National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED

OTHER CONTENTS

Press Release (R-2628): NLRB Announces New Evidentiary Standards for Establishing Duration of Backpay Period in Certain Discrimination Cases

Aero Ambulance Service, Inc. (22-CA-20950; 349 NLRB No. 115) Hackensack, NJ May 31, 2007. The Board ordered that the Respondent pay to Guy Greene the sum of $19,793.13 and to Michael Goldblatt the sum of $23,821.99 to satisfy its obligations as found in the underlying unfair labor practice decision reported at 327 NLRB 639, enfd. mem. 302 F.3d 816 (1999). Member Liebman, dissenting in part, would affirm the administrative law judge's finding that Goldblatt's backpay period commenced with his discharge on Oct. 6, 1995 and continued until Jan. 31, 2000, when it terminated based on the Respondent's valid offer of reinstatement and thus, the Respondent owes Goldblatt $44,358.65. [HTML] [PDF]

Chairman Battista and Member Schaumber agreed with the judge that Goldblatt's backpay commenced with his discharge and continued during his interim employment as an EMT—during which interim employment period Goldblatt properly mitigated his damages. However, they concluded, contrary to the judge, that Goldblatt's backpay period tolled on Feb. 9, 1998, finding that after Feb. 9, Goldblatt was unable or unwilling to perform work substantially equivalent to his EMT duties for the Respondent. Consequently, Chairman Battista and Member Schaumber held that the Respondent owed Goldblatt $23,821.99 in backpay, and not $44,358.65 as found by the judge.

Member Liebman noted that the majority mistakenly discounted evidence (1) that Goldblatt could, and did work after Feb. 1998; and (2) that Goldblatt's physical condition was largely based on his having used a worn-out prosthesis, whose replacement he could not afford, after being unlawfully discharged. She stated: "In sum, the actual evidence . . . is that Goldblatt could and did work after applying for disability benefits and obtaining a new prosthesis for his leg. The record does not establish that he was unable to work, nor would I engage in speculation on that point. The sole question, then, is whether Goldblatt's efforts to find interim employment were sufficient." Member Liebman agreed with the judge's finding that they were.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Raymond P. Green issued his second supplemental decision Sept. 21, 2001.

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Tower Industries, Inc., d/b/a Allied Mechanical (31-CA-26605, et al.; 349 NLRB No. 117) Ontario, CA May 31, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by telling Marcelo Pinheiro that the Respondent would go by the employee handbook regarding seniority because of the Steelworkers' organizing campaign and the Respondent's trouble with the Board, and violated Section 8(a)(1), (3), and (4) by disciplining employee Edwin Shook and by denying Pinheiro's request to transfer to the night shift. It reversed the judge's findings that the Respondent unlawfully denied Pinheiro overtime, issued him a written disciplinary warning, and suspended and discharged him. [HTML] [PDF]

Member Schaumber dissented from the finding that the Respondent violated Section 8(a)(1), (3), and (4) by refusing to transfer Pinheiro to a night-shift position operating its 5-Axis machine. He concluded that the evidence established that Pinheiro did not meet the

Respondent's standards as a 5-Axis operator and that the Respondent would have reached the same decision even in the absence of Pinheiro's union activity.

Chairman Battista and Member Walsh wrote in finding that the Respondent failed to establish that it would have denied Pinheiro's transfer request in the absence of his union activity:

> Our dissenting colleague asserts that the Respondent did not transfer Pinheiro to the night-shift job because of Pinheiro's alleged difficulty in operating the 5-Axis machine. However, it is significant that the Respondent did not give that as the reason for the failure to transfer Pinheiro. Rather, the Respondent told Pinheiro that he was more productive on the day shift. However, we have found no evidence to support that claim. More likely, the Respondent was suggesting Pinheiro would do better during the day because he could be watched more carefully during the day. Further, even if we take into account the belated explanation of poor performance on that machine, the explanation does not withstand scrutiny.

Chairman Battista and Member Walsh also disagreed with Member Schaumber's conclusion that the Respondent's selection of Steven Butkus over Pinheiro to fill the 5-Axis evening-shift position was a legitimate exercise of its business judgment.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Los Angeles, April 12-14, 2004. Adm. Law Judge Mary Miller Cracraft issued her decision July 15, 2004.

