National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED
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American Polystyrene Corp. (31-CA-25761; 341 NLRB No. 67) Torrance, CA March 30, 2004. Chairman Battista and Member Schaumber reversed the administrative law judge and dismissed the complaint, which alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish requested financial information to Food & Commercial Workers Local 1C. Member Walsh disagreed with his colleagues. [HTML] [PDF]

The judge found that the Respondent claimed an inability to pay when Respondent's general manager Carolyn Tan responded to the Union's question about whether she could afford the Union's proposals by stating, "No, I can't. I'd go broke." She found that the Respondent's subsequent statements on the matter did not serve to retract its initial claim of inability to pay and that the Respondent's refusal to supply the Union with the requested financial information violated the Act.

Chairman Battista and Member Schaumber disagreed, finding that the Respondent almost immediately retracted any claim of inability to pay and was not, therefore, obligated to furnish the Union with the requested information. They wrote:

> Even assuming that Tan's oral 'I'd go broke' statement made during the heat of bargaining rose to the level of a claimed inability to pay, we find that the Respondent effectively retracted any such claim simultaneously with its denial of the Union's request for information. Citing Tan's statement, the Union submitted a request for information at the close of the bargaining session. On the very next day, Tan hand-delivered a letter in response denying that she made a claim of inability to pay and clarifying the Respondent's position that the uncertain economic times called for a more cautious approach than the Union proposed. Thus, the Respondent's response was made immediately and in writing, and it unequivocally advised the Union that the Respondent's ability to pay for the Union's bargaining proposals was not in question.

In dissent, Member Walsh held that the judge correctly decided that the Respondent claimed an inability to pay the Union's bargaining proposals, failed to retract its claim, and unlawfully failed to provide the Union with requested financial information. Regarding Tan's "No, I can't. I'd go broke" statement to the Union's bargaining team, he wrote: "The real question in this case is whether the Respondent's subsequent statements and actions served to retract its claim. They did not." Member Walsh concluded that "all of the Respondent's statements about its bargaining position began with a denial that Tan made the 'go broke' statement. Because the judge discredited Tan's denial that she uttered the 'go broke' statement, each of the Respondent's subsequent alleged retractions began with a falsehood. Clearly, lying is a sign of bad-faith bargaining."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Food & Commercial Workers Local 1C; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles on Dec. 9, 2002. Adm. Law Judge Lana H. Parke issued her decision Jan. 24, 2003.

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National Express Corp. d/b/a ATC/Forsythe & Associates, Inc. (28-CA-17291, 17667; 341 NLRB No. 66) Tempe, AZ March 30, 2004. Chairman Battista and Member Schaumber, with Member Liebman concurring, adopted the administrative law judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Lino (George) J. Lima and Eugene McGiffin. They also found that McGiffin was not illegally interrogated by Respondent's General Manager Mark Ward. [HTML] [PDF]

The complaint alleged that Lima was discharged because he had filed a charge in 2000 relating to alleged threats a then supervisor had made to employees and because he formed, joined, and assisted TBOC (Tempe Bus Operators Committee); and that McGiffin was discharged because he formed, joined, and assisted the TBOC, and because he met with city officials on or about December 12, 2001, to discuss terms and conditions of employment. However, Chairman Battista and Member Schaumber agreed with the judge's finding that Lima was discharged for failing to report an accident, in violation of company policy and that McGiffin was discharged because he refused to cooperate with the Respondent's investigation into his activities that were not protected by Section 7 of the Act, and not because he engaged in protected activities.

In her concurrence, Member Liebman said that based on the judge's credibility determinations, she agreed with the finding that the General Counsel did not prove by a preponderance of the evidence that the discharges of Lima and McGiffin were unlawfully motivated. In Lima's case, Member Liebman wrote that she was persuaded by the facts that Lima's failure to report the incident was the reason for his discharge, that Lima's affidavit states that failure to report was the reason given for his termination, and that Lima was hired the same day by a related subsidiary of the Respondent. With regard to McGiffin, she stated that to the extent that McGiffin's activities at the December 12 meeting were unprotected, his discharge for refusing to answer questions about that activity was lawful but the General Counsel did not argue that McGiffin had a right to refuse Ward's question about contractual interference because he could not answer those questions without also revealing his protected TBOC activities. See *Stoner Lumber, Inc*., 187 NLRB 923, 930 (1971).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Lino (George) J. Lima and Eugene McGiffin, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Phoenix, April 8-10, 2002. Adm. Law Judge James L. Rose issued his decision June 27, 2002.

