 2(11) of the Act because of their authority to discipline CNAs by sending them home for refusing to carry out an assignment and their authority to adjust CNA grievances. He found that the staff nurses use independent judgment in deciding whether or not to send CNAs home. The Board found that the record does not substantiate the Regional Director's conclusions about the staff nurses' authority to discipline CNAs and therefore, that he erred in determining that staff nurses are statutory supervisors on that basis.

In finding that the staff nurses adjust CNA grievances, the Regional Director relied on a collective-bargaining agreement provision stating that employees may present their complaints to their "immediate supervisors" for adjustment, CNA Dorothea Lucas's assertion that she understands her "immediate supervisor" to be a staff nurse, the LPN and RN job descriptions stating that the LPNs and RNs supervise CNAs, the RN job description stating that RNs serve as the facility's representative during the first step of the facility's problem-solving process, and Unit Manager Barnes's testimony that she personally resolved disputes between CNAs when she was a staff nurse.

The Board noted that although contractual and handbook provisions exist relating to grievance handling, the Employer provided no evidence to show that current staff nurses actually possess that authority through evidence of participating in the grievance-adjustment process. It also noted that while the RN job description states that the RNs supervise the LPNs, the Employer stipulated at the hearing that the LPN and RN jobs are identical. "Clear evidence of a significant inaccuracy renders the reliability of the LPN and RN job descriptions suspect," the Board wrote. In addition, it found that the Regional Director placed undue emphasis on the testimony by Unit Manager Barnes, who is no longer a staff nurse, saying her testimony reveals little about staff nurses' current duties, particularly given the fact that it contained no reference to the time period or individuals involved.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Extencicare Homes, Inc. d/b/a Bon Harbor Nursing and Rehabilitation Center (25-CA-28991, et al.; 348 NLRB No. 70) Owensboro, KY N0v. 3, 2006. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by discharging Certified Nursing Assistants Sheila Kelley, Stacy Kjelsen, Misty Paulin, and Tammy Snyder, and Certified Medication Aide (CMA) Tammy Hamilton because of their protected concerted activity in protesting staffing conditions at the Respondent's facility; and by conditioning each employee's return on a promise that she would not walk out in protest of future short-staffing issues. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber reversed the judge's findings that the Respondent also violated Section 8(a)(1) by discharging Licensed Practical Nurses (LPNs) Norma Lemon and Rita Adkisson for joining their fellow employees in the concerted protest and conditioning their reinstatement on a promise that they would not engage in a similar protest in the future. They agreed with the Respondent that Lemon and Adkisson are supervisors and therefore, their participation in the employees' protest was not protected and the Respondent was free to discipline them. Member Walsh, dissenting on this issue, found that the Employer failed to carry its burden of showing that LPNs Lemon and Adkisson are supervisors within the meaning of the Act and would adopt the judge's finding that the Respondent violated Section 8(a)(1) with respect to Lemon and Adkisson.

Turning to other alleged violations, the Board affirmed the judge's separate finding that the Respondent violated Section 8(a)(1) when, 1 week following the employees' protest, Unit Manager Della Boehman removed union literature from a bulletin board in the employee breakroom while continuing to allow employees to post nonwork-related material on the same bulletin board. In agreement with the judge, the Board found that the Respondent violated Section 8(a)(1) and (3) when Boehman orally warned CNA Paulin for assisting the Steelworkers by making a written record of Boehman's removal of union literature from the employee bulletin board.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(1). Hearing at Owensboro on Sept. 14, 2004. Adm. Law Judge John H. West issued his decision Mar. 3, 2005.

SNE Enterprises, Inc. (9-RC-17883; 348 NLRB No. 69) Huntington, WV Oct. 31, 2006. Contrary to the Regional Director, Chairman Battista and Member Schaumber, with Member Liebman dissenting, found that two lead persons' active role in soliciting authorization cards constituted objectionable conduct and materially affected the outcome of the election held on April 21, 2004, which Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial

and Service Workers won by a 87-to-82 vote. The majority granted the Employer's request for review in this regard, set aside the results of the election, remanded the case to the Regional Director to conduct a new election, and denied the Employer's request for review in all other respects. [\[HTML\]](#) [\[PDF\]](#)

In his third supplemental decision on remand, the Regional Director reconsidered the case in light of *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), and certified the Union as the exclusive representative of the Employer's production and maintenance employees. He found that the lead persons' solicitation of cards was not coercive and thus did not materially affect the results of the election because of mitigating circumstances, including the leads' lack of power to significantly affect the working lives of employees including those directly under them; the employees' perception of the leads as little more than regular employees with no significant authority over their terms and conditions of employment; that the lead persons had been eligible to vote in three earlier representation elections; the solicitation occurred in otherwise noncoercive circumstances; the Employer's campaign literature, which countered any perceived coercion by telling employees that they could vote against the Petitioner even if they had signed a card; and the cessation of any prounion supervisory conduct a month prior to the election.

