National Labor Relations Board

Weekly Summary of NLRB Cases

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

June 18, 2004 | W-2952

CASES SUMMARIZED
VISIT WWW.NLRB.GOV FOR FULL TEXT

OTHER CONTENTS

Press Releases (R-2528): Labor Board Grants Review and Invites Briefs to be Filed in Two Cases Involving Neutrality Agreements

(R-2529): NLRB Holds that Employees in a Nonunionized Workplace are not Entitled to Representation at a Disciplinary Interview

BHP (USA) Inc. d/b/a BHP Coal New Mexico (28-CA-17103, 17364; 341 NLRB No. 149) Farmington, NM June 10, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changes to its attendance policy. Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated the Act by discharging Truby Werito pursuant to the unlawfully implemented policy because the General Counsel failed to meet his burden of showing by a preponderance of the evidence that the discharge was pursuant to the amended attendance policy. Member Walsh disagreed with his colleagues on this issue. [HTML] [PDF]

The majority wrote: "Because we find that the General Counsel has failed to establish that the Respondent discharged Werito under the amended policy, unlike our dissenting colleague, we find it unnecessary to decide under what policy, if any at all, the Respondent's disciplinary action was taken. As noted above, the Respondent suspended Werito and issued him a final warning for tardiness. Then, when Werito was again tardy, the Respondent discharged him pursuant to that final warning. Since neither the 1995 attendance policy nor the new amended policy provides for either a suspension or a final warning, the Respondent was applying neither policy when it discharged Weirto."

Member Walsh held that "[i]f the Respondent has been following its purported practice under its 1995 attendance policy of treating unexcused tardiness reports the same as unexcused absences, Werito would have been discharged after his third unexcused tardiness report on January 26." Member Walsh wrote "the record facts provide more than ample support for the judge's finding that the General Counsel more than met his burden of proving . . . that the amended policy was a factor in the Respondent's decision to discharge Werito for excessive tardiness."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Operating Engineers Local 953; complaint alleged violation of Section 8(a)(5). Hearing at Farmington on April 2, 2002. Adm. Law Judge James L. Rose issued his decision June 12, 2002.

***

Dana Corp. and Metaldyne Corp. (8-RD-1976, 6-RD-1518, 1519; 341 NLRB No. 150) Upper Sandusky, OH and St. Marys, PA June 7, 2004. Chairman Battista and Members Schaumber and Meisburg granted the Petitioners' (Clarice K. Atherholt, Alan P. Krug, and Jeffrey A. Sample) requests for review of the Regional Directors' dismissals of the instant petitions. The majority also granted the Petitioners' motion to consolidate the above cases and their request that the Board solicit amicus briefs on the issues raised. (By a Notice and Invitation to File Briefs dated June 14, 2004, the Board invited the parties and interested amici to file briefs with the Board on or before July 15, 2004.) The issues are whether the Employers' voluntary recognition of the Auto Workers bars a decertification petition for a reasonable period of time under the circumstances of these cases and whether that recognition should operate as a bar to decertification petitions filed by employees who were not parties to that agreement. Dissenting, Members Liebman and Walsh would deny the requests for review. [HTML] [PDF]

While acknowledging that the current precedent is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer, the majority wrote "in both of the instant cases, an agreement was reached between the union and the employer *before* authorization cards, evidencing the majority status, were obtained. In addition, we believe that changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine."

Contrary to their colleagues, Members Liebman and Walsh asserted that the Petitioners have failed to give any compelling reasons to abolish or modify the recognition bar. They wrote: "Abolishing the recognition bar would make voluntary recognition meaningless. Employers have no incentive to recognize a union if they know that recognition may be subject to immediate second-guessing through a decertification petition. In addition, abolishing the recognition bar would frustrate the Act's fundamental policies of furthering industrial peace and labor relations stability."

In conclusion, Members Liebman and Walsh said: "The issues raised by the Petitioners were settled 40 years ago. The recognition bar has stood the test of time. To revisit it serves no purpose but to undermine a principle that has been endorsed time and again by the Board and the courts. The Petitioners' Requests for Review should be denied."

