



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

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Press Release ([R-2632](#)): NLRB to Hold Oral Argument on Whether Employees of a Lessee Restaurant Can Distribute Handbills on Property Of Lessor Hotel

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AM Property Holding Corp., et al. (2-CA-33146-1, et al.; 350 NLRB No. 80) New York, NY Aug. 30, 2007. The Board reversed the administrative law judge's finding that AM Property Holding Corporation and Planned Building Services, Inc., and AM Property Holding Corporation and Servco Industries, Inc., respectively, were joint employers of the maintenance employees at a building located at 80-90 Maiden Lane in the Wall Street section of New York City. Having rejected the judge's joint employer findings, the Board reversed his findings that the Respondents were joint successors as alleged in the complaint, that they had a successorship obligation to recognize and bargain with Service Employees Local 32BJ, and that they violated Section 8(a)(5) and (1) of the Act by refusing to bargain with that Union. Member Liebman concurred, finding that the majority had correctly applied controlling law. However, she urged the Board to reconsider its current joint employer standard, maintaining that the standard effectively frustrates collective bargaining in the context of the subcontracting of work. [\[HTML\]](#) [\[PDF\]](#)

Based on the Board's conclusion that Planned Building Services had no obligation to bargain with Local 32BJ as a successor employer, a majority consisting of Chairman Battista and Member Kirsanow reversed the judge's finding that Planned Building Services violated Section 8(a)(2) and (1) by recognizing the United Workers of America as the representative of its employees at 80-90 Maiden Lane. Although the General Counsel had also alleged and argued to the judge that the recognition was unlawful because the United Workers of America did not represent an uncoerced majority at the time of recognition, the Board majority found that it was precluded from deciding whether there was a violation on that basis because the General Counsel did not except to the judge's failure to reach the issue. Dissenting, Member Liebman would excuse the General Counsel's technical error in the circumstances of this case, find that the issue was properly before the Board, and find that the recognition was unlawful.

The Board affirmed the judge's findings that AM Property Holding Corporation and Planned Building Services independently violated Section 8(a)(3) and (1) by refusing to hire the building's former maintenance employees because they supported Local 32BJ. Chairman Battista and Member Kirsanow dismissed an allegation that Servco similarly violated the Act by refusing to hire striking employees of Planned Building Services, rejecting the judge's finding that Servco had acted to prevent the employees from applying for positions. Member Liebman dissented, finding that various statements made by officials of Servco and AM Property Holding Corporation established that the strikers were effectively precluded from seeking positions with Servco.

The Board affirmed the judge's findings that AM Property Holding Corporation violated Section 8(a)(1) by threatening employees with discharge for supporting Local 32BJ, interrogating employees about their support for that Union, creating the impression of surveillance, and indicating to employees that support for Local 32BJ would be futile. The Board also affirmed the judge's finding that Servco violated Section 8(a)(1) by threatening employees with discharge for speaking with representatives of Local 32BJ. Finally, the Board affirmed the judge's findings that Planned Building Services violated the Act by unlawfully assisting the United Workers of America, threatening employees with discharge for supporting Local 32BJ, and threatening a witness during the hearing.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by Service Employees Local 32BJ; complaint alleged violation of Section 8(a)(1), (2), (3), and (5). Hearing at New York City on 17 days in March, April, and May 2002. Adm. Law Judge Steven Davis issued his decision May 13, 2003.

BCE Construction, Inc. (17-CA-18556, et al.; 350 NLRB No. 78) Branson, MO Aug. 31, 2007. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees because of their protected concerted activities, by creating an impression of surveillance of employee union activities, by forbidding employees to talk about the Union, and by interrogating employees about their protected concerted activities. As to this last violation, the Board based its finding on one specific incident and found it unnecessary to pass on two other alleged incidents of unlawful interrogation because they would be cumulative and have no effect on the remedy. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by informing employees that it would be futile to support unionization. The Board adopted this finding pro forma because the Respondent's exception on this point failed to conform to Section 102.46 of the Board's Rules and Regulations. [\[HTML\]](#) [\[PDF\]](#)

The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3) by unlawfully refusing to consider for hire and to hire nine "salts" pursuant to the Board's holding in *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). The Board noted that the duration of the backpay of these discriminatees would be determined in accordance with *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007). The Board also adopted the judge's finding that the Respondent violated Section 8(a)(3) by unlawfully discharging one employee pursuant to the Board's holding in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board noted that this discriminatee was not a "salt" like the other nine discriminatees, and, therefore, *Oil Capitol* did not apply to this discriminatee.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters Local 978; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Overland Park, KS, April 25, 2001, and Springfield, MO, May 5 and 6, 1997. Adm. Law Judge Pargen Robertson issued his decision Aug. 11, 1997 and supplemental decision July 9, 2001.

