



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED

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American River Transportation Co. (14-CA-25753; 347 NLRB No. 93) Decatur, IL Aug. 18, 2006. Chairman Battista and Member Schaumber, with Member Walsh concurring in the result, reversed the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by making statements to employees implying that towboat pilots were assigned supervisory duties after May 1999 to discourage their union or protected concerted activity, and that the post-May 1999 assignment of supervisory duties to the pilots violated Section 8(a)(1) and (3). [\[HTML\]](#) [\[PDF\]](#)

In Sept. 1998, the Union, Masters, Mates and Pilots, filed a petition seeking to represent a unit composed of the Respondent's towboat pilots. The Regional Director rejected the Respondent's contention that the pilots were supervisors and issued a decision and direction. The Union failed to obtain a majority of the valid votes counted and a certification of results was issued on Feb. 26, 1999.

Contrary to the judge, the Respondent contended that its pilots possessed supervisory authority and duties prior to May 1999, and that the pilots were authorized to assign or responsibly direct work and exercise independent judgment in making work assignments and directing the crew. The Respondent also argued that the Supreme Court's decision in *Kentucky River Community Care*, 532 F.U.S. 706 (2001) supports finding supervisory status for the pilots.

The General Counsel agreed with the judge that the Respondent did not meet its burden of proving supervisory status for the pilots, contending that the Respondent did not historically treat its pilots as supervisors; it never informed its pilots that they had supervisory authority; and the pilots possessed none of the Section 2(11) indicia of supervisory status. The General Counsel maintained that the Supreme Court's *Kentucky River* decision does not require any factual or legal finding different than those made by the judge, and that the judge's findings of violations should be upheld.

Chairman Battista and Member Schaumber asserted that at all times relevant the Respondent's pilots have been supervisors within the meaning of Section 2(11). They wrote:

They have authority to responsibly direct the towboat crew in their work and to assign work. They use independent judgment in exercising that authority, and they do so in the interest of the employer. Our finding that the Respondent's pilots are statutory supervisors based on their authority to responsibly direct and assign employees is consistent with the approach taken by the Board in several similar post-*Kentucky River* pilots cases. In those cases, the Board found that the pilots at issue used independent judgment in exercising their authority to responsibly direct the towboat crew in their work and to assign work and to assign work to the crew. See *Ingram Barge Co.*, 336 NLRB 1259 (2001); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001); and *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002).

Member Walsh wrote that he concurred in the result reached by his colleagues, but not in their rationale. He went on to say:

In particular, I do not agree that the majority's analysis of the pilots' alleged authority to assign and to responsibly direct other employees, or of the pilots' alleged exercise of independent judgment, is necessarily the proper way to harmonize the result in this case with the concerns express by the Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Nonetheless, I concur in the result based solely on the fact that I acknowledge that the material facts concerning the supervisory status of the Respondent's pilots cannot be meaningfully distinguished from those in current Board precedent involving the same pilot classification in which supervisory status was found.

The majority noted that the judge issued his decision before the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), where the Court rejected the Board's interpretation of the phrase "independent judgment" which appears in Section 2(11)'s definition of the term "supervisor."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Masters, Mates and Pilots; complaint alleged violation of Section 8(a)(1) and (3). Hearing at St. Louis over the course of 10 days in May, July, and Sept. 2000. Adm. Law Judge Paul Bogas issued his decision March 1, 2001.

Jesco, Inc. (26-CA-17283, 17322; 347 NLRB No. 92) Tupelo, MS Aug. 18, 2006. The Board adopted, with modifications, the administrative law judge's findings that the Respondent violated Section 8(a)(1) by interrogating employee Tommy Dearing about his union affiliation and that of other employees; violated Section 8(a)(3) by discharging Dering and employees John Smith, Jay Greenwell, and Kenneth Walgreen for refusing to remove union stickers from the hardhats they wore; and violated Section 8(a)(3) and (1) by manipulating and disregarding its hiring policies at three construction sites in order to avoid hiring union members. Specifically, the Board agreed with the judge that the Respondent unlawfully discriminated against union applicants at its Jackson and Holly Springs sites and that they are entitled to reinstatement and backpay. While it agreed with the judge that the Respondent discriminated against union applicants at the Yazoo City site, it disagreed that the Respondent's use of restrictive language on application forms at the Yazoo City site was unlawful. The Board found that this case is distinguishable from *Zurn/N.E.P.C.O.*, 345 NLRB No. 1 (2005). There, the Board found that, "under the circumstances, the respondent employer's deviations from a hiring policy did not yield an inference that the entire hiring process was unlawfully motivated." [\[HTML\]](#) [\[PDF\]](#)

