National Labor Relations Board

Weekly Summary of NLRB Cases

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Press Releases (R-2626): Richard Kelliher-Paz Appointed Deputy Regional Attorney in NLRB's Chicago, IL Regional Office

(R-2627): Percy Courseault III Appointed Deputy Regional Attorney in NLRB's Milwaukee, WI Regional Office

Tower Industries, Inc., d/b/a Allied Mechanical (31-CA-27201, et al.; 349 NLRB No. 100) Ontario, CA May 14, 2007. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees Walter Reddoch and Kerry Wolken during depositions in a wage claim lawsuit filed by Reddoch and Wolken against the Respondent, by conditioning the settlement of wage claims upon the requirement that employees not engage in protected activity, and by excluding Wolken and Reddoch from meetings attended by other employees because Wolken and Reddoch joined in filing the wage claim lawsuit. [HTML] [PDF]

(Members Liebman, Kirsanow, and Walsh participated.)

Charges filed by Steelworkers and Walter Reddoch and Kerry Wolken, individuals; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles on Nov. 15, 2005. Adm. Law Judge William G. Kocol issued his decision Jan. 31, 1006.

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Bunting Bearings Corp. (7-CA-43996, et al., 7-CB-12863; 349 NLRB No. 99) Kalamazoo, MI May 14, 2007. On remand from the U.S. Court of Appeals for the D.C. Circuit, the Board held that the Respondent's unlawful partial lockout of the bargaining unit following an impasse in negotiations for a successor collective-bargaining contract tainted the decertification petition later circulated by a majority of unit employees and that the Respondent violated Section 8(a)(5) by relying on that petition to withdraw recognition from, and to refuse to bargain with, Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers. The Board determined that an affirmative bargaining order, with its temporary decertification bar, is necessary to remedy the Respondent's unlawful withdrawal of recognition from the Union. [HTML] [PDF]

In a 2004 decision and order reported at 343 NLRB 479, Chairman Battista and Member Schaumber, with Member Liebman dissenting, dismissed the allegations. By unpublished order dated April 28, 2006, the court granted the Union's petition for review, found that the lockout was unlawful, and remanded the case to the Board to determine whether the decertification petition was tainted by the unlawful lockout. The Board held, in this supplemental decision, that a causal relationship has been shown between the Respondent's lockout and the Union's loss of majority and accordingly, the unlawful lockout tainted the petition.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Garden Ridge Management, Inc. (16-CA-22275, 22756; 349 NLRB No. 103) Dallas, TX May 18, 2007. The Board considered the General Counsel's motion for reconsideration of the dismissal of allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining and withdrawing recognition from Teamsters Local 745. In the prior decision, the Board also found that the Respondent violated Section 8(a)(5) and (1) by failing to meet at reasonable times with the Union. 347 NLRB No. 13 (2006). Chairman Battista and Member Schaumber reaffirmed the earlier dismissals. Member Liebman dissented. [HTML] [PDF]

Chairman Battista and Member Schaumber found that the General Counsel failed to raise any new matters as to the withdrawal of recognition, but that the surface bargaining issue warranted additional consideration. Contrary to the General Counsel's contention, the majority noted that they did not conclude that the precertification comments of Vice Presidents Rutherford and Ferguson were irrelevant to the surface bargaining issue and instead found that the comments were insufficient to show that the General Counsel had proven the allegation by a preponderance of the evidence. They decided that the Respondent's failure to meet at reasonable times did not establish the separate allegation of surface bargaining. After examining the totality of the circumstances, the majority affirmed the earlier finding that the General Counsel failed to prove that the Respondent attempted to avoid reaching agreement. In so doing, the majority considered the role in negotiations of the individuals making the remarks, the content of the remarks themselves, and whether they were accompanied by postcertification unlawful conduct.

Member Liebman adhered to her position in her original dissent that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining and by withdrawing recognition from the Union. She found the cases cited by the General Counsel in his motion "bolster" her earlier contention that the majority gave insufficient weight to the precertification statements made by Ferguson and Rutherford, saying: "Together with the other surrounding circumstances, including the Respondent's failure to meet at reasonable times and its repeated introduction of proposals requiring protracted negotiations, these statements establish a surface-bargaining violation." Member Liebman said the majority seems to suggest that only remarks accompanied by "postcertification conduct that clearly evidenced an unlawful intent" are probative. She wrote: "But it is a mistake to give employer statements weight only when the employer's conduct already speaks for itself. This position represents a break from prior case law, where the Board has separately relied on employer statements made prior to certification as a strong indicator of unlawful bargaining behavior."

(Chairman Battista and Members Liebman and Schaumber participated.)

