



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

Washington, D.C. 20570

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May 11, 2007

W-3103

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The Boeing Co. (31-UC-311; 349 NLRB No. 91) Palmdale, CA April 30, 2007. Chairman Battista and Member Schaumber granted the Employer's request for review of the Regional Director's decision and order, reversed the Regional Director's dismissal of the Employer's unit clarification petition, and remanded the case to the Regional Director for further processing, including reopening the hearing. The majority found, contrary to the Regional Director, that the representation issues presented concerning whether the disputed employees are excluded or included in the units are matters for resolution by the Board and not by an arbitrator. [\[HTML\]](#) [\[PDF\]](#)

In her dissent, Member Liebman wrote:

In its eagerness to protect the Board's authority to decide representation questions under the Act, the majority today remands a legally-insufficient unit-clarification petition, preempting an arbitration proceeding that might resolve the matter without the need for Board intervention and that would at least conserve the Board's resources. Consistent with my dissenting position in other cases, I would dismiss the Employer's petition and await the arbitrator's ruling.

Society of Professional Engineering Employees, IFPTE Local 2001 has represented certain professional employees and technical employees working at the Employer's facilities in Washington State and Edwards, CA since at least 1975, adding facilities at Palmdale, CA in 1989. In 1996, the Employer acquired Rockwell International and in 1997, merged with McDonnell Douglas. The Employer began consolidating and restructuring work at its Edwards/Palmdale facilities. The Union learned that the Employer was hiring and placing or transferring certain professional/technical employees at Edwards/Palmdale outside the units when they allegedly should have been in the units. After unsuccessfully attempting to resolve the issue with the Employer, the Union filed a grievance, which is pending arbitration. The Employer filed the instant petition seeking to clarify the existing bargaining units encompassing facilities in Washington State and Edwards/Palmdale facilities in California to exclude certain disputed professional and technical employees.

The majority wrote in reversing the Regional Director's dismissal of the petition: "The Regional Director's dismissal, in effect, allows the arbitrator to decide the representational issues, subject only to a deferential Board review. This result clearly conflicts with Board policy. Thus, we find that the Board has the authority to, and should, define the unit in this case."

(Chairman Battista and Members Liebman and Schaumber participated.)

The Cajun Co., Inc. (15-RC-8615; 349 NLRB No. 96) Gulfport and Escatawpa, MS May 4, 2007. The Board affirmed the Regional Director's finding that the Employer, a contractor that provides maintenance services at power plants, is engaged in the building and construction industry as defined by the Board, and thus that the construction industry eligibility formula as set

forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992), is applicable. The

Board found it unnecessary to pass on the issue of whether the Employer is actually engaged in the building and construction industry as defined under the Act. It remanded the case to the Regional Director for further appropriate action. The Board wrote:

In sum, the Employer performs a substantial amount of construction work during the January through May outage months (when the work force may more than double), and a smaller amount during the remainder of the year. Moreover, the total amount of construction work performed year-round is more than de minimis or incidental, and such functions are integral to the Employer's work at these plants. In addition, the Employer's employment pattern of hiring intermittent employees on an outage-by-outage basis and laying off employees at various times is similar to the hiring pattern in the construction industry. Further, the evidence does not establish that the Employer is a seasonal employer. Under these circumstances, in agreement with the Regional Director, we find that the application of the *Daniel/Steiny* formula is reasonable, regardless of whether the Employer meets the definition of construction employer under the Act. [\[HTML\]](#) [\[PDF\]](#)

In his decision, the Regional Director found that the Employer is engaged in the building and construction industry, and that use of the *Daniel/Steiny* formula is necessary to enfranchise employees who are hired intermittently for "outages" that occur during the months of January through May. He found that the "outage" employees are hired for a specific outage and not an entire outage season, rejecting the Employer's contention that *Daniel/Steiny* should not apply in this case because the Employer is a seasonal employer. The Employer filed a timely request for review of the Regional Director's decision, contending that it is not an employer in the building and construction industry, and that the majority of construction tasks are performed during the outage season, and not year-round. The Employer further contended that it is a seasonal employer, and thus that the *Daniel/Steiny* formula does not apply. On July 20, 2005, the Board granted the Employer's request for review.

