National Labor Relations Board

Weekly Summary of NLRB Cases

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C A S E S S U M M A R I Z E D
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OTHER CONTENTS

Ark Las Vegas Restaurant Corp. (28-CA-14228, et al.; 343 NLRB No. 126) Las Vegas, NV Dec. 16, 2004. On remand from the U.S. Court of Appeals for the District of Columbia Circuit, Members Liebman and Walsh reaffirmed the Board's previous Order reported at 335 NLRB 1284 (2001). The court denied enforcement of the Board's order with respect to the Respondent's Rules 30 and 45 and remanded the case to the Board for further proceeding. [HTML] [PDF]

In the prior decision, the Board found, among others, that the Respondent violated Section 8(a)(1) of the Act by maintaining work rules forbidding its employees from "[r]eporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a shift ends," and from "[r]eturning to the Company's premises, other than as a guest, during unscheduled hours."

In dissent, Chairman Battista would not find that the General Counsel has established that the Respondent violated Section 8(a)(1) of the Act by maintaining Rules 30 and 45 in its handbook. He said there are no evidence of unlawful application and no evidence that any employee has been deterred from engaging in Section 7 activity. Chairman Battista stated: "absent evidence of unlawful application, I would not seek to stretch these rules beyond their reasonable meaning. . . . I would not infer that a reasonable employee would read Rules 30 and 45 as prohibiting Section 7 activity outside the restaurants."

(Chairman Battista and Members Liebman and Walsh participated.)

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Crossroads Electric, Inc, and its alter ego Greer and Associates Electrical, Inc. (26-CA-21574; 343 NLRB No. 112) Nashville, TN Dec. 20, 2004. The Board adopted the administrative law judge's finding that by failing to honor the terms of the collective-bargaining agreement with Electrical Workers Local 429, the Respondent and its alter ego Greer and Associates Electrical, Inc., violated Section 8(a)(5) of the Act. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Electrical Workers Local 429; complaint alleged violation of Section 8(a)(5). Hearing at Nashville on July 14 and 15, 2004. Adm. Law Judge George Carson II issued his decision Sept. 1, 2004.

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DynCorp (9-CA-37324, et al., 9-RC-17352; 343 NLRB No. 124) West Chester, OH Dec. 16, 2004. Members Liebman and Walsh adopted certain of the administrative law judge's finding and held that the Respondent, by prohibiting employees from posting union literature on its bulletin Board or threatening employees for posting such literature; interrogating or soliciting employees about their union activities, membership, or sympathies; and threatening employees with more onerous working conditions because of their union support, violated Section 8(a)(1) and (3) of the Act. [HTML] [PDF]

Members Liebman and Walsh held, contrary to the judge and Chairman Battista, that the Respondent violated the Act by promising improved conditions of employment and by threatening employees with the loss of their Employee Stock Ownership Plan (ESOP) benefits if they chose union representation. They set aside the election of March 8, 2000, and severed and remanded Case 9-RC-17352 to the Regional Director to conduct a new election. The tally of ballots showed that of 226 eligible voters, 94 were for and 114 were against, Postal Workers Local 164, with no challenged ballots.

Dissenting in part, Chairman Battista would dismiss the allegation that the Respondent unlawfully interrogated employee Jon Groves, and would adopt the judge's dismissal of allegations relating to the alleged promise of benefits and the alleged threat to discontinue the Respondent's ESOP contribution if the Union prevailed in the election. While he agreed with his colleagues with regard to the remaining allegations, he said that he found them insufficient to warrant a second election and would direct the Regional Director to issue to appropriate certification.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Postal Workers Local 164 and Grant Turner, Carl D. Moore, and Robert Honnerlaw, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Cincinnati on March 12-15, 2001. Adm. Law Judge Jerry M. Hermele issued his decision July 31, 2001.