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Correctional Medical Services, Inc. (3-CA-23855; 349 NLRB No. 111) Albany, NY May 31, 2007. The issues presented based on a stipulation of facts are whether the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their participation in certain conduct, Section 8(a)(3) by terminating them for that conduct, and Section 8(a)(1) by subsequently threatening employees with discipline if they engaged in such conduct; and whether the conduct amounted to picketing within the meaning of Section 8(g). Chairman Battista and Member Schaumber dismissed the complaint. Member Liebman dissented. [HTML] [PDF]

On April 1, 2002, the Respondent began operating the medical clinic at the Albany County Correctional Facility, an 840-inmate facility in Albany, NY, under a 3-year contract with the State of New York. AFSCME Local 1000 represents the correctional officers at the jail, who are employed by the State of New York. On Aug. 15, 2002, the Union requested that the Respondent recognize it as the representative of all clinic employees except the physician, the supervisors, and the office clerical. The Respondent rejected the request. On Sept. 12, under the direction of the Union and another Albany area labor organization, about 20 individuals,

including 5 clinic employees undertook action in support of the Union's demand for recognition. Four of the employees had completed their shifts and were off duty; the fifth took part during his dinner break and returned to work afterwards. All were in uniform. The action lasted about 40 minutes, during which the 20 individuals continually walked in a circle across the jail's main entrance and exit.

Chairman Battista and Member Schaumber found that the conduct constituted picketing within the meaning of Sec. 8(g), that the Union failed to comply with the notice requirements of that section and, therefore the Union, under whose auspices the picketing was conducted, violated Sec. 8(g). They wrote: "[T]he conduct of the participating employees and other individuals had the potential to influence other employees to withhold their labor, or to deter suppliers or their employees from attempting to enter the clinic. Those *potential* consequences are sufficient to bring the Union's conduct within the ambit of Section 8(g). See, e.g., *United Hospitals of Newark*, 232 NLRB at 443 ('while the Union may attempt to . . . prevent a work stoppage or disruption of services, it cannot control the actions or reactions that the mere presence of a picket line may induce in others.')."

Chairman Battista and Member Schaumber held that the employees who engaged in the picketing were not protected by the Act and that the Respondent did not violate the Act by discharging them. In dismissing the 8(a)(1) allegations, they noted that the alleged threats and coercive interrogations occurred after the employees engaged in the unlawful and unprotected picketing, saying: "As the General Counsel appears to concede, if the employee conduct that was the subject of the threats and interrogations was itself unprotected, it was not unlawful for the Respondent to respond in that manner."

Member Liebman said the Act plainly forecloses the discharge of employees where the union has failed to provide an 8(g) notice of their picketing. She wrote: "In enacting the Health Care Amendments, which added Section 8(g) and amended Section 8(d) to incorporate the 8(g) notice period, Congress decided both what conduct to proscribe and what sanctions would be applicable to which conduct. Unlike the Section 8(b) context, it did not leave the Board free to fashion its own rule with respect to sanctions. Rather, by restricting the loss-of-status provision in Section 8(d) to employees who strike in violation of Section 8(g)—and deliberately omitting picketing as a ground for loss of status—Congress clearly expressed its intention to preclude employers from taking action against individual picketing employees."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Civil Service Employees Local 1000, AFSCME; complaint alleged violation of Section 8(a)(1) and (3). Parties waived their right to a hearing.

