

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED

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Administrative

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Battle Creek Health System and Service Employees Local 79 (7-CA-45473, et al., 7-CB-13488; 341 NLRB No. 119) Battle Creek and Detroit, MI May 12, 2004. The Board adopted the recommendations of the administrative law judge and found that the Union (Service Employees Local 79) violated Section 8(b)(1)(A) of the Act by threatening employees with bodily harm, destruction of their property, and other improper adverse consequences if they supported decertification of the Union or if they crossed the picket line. [\[HTML\]](#) [\[PDF\]](#)

No exceptions were filed to the judge's finding that the Employer (Battle Creek Health System) violated Section 8(a)(1) by issuing or maintaining a policy requiring employees to report to management prior to discussing conditions of employment with other employees, and instructing employees to report harassment by union members to management.

The judge sustained several of the Employer's objections to the Union's preelection conduct and directed a second election in Case 7-RD-3364. On January 15, 2004, the Board granted the individual Petitioner's request to withdraw the decertification election petition and severed Case 7-RD-3364 from the instant proceeding.

(Members Schaumber, Walsh, and Meisburg participated.)

Charges filed by Battle Creek Health System and Service Employees Local 79; complaint alleged violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A). Hearing at Battle Creek, April 21-24, 2003. Adm. Law Judge Paul Bauxbaum issued his decision Sept. 2, 2003.

The Detroit News, Inc. (7-CA-41701; 341 NLRB No. 125) Detroit, MI May 14, 2004. The Board affirmed the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Louis Mleczeko on December 4, 1998 for being part of a group that disrupted the Respondent's interviewing process at the University of Michigan's Ann Arbor campus on November 13, 1998. Member Schaumber agreed with his colleague's adoption of the judge's conclusion that Mleczeko's conduct lost the protection of the Act. [\[HTML\]](#) [\[PDF\]](#)

Susan Burzynski, an assistant managing editor for the Respondent, was at the University of Michigan's Ann Arbor campus on November 13 to interview students to work as summer interns at the newspaper. Mleczeko was at the University that day to attend a rally sponsored by the Graduates Assistants Union to show its support for the unions involved in a continuing labor dispute with the Respondent. At some point during the rally, a leader of the Graduates Assistants Union announced that the Respondent was conducting interviews on campus and that the group should walk to that building and protest. In the hallway outside the interview room, the demonstrators shouted epithets, used a loud speaker, sirens, and other noisemakers at the students and Burzynski. The demonstrators, numbering about 50, eventually flowed into the room and formed in the shape of a horseshoe around Burzynski and the two students. Burzynski recognized Mleczeko as one of the protestors in the room.

On November 24, 1998, the Respondent sent a letter to Mleczo, which stated in part that he, along with approximately 50 other individuals, engaged in such disruptive conduct that the interviewer and students were forced to leave the room; and that the conduct violated the terms of an NLRB settlement stipulation which provided in part that the Metropolitan Council of Newspapers Union would not restrain, threaten or coerce employees of The Detroit News because they choose to exercise their rights guaranteed under Section 7 of the NLRA. The letter gave Mleczo an opportunity to meet with Respondent to discuss his alleged involvement in the incident before taking any disciplinary action. The Union responded by letter dated December 3, 1998 declining the invitation to meet with the Respondent, asserting that Mleczo would not receive fair, nondiscriminatory treatment. The Union also denied any violation of the settlement stipulation. By letter dated December 4, Respondent notified Mleczo that he was discharged because of his conduct on November 13.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Newspaper Guild of Detroit Local 22; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on Oct. 13, 1999. Adm. Law Judge William G. Kocol issued his decision Dec. 30, 1999.