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Electrical Workers Local 357 (Newtron Heat Trace, Inc.) (28-CB-5957, 6013; 343 NLRB No. 136) Primm, NV Dec. 16, 2004. In agreement with the administrative law judge, Members Liebman and Walsh determined that the Respondent violated Section 8(b)(1)(A) of the Act by, among others, restraining and coercing three travelers (members of sister local union, who seek work in the Respondent's jurisdiction) into surrendering job referrals to the Respondent's members and by refusing a hiring hall registrant's request for a copy of the October 3, 2002 side list. The Respondent's coercive conduct, directed at the three travelers, included verbal harassment and threats by groups of union members occurring in the hiring hall and the hiring hall parking lot. This conduct occurred on four dates over a 6-month period starting on March 7, 2003. [HTML] [PDF]

The judge in her remedial order required the Respondent to make whole the three identified travelers (Michael Cieklinski, Richard Henderson, and Allan Naim) and to make whole "other travelers affected by Respondent's unlawful conduct" and stated that "[d]etermining the identities and job opportunity losses of and giving notification to such travelers as may have been coerced is left to the compliance stage of this matter."

The Respondent excepted to the judge's extension of the make whole remedy beyond the three identified travelers. The majority, pursuant to *Electrical Workers Local 48 (Oregon-Columbia NECA)*, 342 NLRB No. 10, slip op. at 9 (2004), wrote that the Board will order the respondent to make whole such unidentified persons only where they constitute a "defined and easily identified class." Here, they found that there is no "defined and easily identified class" sufficient to warrant a broader-make whole Order. Accordingly, they modified the judge's recommended Order to limit the make-whole remedy to the three identified travelers.

In partial dissent, Chairman Battista wrote: "I disagree with my colleagues' conclusion that the unidentified travelers who lost job opportunities as a result of the Respondent's coercive conduct are not a 'defined and easily identifiable class,' entitled to remedial relief." He would affirm the judge's recommended Order providing a make-whole remedy for all travelers who lost job opportunities as a result of the Respondent's coercive conduct and deferring to compliance proceedings issued related to which, if any, travelers are entitled to be made whole.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Michael J. Cieklinski and Richard Brian Henderson, Individuals; complaint alleged violation of Section 8(b)(1)(A). Hearing at Las Vegas on March 9 and 10, 2004. Adm. Law Judge Lana H. Parke issued her decision June 15, 2004.

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Sonic Automotive, formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford (32-CA-19327-1; 343 NLRB No. 116) San Jose, CA Dec. 16, 2004. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Machinists District Lodge 190 Local 1101) as the exclusive bargaining representative of its employees in the bargaining unit, by unilaterally changing the payroll period, and by dealing directly with bargaining unit employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment. [HTML] [PDF]

Chairman Battista and Member Schaumber adopted the judge's dismissal of the complaint allegations that the Respondent made statements threatening employees in violation of Section 8(a)(1). They agreed with the judge's finding that the Respondent is an undisputed *Burns* successor employer and therefore, did not violate Section 8(a)(5) by unilaterally implementing the October 2001 productivity bonus program, and thereafter unilaterally modifying the bonus program. They said that the record showed similar bonus programs utilized by the Respondent's predecessor and this discretion was authorized under the union-predecessor collective-bargaining agreement.

The majority held that the Respondent did not violate Section 8(a)(5) by unilaterally implementing two paid holidays, the day after Thanksgiving and the day of Christmas Eve. They found no change from the predecessor's established practice of granting the day after

Thanksgiving as a paid holiday and agreed with the judge that the Respondent did not engage in unlawful direct dealing with employees with respect to these holidays.

Contrary to his colleagues, Member Walsh contended that the Respondent violated Section 8(a)(5) by unilaterally modifying the productivity bonus program it implemented in October 2001, by unilaterally implementing the day after Thanksgiving holiday, and by direct dealing with employees. He wrote that while the Union had no objection to the productivity bonus program, the Respondent was not privileged to unilaterally modify the bonus program it put into effect. With respect to the implementation of the day after Thanksgiving holiday, he said it was a change from the Respondent's initial terms and conditions of employment, that the Respondent never bargained with the Union about the change, and that the Respondent met directly with employees regarding the change and excluded the Union from the process.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Machinists District Lodge 190 Local 1101; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Jose on Sept. 18, 2002. Adm. Law Judge James M. Kennedy issued his decision Feb. 28, 2003.