The Regional Directors, in dismissing the petitions, invoked the Board's long-established recognition bar doctrine, which provides that voluntary recognition of a union in good faith based on demonstrated majority status will bar a petition for a reasonable period of time. See *Keller Plastics Eastern, Inc*., 157 NLRB 583 (1966); *Sound Contractors Assn*., 162 NLRB 364 (1966).

(Full Board participated.)

***

IBM Corp. (11-CA-19324, et al.; 341 NLRB No. 148) Research Triangle Park, NC June 9, 2004. Chairman Battista and Member Meisburg, with Member Schaumber separately concurring, held that employees who work in a nonunion workplace are not entitled under Section 7 of the National Labor Relations Act to have a coworker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline. The Board majority overruled *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which extended to unrepresented employees a right to have a coworker present during investigatory interviews, and returned to pre-*Epilepsy* Board precedent holding that *Weingarten* rights apply only to unionized employees. Under *NLRB v J. Weingarten*, 420 U.S. 251 (1975), employees represented by a union have the right to have a representative accompany them to a disciplinary interview. Members Liebman and Walsh dissented. [HTML] [PDF]

In this case, IBM, whose employees are not represented by a union, denied three employees' requests to have a coworker present during investigatory interviews about a former employee's allegations that they had engaged in harassment. An NLRB administrative law

judge, applying *Epilepsy Foundation*, found that IBM violated Section 8(a)(1) of the Act by denying the employees' requests for the presence of a co-worker. Upon review, a Board majority reversed *Epilepsy* and therefore reversed the judge.

Chairman Battista and Member Meisburg, in reversing the judge, found that national labor policy is best served by not extending to a nonunion workplace a right to representation at a disciplinary interview. They noted changes in work environments requiring employers to conduct various types of workplace investigations pursuant to federal, state and local laws, especially workplace discrimination and sexual harassment, and the need for an employer to conduct those investigations in a thorough, prompt and confidential manner. They also noted increasing instances of workplace violence and the aftermath of events of September 11, 2001.

Chairman Battista and Member Meisburg pointed out that in a nonunion workplace, coworkers do not represent the interests of the entire work force; coworkers have no official status as does a union representative in dealing with an employer and thus cannot redress the imbalance of power between employers and employees; coworkers do not have the same knowledge and skills as a union representative and thus are not as effective in facilitating workplace interviews; and, finally, the presence of a coworker, instead of a union representative, may compromise the confidentiality of a workplace investigation. For these reasons, they concluded that a nonunion employer has the right to conduct prompt, efficient, thorough and confidential workplace investigations without the presence of a coworker, saying:

> Our reexamination of *Epilepsy Foundation* leads us to conclude that the policy considerations supporting that decision do not warrant, particularly at this time, adherence to the holding in *Epilepsy Foundation*. In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.
>
> Our considerations of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a co-worker.

Member Schaumber joined the rationale of the majority and offered his own views in a separate concurring opinion. He found that the right to the presence of a witness in a predisciplinary investigatory interview is unique to a workplace in which employees are represented by a union and is distinctly derived from the statute. Member Schaumber concluded that the language of the statute does not provide such a right to nonrepresented employees. In this regard, he explained that the "better construction and the one most consistent with the language and policies of the Act, is that the *Weingarten* right is unique to employees represented by a Section 9(a) bargaining representative. The Board's decision to the contrary in *Epilepsy* sheared *Weingarten* from its historical, factual and analytical roots; infringed upon recognized

and fundamental common law management prerogatives; and ignored extant Board precedent that requires actual proof—rather than presuming its existence—of activity which is both 'concerted' and 'for mutual aid and protection' to qualify for protection under Section 7. Consequently, *Epilepsy* represented an abrupt and unwarranted departure from established law, an error we correct through our decision today."

Members Liebman and Walsh in dissent wrote: "Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy." They found no persuasive basis for the majority's "abruptly overruling" *Epilepsy Foundation of Northeast Ohio*, a recent decision upheld on appeal as "both clear and reasonable." Members Liebman and Walsh concluded that a statutory foundation for coworker representation exists under Section 7 even in the absence of a union, and that due process considerations supported such representation. The presence of a coworker at a disciplinary interview gives the affected worker a "potential witness, advisor, and advocate" in what can be an adversarial situation, Members Liebman and Walsh explained. "On this view, it is our colleagues who are taking a step backwards. They have neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for falling to follow precedent. They have overruled a sound decision not because they must, and not because they should, but because they can. As a result, today's decision itself is unlikely to have an enduring place in American labor law. We dissent."

