National Labor Relations Board

Weekly Summary of NLRB Cases

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Press Release (R-2622): Barnett Horowitz is Appointed Resident Officer in NLRB's Albany, NY Resident Office

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Austal USA, L.L.C. (15-CA-16552, et al., 15-RC-8394; 349 NLRB No. 51) Mobile, AL March 21, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated the Act in certain respects and engaged in objectionable conduct that warranted a new election. It set aside the election held in case 15-RC-8394 on May 24, 2002, which Sheet Metal Workers Local 441 lost 45 to 63, and directed a second election. [HTML] [PDF]

Specifically, the Board agreed with the judge that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by: coercively questioning employees about their union sentiments; threatening plant closure, job loss, stricter discipline, and other unspecified reprisals if employees voted for Sheet Metal Workers Local 441; promising or impliedly promising benefits if employees rejected the Union; giving informal evaluations to three employees because of their union activity; and instructing employees not to read or discuss union material during working time. It also agreed that the Respondent violated Section 8(a)(3) and (1) by: terminating team leader Charles Gates because he would not support the Respondent's position on unionization; refusing to allow Gates to return to the Respondent's premises as an employee of a contractor the day after he was terminated; terminating eight employees on May 9, 2002; suspending employee Tony Causey and terminating him; giving employee Darrell Spencer a 3-day suspension; and giving employee Hank Williams a verbal warning.

Chairman Battista, dissenting in part, concluded that the Respondent lawfully disciplined Spencer for an improper weld. Contrary to his colleagues, Chairman Battista would also reverse the judge's finding that the Respondent unlawfully terminated eight employees, saying the judge's finding was based on a theory that was neither alleged in the complaint nor litigated at the hearing.

Members Liebman and Schaumber, in disagreeing that the judge relied on a theory neither alleged in the complaint nor litigated at the hearing, noted that the complaint alleges that the Respondent terminated the employees, thereby discriminating against them and discouraging membership in a labor organization in violation of Section 8(a)(3) and (1). They also noted that Chairman Battista acknowledges the General Counsel's further explanation, in his opening statement at the beginning of the hearing, that "[t]he employees were told that they were being laid off, but they would not have any recall rights. So, our position is that they were effectively terminated." Thus, Members Liebman and Schaumber found that both the complaint and the General Counsel's litigation theory were the same, that the employees were terminated. They added that the dissent's view that the Respondent rebutted the General Counsel's evidentiary showing with respect to Spencer "does not fully account for the undisputed facts and the judge's credibility findings."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 441; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Mobile, Jan. 27-30, 2003. Adm. Law Judge George Carson II issued his decision April 7, 2003.

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Cheney Construction, Inc. (17-CA-22517; 349 NLRB No. 54) Manhattan, KS March 22, 2007. Affirming the administrative law judge's supplemental decision, the Board ordered the Respondent to pay a total of $46,966.54 to Randy Mumpower ($17,707.91), David Randy Johns ($9,899.78), and Kenneth Fairchild ($9,358.85), to remedy its backpay obligation as ordered by the Board at 344 NLRB No. 9 (2005). [HTML] [PDF]

In its prior decision, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider for hire and failing and refusing to hire applicants Mumpower, Johns, and Fairchild because of their membership in or support for Carpenters Local 918. The judge determined, in this supplemental proceeding, how long the three applicants would have remained employees of the Respondent if they had not been discriminated against. He noted that the issue is controlled by the Board's rebuttable presumption of continuing employment in the construction industry as set forth in *Dean General Contractors,* 285 NLRB 573 (1987); see also *Cobb Mechanical Contractors v. NLRB,* 295 F.3d 1370, 1379 (D.C. Cir. 2002), citing *Tualatin Electric v. NLRB,* 253 F.3d 714, 718 (D.C. Cir. 2001).

While Members Schaumber and Kirsanow acknowledged that *Dean General* represents the current Board standard for deciding how long the discriminatees would have worked for the Respondent if they had not been unlawfully refused hire, they have concerns as to whether that case was correctly decided. See, e.g., *Construction Products*, 346 NLRB No. 60, slip op. at 1 fn. 2 (2006); *McKee Electric Co.*, 349 NLRB No. 46, slip op. at 4 fn. 14 (2007). However, for institutional reasons, they applied that precedent here in adopting the judge's supplemental decision.

(Members Schaumber, Kirsanow, and Walsh participated.)

Adm. Law Judge Thomas M. Patton issued his supplemental decision March 29, 2006.

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Eastern Energy Services, LLC (34-CA-11315; 349 NLRB No. 53) Norwich, CT March 20, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and to consider for hire Thomas Kelm, Arthur Bregoli, Gerald Satin, and Kenneth Moore; and unlawfully refusing to consider for hire Charles Bristol, Nicholas Susko, Armand Joseph Richard, Paul Nieves, and Damien Pisani, all because of their union membership and support of Sheet Metal Workers Local 40. [HTML] [PDF]

The judge found that the General Counsel established that the Respondent's antiunion animus was a contributing factor for the Respondent's refusal to consider the applicants for hire and that the Respondent failed to prove that it would not have considered the applicants in the absence of their union membership. He also found that the General Counsel established that the Respondent was hiring during the relevant period, that the applicants had experience and training

relevant to the generally known requirements of the positions for which they applied, and that antiunion animus contributed to the decision not to hire the applicants.

