National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

September 21, 2007 W-3122

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CASES SUMMARIZED

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California Newspapers Partnership d/b/a ANG Newspapers (32-CA-19276-1; 350 NLRB No. 89) San Francisco Bay Area, CA Sept. 10, 2007. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by implementing a revised electronic mail policy on June 13, 2001, without reaching impasse or agreement with the Union. The Respondent argued, inter alia, that through management-rights and "zipper" clauses in the parties' collective-bargaining agreement, the Union waived its right to bargain over the revised policy. The Board agreed with the judge that the evidence failed to show a clear and unmistakable waiver. [HTML] [PDF]

In a concurring footnote, Member Kirsanow stated that in his view, the language of the zipper clause, without more, would demonstrate a waiver. However, he acknowledged Board precedent to the contrary. While not passing on the soundness of those decisions, he observed that they were the law at the time the parties entered into their agreement, and therefore the parties could not have contemplated that the zipper clause would constitute a waiver of the right to bargain over the revised e-mail policy. On that basis, Member Kirsanow agreed that the Respondent violated Section 8(a)(5) by implementing the revised policy.

The Board's Order included a provision requiring the Respondent to rescind the June 13, 2001 revised e-mail policy. However, the Board majority agreed with the Respondent that after rescission of the June 13 policy, the Respondent's January 1, 2001 e-mail policy will remain in effect. The majority emphasized that the judge found that there were two policies: the January 1 policy and the June 13 revised policy. Only the June 13 policy was alleged to be unlawful. Member Walsh, dissenting in part in a footnote, found that the January 1 policy was never fully implemented. Therefore, he found, there would be no e-mail policy in effect after rescission of the June 13 revised policy, and the Respondent should be required to bargain before implementing one.

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Northern California Media Workers Guild/Typographical Local #39521, TNG-CWA; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Oakland on Oct. 2, 2002. Adm. Law Judge Clifford H. Anderson issued his decision Dec. 23, 2002.

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Disneyland Park (21-CA-35222; 350 NLRB No. 88) Los Angeles, CA Sept. 13, 2007. The Board, in a 2-1 decision: affirmed the administrative law judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by denying the Union's requests to view certain subcontracts and files related to the bidding and performance of the subcontracts; and reversed the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the dates of each subcontract, the nature of the work, the dates upon which the work was performed, and the names of the subcontractors performing the work. In the latter connection, the Board noted that the requested information was not presumptively relevant because it concerned subcontracting agreements, and thus the General Counsel had the burden of establishing either that (a) the Union had demonstrated the relevance of the information, or (b) the relevance of the information should have been apparent under the circumstances. The Board

found that the General Counsel failed to meet this burden. In this regard, the Board stated that Section 23 of the parties' collective-bargaining agreement allowed the Respondent to subcontract work, provided that such subcontracting did not result in a termination, layoff or failure to recall unit employees from recall. The Board noted that, in its information requests, the Union had stated that: it had observed that there had been a number of subcontracts for work covered by the agreement; it believed there had been an increase in subcontracts; at least one employee had retired and not been replaced; and no new steward had been hired, thus indicating that the Respondent was reducing its workforce and subcontracting additional work. The Board found that, under the circumstances, these explanations were insufficient to demonstrate the relevance of the requested information because there were no claims that: any employee had been terminated or laid off; any previously laid-off employee had not been recalled; or any such actions had resulted from subcontracting. The Board noted that Section 23 began with a general sentence prohibiting the Respondent from subcontracting "for the purpose of evading its obligations under the agreement[,]" but the Board found that the Union never had claimed that the subcontracting had that evasive purpose, and that the surrounding circumstances would not have made the Respondent aware that this was the Union's concern. [HTML] [PDF]