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Blue Chip Casino, L.L.C., a wholly owned subsidiary of Boyd Gaming Corp. (25-CA-27856-1; 341 NLRB No. 74) Michigan City, IN March 31, 2004. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by suspending and then terminating Delano McMillin. [HTML] [PDF]

Member Schaumber concurred in the result reached by his colleagues that McMillin engaged in certain protected concerted activities, that the General Counsel showed that those activities were a motivating factor in his discharge, and that the Respondent failed to show it would have discharged McMillin absent those activities.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Delano Roy McMillin, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at LaPorte, June 3-4, 2002. Adm. Law Judge William G. Kocol issued his decision Aug. 16, 2002.

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Chicago and Northeast Illinois District Council of Carpenters (Prate Installations, Inc.) (13-CD-664; 341 NLRB No. 73) Wauconda, IL March 31, 2004. Relying on the factors of the Employer's preference, economy and efficiency of operations, and skills and training, the Board decided that the employees of Prate Installations, Inc., represented by Roofers Local 11 are entitled to perform the work in dispute. Specifically, the shingling work—the installing of underlayment, shingles, and ice and watershields—at new construction sites located at: Lakemoor Farms at Route 12 and Route 120, Lakemoor, Illinois; The Lindens at Route 88 and Orchard Road, Algonquin, Illinois; Algonquin Lakes at Route 62 and Sand Bloom, Algonquin, Illinois; Natures Pointe at Waterford and Caredon, Aurora, Illinois; Pheasant Ridge at Drauden Road and Theodore, Joliet, Illinois; Ashcroft at Route 25 and Plainfield Road, Oswego, Illinois; Windsor Pointe at Route 56 and Galena Road, Sugar Grove, Illinois; and Farmington Lakes at Route 30 and Route 34, Oswego, Illinois. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

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Electrical Workers IBEW Local 494 (Gerald Nell, Inc.) (30-CB-4127, 4128; 341 NLRB No. 71) Waukesha, WI March 31, 2004. On remand from the U.S. Court of Appeals for the D.C. Circuit, the Board reversed the prior decision, 332 NLRB 1223 (2000), and held that the Respondent violated Section 8(b)(1)(B) of the Act by restraining and coercing an employer, Gerald Nell, Inc. (Nell), in the selection of its representatives for the purposes of collective bargaining and grievance adjustment by preferring and processing union disciplinary charges against Charging Party Joseph Podewils, by finding Podewils guilty of such charges, and by levying a fine against him. In the earlier decision, the Board found, contrary to the administrative law judge, that the Respondent was not seeking to enter into a collective-bargaining relationship with Nell, and dismissed the complaint. [HTML] [PDF]

On review, the court of appeals rejected the Board's finding that the Respondent was not seeking a collective-bargaining relationship with the Employer. Because the court's finding is the law of the case and the Respondent was seeking a collective-bargaining relationship with

Nell, and all remaining elements of an 8(b)(1)(B) violation have already been adjudicated and established in the initial proceeding, the Board held, in this supplemental decision, that the Respondent violated Section 8(b)(1)(B) and issued an appropriate remedial order.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Frito Lay, Inc. (36-RD-1595; 341 NLRB No. 65) Vancouver, WA March 31, 2004. Chairman Battista and Member Schaumber certified the results of a decertification election held on January 17, 2002, which showed 29 votes cast for and 32 votes cast against union representation, with no challenged ballots. Contrary to the Regional Director, they overruled the Union's (Teamsters Local 58) Objections 2 and 3, alleging that the election should be set aside based on (1) the Employer's use of "ride-alongs" (nonunion truckdrivers from Frito Lay facilities and company managers and supervisors) to communicate with the unit employees prior to the election and (2) Operations Director Alex Rembert's question to a union steward regarding whether he would quit if the Union were decertified. [HTML] [PDF]

Member Liebman, concurring, found the result is compelled by *Noah's New York Bagels*, 324 NLRB 266 (1997). She wrote: "There is no basis for setting aside the election in this case unless 'ride-alongs'—in which employer officials accompany employee-drivers in order to campaign against the union—are deemed inherently objectionable. But the Board instead looks to the specific circumstances, applying several factors to gauge the tendency of particular ride-alongs to interfere with employee free choice. We should reconsider that approach. As this case illustrates, there are good reasons to adopt a bright-line rule prohibiting campaign ride-alongs altogether."