(Chairman Battista and Members Liebman and Walsh participated.)

Detroit East, Inc. (7-RD-3494; 349 NLRB No. 87) Detroit, MI April 30, 2007. Members Liebman and Walsh remanded the case to the hearing officer for further consideration and issuance of a supplemental report, declining to adopt the hearing officer's recommendation to overrule the Union's objection, which alleges that the Employer improperly used its attorney's paralegal Maurine Payne as its election observer. The hearing officer found that the Union waived this objection by failing to raise it during the preelection conference. Members Liebman and Walsh noted the testimony of Elaine Crenshaw, the Union's designated election observer, that during the conference, she informed the Board agent that Payne was the Employer's attorney and asked her why she was present. Crenshaw testified that, in response, the Board agent called her

supervisor at the Regional Office and thereafter pulled Payne aside. The majority decided that Crenshaw's testimony, if credited, would sufficiently establish that the Union raised the status of the Employer's observer during the preelection conference. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista, dissenting, concluded that Crenshaw's testimony, even if credited, is insufficient to establish that the Union raised this objection during the preelection conference and agreed with the hearing officer that the Union waived this objection.

The tally of ballots for the election held on Aug. 18, 2006, shows 17 votes for, and 19 votes against, AFSCME Local 1640, Michigan Council 25, and no challenged ballots. The hearing officer found that Crenshaw did understand the difference between an attorney and a paralegal in referring to Payne as an attorney.

(Chairman Battista and Members Liebman and Walsh participated.)

Diverse Steel, Inc. and Pinnacle Steel, Inc., alter egos (26-CA-20799; 349 NLRB No. 90) Roland and Little Rock, AR April 30, 2007. The administrative law judge found, and the Board agreed, that Respondent Pinnacle Steel was an alter ego of Respondent Diverse Steel, and that the Respondents violated Section 8(a)(5) and (1) of the Act when Pinnacle failed to apply the terms of Diverse's collective-bargaining agreement with Iron Workers Local 321 to its ironwork employees. The Board also agreed with the judge that the Respondent did not violate Section 8(a)(3) and (1) by refusing to recall Diverse's employees to work on the Rave 18 Theater Project. [\[HTML\]](#) [\[PDF\]](#)

In finding that Pinnacle and Diverse were alter egos, the judge concluded that "Pinnacle ultimately became the means by which Diverse could [] continue to do business without the limitations and expenses of the Union contract" and that "since May 2002, Pinnacle has functioned as a disguised continuance of Diverse." The Board agreed. Contrary to the judge who failed to also find that Pinnacle was created for the purpose of evading the Union, the Board concluded that the record supported a finding that one of the reasons for forming Pinnacle was to avoid Diverse's contractual and statutory obligations under the Act.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Iron Workers Local 321; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Little Rock, Feb. 13-14, 2003. Adm. Law Judge Margaret G. Brakebusch issued her decision March 21, 2003.

Downtown Hartford YMCA (34-CA-10011, et al.; 349 NLRB No. 92) Hartford, CT April 30, 2007. The Board, in agreeing with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire 12 employees of its predecessor, relied on *Planned Building Services*, 347 NLRB No. 64 (2006), rather than *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), applied by the judge. [\[HTML\]](#) [\[PDF\]](#)

In *Planned Building Services*, which issued after the judge's decision, the Board held that *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire employees of its predecessor to avoid a bargaining obligation. The judge found, and the Board agreed, that the General Counsel established that the Respondent's decision not to hire its predecessor's employees was motivated by antiunion animus and that the Respondent failed to meet its burden by establishing that it would not have hired those employees absent its hostility toward the Union.