Fessler & Bowman, Inc. (7-RC-22434; 341 NLRB No. 122) Flushing, MI May 12, 2004. The Board adopted a new rule that any party's collection of ballots in a Board-conducted mail ballot representation election constitutes objectionable conduct that may warrant setting aside an election. It also revised the instructions in NLRB Form-4175, Instructions to Eligible Employees Voting By United States Mail, to reflect the new standard. [\[HTML\]](#) [\[PDF\]](#)

In this case, the tally of ballots for the runoff mail-ballot election held between July 24 and August 18, 2003, shows 19 votes for the Union (Plasterers Local 16) and 15 votes for the Petitioner (Bricklayers Local 9), with 2 challenged ballots. No exceptions were filed to the hearing officer's overruling of Petitioner's Objections 2, 3, and 4. The Union obtained exclusive control of two voters' mail ballots for an extended period of time after they were cast. The hearing officer determined that the Union's solicitation and collection of the two ballots did not constitute objectionable conduct because the ballots were sealed when given to the Union's agents and there was no evidence of ballot tampering. She found no evidence that the Union's conduct compromised the secrecy of the mail ballot or that the Union's solicitations to collect ballots placed any undue pressure on the voters.

Members Liebman and Walsh held, contrary to the hearing officer, that the Union engaged in objectionable conduct when it collected the two mail ballots because such conduct casts doubt on the validity of the two ballots. However, they agreed that the Union's solicitation of the ballots did not constitute objectionable conduct because "unlike the ballot collection, the solicitation of ballots did not create an opportunity for ballot tampering or for a breach of secrecy."

Regarding the issue of whether a party's collection of mail ballots is objectionable, Members Liebman and Walsh wrote: "We agree with the proposition that the secrecy of balloting—be it manual or mail ballot—is a hallmark of our election procedures. Where mail-ballot collection by a party occurs, we find that it casts doubt on the integrity of the election process and undermines election secrecy."

Based on the current actual tally (19-15), Members Liebman and Walsh found that the Union's objectionable conduct involving the two collected mail ballots could have affected the election result. Assuming that the two collected ballots were changed from votes for the Petitioner to votes for the Union, the election would have resulted, in the absence of the objectionable conduct, in a 17-17 tie. Therefore, Members Liebman and Walsh remanded the case to the Regional Director for resolution of the challenges as follows: 1) if both challenges are sustained, the election must be set aside; 2) if only one challenge is sustained, the election will be set aside if the eligible ballot is cast for the Petitioner, but will stand if it was cast for the Union; and 3) if neither challenge is sustained the election will be set aside if at least one of the two eligible ballots was cast for the Petitioner.

Concurring in part and dissenting in part, Chairman Battista and Member Schaumber agreed with their colleagues insofar as they established the principles that a party's collection of mail ballots is objectionable conduct, but they would bar a party from soliciting or collecting mail ballots. They noted that their colleagues essentially hold that a party engages in objectionable conduct if it *succeeds* in its efforts to collect mail ballots, but does not engage in objectionable conduct if it *fails* in its efforts. Chairman Battista and Member Schaumber held that the integrity of the electoral process demands that the employee control his ballot at all times and any effort to interfere with the process, whether successful or not, undermines the integrity of the process, and is therefore objectionable.

Contrary to their colleagues' decision to set aside the election only if the collected ballots turn out to be determinative of the election result, Chairman Battista and Member Schaumber would establish a bright-line rule that elections should be set aside, upon the filing of timely objections, whenever a party is shown to have collected or solicited mail ballots. In the absence of a Board majority to adopt their positions, Chairman Battista and Member Schaumber agreed with their colleagues to remand the case to the Regional Director to resolve the challenges ballots and to take further appropriate action.

(Chairman Battista and Members Liebman, Schaumber, and Walsh participated.)

ITT Industries, Inc. (7-CA-40946; 341 NLRB No. 118) Tawas City, MI May 13, 2004. On remand from the D.C. Circuit, Members Liebman and Walsh reaffirmed the original finding reported at 331 NLRB 5 (2000) that the Respondent violated Section 8(a)(1) of the Act by prohibiting handbilling by its offsite employees at its East Tawas parking lot. Chairman Battista, contrary to his colleagues, did not find that the Respondent violated the Act. [\[HTML\]](#) [\[PDF\]](#)

The Board, in the original decision, adopted the judge's application of the standard set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), that prohibits an employer from denying off-duty employees entry to parking lots and other nonworking areas to handbill except where justified by business reasons. The judge relied on Board cases holding that an employer's employees from one plant are considered employees when they handbill at another of the employer's plants.