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JHP & Associates, LLC d/b/a Metta Electric (14-CA-28042, 28179; 349 NLRB No. 101) St. Charles, MO May 16, 2007. 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 collectively with Electrical Workers IBEW Local 1, and by refusing to furnish, and delaying in furnishing, requested information that is necessary and relevant to the Union's performance of its duties as exclusive collective-bargaining representative of unit employees. [HTML] [PDF]

Members Schaumber and Kirsanow substituted a narrow cease-and-desist order for the judge's recommended broad order. The judge, noting that this is the second case against the Respondent, found that a broad order was warranted under *Hickmott Foods*, 242 NLRB 1357 (1979), based on the Respondent's proclivity to violate the Act. See *Metta Electric*, 338 NLRB 1059 (2003) (*Metta I*), enfd. 360 F.3d 904 (8th Cir. 2004). Members Schaumber and Kirsanow found the Respondent's recidivism here, standing alone, insufficient to warrant a broad order

under the *Hickmott* standard. Member Liebman would grant a broad order "based on the Respondent's many violations of the Act in a relatively short period of time." She would also order the Respondent to read to its employees the Notice to Employees, as requested by the General Counsel.

Member Liebman and Kirsanow adopted the judge's recommendation and extended the Union's certification year for 12 months pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). They noted that the Board ordered a 12-month *Mar-Jac* extension in *Metta I*; that the Eighth Circuit enforced the order; and that the Respondent subsequently refused the Union's request for information and refused to bargain, furnished some of the information 8 months later, bargained with the Union three times over 2 months and then invalidly declared impasse and refused to bargain any further. Members Liebman and Kirsanow said the Union "has yet to secure a single minute of bargaining uncompromised by the Respondent's unlawful conduct."

Member Schaumber would extend the certification year for 6 months, finding several factors militate against a full-year extension. He noted that the unlawful conduct consisted of information request violations and a refusal to meet with the Union at reasonable times for bargaining, not a withdrawal of recognition or coercive conduct directed to employees; and that more than 7 years have passed since the certification. Although Member Schaumber acknowledged his colleagues' position that the parties only bargained three times before the Respondent declared impasse, he emphasized that during those sessions, the Union was unwilling to back down from its objective that the Respondent accept the Union's area agreement with National Electrical Contractors Association. He added that the Union presented no real counterproposals.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Electrical Workers IBEW Local 1; complaint alleged violation of Section 8(a)(1) and (5). Hearing at St. Louis on May 25, 2005. Adm. Law Judge James L. Rose issued his decision July 13, 2005.

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Teamsters Local 917 (29-CE-128; 349 NLRB No. 97) Floral Park, NY May 11, 2007. Chairman Battista and Member Schaumber held, contrary to the administrative law judge, that the Respondent violated Section 8(e) of the Act by grieving Peerless Importers, Inc.'s (Peerless) failure to assign unit employees certain work, by arbitrating that grievance, and by securing an arbitration award holding that the parties' collective-bargaining agreement prohibited Peerless from failing to assign the work to unit employees. [HTML] [PDF]

Member Liebman, dissenting, found that Local 917-represented employees had a clear contractual claim to the work at issue, which they had historically performed, and that the Respondent asserted that claim through lawful, contractual channels against the contracting party, Peerless, and it prevailed.

Peerless is engaged in the distribution of alcoholic beverages throughout the New York City (NYC) Metropolitan area. The Respondent represents a unit of Peerless' drivers and helpers. The parties' collective-bargaining agreement requires Peerless to use unit employees to transport beverages to and from its facility, with exceptions not relevant here. Peerless purchases beverages from several suppliers, including Diageo North America Inc. (Diageo). On Oct. 1, 2002, Peerless and Diageo entered into a Distribution Agreement, making Peerless the exclusive distributor of Diageo's beverages in the NYC Metropolitan area. Previously, Peerless was one of two New York distributors of Diageo's beverages. Peerless' unit employees, who had transported beverages from Diageo's facilities to Peerless' facility for many years, continued to do so for the first 6 months of 2002 under the 2002 distribution agreement. While the agreement does not expressly address which party would transport the beverages from Diageo to Peerless, it gives Diageo authority to unilaterally change "Sales Terms," except for "remittance" terms. In April 2003, Diageo implemented its delivered pricing program and began using its employees to transport some of its brands to Peerless. The Respondent filed a grievance alleging that Peerless breached the collective-bargaining agreement by failing to use unit employees to transport all of Diageo's beverages.