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Country Lane Construction, Inc. (7-CA-44949; 349 NLRB No. 116) Goshen, IN May 31, 2007. Pursuant to the noncompliance provisions of a settlement agreement, the Board found that the allegations of the compliance specification are true, granted the General Counsel's motion for summary judgment, concluded that the net backpay due discriminatee Jeff Blair is as stated in the compliance specification, and ordered the Respondent to make Blair whole by paying him $13,090. [HTML] [PDF]

In a 2003 decision and order reported at 339 NLRB 1321, the Board directed the Respondent to make Blair whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to hire him in violation of Section 8(a)(3) and (1) of the Act. On April 23, 2004, the U.S. Court of Appeals for the Sixth Circuit enforced in full the Board's decision. 95 Fed. Appx. 817. Subsequently, the Regional Director issued a compliance specification alleging the amount due under the terms of the Board's Order. On Jan. 16, 2007, the Respondent entered into a settlement agreement, approved by the Acting Regional Director on Jan. 17, 2007, that required the Respondent to make Blair whole by paying him backpay no later than Jan. 31, 2007. The Respondent has not submitted any of the backpay required under the terms of the settlement agreement. On May 2, 2007, the Regional Director reissued the compliance specification pursuant to the noncompliance provisions of the settlement agreement.

(Members Liebman, Schaumber, and Walsh participated.)

General Counsel filed motion for summary judgment May 8, 2007.

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Elevator Constructors Local 2 (13-CD-760; 349 NLRB No. 112) Chicago, IL May 31, 2007. Relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, and economy and efficiency of operations, the Board decided that employees of Kone, Inc., represented by Elevator Constructors Local 2, rather than those represented by Iron Workers Local 63, are entitled to perform the work in dispute. That work is the installation of elevator door frames and related material, including off-loading, handling, hoisting, and installation of the sill, sill supports, struts, header, door jamb/buck, door frame and fascia at the Trump Tower, 401 N. Wabash, in Chicago, IL. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

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Gallup, Inc. (16-CA-19898, et al.; 349 NLRB No. 113) Houston, TX May 31, 2007. The Board reversed the administrative law judge and found that the Respondent violated Section 8(a)(1) of the Act when Supervisor Gisela Uria-Ruiz told prounion interviewers that they could only distribute their literature with the permission from a supervisor. The judge found that Uria-Ruiz's statement "applied to all distributions" and therefore did not constitute disparate

enforcement. The Board disagreed, saying "although Uria-Ruiz may not have referred explicitly to 'union' literature when she imposed an oral restriction on distribution, she was applying a new and restrictive policy specifically to a union distribution." The Respondent had not previously restricted any nonunion-related distribution or posting. [HTML] [PDF]

In another reversal of the judge, the Board found merit in the General Counsel's exception to the judge's failure to find that the Respondent, by Supervisor Heidi Roberts, violated Section 8(a)(1) on three occasions when she told employees who acted as mentors for new interviewer trainees not to talk to the trainees about the Union during training sessions. The Board noted that antiunion mentors wore antiunion T-shirts and buttons and that Roberts addressed only the prounion mentors, who wore no insignia, and told them to refrain from talking about the Steelworkers.

The Board upheld the judge's dismissal of the complaint allegation that on May 19, 1999, Supervisor Heidi Roberts removed union flyers from employees' cubicle walls and desks, and told employees they could not post union literature. The Board noted that the record evidence pertained only to other misconduct allegedly committed by Roberts on different dates and that the General Counsel neither amended the complaint in this regard nor cited any evidence to support the complaint allegation.

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by, among others, restricting employees from posting, distributing, or possessing union-related literature; by removing and confiscating such material; by requiring employees to notify a supervisor before distributing union literature; and by instructing new employees to report attempts by other employees to speak to them about union matters.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Steelworkers; complaint alleged violation of Section 8(a)(1). Hearing at Houston for 16 days between Nov. 16, 1999 and June 27, 2000. Adm. Law Judge Richard J. Linton issued his decision May 25, 2001.

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Madison Industries, Inc. (21-CA-34759, 34927; 349 NLRB No. 114) Los Angeles, CA May 31, 2007. Chairman Battista and Member Schaumber found, contrary to the administrative law judge, that the parties' relationship was governed by Section 8(f) of the Act, rather than by Section 9(a), and that the Respondent lawfully repudiated its relationship with, and lawfully refused to provide requested information to, the Union following the expiration of their bargaining agreement. The majority dismissed the complaint in its entirety. [HTML] [PDF]

In dissent, Member Liebman found that the Respondent violated Section 8(a)(5) and (1), as alleged, by refusing to bargain and to provide information relevant to bargaining. She found that the language of the recognition clause in the parties' contract meets the requirements of *Staunton Fuel & Material*, 335 NLRB 717 (2001), for establishing a relationship under Section 9(a), (as opposed to Section 8(f)), and the Respondent's repudiation of that relationship thus was unlawful.