Chairman Battista and Member Schaumber disagreed that the Board should revisit *Noah New York Bagels* and consider whether to adopt a bright line rule prohibiting all employer ride-alongs for campaign purposes during the critical period, noting no party seeks to overrule *Noah New York Bagels* and there is no suggestion that its principles have given rise to confusion or have been difficult to administer. They concluded that the multifactor approach of *Noah's New York Bagels* "represents a careful balance between employee rights and managerial prerogatives."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Hewlett Packard Co. (25-CA-28591; 341 NLRB No. 62) Indianapolis, IN March 29, 2004. The Board affirmed the administrative law judge's findings and held that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee David Snead because of his activities for the Steelworkers. [HTML] [PDF]

Chairman Battista agreed with the judge and his colleagues that the General Counsel met his burden under *Wright Line*, 251 NLRB 1083 (1980), by showing that the Respondent disparately enforced its "remain in your work area" rule, and failed to establish that it would have discharged Snead even absent his union activities. He found it unnecessary to rely on the judge's additional reasons for finding the violation.

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Indianapolis, July 10 and 11, 2003. Adm. Law Judge Joseph Gontram issued his decision Nov. 5, 2003.

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Iron Workers Local 433 (Steel Fabricators Assoc.) (21-CB-12858; 341 NLRB No. 68) Los Angeles, CA March 31, 2004. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(b)(1)(A) of the Act when it threatened to, and later did, apply Sotero Lopez' dues payment to his fine balance, and threatened him with suspension for failing to pay his dues. It found no merit in the Respondent's argument that the judge erred in finding that it unlawfully informed Lopez that it would apply his dues payments to his fine balance because the complaint contained no such allegation. Citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d. Cir. 1990), the Board explained it may find and remedy a violation even in the absence of a specific complaint allegation if the issue is closely connected to the subject matter and has been fully litigated and that both conditions have been met in the instant matter. [HTML] [PDF]

Contrary to the judge, the Board found that the Respondent unlawfully refused to register and refer Lopez for employment from April 30 until September 5, 2000, agreeing with the General Counsel that, under the circumstances, it would have been futile for Lopez to attempt to register. The Board rejected the judge's finding that Lopez was unable to work because of his claimed disability, noting Lopez' uncontradicted testimony that it was the Respondent's refusal to register and refer him—not his physical problems or disability claim—that prevented him from working.

The Board reversed the judge's finding that the Respondent unlawfully suspended Lopez from membership and, therefore, dismissed the allegation that the Respondent unlawfully failed to give Lopez notice of his rights as a nonmember under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) and *NLRB v. General Motors Corp*., 373 U.S. 734 (1963). It agreed with the Respondent that there is no evidence that Lopez was suspended.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Sotero Lopez, an Individual; complaint alleged violation of Section 8(b)(1)(A) and 8(b)(2). Hearing at Los Angeles on June 24, 2002. Adm. Law Judge William L. Schmidt issued his decision Sept. 30, 2002.

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Laborers Local 271 (New England Foundation Co., Inc.) (1-CD-1036; 341 NLRB No. 70) Providence, RI March 31, 2004. The Board determined that the employees of New England Foundation Co., Inc., represented by Laborers Local 271, are entitled to perform work associated with the drilling and placement of concrete for drill shafts/caissons on the Providence River Washington Bridge rehabilitation project in Providence, Rhode Island. In making the award, the Board relied on the factors of collective-bargaining agreements, employer preference and past practice, area practice, and relative skills, training, and safety. [HTML] [PDF]

(Chairman Battista and Members Liebman and Meisburg participated.)

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United Rentals, Inc. (32-RC-5078; 341 NLRB No. 72) San Leandro, CA March 31, 2004. The Board reversed the Regional Director's Decision and Direction of Election and remanded this matter to the Regional Director for further appropriate action. [HTML] [PDF]

The Regional Director found appropriate the petitioned-for unit of mechanics, yard employees, and drivers, excluding counter employees, the parts associate, and the branch associate at the Employer's San Leandro, California facility and that mechanic foreman Sweat be permitted to vote subject to challenge. Additionally, the Regional Director found that the only evidence of interchange is limited to occasional instances that are insufficient to require the inclusion of the counter employees, parts associate, and branch associate in the petitioned-for unit. The Employer argued that the smallest appropriate unit is a facility-wide unit of the San Leandro facility employees.

