



# National Labor Relations Board

## Weekly Summary of NLRB Cases

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*Bill's Electric, Inc.* (17-CA-18629-1, et al: 350 NLRB No. 31) Webb City, MO July 24, 2007. Applying the test of unlawful motivation in refusal to hire and consider cases in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), which issued after the administrative law judge's decision in this case, the Board affirmed the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union organizer Ron Lundien in April 1996, but that the Respondent did not unlawfully refuse to hire or consider for hire other union applicants on and after May 14, 1996. The Board found that the General Counsel proved a prima facie case of unlawful motivation for refusing to hire Lundien and for refusing to hire or consider hiring 4 applicants who later appeared with Lundien at the Respondent's office on May 14. As to Lundien, the Board found the Respondent failed to meet its *FES* rebuttal burden of showing it would not have hired him in the absence of his declared intent to organize. As to the May 14 applicants, however, the Board affirmed the judge's finding that the Respondent lawfully refused to hire or consider hiring them because they acted in concert with Lundien, who ignored the request of the Respondent's president to cease videotaping the application process in the office area and continued videotaping until police arrived to remove him from the premises. The Board agreed with the judge that the refusal to cease videotaping was "sufficiently disruptive and disrespectful" to justify the refusal to hire or consider hiring these four applicants on and after May 14. Finally, as to two union members who applied for work in the fall of 1996, the Board found that the General Counsel failed to meet his initial *FES* burden of proving that the Respondent was hiring or had concrete plans to hire during the 30-day period when their applications were active. [\[HTML\]](#) [\[PDF\]](#)

The Board was divided in its analysis of the impact of Lundien's May 14 conduct on the remedy for the Respondent's earlier unlawful refusal to hire him. Members Liebman and Walsh rejected the judge's recommendation that backpay for Lundien should toll as of May 14 and that the Respondent should be relieved of the obligation to offer him reinstatement to the job for which he had applied. Finding that the parties did not litigate the "discrete, separate issue" whether the Respondent would have terminated Lundien for his May 14 conduct if it had not unlawfully refused to hire him prior to that date, they modified the Order to provide for full backpay and reinstatement and left the issue of limiting this remedy to compliance proceedings where the Respondent will bear the burden of proving that Lundien engaged in misconduct for which it would have discharged any employee. Member Kirsanow, dissenting, would not provide any make-whole relief for Lundien beyond the limited backpay recommended by the judge. In his view, the matter was fully litigated as part of the merits of the unfair labor practice issue and insubordinate conduct proven sufficient to justify a refusal to hire would a fortiori justify Lundien's discharge if he were an employee.

The Board also affirmed the judge's findings that the Respondent violated Section 8(a)(1) by maintaining and enforcing a mandatory grievance and arbitration policy that restricted employee and job-applicant access to the Board. It also violated Section 8(a)(4) by attempting to enforce this policy in letters it sent to the four alleged discriminatees who applied for work on May 14. The Board found that although the policy did not expressly prohibit applicants and employees from filing unfair labor practice charges, the application forms and letters sent to discriminatees portrayed mandatory grievance and arbitration as the exclusive method for dispute resolution, subject only to limited *judicial* review, and the policy threatened that any applicant or employee who sought Board relief before completion of the arbitration process

could be compelled to bear the costs of any litigation to compel their compliance with that process. At the least, applicants and employees would reasonably read this policy as “substantially restricting, if not totally prohibiting, their access to the Board’s processes.” The Board noted that it was only deciding the legality of this specific policy and not otherwise passing on the lawfulness of mandatory arbitration in an unorganized work force.

Finally, the Board affirmed the judge’s findings that the Respondent lawfully gave its employees a wage increase in May 1996 as the result of an “exceptionally good” fiscal year, but that the Respondent’s foremen, acting as its agents, violated Section 8(a)(1) by threatening that its shop would close if the Respondent had to recognize the Union, by promulgating or maintaining a no-solicitation policy that pertained only to union solicitation, by asking employees to report violations of this policy, and by telling employees that union sympathizers would be laid off first

(Members Liebman, Kirsanow, and Walsh participated)

Charges filed by Electrical Workers IBEW Local 95; complaint alleged violations of Section 8(a)(1), (3), and (4). Hearing at Joplin, April 21 and 22, 1998. Adm. Law Judge William L. Schmidt issued his decision August 10, 1999.