The majority, applying the *Staunton Fuel* standard, examined the parties' entire agreement to determine whether a 9(a) relationship was intended. They wrote after deciding that the General Counsel has not established that the Agreement reflects a Section 9(a) relationship: "Specifically, the Agreement contains a provision waiving the Respondent's right to file a petition for an election with the Board during the term of the Agreement. If the agreement were a 9(a) agreement, there would be no need for such a provision. That is, an agreement governed by Section 9(a) bars an employer from filing a petition for an election during its term. By contrast, a petition can be processed during the life of an 8(f) contract. Thus, it would appear that the parties contemplated an 8(f) contract, and yet wished to waive the Respondent's right to file a petition during the term of the Agreement." Absent extrinsic evidence to clarify the ambiguity of the contractual language, the General Counsel has not rebutted the 8(f) presumption, the majority held.

Member Liebman said her colleagues' approach "stretches the entire-agreement rule too far." She explained: "This is not a dispute over a single term that could arguably be interpreted in two different ways. Where, as here, a contract provision clearly addresses an issue with an unambiguous meaning, there can be no ambiguity unless another provision squarely contradicts it. The recognition clause in this contract states categorically that the Union is the 'majority representative' and that the Employer recognizes it as such. A separate clause that only waives the Respondent's right to file a Board petition—which would merely be consistent with the Union's having Section 8(f) status—simply does not negate or contradict the recognition clause in a manner that creates a genuine ambiguity."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Iron Workers District Council of the State of California and Vicinity; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing. Adm. Law Judge Jay R. Pollack issued his decision Sept. 26, 2002.

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Oil Capitol Sheet Metal, Inc. (17-CA-19714; 349 NLRB No. 118) Tulsa, OK May 31, 2007. The Board announced new evidentiary standards for determining the duration of the backpay period when the discriminatee is a "salt." [HTML] [PDF]

In cases of this kind, a union has sent members to seek employment from a nonunion employer with the intent of obtaining employment and then organizing the employer's employees. Those members are commonly referred to as "salts." Under the law, if the employer discharges or refuses to hire the salt because of his union affiliation or activity, the employer's conduct is unlawful.

In this decision, the Board found unanimously that the employer, Oil Capitol Sheet Metal, Inc., violated Section 8(a)(3) and (1) of the Act by refusing to hire a salt. The Board split, however, over the remedy to be ordered.

Prior to this decision, the remedy for an unlawful discharge or refusal to hire included the employer's payment of backpay to the employee for the period from the unlawful act until the employer made a valid offer of reinstatement (or instatement, in the case of an unlawful refusal to hire). The Board applied a presumption that, if hired, the "salt" would have stayed on the job for an indefinite period. If the job was a construction job, the Board applied a further presumption that the employer would have transferred the employee to other jobsites when the job from which he was discharged (or for which he should have been hired) came to an end.

Chairman Battista and Members Schaumber and Kirsanow declined to continue to apply those presumptions. The majority reasoned that they are inconsistent with the reality of salting. The reality is that salts, when hired, stay on the job until they succeed in their organizational effort or reach the point where such efforts are unsuccessful. In either situation the union typically then sends the salt to seek to organize the employees of another nonunion employer.

The majority recognized that this will not always be the case. There may be instances where the union will permit a member to work for the targeted employer for an indefinite period. However, the Board majority view is that the union is in the better position to explain its intentions, and thus the burden to establish the fact should be on the union. The burden should not be on the employer to prove the contrary.

In its opinion, the majority stated:

> The traditional presumption that the backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed, as discussed below, rote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption has no validity and creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice, and that the Board's authority to command affirmative action is remedial, not punitive.

In reaching its conclusions, the majority relied in part on the Fourth Circuit's decision in *Aneco v. NLRB*, 285 F.3d 326, where the court deemed "indefensible" the Board's assumption that the hired salt would have worked for the respondent employer for 5 years.