CGLM, Inc. (15-CA-17889; 350 NLRB No. 77) Jefferson, LA Aug. 27, 2007. In this case, the Board adopted the administrative law judge's finding that the Respondent violated

Section 8(a)(1) of the Act by discharging several employees for their act of "going on strike," which constituted concerted protected activity. The Board also affirmed the judge's finding that the Respondent failed to establish that the Respondent's warehouse manager was a Section 2(11) supervisor. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Kirsanow and Walsh participated.)

Charge filed by Alan Kansas, an individual; complaint alleged violation of Section 8(a)(1). Hearing at New Orleans, June 26-27, 2006. Adm. Law Judge George Carson II issued his decision Aug. 28, 2006.

Consolidated Bus Transit, Inc. and Teamsters Local 854 (2-CA-34661, et al., 2-CB-19125, et al.; 350 NLRB No. 92) Brooklyn, NY Aug. 31, 2007. Reversing the administrative law judge, the Board held that the Respondent Employer violated Section 8(a)(3) and (1) of the Act by discharging bus driver Juan Carlos Rodriguez. The Board found that the Respondent Employer knew of Rodriguez's protected activities of organizing and leading four to six employee meetings to discuss the quality of representation by the Respondent Union, Teamsters Local 854, which represented the bus drivers and contacting Teamsters for a Democratic Union, which brought the unfair labor practice charges. The Board also found that the Respondent Employer demonstrated union animus by, among other things, following, video-taping, and disciplining Rodriguez because of those activities. [\[HTML\]](#) [\[PDF\]](#)

The General Counsel demonstrated to the Board that the Respondent Employer's union animus was a substantial or motivating factor leading to Rodriguez's discharge. Rodriguez was singled out for driver testing for unlawful reasons (to which finding no party excepted). Even though Rodriguez failed two tests due to his deficient performance, his qualification for employment would never have been jeopardized were it not for the Respondent Employer's unlawful actions. Absent circumstances not present, he should have remained qualified for employment until his next lawfully-administered test. The Board found that, by unlawfully singling out Rodriguez for testing, the Respondent Employer orchestrated the circumstances leading to his premature disqualification from driving and that he would not have been discharged but for his protected concerted activities. The Board ordered that Rodriguez be reinstated conditioned upon his demonstrating that he has reestablished his driver certification within a reasonable time of the offer of reinstatement and that he be made whole from the date of his discharge to the date when he would have been required, under standard testing procedures, to be recertified.

The Board also found a violation of Section 8(b)(1)(A) by the Respondent Union. The day that the Respondent Union received a copy of a charge filed by employee Jona Fleurimont against it, Respondent Union President Daniel Gatto engaged in a heated exchange with Fleurimont at a meeting after Fleurimont accused Gatto and the Respondent Union of breaking his car windows. Gatto told Fleurimont that, if he "had a beef with [Fleurimont]," he would not

break his windows; he would “break something else.” The Board reversed the administrative law judge’s recommended dismissal of the allegation that Gatto’s statement constituted an 8(b)(1)(A) threat. The Board found that Gatto’s statement would reasonably have been interpreted by Gatto as a threat of physical violence. Gatto admitted that his anger toward Fleurimont stemmed from the Board charges, to which Gatto made specific reference prior to the threat. The Board found that Gatto’s statement would reasonably have a tendency to coerce and restrain Fleurimont in the exercise of his rights under the Act and thereby violated Section 8(b)(1)(A).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Jona Fleurimont and Jose Guzman, individuals; complaint alleged violation of Section 8(a)(1) and (3) Section 8(b)(1)(A). Hearing at New York on 15 days between March 22 and July 21, 2004; reopened hearing held May 9-12, 2005. Adm. Law Judge Eleanor MacDonald issued her decision July 21, 2005.

Electrical Workers IBEW Local 98 (TRI-M Group, LLC) (4-CB-9713; 350 NLRB No. 83) Philadelphia, PA Aug. 31, 2007. The Board affirmed the administrative law judge’s finding that the Respondent violated Section 8(b)(1)(A) of the Act by blocking an employee from entering a jobsite who was attempting to perform a work task. The Board also adopted the judge’s finding that a broad cease-and-desist order was warranted. In so doing, the Board noted that it is proper to consider prior Board and court orders when determining whether a respondent has a proclivity to violate the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Kirsanow and Walsh participated.)

Charge filed by TRI-M Group, LLC; complaint alleged violation of Section 8(b)(1)(A). Hearing at Philadelphia on Jan. 25, 2007. Adm. Law Judge Paul Buxbaum issued his decision April 10, 2007.

Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel (21-CA-36429; 350 NLRB No. 84) Universal City, CA Aug. 31, 2007. The Board majority of Chairman Battista and Member Schaumber reversed the administrative law judge’s finding that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Front Desk Supervisor Kevin Grace for his refusal to remove a union button from his shirt. The majority found that the discharge was lawful because Grace was a supervisor under Section 2(11) and therefore excluded from the coverage of the Act. The supervisory finding was based on Grace’s authority to effectively recommend discipline and to effectively recommend against hiring applicants, as well as secondary indicia. The complaint was dismissed in its entirety. [\[HTML\]](#) [\[PDF\]](#)

In finding Grace possessed supervisory authority to effectively recommend discipline, the majority discussed how Grace initiated disciplinary action through “coach-and-counsel” sessions and made a recommendation that an employee be harshly disciplined after Grace had repeatedly coached the employee about treating hotel guests rudely. Management followed Grace’s recommendation without evidence of an independent investigation. The majority relied on *Progressive Transportation Services*, 340 NLRB 1044 (2003) and *Mountaineer Park, Inc.*, 343 NLRB 1473 (1474-1475) (2004), both cases where supervisors similarly made recommendations to discipline employees and such recommendations were typically accepted by upper management without further investigation.

In finding Grace possessed supervisory authority to effectively recommend against hiring, the majority relied on the testimony of Director of Rooms Tony Fernandez. Fernandez testified that the Front Desk Supervisors’ hiring recommendations were “very, very key,” and if Grace recommended that a candidate not be hired, that “would be fatal.” The majority cited *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), enfd. 678 F.2d 679 (7th Cir. 1982), supplemented by 281 NLRB 1157 (1986) and *HS Lordships*, 274 NLRB 1167, 1173 (1985) for the proposition that the authority to effectively recommend *against* hiring a candidate establishes supervisory authority. And while Fernandez did not discuss specific examples of Grace giving a negative hiring recommendation, the majority noted that Section 2(11) requires only possession of supervisor authority and not its actual exercise, citing *N.L.R.B. v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972).

Member Walsh dissented arguing that Grace was the sort of “minor supervisory employee” whom Congress intended the Act to protect, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279-283 (1974). He agreed with the judge that Respondent violated 8(a)(3) of the Act by discharging Grace for refusing to remove a union button. Member Walsh asserted that the majority ignored the strongly worded, on-point decision, *Jochims v. NLRB*, 480 F.3d 1161 (2007), reversing *Wilshire at Lakewood*, 345 NLRB No. 80 (2005). That case admonished the Board for broadening the scope of supervisory authority without regard to precedent.

Member Walsh found that Grace’s couch-and-counsel duties were merely reportorial. He also found the one example of Grace’s recommendation to discipline an employee insufficient to establish supervisory authority. In his view, the recommendation was vague, and there was no showing that management disciplined the employee as a result of Grace’s recommendation. As for Grace’s authority to effectively recommend against hiring, Member Walsh found the evidence was insufficient because it consisted of Fernandez’s conclusory testimony alone.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by UNITE HERE Local 11; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, Sept. 28 and 29, 2005. Adm. Law Judge Lana H. Parke issued her decision Dec. 2, 2005.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Dietrich Industries, Inc. (Teamsters Local 142) Hammond, IN Aug. 28, 2007. 13-CA-43598, 43718; JD(ATL)-23-07, Judge George Carson II.

Foundation Coal West, Inc. (Mine Workers) Gillette, WY Aug. 30, 2007. 27-CA-20202, 20295; JD(SF)-24-07, Judge John J. McCarrick.

Smiths Detection, Inc. (Electrical Workers [IUE] Local 82-109) Edgewood, MD Aug. 31, 2007. 5-CA-33364; JD-59-07, Judge Arthur J. Amchan.

NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

National Specialties Installations, Inc. (an Individual) (7-CA-46698; 350 NLRB No. 79) Detroit, MI Aug. 28, 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 CERTIFICATION OF RESULTS OF ELECTION

Becoming Independent, Santa Rosa, CA, 20-RC-18136, Aug. 29, 2007 (Chairman Battista and Members Kirsanow and Walsh)

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

Davis Vision, Inc., Plainview, NY, 29-RC-11450, Aug. 28, 2007 (Chairman Battista and Members Kirsanow and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Ryder System, Inc., Burlington, KY, 9-RC-18153, Aug. 30, 2007 (Chairman Battista and Members Kirsanow and Walsh)

**DECISION AND DIRECTION
[that Regional Director open and count seven ballots]**

All Star Transportation, Inc., New Milford, CT, 34-RD-336, Aug. 30, 2007
(Chairman Battista and Members Kirsanow and Walsh)

**DECISION AND ORDER [remanding case to
Regional Director for further appropriate action]**

Beacon of Hope of Iowa, Inc., Davenport, IA, 33-RC-5021, Aug. 30, 2007
(Chairman Battista and Members Kirsanow and Walsh)

Miscellaneous Decisions and Orders

LETTER [granting Employer Petitioner's request to withdraw petition]

Virginia Mason Hospital, Seattle, WA, 19-UC-741, Aug. 29, 2007

**ORDER VACATING [Decision and Certification of Representative
dated 8/28/07 and substituting a corrected one]**

Davis Vision, Inc., Plainview, NY, 29-RC-11450, August 31, 2007