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Jewish Home for the Elderly of Fairfield County (34-CA-9920, et al., 34-RC-1947; 343 NLRB No. 117) Fairfield, CT Dec. 16, 2004. The Board affirmed the administrative law judge's findings that the Respondent committed numerous violations of the Act. Among others, it found that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule denying off-duty employees access to "the facility" unless visiting residents, clients, or conducting official business. The Board set aside the election conducted in Case 34-RC-1947 and remanded this case to the Regional Director to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative. In the absence of exceptions, it adopted the judge's recommendations to overrule Objections 2, 4, 10, 12, and 15. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by New England Health Care Employees (SEIU) District 1199; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Hartford over 16 days between Nov. 13, 2002 and Feb. 11, 2003. Adm. Law Judge Michael A. Marcionese issued his decision Nov. 21, 2003.

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Mountaineer Park, Inc. (6-RC-12289; 343 NLRB No. 135) Chester, WV Dec. 16, 2004. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the Petitioner's (Food & Commercial Workers Local 23) Objections 1 and 3, and to overrule the challenges to the ballots of employees Wanda Board, Dwayne Edward Franklin, Crystal D. Gajitka, Julie Lynne Krynicki, and Laura Lynne Smith. It directed the Regional Director to open

and count the overruled ballots, and to prepare and serve on the parties a revised tally of ballots and the appropriate certification. The tally of ballots for the election held December 19, 2003 showed 75 for and 70 against the Petitioner, with seven challenged ballots, a number sufficient to affect the results of the election. [HTML] [PDF]

Chairman Battista and Member Schaumber held, contrary to the hearing officer, that Evelyn Fullerton and Cheryl Guzzo are supervisors within the meaning of Section 2(11) of the Act and, accordingly, sustained the challenges to their ballots. The two employees are "assistant supervisors" in the Employer's housekeeping department. Member Walsh disagreed with the majority's finding that the Employer has met its burden of proving that Fullerton and Guzzo exercise independent judgment in effectively recommending employee discipline. He would adopt the hearing officer's finding and overrule the challenges to their ballots.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Overnite Transportation Co. (26-CA-19037, et al.; 343 NLRB No. 134) Memphis, TN Dec. 16, 2004. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to respond to Teamsters Local 667's information request. It affirmed the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by allegedly terminating employees Walter Jones and Terry Holcomb for engaging in protected concerted activity. [HTML] [PDF]

Chairman Battista and Member Liebman disagreed with the judge that the Respondent violated Section 8(a)(3) and (1) by suspending and then discharging seven employees in February 1999. Dissenting in part, Member Walsh held that the Respondent failed to prove it would have imposed the discharges in the absence of the employees' union activity. Accordingly, he found that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged six employees because of their union activities and when it discharged a seventh employee to mask its reason for discharging the other six.

A different majority (Members Liebman and Walsh) agreed with the judge that the Respondent violated Section 8(a)(3) and (1) by twice disciplining employee Sam Powell, suspending him, and discharging him because of his protected concerted union activity. Chairman Battista disagreed, contending that the Respondent adequately demonstrated that it decided to twice discipline, suspend, and then to terminate Powell for legitimate reasons (i.e. because he engaged in misconduct), rather than for discriminatory reasons.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 667; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Memphis on various days in June, July, and Nov. 2000 and March 2001. Adm. Law Judge Leonard M. Wagman issued his decision July 17, 2002.