(Full Board participated.)

Charges filed by Kenneth Paul Schult, Robert William Bannon, and Steven Parsley, Individuals; complaint alleged violation of Section 8(a)(1). Hearing at Winston-Salem on Aug. 9, 2002. Adm. Law Judge George Carson II issued his decision Sept. 25, 2002.

***

St. Barnabas Medical Center (22-CA-24632; 341 NLRB No. 151) Livingston, NJ June 12, 2004. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by unilaterally granting wage increases and other improvements in the terms and conditions of employment to its registered nurses during the term of the parties' contract without the Union's consent. [HTML] [PDF]

The Board found no merit in the Respondent's argument that the rules governing the midterm modification of contracts do not apply here because "[o]nce the Union urgently requested that wages be reopened and the Medical Center agreed, the Union and Medical Center incurred the same bargaining obligations and rights that they would enjoy or have had no contract been in existence."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by New Jersey Nurses Local 1091, CWA; complaint alleged violation of Section 8(a)(5). Hearing at Newark on Sept. 16, 2001. Adm. Law Judge Joel P. Biblowitz issued his decision Oct. 29, 2002.

***

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Fluor-Daniel, Inc. (Boilermakers) Greenville, SC June 7, 2004. 26-CA-13842; JD(ATL)-31-04, Judge Jane Vandeventer.

General Cable Texas Operations Limited Partnership (Auto Workers) Scottsville, TX June 8, 2004. 16-CA-23012, 23279; JD(ATL)-32-04, Judge Keltner W. Locke.

Yankee Screw Products Co. (Auto Workers Local 771) Madison Heights, MI June 8, 2004. 7-CA-46599; JD-52-04, Judge David L. Evans.

David's Jade Palace Restaurant (318 Restaurant Workers) Hartsdale, NY June 10, 2004. 2-CA-35470-1, et al.; JD(NY)-26-04, Judge Eleanor MacDonald.

Ohio Medical Transportation Inc. d/b/a Medflight (an Individual) Columbus, OH June 10, 2004. 9-CA-40356; JD(NY)-27-04, Judge Joel P. Biblowitz.

OPW Fueling Components (an Individual) Butler County, OH June 10, 2004. 9-CA-40071; JD-54-04, Judge John T. Clark.

Providence Alaska Medical Center (Laborers Local 341) Seattle, WA June 9, 2004. 19-CA-28803; JD(SF)-44-04, Judge Jay R. Pollack.

Renzenberger, Inc. (Teamsters Local 150) Roseville, CA June 9, 2004. 20-CA-31176, et al.; JD(SF)-45-04, Judge Mary Miller Cracraft.

***

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

Dart Container Corporation of Georgia, Tumwater, WA, 19-RC-14454, June 9, 2004

DECISION AND ORDER[overruling Employer's Objection 2]

Marietta Nursing and Rehabilitation Center, Marietta, OH, 8-RC-16595, June 9, 2004

***

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

Heritage Healthcare Center, Venice FL, 12-RC-8990, June 9, 2004
Quality Inn & Suites, Minneapolis, MN, 18-RC-17243, June 10, 2004
Washington Demilitarization Company, Hermiston, OR, 36-RC-6233, June 10, 2004

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Stora Enso North America, Duluth, MN, 18-RC-17225, June 10, 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)

Airco Industrial Contractors, Inc., Savannah, GA, 10-RC-15443, June 9, 2004
Sanmina-Sci Corporation, Allen, TX, 16-UC-205, June 9, 2004
Capitol Plaza Corp. and Bashara & Company, Montpelier, VT, 1-RM-1264, June 9, 2004
Honeywell International, Inc., Jacksonville, FL, 26-UC-192, June 10, 2004

(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)

Westchester Division of New York and Presbyterian Hospital, White Plains, NY, 2-RM-00298, June 8, 2004
Cequent Towing Products, Goshen, IN, 25-RD-1447, June 9, 2004
El Paso Electric Company, El Paso, TX, 16-RC-10572, June 10, 2004

***

Miscellaneous Board Orders

ORDER REMANDING

Margate Towers Condominium Association, Inc., Margate, NJ, 4-RC-20486 June 10, 2004