Turning to other alleged violations, the Board affirmed, as modified, the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally setting initial terms and conditions of employment upon becoming a successor and violated Section 8(a)(1) by denying Union Representative Rebecca Maran access to its facility to meet with employees, threatening to and causing Maran's arrest for meeting with employees on its premises, promulgating and enforcing a discriminatory and overly broad no-solicitation-distribution rule, and telling employees during job interviews that they would not be hired because of their union affiliation.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Service Employees 32BJ District 531; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hartford, Aug. 19-23 and Sept. 17-20, 2002. Adm. Law Judge Michael A. Marcionese issued his decision June 19, 2003.

Extreme Building Services Corp. (29-CA-24894, et al.; 349 NLRB No. 86) Great Neck, NY April 30, 2007. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act in several respects, including discharging employees Fabio Morales, Betsey Arruda, Maria Ortega, Jerry Sokol, and Andrej Siemek and physically assaulting an employee, preventing him from washing up, and destroying his asbestos worker's license, all in reprisal for union activity. The Board explained its basis, which differed from that of the judge, for finding the violations regarding the discharges of Morales, Arruda, Ortega, and Sokol. [\[HTML\]](#) [\[PDF\]](#)

There were no exceptions to the judge's recommended dismissal of the complaint allegations that the Respondent violated Section 8(a)(3) by discharging employees Caryl Vargas and William Leon, or to his failure to find that Morales was fired based on his contact with

OSHA. The Board found it unnecessary to pass on the judge's finding that Segundo Moposita is a statutory supervisor or that his questioning of an employee about his union membership and implicitly threatening him with discharge violated Section 8(a)(1).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Laborers Local 78; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn, Sept. 24, Oct. 16-18, and Oct. 21-24, 2002. Adm. Law Judge Steven Davis issued his decision Feb. 10, 2003.

J. Shaw Associates, LLC (8-CA-36568; 349 NLRB No. 88) Perrysburg, OH April 30, 2007. Affirming the administrative law judge's recommendation, the Board dismissed the complaint. The Charging Party, Therese Haskell, did not except to the judge's findings that the Respondent did not discriminate against her by issuing her a written warning on Feb. 1, 2006, that Manager Bryant's statements did not unlawfully prohibit Haskell from discussing wages with other employees, and that the Respondent did not verbally promulgate a rule prohibiting such discussions. Haskell excepted to the judge's failure to find that the Feb. 1 written warning independently violated Section 8(a)(1) by prohibiting her from discussing wages with other employees. [\[HTML\]](#) [\[PDF\]](#)

In agreeing with the judge's dismissal of the 8(a)(1) discriminatory discharge allegation, the Board found it unnecessary to pass on the judge's finding that Haskell was not engaged in protected concerted activity. Even assuming arguendo that the General Counsel met his threshold burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), the Board agreed with the judge's finding that the Respondent demonstrated that it would have discharged Haskell even in the absence of any protected concerted activity. The judge found that Respondent's owner Shaw and Haskell were romantically involved prior to and continuing after her employment. Haskell's conduct, including harassing Shaw at work and using profanity in their conversations after Shaw wanted to end the relationship and she wanted it to continue, "constituted ample grounds to justify her termination, regardless of any protected activity in which she might have engaged," the judge held.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charge filed by Therese Haskell, an individual; complaint allege violation of Section 8(a)(1). Hearing at Toledo, Nov. 7-9, 2006. Adm. Law Judge Ira Sandron issued his decision Dec. 27, 2006.