Member Liebman dissented, stating that the majority's approach effectively required the Union to prove that it had a meritorious grievance, contrary to the liberal, "discovery-type" standard that is applied to information requests even in cases involving subcontracting information. Member Liebman stated that the asserted need to police compliance with a contract provision on subcontracting can establish the relevance of subcontracting-related information. Member Liebman found that the Union had met its burden of establishing relevance by pointing not only to a relevant contractual provision, but also to facts prompting its concern that the contract had been violated: an apparent increase in the volume of subcontracts and a possible decrease of two bargaining-unit positions, coupled with the Union business agent's observation that unit employees seemed to be idle while subcontractors were busy with bargaining-unit work. Member Liebman stated that the contract prohibited subcontracting "for the purpose of evading . . . obligations" under the agreement, and thus the factual basis asserted by the Union was sufficient to support the information request, even absent an actual layoff.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Iron Workers Local 433; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles on March 31, 2003. Adm. Law Judge Lana H. Parke issued her decision May 15, 2003.

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Exceptional Professional, Inc. d/b/a EPI Construction (17-CA-19272, et al.; 350 NLRB No. 81) Nixa, MO Aug. 28, 2007. The Board adopted the administrative law judge's findings that the Respondent, a drywall installation contractor, violated Section 8(a)(3) and (1) of the Act by

refusing to hire two applicants. The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3) and (1) by refusing to consider eight applicants but that the Respondent's refusal to hire them did not violate the Act. [HTML] [PDF]

The Board found that the General Counsel established his initial burden for showing that the Respondent's refusal to hire all 10 union-affiliated applicants, who were journeymen carpenters, violated the Act. The Board further found, however, that the Respondent met its rebuttal burden of showing that it would not have hired 8 of them even in the absence of their union activity or affiliations. The Respondent did so by showing that the employees whom it hired to fill 8 of the job openings had superior qualifications to those of the union-affiliated applicants. These 8 had "immediate, observed, steady drywall employment." They had substantial, recent experience in drywall work, and the Respondent had directly observed the work of all but one, and that individual came highly recommended by current employees.

Contrary to the judge, the Board found that the Respondent did not fail to adhere to its hiring criteria but merely deviated from its usual procedures for determining whether applicants met those criteria. Thus, while the Respondent did not consistently require that applicants follow the procedures of completing an application, giving personal references, or having interviews, those whom it hired satisfied the Respondent's criteria that applicants have substantial, recent experience in drywall work.

Member Walsh dissented from the Board's adoption of the judge's dismissal of the refusal to hire allegations regarding the 8 union-affiliated applicants. In Member Walsh's view, it was illogical for the judge, having found that the Respondent applied its hiring criteria pretextually, to then allow the Respondent to show that it would have refused to hire 8 of the union applicants because it hired 8 other applicants who possessed stronger qualifications. Having found that the Respondent acted with antiunion animus and applied its hiring criteria pretextually, the judge, in Member Walsh's view, should not have found that the Respondent acted lawfully in hiring 8 nonunion applicants, based on their allegedly superior credentials. Member Walsh further found that, regardless of whether it was the Respondent's hiring criteria or its hiring procedures that it applied discriminatorily, the Respondent skewed its overall process to give preferential treatment to nonunion applicants.

(Chairman Battista and Members Walsh and Kirsanow participated.)

Adm. Law Judge Mary Miller Cracraft issued her decision on remand Jan. 11, 2002.

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Sunshine Piping, Inc. (15-CA-16530; 350 NLRB No. 90) Panama City, FL Sept. 10, 2007. In this case, the Board adopted the administrative law judge's finding that the Respondent committed numerous 8(a)(1) violations, including unlawfully threatening employees with plant closure if they selected a union as their collective-bargaining representative, coercively interrogating employees regarding their union membership, and enforcing a rule prohibiting

employees from displaying union logos or insignia on their personal attire. The Board also adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) by unlawfully laying off and failing to recall employees because of their union activity. [HTML] [PDF]

The Board (Members Schaumber and Kirsanow; Member Liebman, dissenting) reversed the judge's finding that the Respondent violated 8(a)(1) by unlawfully creating the impression that employees' union activities were under surveillance. The majority reasoned that a supervisor's statement that "about 80 percent of the shop" had signed authorization cards was insufficient to create an unlawful impression of surveillance because the statement suggested only that the supervisor had been observing open activity occurring on Respondent's property, not that the Respondent was "closely monitoring the degree and extent of [the employees'] organizing efforts and activities." Member Liebman would find that statement unlawful because it "suggested (and surely was intended to suggest) a close and sustained scrutiny, reasonably conveying the impression that [employees'] union activities were under surveillance."