Chairman Battista and Member Schaumber agreed with the Regional Director that the leads' comments during the campaign were not objectionable and that the hearing officer's conduct did not warrant setting aside the election. They disagreed however with the Regional Director's finding that mitigating circumstances in this case sufficiently negated the inherently coercive effect of the supervisory solicitation of authorization cards on the subsequent election, which the Union won by a very narrow margin.

In dissent, Member Liebman said this case illustrates the errors of the Board's divided decision in *Harborside* and underscores the unfairness inherently in applying it retroactively. She noted that the solicitations were lawful under existing Board precedent when they occurred; that the supervisory status of the solicitors was undetermined at the time of the solicitations; that the supervisors did not implicitly or explicitly threaten or make promises to employees, or engage in otherwise coercive conduct; and that there were circumstances mitigating any effect the card solicitations may have had on employees, including statements by the Employer affirming that employees did not have to vote for the Union, even if they had initially signed authorization cards.

Member Liebman wrote: "Before *Harborside*, the Board would never have overturned the election in this case. But even under the *Harborside* standard, the behavior of the supervisors did not rise to the level of objectionable conduct. The majority applies *Harborside* to the facts of this case far more aggressively than that decision itself warrants."

(Chairman Battista and Members Liebman and Schaumber participated.)

St. George Warehouse, Inc. (22-CA-24902; 348 NLRB No. 67) Kearny, NJ Oct. 30, 2006. Affirming the administrative law judge's recommendation, the Board ordered that the Respondent comply with a prior Board Order to restore a bargaining unit that had been reduced by the Respondent's unilateral transfer of unit work to nonunit employees in violation of Section 8(a)(5) and (1) of the Act. *St. George Warehouse*, 341 NLRB 904, 909 (2004), *enfd.* 420 F.3d 294 (3d Cir. 2005). [\[HTML\]](#) [\[PDF\]](#)

The Respondent argued that an alleged loss of majority support among the remaining unit employees makes the Board's Order to restore the bargaining inappropriate. The Board agreed with the judge that under *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the alleged loss of majority support is tainted by the Respondent's unlawful transfer of unit work to nonunit employees. It also rejected the Respondent's argument that restoration would require the hiring of additional employees who have not chosen to be represented by Teamsters Local 641 and therefore, the Union will lack majority status in the restored unit. The Board explained that the new employees will be hired as a result of a court-enforced Board order to restore the status quo to remedy the Respondent's unilateral transfer of unit work and that the Respondent is objecting to the very situation that it caused.

Member Walsh, in rejecting the Respondent's argument that the Union will lack majority support in the restored unit, also relied on the Board's well-established presumption that new hires support the union in the same ratio as the employees they replace. See, e.g., *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 779 (1990); *Furniture Renters of America v. NLRB*, 36 F.3d 1240, 1244 (3d Cir. 1994); *Spellman Co.*, 311 NLRB 95 (1993), *end. mem.* 41 F.3d 1507 (6th Cir. 1994).

(Chairman Battista and Members Schaumber and Walsh participated.)

Hearing held on April 27, 2006. Adm. Law Judge Eleanor MacDonald issued her decision July 28, 2006.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Elevator Constructors Local 131 (Individuals) Albuquerque, NM Oct. 30, 2006. 28-CB-6384, et al.; JD(SF)-55-06, Judge Gregory Z. Meyerson.

Interstate Bakeries Corp. and Teamsters Local 523 (an Individual) Kansas City, MO Oct. 31, 2006. 17-CA-23404, 17-CB-6146; JD(SF)-56-06, Judge Gerald A. Wacknov.

Mezonos Maven Bakery, Inc. (Puerto Rican Legal Defense and Education Fund) Brooklyn, NY Nov. 1, 2006. 29-CA-25476; JD(NY)-48-06, Judge Steven Davis.

NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's withdrawal of its answer to the compliance specification.)

Ybarra Construction Co. and D & P Drywall, Inc., Single Employer (Painters District Council 22) (7-CA-44842; 348 NLRB No. 66) Dearborn, MI Oct. 31, 2006.

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.)

Fairmont General Hospital, Inc. (Food & Commercial Workers Local 550) (6-CA-35297; 348 NLRB No. 68) Fairmont, WV Oct. 31, 2006.

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

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

Virginia Mason Hospital, Seattle, WA, 19-UC-741, Nov. 2, 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)

Fairmont General Hospital, Fairmont, WV, 6-UC-476, Nov. 2, 2006 (Chairman Battista and Members Liebman and Walsh)

USF Bestway, Van Buren, AR, 26-RD-1133, Nov. 2, 2006 (Chairman Battista and Members Liebman and Walsh)

Miscellaneous Board Orders

**CERTIFICATION OF REPRESENTATIVE AS BONA FIDE UNDER
SECTION 7(B) OF THE FAIR LABOR STANDARDS ACT OF 1938**

Douglas County, Alexandria, MN, 18-WH-11, Oct. 31, 2006

ORDER [denying Employer's request to stay further consideration]

*Valley Garbage & Rubbish Co., Inc. d/b/a Health Sanitation Services, Santa Maria, CA,
31-RD-1540, Nov. 3, 2003*