R.J. Corman Railroad Construction, L.L.C., f/k/a and successor-in-interest to R.J. Corman Railroad Co., L.L.C. (13-CA-38807-1; 349 NLRB No. 89) Nicholasville, KY May 2, 2007. The Board upheld the administrative law judge's findings that the Respondent committed several unfair labor practices following an attempt by 15 Union applicants to apply for work with the Respondent on May 4, 2000. Specifically, the judge found, with Board approval, that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Scott Bell, conveying to Bell that union activity would be futile, and threatening employees that the Respondent would close its facility in Bedford Park and take away their benefits if the employees selected Operating Engineers Local 150 as their collective-bargaining representative; and violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire the Union applicants. The Board analyzed the refusal-to-hire allegation under the framework set forth in *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002), because the judge's analysis does not fully conform with the *FES* standard. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Operating Engineers Local 150; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Chicago, May 29-31, 2001. Adm. Law Judge William G. Kocol issued his decision Aug. 22, 2001.

St. George Warehouse, Inc. (22-CA-25400, 25938; 349 NLRB No. 84) South Kearny, NJ April 30, 2007. The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by assisting employee Louis Guono in circulating a decertification petition; Section 8(a)(5) and (1) by engaging in surface bargaining and unilaterally enforcing a 15-minute break limitation without giving Teamsters Local 641 notice and an opportunity to bargain; Section 8(a)(3), (4), and (1) by issuing written warnings and suspensions to employee Tony Daniels for supporting the Union and giving testimony under the Act; and Section 8(a)(3) and (1) by issuing written warnings to employee Purcell Robert Wallace because of his union activities. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber dismissed the surface bargaining allegation, dismissed or found it unnecessary to pass on certain allegations involving the discipline of Daniels and Wallace, and affirmed the remaining violations. Member Walsh, dissenting in part, agreed with the judge that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. Chairman Battista and Member Schaumber found, contrary to the judge and dissenting Member Walsh, that the totality of the Respondent's conduct, both at and away from the bargaining table failed to warrant a finding of surface bargaining. Member Walsh wrote: "The Respondent, a repeat offender of the Act, is no stranger to Board proceedings or to allegations of surface bargaining. Here, for the second time since 2002, an administrative law judge has found that the Respondent engaged in surface bargaining. For the second time, the majority reverses that finding. I dissented in the prior case, and I do so again here. Through the

conduct and statements of its president and chief negotiator, the Respondent demonstrated its intent to frustrate agreement, continuing its longstanding pattern of hostility to the Union and the collective-bargaining process.”

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Teamsters Local 641; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Newark on 7 days between July 22, 2003 and Jan. 6, 2004. Adm. Law Judge Eleanor MacDonald issued her decision Jan. 10, 2005.

Sam's Club, a Div. of Wal-Mart Stores, Inc. (28-CA-17057, et al.; 349 NLRB No. 94) Las Vegas, NV May 4, 2007. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by announcing an unlawful rule against talking about the Food and Commercial Workers and by promulgating an employee dress code that effectively prohibited employees from wearing “badge backers” bearing statements of their rights under the Act at its Spring Mountain store. [\[HTML\]](#) [\[PDF\]](#)

The Board reversed the judge’s findings that the Respondent’s dress code was otherwise unlawful and that the Respondent violated the Act by: suspending Ida Williams because of her reaction to being denied a witness at a meeting with management, which she reasonably believed would result in discipline; suspending merit raises pending a representation election without telling employees that the raises would be reinstated after the election regardless of who won the election; and soliciting employee signatures on letters stating opposition to the Union. Contrary to the judge, the Board ordered the Respondent to post remedial notices only at the facility at which employees were affected by the Respondent’s unlawful actions.

Member Liebman, dissenting in part, would find that Williams’ suspension was unlawful. She explained that Williams exercised her right to request an employee witness at a disciplinary interview and the Respondent seized on her alleged emotional state as a pretext for retaliating against her.

The judge found that the Respondent violated Section 8(a)(1) by refusing to allow Williams to have a coworker representative present at a June 19, 2001, meeting with Store Manager Roberts and violated Section 8(a)(3) and (1) when it suspended Williams for the remainder of the day because she protested Roberts’ denial of the representative. In *IBM Corp.*, 341 NLRB 1288 (2004), which issued subsequent to the judge’s decision, the Board held that an employee not represented by a union has no statutory right to the presence of a coworkers at an investigatory interview that the employee reasonably believes could lead to discipline.