Contrary to the Regional Director, the Board asserted that the overwhelming and undisputed evidence of overlapping duties and interchange between the excluded employees and the petitioned-for employees, and of their common terms and conditions, demonstrated that the petitioned-for unit is not an appropriate unit. Based on the significant overlapping duties and interchange, common labor relations control, common oversight and assignment of work by Branch Manager Dale Ferdinandi, common hours of work, and similar wages and benefits, the Board found that the excluded counter employees, the parts associate, and the branch associate share such a substantial community of interest with the petitioned-for employees that they must be included in the unit. Because the Petitioner (Laborers Local 886) has not indicated whether it would be willing to proceed to an election in a unit different from the unit found appropriate by the Regional Director, the case was remanded to the Regional Director.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Willamette Industries, Inc. and Weyerhaeuser Co., a Golden State Successor (26-CA-19667, et al.; 341 NLRB No. 75) Fort Smith, AR March 31, 2004. Members Liebman and Walsh affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by adversely changing the work schedules of a group of its corrugator

employees in retaliation for their activity for Paper, Allied-Industrial, Chemical and Energy Workers International. They modified the judge's remedy to include the traditional remedy for a discriminatory change in working conditions, i.e., restoration of the status quo ante, and the payment of backpay. [HTML] [PDF]

Chairman Battista, dissenting in part, agreed that the Respondent unlawfully instituted a change in the employees' work schedules because of their union activity, and that the affected employees should be made whole for their loss of wages and overtime. He would not require the reinstatement of the prior schedule, noting that: 1) neither the General Counsel nor the Union sought this remedy at the hearing before the judge; 2) the Respondent and apparent successor (Weyerhauser) did not have the opportunity to argue and present evidence before the judge that a restoration of the prior schedule would be inappropriate; and 3) more than 3 years have passed since the violation occurred and a new company has taken over the Respondent's operations.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Paper, Allied-Industrial, Chemical and Energy Workers International; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Fort Smith, Jan. 13-14, 2003. Adm. Law Judge Pargen Robertson issued his decision April 21, 2003.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Black's Railroad Transit Service, Inc. (an Individual) Peoria, IL March 30, 2004. 33-CA-13903; JD-24-04, Judge Michael A. Rosas.

Ryan Iron Works, Inc. (Iron Workers Local 501) Raynham, MA March 30, 2004. 1-CA-33353, et al.; JD-25-04, Judge Martin J. Linsky.

Lincoln Alexis, d/b/a Alexis Painting Co. (Individuals) Metairie, LA March 31, 2004. 15-CA-16923, et al.; JD(ATL)-17-04, Judge Lawrence W. Cullen.

Shelby County Health Care Corp. d/b/a The Regional Medical Center at Memphis (Individuals) Memphis, TN March 31, 2004. 26-CA-21173, et al.; JD(ATL)-16-04, Judge Margaret G. Brakebusch.

The Frank Martz Coach Co., Inc. (Transit Union Local 668) Wilkes Barre, PA April 1, 2004. 4-CA-31070; JD-26-04, Judge Joseph Gontram.

C.T. Taylor Co., Inc. and Structural Building Systems, Inc. (Laborers and Iron Workers Local 17) Cleveland, OH April 1, 2004. 8-CA-33875, 33950; JD(ATL)-21-04, Judge George Carson II.

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NO ANSWER TO COMPLAINT

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

A & B Hydraulic Co. (Auto Workers Local 155) (7-CA-46735; 341 NLRB No. 69) St. Clair Shores, MI March 31, 2004. [HTML] [PDF]

Desert Cities Construction d/b/a Desert Cities Nurseries (Laborers Local 1184) (21-CA-35272; 341 NLRB No. 76) Bermuda Dunes, CA March 31, 2004. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(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)

Akron Zoological Park, Akron, OH, 8-RC-16589, March 31, 2004

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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)

AGI Klearfold Incorporated, Inc., Melrose Park, IL, 13-RC-21129, April 1, 2004

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