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*Champion Home Builders Co., a subsidiary of Champion Enterprises, Inc.* (32-CA-17185; 350 NLRB No. 35) Lindsay, CA July 23, 2007. The Board accepted the remand of the U.S. Court of Appeals for the Ninth Circuit (*Carpenters Union Local No. 1109 v. NLRB*, 219 Fed. Appx. 654 (9<sup>th</sup> Cir. Jan. 22, 2007), amending 209 Fed. Appx. 692 (9<sup>th</sup> Cir. Dec. 4, 2006)) to find that the Respondent violated Section 8(a)(1) of the Act by failing or refusing to stay or seek the dissolution of a state court restraining order issued against a former employee whose termination was found unlawful (see 343 NLRB 671 (2004)). In its earlier decision in this case, the Board found that Board law preempted the state court restraining order as of the date the Board issued its decision. The court disagreed and found that the restraining order (to the extent that it prohibited protected concerted activity) was preempted earlier, as of the date the complaint issued. Thus, on remand, the Board found that the Respondent’s maintenance of the restraining order while the Board case was pending violated the Act, to the extent that the order prohibited activity protected under Section 7 of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Members Schaumber, Kirsanow, and Walsh participated.)

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*Detroit Newspaper Agency, d/b/a Detroit Newspapers* (7-CA-42544; 350 NLRB No. 38) Detroit, MI July 27, 2007. On remand from the U.S. Court of Appeals for the D.C. Circuit (*Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 312 (D.C. Cir. 2006)), the Board dismissed the complaint alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging

employee Thomas Hydorn because he participated in a strike against the Respondent and engaged in protected activity by questioning whose responsibility it was to perform a particular work task, and because of his union membership and support. In an earlier decision and order reported at 342 NLRB 1268 (2004), the Board found that the Respondent violated Section 8(a)(3) and (1) by discharging Hydron. Member Schaumber dissented. The Court remanded the proceeding to the Board for clarification and further review. [\[HTML\]](#) [\[PDF\]](#)

The Board accepted the Court's holding as the law of the case and reexamined the original decision. It interpreted the Court's remand to hold that "the Board is not free now to consider the disparate treatment evidence if, in fact, we did not originally rely on this evidence in finding that the General Counsel had established a prima facie case." After reviewing the original decision, the Board concluded that it did not consider the evidence of disparate treatment in finding that the General Counsel had presented a prima facie case of discriminatory motive. It wrote: "Under the terms of the court's remand, we may not do so here for the first time. In view of the court's rejection of the grounds upon which the Board relied in finding animus, we conclude that the General Counsel failed to establish a prima facie case."

Member Schaumber agreed that the Board's prior decision did not consider disparate treatment in analyzing the General Counsel's prima facie case. In addition, he reaffirmed his original dissent. Accordingly, Member Schaumber concurred in the dismissal of the complaint.

(Members Liebman, Schaumber, and Walsh participated.)

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*Gruma Corp. d/b/a Mission Foods* (28-CA-17946, et al.; 350 NLRB No. 36) Tempe, AZ July 27, 2007. The Board adopted the administrative law judge's findings that Respondent violated Section 8(a)(5) and (1) of the Act by taking the following actions without giving the Union notice and an opportunity to bargain: (i) eliminating a bargaining unit position from the sanitation department; (ii) transferring employee Michaela Burgara from the sanitation department to another department; (iii) subcontracting the sanitation department work; and (iv) eliminating its employee-of-the-quarter award. [\[HTML\]](#) [\[PDF\]](#)

The Board also adopted the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its method for determining whether to grant an annual wage increase and by unilaterally failing to grant a wage increase in 2002. In adopting the judge's findings, the Board clarified the judge's rationale. Specifically, the Board found that the increase at issue was a structural scale increase and not a merit-based increase. The Board found, however, that the type of increase did not alter the judge's conclusion that the Respondent's unilateral changes violated the Section 8(a)(5) and (1).

Finally, the Board adopted the judge's dismissal of the complaint allegations that the Respondent unlawfully suspended and discharged employee Ramon Marquez. In adopting the judge's dismissal, the Board relied only on the judge's finding that the General Counsel failed to show that the Respondent had knowledge of Marquez' union activity.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Food and Commercial Workers Local 99; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Phoenix, April 18-20 and Nov. 30, 2005. Adm. Law Judge Albert A. Metz issued his decision March 29, 2006.

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*Plumbers Local 447 (Rudolph & Sletten, Inc.)* (20-CD-738; 350 NLRB No. 33) Roseville, CA July 23, 2007. In this jurisdictional dispute, the Board found reasonable cause to believe that the Respondent, Plumbers Local 447 (the Plumbers) had violated Section 8(b)(4)(D) of the Act. The Board awarded the disputed work (the receiving, inventory, distribution, layout and installation of headwall/headboard units in patient rooms at the Kaiser Women's and Children's Center) to employees represented by Carpenters Local 46 (the Carpenters) rather than to a composite crew consisting of employees represented by the Plumbers and by the Electrical Workers IBEW Local 340 (the Electricians). [\[HTML\]](#) [\[PDF\]](#)

After considering all of the relevant factors, the Board found that although the factors of relative skills and training and economy and efficiency of operations slightly favored awarding the disputed work to a composite crew of employees represented by the Plumbers and the Electricians, those factors were outweighed by the factors of Employer's preference, past practice, and current assignment, and collective-bargaining agreement that favored awarding the disputed work to employees represented by the Carpenters.