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Promedica Health Systems, Inc, et al. (8-CA-31818, 32345, 8-RC-16175, 16176; 343 NLRB No. 131) Toledo, OH Dec. 16, 2004. The administrative law judge found, and Members Liebman and Walsh agreed, that the Respondents violated Section 8(a)(3) of the Act by issuing coachings (performance counseling) to employees Dea Lyn Keckler, Robert Hasenfratz, Christine Gallagher, Billie Smith, and Cynthia Miller, directed at the union activity. They also adopted the judge's findings that the Respondents violated Section 8(a)(1) by creating the impression of surveillance of Robert Hasenfratz' union activities, and by telling the PTs (preanalytical technicians in the clinical laboratory) that a previously promised wage increase was placed on hold because the Auto Workers had filed an election petition. [HTML] [PDF]

The Union filed four separate representation petitions for the units composed of: skilled maintenance, nursing, technical, and support services. The tally of ballots showed that a majority of ballots were against the Union in all of the units. Objections considered in this case pertain to the elections held in the technical and support service units. The judge asserted that the announced withholding of the PT wage increase constituted objectionable conduct and set aside the election in both the support services unit, in which the PTs were included, and the technical unit. Members Liebman and Walsh agreed with the judge to set aside the election in the support services unit and directed that a second election be conducted in Case 8-RC-16176. However, contrary to the judge, they found no basis to set aside the election in the technical unit and certified the results of the election in Case 8-RC-16175.

Chairman Battista, contrary to the judge and his colleagues, would not find that the Respondent violated Section 8(a)(1) by creating the impression of surveillance, or by making statements regarding the withholding of wage increase for the PTs. He found that the statements themselves reflected current law and wrote: "Once the election matter was resolved, the Respondents would be free to unilaterally grant the increase if the Union lost, and the Respondents would be obligated to bargain about the matter if the Union won. The Respondents told employees the truth. That is neither unlawful nor objectionable."

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Auto Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Toledo on various dates in Oct. and Dec. 2001, and Jan. 2002. Adm. Law Judge Earl E. Shamwell, Jr. issued his decision May 6, 2003.

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Publix Super Markets, Inc. (13-RC-20891, et al.; 343 NLRB No. 109) Deerfield Beach, FL Dec. 16, 2004. Reversing the Regional Director's unit determination, the Board found that the smallest appropriate unit is a plant-wide production and maintenance unit including all employees working out of the satellite buildings but excluding truckdrivers. It remanded the case to the Regional Director for further appropriate action. [HTML] [PDF]

In her decision and direction of election, the Regional Director directed an election in two units: a fluid processing unit and a "Dallas/non-Dallas" or distribution unit. The Board found, contrary to the Regional Director, that there was insufficient evidence to warrant finding that a separate fluid processing unit is appropriate apart from the other production and maintenance employees.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Robert Orr/Sysco Food Services, LLC (26-CA-20384, et al.; 343 NLRB No. 123) Nashville, TN Dec. 16, 2004. Members Liebman and Walsh adopted the administrative law judge's finding that the Respondent committed numerous violations of Section 8(a)(1), (3), and (4) of the Act in the period before, during, and after a rerun representation campaign. Among others, they affirmed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging employees Tommy Thomas, James Garza, and Chris Shouse, and by issuing a warning to and discharging employee James Utley. Contrary to Chairman Battista, the majority, in agreement with the judge, held that Ben Kelley and Greg Jaster were discharged because of their union activities and not because they engaged in workplace violence. [HTML] [PDF]

Dissenting in part, Chairman Battista asserted that Kelley and Jaster were discharged for violating the Respondent's "zero tolerance" policy concerning hostile physical conduct and that the discharges did not violate Section 8(a)(3). In his view the decisive factor in the decision to discharge was that there was physical touching in the course of an argument between the two men. He wrote: "[T]he prevention of violence in the workplace is a legitimate and serious concern, and an employer should be free to establish what constitutes impermissible violent behavior. The Board should not, as here, substitute its judgment for that of the employer."

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 480; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Nashville on 7 days in Aug. and Sept. 2002. Adm. Law Judge Jane Vandeventer issued her decision May 9, 2003.