On June 5, 2001, the court, in vacating the Board's decision wrote: "[W]e simply cannot assess the reasonableness of the Board's decision to apply the *Tri-County* test to off-site employees in the present case." Following the court's decision, the Board specifically addressed the court's concerns in *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003), which presented the same issue. The Sixth Circuit enforced the Board's decision in *Hillhaven*, holding that "the Board's finding that offsite employees enjoy Section 7 organizational rights of access that are nonderivative was reasonable under the law." The court found significant the fact that "offsite and onsite employees share the same common concerns as to a specific employer, not only as to employment in general for purposes of garnering union support, but also on matters relating to such things as wages, benefits, and other workplace issues."

Turning to this case, the majority accepted the court's opinion as the law of the case. They noted however that the Board in *Hillhaven* addressed the court's directive to develop a balancing test between the property interests of an employer and the Section 7 organizational rights of offsite employee and thus, they need only apply that test to the facts here. Applying *Hillhaven*, the majority found that the Respondent unlawfully denied access to offsite employees to handbill in its parking lot.

In dissent, Chairman Battista contended that the Respondent, for valid security reasons, has a policy that forbids access to the plant to all persons who work at the plant. He said that the issue is whether the Respondent must modify that policy so as to permit employees who work at other sites to come onto the property to engage in Section 7 activity. He would not require the Respondent to modify its policy. Chairman Battista found that the Respondent's property rights and security concerns, plus the employees' alternative means of access, outweigh the Section 7 rights involved and thus, the Respondent could prohibit its offsite employees from handbilling on its parking lot. In his view, the Respondent's prohibitions did not violate the Act.

(Chairman Battista and Members Liebman and Walsh participated.)

New York Display & Die Cutting Corp. (2-RC-22744; 341 NLRB No. 121) New York, NY May 12, 2004. The Board, contrary to the hearing officer, overruled the challenge to the ballot of Gena McCormick. In the absence of exceptions, it adopted the hearing officer's recommendation that the challenge to the ballot of Carlos Forte be sustained, and that the challenges to the ballots of V. Seemangal, Claudia Vakhrusheva, Raisma Vaysman, and Crisante Torres be overruled. The Board directed the Regional Director to open and count the

ballots of the voters whose challenges were overruled and prepare and serve on the parties a revised tally of ballots and issue the appropriate certification. The tally of ballots for the election conducted on September 18, 2003 showed 12 votes for and 9 against the Petitioner (Paper Allied Industrial Chemical Employees Local 107), with 6 challenged ballots, a number sufficient to affect the results of the election. [\[HTML\]](#) [\[PDF\]](#)

The Petitioner challenged McCormick's ballot on the grounds that she was not a regular employee because she had been hired only a short time before the election. The hearing officer agreed, concluding that McCormick's period of employment before the election "is too brief to find that McCormick is a regular employee," and sustained the challenge to her ballot. The Board found that the hearing officer erred in concluding that McCormick was not a regular part-time employee. Applying *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99 (2003), citing *Davison-Paxon Co.*, 185 NLRB 21 (1970), the Board wrote that applying the *Davison-Paxon* test, McCormick did work a sufficient period of time in the period preceding the election to qualify as a regular part-time employee and should be included in the unit.

(Chairman Battista and Members Liebman and Walsh participated.)