Member Walsh agreed that the disputed work should be awarded to employees represented by the Carpenters, but he did not rely on the collective-bargaining agreement factor. In awarding the disputed work to employees represented by the Carpenters, Member Walsh found that the factors of Employer's preference, past practice, and current assignment, which clearly favored awarding the work to Carpenters-represented employees, outweighed the factors of relative skills and training and economy and efficiency of operations, which only slightly favored awarding the work to a composite crew of employees represented by the Plumbers and the Electricians.

(Chairman Battista and Members Liebman and Walsh participated.)

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*Fresh Organics, Inc., d/b/a Real Foods Co., a wholly-owned subsidiary of Nutraceutical Corp. and Nutraceutical Corp.* (20-CA-31416-1 et al.; 350 NLRB No. 32) San Francisco, CA July 24, 2007. A Board panel unanimously found that the single-employer Respondents, a chain of organic grocery stores and its corporate parent, violated Section 8(a)(3) and (1) of the Act by closing a store for a lengthy remodeling in the face of a nascent organizing drive. Contrary to the rationale rooted in business analysis advanced by the administrative law judge, the Board instead found that the Respondents had not proven the store would have been closed in the absence of the organizing drive. In its analysis, the Board largely relied on a series of “escalating events,” including the Respondents’ awareness of the drive, their unlawful termination of two prominent pro-union employees (the Board unanimously adopted the judge’s finding of those Section 8(a)(3) violations), their receipt of a list of demands from two different pro-union employees, and their ultimate closure of the store and the consequent termination of its employees. The panel also unanimously reversed the judge’s finding that the Respondents violated Section 8(a)(1) by downgrading an employee’s evaluation, finding instead that that issue was neither alleged in the complaint nor fully litigated. *Bouley, Inc.*, 306 NLRB 385, 386 (1992), supplemented by 308 NLRB 653 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993). [\[HTML\]](#) [\[PDF\]](#)

A divided panel adopted the judge’s finding that the Respondents did not violate Section 8(a)(1) in two separate instances when low-level managers not involved in the closure decision expressed personal opinions to a pro-union employee concerning job loss and store closure. A divided panel also found that the General Counsel failed to prove that the Respondents’ implementation of a length-of-service award violated Section 8(a)(1), reversing the judge’s finding of a violation. On this, the Board focused on the fact that the award was a preexisting benefit of the corporate parent, which extended the benefit to all of its newly-acquired grocery stores. See *Nalco Chemical Co.*, 163 NLRB 68, 70-71 (1967) (finding improvements to vacation and holiday benefits did not violate Section 8(a)(1) in part because improvements applied corporate-wide). Finally, a divided panel reversed the judge’s conclusion that the Respondents’ refusal to rehire a former employee violated Section 8(a)(3), finding instead that the Respondents were privileged to refuse to rehire the former employee due to her rude and disrespectful conduct in her application process. *Exterior Systems, Inc.*, 338 NLRB 677, 678 (2002).

Member Walsh dissented from the Board’s findings on the alleged threats of job loss and store closure, the alleged unlawful service award, and the alleged unlawful refusal to rehire a former employee. On the alleged threats, Member Walsh determined that the statements, because they involved job loss and store closure, had a tendency to coerce employees and violated Section 8(a)(1), regardless of the fact that the statements were made by store department managers not directly involved in the closure decision. As for the service award which he found to violate Section 8(a)(1), Member Walsh relied largely on its timing, coming shortly after the organizing effort began at the store, as well as the lack of additional evidence regarding the corporate parent’s decision to extend the benefit to its subsidiary stores. Finally, Member Walsh would have affirmed the judge’s finding that the refusal to rehire the former employee violated Section 8(a)(3), finding that the Respondents had not established that the former employee’s rudeness was the actual reason she was not rehired.

(Members Schaumber, Kirsanow, and Walsh participated)

Charges filed by Food and Commercial Workers Local 648, and Adriel Ahern, Joshua Peach, and Sarah Genlot-Joslyn, individuals; complaint alleged violation of Section 8(a)(3) and (1). Hearing at San Francisco for 8 days between March 21 and April 22, 2005. Adm. Law Judge James M. Kennedy issued his decision Nov. 18, 2005.