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Plumbers Local 366; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Panama City, Aug. 26-28, 2002. Adm. Law Judge George Carson II issued his decision Nov. 1, 2002.

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Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners (12-CA-18190; 350 NLRB No. 86) Lake Buena Vista, FL Sept. 11, 2007. In *Grosvenor Resort*, 336 NLRB 613 (2001), enfd. *Grosvenor Orlando Associates, Ltd. v. NLRB*, 52 Fed. Appx. 485 (11th Cir. 2002) (Table), the Board found that the Respondent unlawfully discharged 44 of its housekeeping, service, and maintenance employees and directed the Respondent to reinstate the employees and to make them whole for any loss of earning and benefits resulting from their discharges. In a supplemental decision, the administrative law judge resolved numerous issues raised by the Respondent in opposition to the General Counsel's compliance specification alleging the amounts of backpay due to the discriminatees. [HTML] [PDF]

The Board adopted the judge's findings regarding many of the discriminatees, but reversed his findings regarding others. Specifically, the Board reversed the judge's findings that certain discriminatees did not incur a willful loss of earnings by delaying their initial search for interim work. In doing so, the Board found that, absent circumstances justifying a longer delay, the discriminatees should have begun their initial search for interim work within the 2-week period following their discharges. As the Board found that several discriminatees did not begin their search at any time during this period, the Board tolled the discriminatees' backpay until they commenced a proper job search. The Board also reversed the judge's findings that several discriminatees reasonably mitigated their damages once they commenced their search for interim work. In this connection, the Board found that several discriminatees did not conduct adequate

searches for interim work because they applied to only a few employers during the relevant time period. The Board thus tolled their backpay for the relevant period.

Member Walsh dissented, stating that he would affirm the judge's findings, for the reasons the judge states in his decision.

(Chairman Battista and Members Schaumber and Walsh participated.)

Hearing at Lake Buena Vista and Orlando on 12 days between Nov. 15, 2004 and Jan. 20, 2005. Adm. Law Judge Benjamin Schlesinger issued his decision June 29, 2005.

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Towne Bus LLC (29-RC-11389, 11390; 350 NLRB No. 91) Holtsville, NY Sept. 12, 2007. The Board, in a 2-1 decision involving Towne Bus LLC, a Holtsville, NY bus company, adopted the hearing officer's report recommending that an election held Dec. 8, 2006 be set aside and a new election held. [HTML] [PDF]

An election objection filed by Amalgamated Transit Local 1181-1061 alleged, inter alia, that the Employer promised future benefits to employees in order to dissuade them from voting for the Union. In agreement with the hearing officer, a majority of the panel (Members Kirsanow and Walsh) found that the Employer's issuance of a new employee manual shortly before the election that stated that employees would receive future increases in wages and benefits was a promise of future benefits because it represented a change in existing terms and conditions of employment. They relied on precedent holding that the employer had the burden of demonstrating that the future benefits promised in the manual were part of an already-established company policy. See *Mercy Hospital Mercy Southwest Hospital,* 338 NLRB 545 (2002).

Chairman Battista, dissenting, would have overruled the objection. In his view, the Union failed to establish that the existing terms and conditions of employment differed from those stated in the employee manual and the Union failed to show that the announced increases had not been previously scheduled to occur on those dates. These were matters as to which the objecting party had the burden of proof, in his view.

