

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN DIRECTIONAL BORING, INC.  
d/b/a ADB UTILITY CONTRACTORS, INC.

and

Cases 14-CA-27386,  
14-CA-27570,  
and 14-CA-27677

LOCAL 2, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S SUPPLEMENTAL BRIEF  
RELEVANT TO THE BARGAINING ORDER OR ALTERNATIVE REMEDIES

Counsel for the Acting General Counsel submits that a *Gisse/* bargaining order remains the appropriate remedy in these cases despite any changed circumstances. If the Board should find a bargaining order is no longer appropriate, special notice and access remedies would be appropriate and are requested.

I. A *Gisse/* Bargaining Order Remains Appropriate:

Any "changed circumstances" claimed by Respondent occurred solely because Respondent injected significant delay into the processing of these cases: by committing further unfair labor practices, and by pursuing the spurious claim that crew leaders were statutory supervisors.

Respondent caused significant delay in the processing of these cases by continuing to commit numerous and substantial unfair labor practices, even after the initial unfair labor practice hearing commenced. The charge in Case 14-CA-27386 was filed on April 16, 2003; a Complaint and Notice of Hearing issued on June 26, 2003; and the hearing started on August 4, 2003. After nine (9) days of hearing, during one week in August and another in September, Respondent committed additional unfair labor practices. Case 14-CA-27570 was consolidated with the original charge and six (6)

additional days of hearing were required in October 2003. After 15 days of hearing, Respondent was not finished committing serious unfair labor practices. The charge in Case 14-CA-27677 was filed on December 2, 2003; a complaint issued on December 9, 2003; all three cases were consolidated; and the record was reopened for further hearing on February 5, 2004. Briefs were submitted about April 1, 2003; nearly a year from the start of Respondent's virulent campaign to crush the majority will of employees.

Administrative Law Judge Schlesinger's Decision issued two years later, on May 10, 2005. He attributed the delay in issuing his decision specifically to the fact that he was awaiting the Board's resolution of three cases<sup>1</sup> involving the supervisory issues raised by the U.S. Supreme Court's decision in *Kentucky River*, 532 U.S. 706 (2001). It was only due to "personal commitments" that he issued his decision before those cases were decided. *American Directional Boring, Inc.*, 353 NLRB No. 21, slip op p. 11 (2008). While objections to his decision were pending, on September 29, 2006, the Board issued the *Oakwood* trilogy of decisions resolving the Section 2(11) issues of assigning work, responsibly directing work, and independent judgement.<sup>2</sup> As a result, on September 30, 2006, these cases were remanded to Administrative Law Judge Buxbaum who issued his Supplemental Decision on August 23, 2007. Nearly 4 years of delay is attributable to Respondent's specious injection of the supervisory issue.

To deny the *Gissel* bargaining order here would permit Respondent to benefit from its own misconduct. Respondent fabricated the reasons it fired each of the discriminatees, just as it fabricated testimony related to the supervisory status of crew leaders. The administrative process has been significantly prolonged by Respondent's

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<sup>1</sup> Those three cases, now very well known, are *Oakwood Healthcare, Inc.*, Case 7-RC-22414; *Golden Crest Healthcare Center*, Case 18-RC-16415-6; and *Croft Metals, Inc.*, Case 15-RC-8393.

<sup>2</sup> The *Oakwood* trilogy consists of: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006); and *Croft Metals, Inc.*, 348 NLRB 717 (2006).

fabricated defenses and false claims of Section 2(11) authority. Respondent must not profit from its own wrongdoing. The bargaining order, which is supported by substantial evidence, should be affirmed here.

II. Alternative to Bargaining Order – Only Significant Special Remedies Suffice:

A bargaining order is necessary here, as two administrative law judges and the Board has already found. The passage of time has not diminished the necessity for a *Gissel* bargaining order. There is no special remedy that can equal the remedial power of a bargaining order. If the bargaining order is denied, however, the Board should impose upon Respondent its entire arsenal of special remedies. The full arsenal of special remedies include: full and regular access to the Employer's facility; time for the Charged Party to conduct captive audience meetings; full access to employee and job site data; access to internal mechanisms of communicating with employees; reading of the notice by Respondent's owner to all employees; mailing of the notice to employees; and posting of the notice on its web site.

In the absence of a bargaining order, imposing anything less than significant special remedies upon this Respondent will send a message, loud and clear, to all employers who would oppose unionization in the same manner, that the National Labor Relations Act is hollow.

For all these reasons, Counsel for the Acting General Counsel submits that a bargaining order remains appropriate here, and in the alternative, the full arsenal of special remedies should be imposed.

August 17, 2010



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**CERTIFICATE OF SERVICE**

Pursuant to the National Labor Relations Board's Rules and Regulation, Section 102.114, a true and correct copy of the foregoing Counsel for the Acting General Counsel's Supplemental Brief Relevant to the Bargaining Order or Alternative Remedies was served electronically this 17th day of August 2010 upon the following:

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