St. George Warehouse, Inc. (22-CA-24902; 341 NLRB No. 120) South Kearney, NJ May 12, 2004. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring unit work to temporary agency employees without giving Teamsters Local 641 notice and an opportunity to bargain and failing to provide the Union with requested information concerning temporary agency employees and the agencies that supplied them. [\[HTML\]](#) [\[PDF\]](#)

Chairman Battista and Member Schaumber reversed the judge and dismissed the allegation that the Respondent engaged in surface bargaining, after considering the Respondent's conduct both at and away from the bargaining table and concluding that the Respondent engaged in hard but lawful bargaining to achieve a contract that it considered desirable. Member Walsh, dissenting on this issue, agreed with the judge that the Respondent violated the Act by engaging in surface bargaining, saying: "The Respondent expressly stated that the Union would not get a contract, made an unlawful unilateral change that seriously eroded the bargaining unit, delayed and refused to provide relevant information to the Union, and engaged in conduct at the bargaining table that showed its intent to frustrate bargaining and prevent the successful negotiation of a collective-bargaining agreement."

No exceptions were filed to the judge's finding that the Respondent violated the Act by delaying in providing the Union with information on health insurance premiums and failing to provide the Union with the names, addresses, job classifications, wage rates, and duration of employment of temporary agency employees who have performed bargaining unit work.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 641; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, July 8-9, 2002. Adm. Law Judge Steven Davis issued his decision Oct. 22, 2002.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Marble Magician, Inc. (an Individual) Williston Park, NY May 10, 2004. 29-CA-25993; JD(NY)-18-04; Judge Steven Davis.

Arens Control Company, L.L.C. (Service Employees Local 1) Carpentersville, IL May 13, 2004. 13-CA-40524; JD-41-04, Judge Martin J. Linsky.

Cox Communications Gulf Coast, L.L.C. (Individuals) Mary Esther, FL May 13, 2004. 15-CA-16904, 17145; JD(ATL)-24-04, Judge George Carson II.

Media General Operations, Inc., d/b/a The Tampa Tribune (an Individual) Tampa, FL May 13, 2004. 12-CA-23467; JD(ATL)-24-04, Judge Lawrence W. Cullen.

United States Postal Service (Postal Workers San Francisco Local) San Francisco, CA May 11, 2004. 20-CA-31486-1, 31540-1; JD(SF)-36-04, Judge Clifford H. Anderson.

NO ANSWER TO COMPLAINT

(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 complaint.)

Cray Construction Group LLC (Laborers Local 130) (4-CA-32367; 341 NLRB No. 123) Gap, PA May 13, 2004. [\[HTML\]](#) [\[PDF\]](#)

**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 CERTIFICATION OF REPRESENTATIVE

Owens International Inc., South Holland, IL, 13-RC-21118, May 14, 2004
United Way of Greater Duluth, Inc., Duluth, MI, 18-RD-2470, May 14, 2004

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

DAK Americas, L.L.C., Leland, NC, 11-RC-6556, May 14, 2004

*(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)*

Yavneh Day School Association, Inc., Cincinnati, OH, 9-RC-17872, May 12, 2004
Pace University, New York, NY, 2-RC-22795, May 13, 2004
Ann Arbor Cabinet Co., Inc., Ypsilanti, MI, 7-RD-3443, May 13, 2004
Holsum De Puerto Rico, Inc., Toabaja, PR, 24-RC-8329, May 13, 2004

Miscellaneous Board Orders

ORDER[reinstating petition and remanding to Regional Director]

Integro, L.L.C., Jackson, MI, 7-RD-3401, May 12, 2004

ORDER[denying Union's request for special permission to appeal]

US Protect Corp. San Francisco, CA, 32-UD-209, May 12, 2004

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

City of Ogle/Ogle County Sheriff, Oregon, IL, 13-WH-3, May 12, 2004

City of Ogle/Ogle County Sheriff, Oregon, IL, 13-WH-2, May 12, 2004

City of Zion, Zion, IL, 13-WH-1, May 12, 2004

Northeastern Illinois University, DeKalb, IL, 13-WH-5, May 12, 2004

City of Marengo, Marengo, IL, 13-WH-6, May 13, 2004

City of McHenry, McHenry, IL, 13-WH-4, May 13, 2004

**ORDER VACATING[Board's February 18, 2004
Order Granting Review]**

Rock-Tenn Company, Conway, AR, 26-RD-1090, May 13, 2004