In light of the decision *FES*, 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir 2002), the Board remanded this case to the administrative law judge for further proceeding. In his original decision, the judge found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. On remand, the judge affirmed his prior conclusions of law and his recommended order.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by Electrical Workers IBEW Locals 480 and 474; complaint alleged violation of Section 8(a)(1) and (3). Hearing Jackson, Feb. 3-7, 1997. Adm. Law Judge Howard I. Grossman issued his decision Aug. 21, 1997 and supplemental decision Feb. 6, 2001.

Nestle Purina Petcare Co. (17-CA-22997; 347 NLRB No. 91) Crete, NE Aug. 16, 2006. The Board affirmed the recommendation of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by denying Food & Commercial Workers District 271 access to its Crete, Nebraska facility to conduct a time and motion study of the work performed by bargaining-unit forklift drivers who had complained to the Union of a work overload. [\[HTML\]](#) [\[PDF\]](#)

The judge found the violation under *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 447 U.S. 905 (1986). The Board agreed. In affirming the judge's finding that the Respondent unlawfully denied the Union access to its Crete facility, the Board emphasized: (1) that the time study was plainly relevant to the Union's proper representation of the forklift drivers on the work-load issue; and (2) that the Respondent failed to carry its burden of showing that there were alternate means by which the Union could effectively represent the employees on the issue and, consequently, failed to establish that its property rights should take precedence over the Union's right of reasonable access. The Board also agreed with the judge that the Respondent's reliance on *Brown Shoe Co. v. NLRB*, 33 F.3d 1019 (8th Cir. 1994), is misplaced, because the facts are distinguishable given the lack of available alternatives to union access.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Food & Commercial Workers District 271; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Crete on June 23, 2005. Adm. Law Judge William L. Schmidt issued his decision Dec. 23, 2005.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

The Wackenhut Corp. (an Individual) Plymouth, MA August 15, 2006. 1-CA-42837; JD-56-06, Judge Wallace H. Nations.

Infiniti of Montclair (an Individual) Montclair, CA Aug. 16, 2006. 21-CA-36952; JD(SF)-41-06, Judge Nick Valenti.

Letter Carriers Branch 410 (an Individual) Henderson, KY Aug. 17, 2006. 25-CB-8924; JD-60-06, Judge John T. Clark.

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.)

American Commercial Finance, Inc. (Teamsters Local 580) (7-CA-49153; 347 NLRB No. 90) Dimondale, MI August 14, 2006. [\[HTML\]](#) [\[PDF\]](#)

**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS
IN REPRESENTATION CASES**

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

American Medical Response, Fort Wayne, IN, 25-RC-10310, Aug. 16, 2006 (Members Liebman, Schaumber, and Kirsanow)

L.M. Waste Service Corp., Yauco, PR, 24-RC-8482, Aug. 16, 2006 (Members Liebman, Schaumber, and Kirsanow)

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

*Desert Springs Hospital Medical Center, Las Vegas, NV, 28-RD-946, Aug. 15, 2006
(Members Liebman, Schaumber, and Kirsanow)*

(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)

Boston Medical Center Corp., Boston, MA, 1-UC-839, Aug. 16, 2006 (Members Liebman, Schaumber, and Kirsanow)

Eden Medical Center, Castro Valley, CA, 32-RD-1486, Aug. 16, 2006 (Members Schaumber and Kirsanow; Member Liebman dissenting)

Miscellaneous Board Orders

ORDER [granting Intervenor's requests for special permission to appeal Acting Regional Director's order and denying the appeals on their merits]

*JBM, Inc., d/b/a Bluegrass Satellite, Indianapolis, IN, 25-RC-10327, Aug. 17, 2006
(Chairman Battista and Members Schaumber and Walsh)*