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*SEIU United Healthcare Workers-West (California Pacific Medical Center)* (20-CG-65; 350 NLRB No. 34) San Francisco, CA July 23, 2007. The Board majority of Chairman Battista and Member Kirsanow upheld the administrative law judge's finding that the Respondent Union violated Section 8(g) of the Act by inducing and directing employees of California Pacific Medical Center to refuse to volunteer to work overtime or extra shifts without providing the Hospital and the Federal Mediation and Conciliation Service (FMCS) 10 days' notice of the job action as required by the statute. On June 1, 2006, Union officials notified the Hospital that its members intended not to work overtime over the week of June 5. The Union did not provide any prior notice of its action to FMCS. [\[HTML\]](#) [\[PDF\]](#)

The Board rejected the Respondent's argument that the Section 8(g) allegation be deferred to the parties' arbitration mechanism because the argument was not timely raised. In adopting the judge's finding of a violation, the majority agreed with the judge that the employees' concerted refusal to volunteer for overtime fell within Section 8(g)'s notice requirement for "other concerted refusals to work." The majority did not reach the issue of whether the employees' conduct in this case constituted a strike. The majority also substituted a new order and notice.

In dissent, Member Liebman would find that the Union did not violate Section 8(g), relying on her earlier dissent in *New York State Nurses Association (Mt. Sinai Hospital)*, 334 NLRB 798 (2001). In that case, Member Liebman concluded that employees' refusal to volunteer for overtime did not constitute a "concerted refusal to work" within the meaning of Section 8(g) and therefore that the Union did not violate that provision by failing to provide the required notices. Citing *Alexandria Clinic, P.A.*, 339 NLRB 1262 (2003), *enfd.* 406 F.3d 1020 (8th Cir. 2005), Member Liebman also stated that, as a practical matter, there is no way for unions to comply with Section 8(g)'s notice requirements in cases involving concerted refusals to volunteer. In such cases, Member Liebman noted that the employer exercises complete control over when employees will be asked to work overtime. As such, even where a union sets a prospective date and time for employees' refusal to volunteer, there is no guarantee that overtime will be offered precisely then.

Responding to Member Liebman's dissent, the majority stated that, at the very least, the Union was required to delay the start of its concerted refusal to volunteer for 10 days after announcing it on June 1. Noting that the Union sent no notice at all to FMCS, the majority also noted that the Union made no attempt to comply with Section 8(g)'s notice requirements. Accordingly, the majority found it unnecessary to address Member Liebman's "hypothetical concern."

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by California Pacific Medical Center; complaint alleged violation of Section 8(g). Hearing at San Francisco, Oct. 3 and 25, 2006. Adm. Law Judge Jay R. Pollack issued his decision Dec. 29, 2006.

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### **LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES**

*Wayneview Care Center and Victoria Health Care Center* (SEIU 1199, New Jersey Health Care Union) Wayne and Matawan, NJ July 26, 2007. 22-CA-26987, et al.; JD(NY)-34-07, Judge Eleanor MacDonald.

*Diversified Enterprises, Inc.* (Mid-Atlantic Regional Council of Carpenters) Mount Hope, WV July 27, 2007. 9-CA-43110; JD-52-07, Judge Eric M. Fine.

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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 CERTIFICATION OF REPRESENTATIVE**

*U.S. Security Associates, Inc.*, East Boston, MA, 1-RC-22038, July 25, 2007  
(Members Liebman, Schaumber, and Kirsanow)

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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 REPRESENTATIVE**

*Progress Transit Incorporated*, Brooklyn, NY, 29-RC-11388, July 25, 2007  
(Members Schaumber, Kirsanow, and Walsh)

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***(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)***

*Midwest Air Traffic Control Service, Inc.*, Overland Park, KS, 5-RD-1421, July 25, 2007  
(Members Schaumber, Kirsanow, and Walsh)

*Waste Management of Arizona, Inc.*, Tucson, AZ, 28-RD-963, July 25, 2007  
(Members Schaumber, Kirsanow, and Walsh)

*M7 Aerospace*, San Antonio, TX, 1-RC-22116, July 26, 2007, (Members Schaumber,  
Kirsanow, and Walsh)

*BP Products North America, Inc.*, Carson, CA, 21-RC-20968, July 27, 2007  
(Members Schaumber, Kirsanow, and Walsh)

**ORDER [amending Regional Director's decision to permit  
certain individuals to vote under challenge, and  
denying request for review in all other respects]**

*Sinai Health System*, Chicago, IL, 13-RC-21601, July 25, 2007 (Members Schaumber,  
Kirsanow, and Walsh)

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***Miscellaneous Decisions and Orders***

**DECISION ON REVIEW AND ORDER  
[remanding proceeding to Regional Director  
for further appropriate action]**

*Hilson & Fergusson, Inc. and HFH, Inc.*, Sarasota, FL, 12-RC-9118, 9119; July 19, 2007  
(Members Liebman and Walsh; Member Schaumber concurring)

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

*City of South Haven*, South Haven, MI, 7-WH-216, July 27, 2007

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