As the Respondent’s employees were not represented by any union when Williams asked for a witness, the General Counsel moved to withdraw the portions of the complaint alleging that Roberts unlawfully denied Williams’ request to have a coworker representative present at their

June 19 meeting. In light of *IBM Corp.*, and the lack of opposition, Chairman Battista and Member Schaumber granted the motion. They found, contrary to the judge, that the Respondent did not unlawfully suspend Williams because of her outburst in questioning Roberts' denial of her request to have an employee witness at their meeting, saying: "Williams' heated statement, 'this is a bunch of crap,' was not an act of protected activity, i.e., a request for a witness, but rather an intemperate response to a lawful act of the Respondent."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UFCW; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge James L. Rose issued his decision Nov. 29, 2002 and his supplemental decision May 25, 2004.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Alan Ritchey, Inc. (Teamsters Local 117) Seattle, WA April 30, 2007. 19-CA-30333; JD(SF)-11-07, Judge William G. Kocol.

Metro Mayaguez, Inc. d/b/a Hospital Pavia Perea (Unidad Laboral de Enfermeras (OS) Y Empleados de la Salud) Mayaguez, PR April 30, 2007. 24-CA-10505; JD(ATL)-10-07, Judge William N. Cates.

Carriage Inn of Cadiz (Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industry and Service Workers Local 13983-08) Cadiz, OH May 1, 2007. 8-CA-36464; JD-29-07, Judge Earl E. Shamwell.

Catelli Brothers, Inc. (Food & Commercial Workers Local 342) Shrewsbury, NJ May 1, 2007. 4-CA-33420, et al., 4-RC-21173; JD-31-07, Judge Arthur J. Amchan.

Camaco Lorain Manufacturing Plant (Autoworkers [UAW] Region 2B) Lorain, OH May 2, 2007. 8-CA-36785; JD(ATL)-16-07, Judge Keltner W. Locke.

Alpha Baking Co. (Bakery Workers Local 1) Chicago, IL May 2, 2007. 13-CA-43723; JD(ATL)-15-07, Judge George Carson II.

Acklin Stamping Co. and Autoworkers [UAW] Local 12 (an Individual) Toledo, OH May 4, 2007. 8-CA-36788, 8-CB-10622; JD-32-07, Judge Bruce D. Rosenstein.

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.)

Guardsmark, LLC (Plant Protection Association National) (7-CA-49745; 349 NLRB No. 93) Dearborn, MI May 3, 2007. [\[HTML\]](#) [\[PDF\]](#)

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

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

DECISION AND DIRECTION OF SECOND ELECTION

Bayshore Health Care Center, Inc., Holmdel, NJ, 22-RC-12695, April 30, 2007
(Chairman Battista and Members Liebman and Walsh)

DECISION AND DIRECTION

[that Regional Director open and count one ballot]

Classic Brands, Inc., Chillicothe, OH, 9-RC-18128, May 4, 2007 (Chairman Battista and Members Liebman and Kirsanow)

(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)

Cadence Innovation, LLC, Troy, Clinton Township, Fraiser, and Chesterfield, MI, 7-RC-23080, April 30, 2007 (Members Liebman, Kirsanow, and Walsh)

Dominion Energy New England, Somerset, MA, 1-UC-849, May 2, 2007
(Chairman Battista and Members Liebman and Kirsanow)

Whitesell, Washington, IA, 18-RD-2586, May 2, 2007 (Chairman Battista and Members Liebman and Kirsanow)

Miscellaneous Decisions and Orders

**ORDER [granting Employer's request for review of Regional
Director's decision to hold petition in abeyance pending
disposition of Case 4-CA-45082]**

Archer Daniels Midland Co., Langhorne, PA, 4-RD-2073, May 2, 2007
(Chairman Battista and Member Kirsanow; and Member Liebman dissenting)