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Tyson Fresh Meats, Inc. (19-RD-3576; 343 NLRB No. 129) Wallula, WA Dec. 16, 2004. Contrary to the hearing officer, the Board sustained the Employer's Objections 1 and 5, set aside the election of April 8 and 9, 2004, and directed a second election. The tally of ballots showed 708 votes for and 657 against, General Teamsters Local 556, with 5 challenged ballots, an insufficient number to affect the results of the election. [HTML] [PDF]

Objection 1 alleged that the Union, through its agents and adherents, improperly communicated and campaigned to employees who were waiting in line to vote and to employees who were entering the polling place and Objection 5 alleged that the Union engaged in electioneering in the voting area that was intended to intimidate employees into voting for the Union.

In overruling Objections 1 and 5, the hearing officer found that the union stewards were not union agents because they had neither actual nor apparent authority to act on behalf of the Union and, pursuant to *Milchem, Inc*., 170 NLRB 362 (1968), found that the stewards did not violate the rule which applies only to party misconduct. The Board noted that the hearing officer inadvertently applied the wrong standard for determining objectionable electioneering by a third-party, and concluded that the electioneering by the stewards was not so "aggravated" as to have "create[d] a general atmosphere of fear and reprisal rendering a fair election impossible."

(Chairman Battista and Members Schaumber and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

B.A.S.S. Electric, Inc., and David L. Bowers d/b/a B.A.S.S Electric, Inc. (Electrical Workers [IBEW] Local 640) Peoria, AZ December 15, 2004. 28-CA-19577; JD(SF)-78-04, Judge Lana H. Parke.

Charles Schwab & Co., Inc. (an Individual) Phoenix, AZ December 16, 2004. 28-CA-19445; JD(SF)-79-04, Judge Gregory Z. Meyerson.

AK Tube, LLC (Individuals) Walbridge, OH December 17, 2004. 8-CA-34830, 34831; JD-117-04, Judge Mark D. Rubin.

Berkshire Nursing Home, LLC (Service Employees Local 1199) West Babylon, NY December 21, 2004. 29-CA-26082; JD(NY)-51-04, Judge Joel P. Biblowitz.

National Steel Supply, Inc. (Trade Unions Local 713) Bronx, NY December 23, 2004. 2-CA-36457, 36464; JD(NY)-54-04, Judge Raymond P. Green.

Connecticut Rural Letter Carriers (an Individual) East Hampton, CT December 23, 2004. 34-CB-2713(P); JD(NY)-53-04, Judge Joel P. Biblowitz.

Sunshine Piping, Inc. (Plumbers Local 366) Cedar Grove, FL December 23, 2004. 15-CA-16781; JD(ATL)-64-04, Judge Margaret G. Brakebusch.

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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.)

Design Originals, Inc. a/k/a Original Designs, Inc. (Steelworkers District 10) (4-CA-31926, et al.; 343 NLRB No. 115) Allentown, PA December 16, 2004. [HTML] [PDF]

Landmark Installations, Inc. (Iron Workers Locals 272 and 698) (12-CA-21376, 21441; 343 NLRB No. 120) Pompano Beach, FL December 16, 2004. [HTML] [PDF]

Modern Packaging Corp. (PACE Local 6-1031) (7-CA-47663; 343 NLRB No. 121) Monroe, MI December 16, 2004. [HTML] [PDF]

New Link, Ltd., *et al.* (State, County and Employees Council 25) (7-CA-47639; 343 NLRB No. 118) Detroit, MI December 16, 2004. [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 CERTIFICATION OF RESULTS OF ELECTION

Aacres/Allvest, L.L.C., Vancouver, WA, 36-UD-357, December 20, 2004
(Chairman Battista and Members Liebman and Schaumber)
Prescott House Nursing Home, North Andover, MA, 1-RC-21805, December 22, 2004

(Chairman Battista and Members Liebman and Schaumber)

(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)

Tinley Park J. Imports, Inc. and Tinley Park V. Imports, Inc., Tinley Park, IL, 13-RC-21270, December 22, 2004 (Chairman Battista and Members Liebman and Schaumber)

Vallejo Garbage Service, Vallejo, CA, 20-UC-410, December 22, 2004 (Chairman Battista and Members Liebman and Schaumber)

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