(Chairman Battista and Members Kirsanow and Walsh participated.)

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United Workers of America (2-CB-18037; 350 NLRB No. 92) New York, NY Sept. 13, 2007. In the absence of good cause being shown for the Respondent's failure to file a timely answer to the complaint, the Board partially granted the General Counsel's motion for summary judgment and held that the Respondent violated Section 8(b)(1)(A) of the Act by accepting assistance from

Planned Building Services, Inc. (PBS) in soliciting authorization from employees to deduct union dues from their paychecks, and by telling PBS employees that they were required to sign authorization cards. [HTML] [PDF]

Chairman Battista and Member Kirsanow denied the General Counsel's motion for summary judgment concerning allegations that the Respondent violated Section 8(b)(1)(A) and (2) by accepting recognition from PBS and entering into a collective-bargaining agreement with PBS at 80-90 Maiden Lane, New York City, NY and dismissed that portion of the complaint. They relied on their prior dismissal of the allegation that PBS' recognition of the Respondent at 80-90 Maiden Lane violated the Act (see 350 NLRB No. 80, slip op. at 8). Member Liebman found that PBS' recognition of the Respondent at 80-90 Maiden Lane violated the Act. Therefore, she would find that the Respondent violated Section 8(b)(2) and (1)(A) by accepting recognition from PBS and maintaining the collective-bargaining agreement. See 350 NLRB No. 80, slip op. at 16.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by Service Employees Local 32B-32J; complaint alleged violation of Section 8(b)(1)(A) and (2). General Counsel filed motion for summary judgment Feb. 19, 2002.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Center for Economic Progress (Chicago Newspaper Guild Local 34071, TNG/CWA) Chicago, IL Sept. 13, 2007. 13-CA-43610; JD(ATL)-26-07, Judge Keltner W. Locke.

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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.)

John Pomaville d/b/a John Pomaville Plumbing (Plumbers Local 333) (7-CA-47830; 350 NLRB No. 95) Lasing, MI Sept. 14, 2007. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

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

Good Samaritan Hospital, Los Angeles, CA, 31-RD-1555, Sept. 10, 2007 (Chairman Battista and Members Liebman and Walsh)

Columbus Construction Corp., Brooklyn, Bronx, Manhattan, Queens, and Staten Island, NY, 29-RC-11200, Sept. 12, 2007 (Chairman Battista and Members Liebman and Walsh)

DECISION, ORDER [setting aside election conducted on July 10, 2007] AND DIRECTION OF SECOND ELECTION

Recall Secure Destruction Services, Inc., San Diego, CA, 21-RC-20969, Sept. 13, 2007 (Chairman Battista and Members Liebman 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)

Farmer Joe's Marketplace, Inc., Oakland, CA, 32-RM-805, 806, Sept. 12, 2007 (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh dissenting)

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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)

Columbus Symphony Orchestra, Inc., Columbus, OH, 9-RC-18137, Sept. 12, 2007 (Chairman Battista and Members Liebman and Schaumber)

ORDER [amending Regional Director's supplemental decision to permit three employees to vote under challenge, and denying requests for review in all other respects]

Hydrochem Industrial Services, Inc., Freeport, TX, 16-RC-10800, Sept. 12, 2007 (Chairman Battista and Members Liebman and Walsh)

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Miscellaneous Decisions and Orders

DECISION ON REVIEW AND ORDER [directing Regional Director to open and count ballots in the election held on Sept. 7, 2006, and issue an appropriate certification]

Wine and Dine Group, LLC, Albany, NY, 3-RM-787, Sept. 12, 2007
(Members Schaumber, Kirsanow, and Walsh)

DECISION ON REVIEW AND ORDER [affirming Regional Director's Decision and Order and dismissing petition]

Marriott Hartford Downtown Hotel, Hartford, CT, 34-RM-88, Sept. 14, 2007
(Members Liebman, Kirsanow, and Walsh)

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