On other alleged violations, the Board agreed with the judge that the Respondent violated Section 8(a)(1) by telling employees that the Respondent does not hire sheet metal workers who are union members, interrogating employees concerning the Union and its members' engagement in concerted activities, and telling union representatives that the Respondent will not do business with the Union or that it will not hire Union members because the Union has filed charges against it with the Connecticut Department of Consumer Protection.

Member Kirsanow, in affirming the judge's finding that the Respondent violated Section 8(a)(1) by the statement of Director of Operations Debra Roggero to union officials Kelm and Ford on Oct. 19, 2005, relied on Roggero's statement that she was not going to hire any of the Union's sheet metal workers. The statement was a direct avowal of intent to discriminate against union job applicants, he observed. Having affirmed the 8(a)(1) finding on this basis, Member Kirsanow found it unnecessary to pass on the judge's additional finding of an 8(a)(1) violation based on Roggero's statement that she does not do business with organizations that file complaints with the Department of Consumer Protection and cost her company money.

The Board amended the judge's remedy to reflect the appropriate remedy for discriminatory refusals to hire and to consider for hire, modified the judge's recommended Order to correspond with the Amended Remedy and the Board's standard remedial language, and substituted a new notice that reflects the changes.

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Sheet Metal Workers Local 40; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford, May 16-17, 2006. Adm. Law Judge Lawrence W. Cullen issued his decision Aug. 9, 2006.

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Elevator Constructors International and its Local 18 (21-CB-13923, 13925; 349 NLRB No. 55) Pasadena, CA March 22, 2007. The Board agreed with the administrative law judge that the Respondents violated Section 8(b)(1)(A) of the Act by disciplining Scott Congrove for engaging in protected activity in following his supervisor's direction while performing work for his employer, Otis Elevator Co. In adopting this finding, the Board also relied on the fact that the parties' Standard Agreement contained a no-strike clause. The Board reversed the judge's finding that the Respondents violated Section 8(b)(1)(B) by disciplining Supervisor Scott Cutler. [HTML] [PDF]

Chairman Battista, dissenting in part, found that the Respondents violated Section 8(b)(1)(B) by their discipline of Cutler. He decided that Cutler, the Employer's representative for purposes of grievance adjustment and contract interpretation, was disciplined for engaging in that activity. In finding a violation with respect to Congrove, Chairman Battista relied solely on the fact that the parties' Standard Agreement contained a no-strike clause. Thus,

as the judge found, Congrove was disciplined for refusing to engage in a work stoppage prohibited by the Standard Agreement's no-strike clause.

On Feb. 5, 2004, the Employer's 5-person crew, including Congrove and mechanic-in-charge Cutler, was scheduled to raise two escalators at the Morongo Casino in Cabazon, CA. The crew was overseen by Jeffrey Gibas, the Employer's construction and modernization superintendent. Cutler ran the day-to-day operations because Gibas was not on site every day. It is undisputed that Cutler was a statutory supervisor and a member of the Respondent Unions. The general contractor informed Cutler that the typical method of raising escalators (i.e., hoisting the escalator in place by using a pulley attached to the building steel) was not possible because the steel could not support their weight. Cutler phoned Gibas and informed him of the problem. Gibas later hired an outside contractor, Halbert Brothers (Halbert), to provide and set up the gantry because the Employer's tool shop did not possess a gantry large enough to hoist the escalators. Halbert's employees are represented by the Ironworkers.

On March 5, Respondent Local 18 initiated intraunion disciplinary proceedings against the 5-member crew, including Cutler. The charge described Cutler's offense as "work[ing] with a composite crew of Ironworkers and Elevator Const[ructors] in rigging and [i]nstall of Escalators," thereby failing to abide by the Standard Agreement's provision governing work jurisdiction and violating his oath as a union member. Respondent Local 18 found Cutler "guilty" of the charges and fined him. The International Union denied Cutler's appeal.

Members Liebman and Walsh decided that Cutler was not disciplined for engaging in either collective bargaining or grievance adjustment. They noted that, according to the charges against him, Cutler's offending conduct was working with a composite crew of members and nonmembers. During the incident referenced in the charges, Cutler did not engage in grievance adjustment or collective bargaining, Member Liebman and Walsh explained. At most, his conduct consisted of ordinary supervisory duties and discipline for those kinds of duties is insufficient to invoke Section 8(b)(1)(B).

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Otis Elevator Co.; complaint alleged violation of Section 8(b)(1)(A) and (B). Hearing at Los Angeles, Oct. 31 and Nov. 1, 2005. Adm. Law Judge Gregory Z. Meyerson issued his decision Jan. 25, 2006.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

First Student, Inc., Anchorage, AK, 19-RC-14906, March 20, 2007 (Chairman Battista and Members Kirsanow and Walsh)

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(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)

Multimedia KSDK, Inc., St. Louis, MO, 14-RC-12419, March 21, 2007
(Chairman Battista and Member Kirsanow; Member Walsh dissenting)

(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)

Smarte Carte, Inc., Flushing, NY, 29-RC-11412, March 21, 2007 (Chairman Battista and Members Kirsanow and Walsh)
Sunbridge Rehabilitation of West Toledo, Toledo, OH, 8-RC-16487, March 21, 2007
(Chairman Battista and Member Walsh; Member Kirsanow dissenting)

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Miscellaneous Decisions and Orders

ORDER [granting request to withdraw petition]

Laidlaw Transit Services, Inc., El Cajon, CA, 21-RC-20795, March 21, 2007

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