The majority decided that the Respondent's enforcement of the requirement that Peerless use unit employees to transport beverages impairs Peerless' business relationship with Diageo. While the majority acknowledged that the unit employees have historically performed that work, they added that the "work preservation" defense has a second prong. If the employer of the unit employees has lost control of the work, and such loss of control was not initiated by it or at its own volition, the work preservation defense is not a valid one. *NLRB v. Plumbers Local 638*, 429 U.S. at 525–526. See also *Electrical Workers Local 501 (Atlas Construction Co.)*, 216 NLRB 417, 417 (1975), enfd. 566 F.2d 348 (D.C. Cir. 1977). (right of control doctrine "presumes an employer to be 'neutral' if that employer, when faced with a coercive demand from its union, is powerless to accede to such a demand except by bringing some form of pressure on an independent third party.") The majority concluded that, under this test, Peerless was an unoffending neutral without the right to control the disputed work.

(Chairman Battista and Members Liebman and Schaumber participated.)

Hearing held on Jan. 11, 2006. Adm. Law Judge Raymond P. Green issued his decision on remand March 15, 2006.

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Wal-Mart Stores, Inc. (28-CA-18255, et al.; 349 NLRB No. 102) Henderson, NV May 18, 2007. The administrative law judge found, with Board approval, that the Respondent did not unlawfully restrict worktime solicitation or discharge Larry Allen at its store in Las Vegas, NV and did not unlawfully exclude nonemployee solicitors for the Food and Commercial Workers International from soliciting and distributing literature near the entrance of its store in Henderson, NV. [HTML] [PDF]

The Respondent leased the tract on which the Henderson store was located from the Wal-Mart Real Estate Business Trust (the owner of the tract). Under the terms of a three-party lease agreement between the trust, the Respondent, and a neighboring independent developer lessee, the tract included a "common area" for access, containing parking space and front walk, that was shared with an adjoining tract. The Union contended that a clause in the three-party lease confined the Respondent's possessory interest in the common areas to a "nonexclusive easement" and that the restricted easement did not include the right to exclude nonemployee solicitors from engaging in nondisruptive union solicitation.

The Board found it unnecessary to decide that question because, even assuming arguendo that the lease clause on which the Union relies would have barred the exclusion in other circumstances, the Respondent had the right, under the other terms of the lease, to require solicitors to provide advance notice before engaging in solicitation activity. "Because the Respondent had such a requirement in place and was not shown to have enforced it in a disparate manner, and because the Union knowingly failed to comply with that requirement, the exclusion of the solicitors was lawful," the Board held.

The Board agreed with the judge that the Respondent met its burden of showing that it would have terminated Allen for soliciting on worktime even if he had not engaged in protected union activity, and found it unnecessary to reach the question of whether the General Counsel showed that the Respondent acted with unlawful animus.

No exceptions were filed to the judge's findings that the Respondent unlawfully confiscated union material from employees and implicitly ordered employees to destroy union literature at its Henderson, NV store on Oct. 17, 2002, or to the dismissal of other complaint allegations not discussed in this summary.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UFCW; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Las Vegas, Feb. 10-13, 2004. Adm. Law Judge Lana H. Parke issued her decision April 26, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Longshoremen Local 333 (an Individual) New York, NY May 14, 2007. 29-CB-13237; JD(NY)-23-07, Judge Howard Edelman.

Caldwell Manufacturing Co. (IUE Local 81331) Rochester, NY May 14, 2007. 3-CA-24955, 25076; JD-33-07, Judge Earl E. Shamwell Jr.

United States Postal Service (an Individual) Destin, FL May 17, 2007. 15-CA-17767, et al.; JD(ATL)-17-07, Judge Keltner W. Locke.

Iberia Road Markings Corp. (an Individual) Brooklyn, NY May 18, 2007. 29-CA-27930, 29-RD-1070; JD(NY)-24-07, Judge Mindy E. Landow.

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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 [that Regional Director open and count two ballots]

Penske Logistics, Inc., Marysville, OH, 8-RC-16855, May 18, 2007 (Chairman Battista and Members Liebman and Walsh)

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(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

Strassburger Meats, LLC, Carlstadt, NJ, 22-RC-12782, May 15, 2007 (Chairman Battista and Members Liebman and Schaumber)

Tendercare (Michigan) Inc. d/b/a Tendercare Greenview, Alpena, MI, 7-RC-23063, May 17, 2007 (Chairman Battista and Members Liebman and Schaumber)

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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)

Columbus Symphony Orchestra, Inc., Columbus, OH, 9-RC-18137, May 16, 2007 [solely with respect to Regional Director's eligibility determination] (Chairman Battista and Members Liebman and Schaumber)

Woody Bogler Trucking Co., Gerald, MO, 14-RC-12655, May 16, 2007 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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Miscellaneous Decisions and Orders

ORDER [affirming Regional Director's determination to hold the petition in abeyance pending resolution of the outstanding unfair labor practice charge]

Industrial Hard Chrome, Geneva, IL, 13-RD-2561, May 17, 2007 (Chairman Battista and Member Liebman; Member Schaumber dissenting)

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