The majority acknowledged that the parties to the case before it had not sought a reversal of Board law. However, the Board said that it was its responsibility to ensure that its remedies are compensatory and not punitive.

The majority also held that instatement to the job would not be ordered where the "salt" would have left the job prior to the Board's decision.

In dissent, Members Liebman and Walsh criticized the majority for overturning Board precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis. The dissent would have continued to treat salts as the Board treats all other employees who are subjected to employment discrimination. The dissent stated that, in backpay cases, it is fundamental that the Board resolves factual uncertainties against the wrongdoer, the employer. This approach is not unique to the Board. Rather, as the Supreme Court stated in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946), the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." In the view of the dissenting members, the majority's new approach not only violates that well-established principle of resolving remedial uncertainties against the wrongdoer, but it treats salts "as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court's ruling that salts are protected employees under the National Labor Relations Act. *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995)."

The dissent also stated that the majority's reasons for adopting its new evidentiary approach were "dubious at best," and that it was unreasonable to presume that salts would leave employment at some fixed point in time, known by a union in advance. For those same reasons, the dissenters found that there was no justification for the majority's departure from the presumption that a salt, like any other employee at a construction site, would have been transferred to one of the employer's other projects upon completion of the project at the site where the discrimination occurred.

(Full Board participated.)

Charges filed by Sheet Metal Workers Local 270; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tulsa for 2 days in 1999. Adm. Law Judge William N. Cates issued his decision Jan. 3, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Inter-State Tile & Mantel Co., Inc. (Individuals) Harrisburg, PA May 29, 2007. 4-CA-34800; JD-36-07, Judge Richard A. Scully.

Domtar Paper Co., LLC (an Individual) Johnsonburg, PA May 30, 2007. 6-CA-35349; JD-37-07, Judge Bruce D. Rosenstein.

California Almond Growers Exchange d/b/a Blue Diamond Growers (Longshoremen Local 17) Sacramento, CA May 31, 2007. 20-CA-32930, 33195; JD(SF)-16-07, Judge Jay R. Pollack.

Wheeling Brake Block Mfg. Co., and Wheeling Brake Band & Friction Mfg. Co.(Food & Commercial Workers Local 379) Bridgeport, OH May 31, 2007. 8-CA-34764, 35543; JD-38-07, Judge David I. Goldman.

H & R Industrial Services, Inc. (Carpenters) Allentown, PA June 1, 2007. 4-CA-34848; JD-39-07, Judge Jane Vandeventer.

Carpenters Metropolitan Regional Council, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland (Adams-Bickel Associates, Inc. and Penn Valley Constructors, Inc.) Philadelphia, PA June 1, 2007. 4-CC-2463, 2482; JD-24-07, Judge Paul Buxbaum.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

City Waste Services of New York, Inc., Bronx, NY, 2-RC-23127, May 31, 2007 (Members Schaumber, 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)

American Red Cross, Heart of America Blood Services Region, Peoria, IL, 33-RC-5033, May 30, 2007 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

Locating, Inc., Subsidiary of Dycom Industries, Inc., Auburn, WA, 19-RC-14949, May 30, 2007 (Chairman Battista and Members Liebman and Schaumber)

(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)

Civista Health, Baltimore, MD, 5-RD-1392, May 30, 2007 (Chairman Battista and Members Liebman and Schaumber)

Shoprite of Waterbury, LLC and Shoprite of Bristol, LLC, Waterbury and Bristol, CT, 34-RC-2211, May 30, 2007 (Chairman Battista and Members Liebman and Schaumber)

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Miscellaneous Decisions and Orders

ORDER [granting Regional Director's request for authorization to approve withdrawal of petition after election and rerun election]

Mountain States Engineering, Inc., Aurora, CO, 27-RC-08397, May 29, 2007

ORDER [denying Employer's request for special permission to appeal Regional Director's refusal to postpone election]

American Red Cross, Heart of America Blood Services Region, Peoria, IL, 33-RC-5033, June 1, 2007 (Chairman Battista and Members Liebman and Schaumber)

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