National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED
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Aramark Services, Inc. (7-CA-43748; 344 NLRB No. 68) Sterling Heights, MI April 29, 2005. Chairman Battista and Member Schaumber held, contrary to the administrative law judge, that the arbitrator's conclusion that the Respondent properly disciplined Charging Party Leslie Lauria, for harassing other employees in connection with a union-related issue, was not clearly repugnant to the Act within the meaning of *Spielberg Mfg. Corp*., 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984). Chairman Battista and Member Schaumber, in dismissing the complaint, found that the judge erred by declining to defer to the arbitrator's decision because the General Counsel failed to show, under *Olin*, that the decision—to reinstate Lauria without backpay—was not consistent with the Act. [HTML] [PDF]

Member Liebman, dissenting, concluded that the judge correctly found that Lauria's discharge violated Section 8(a)(3) and (1). She explained that the arbitrator's decision—which upheld the Respondent's discipline of Lauria, who gathered signatures on a petition involving a union steward's election—disregarded well-established principles of Board law because he improperly relied on the subjective reactions of other employees in concluding that Lauria harassed her coworkers. Member Liebman wrote: "The arbitrator's own fact findings rather confirm that Lauria's discharge violated the Act. When there is no dispute that an employer's disciplinary action was directed at Section 7 activity, a *Wright Line* analysis to determine the employer's motive is unnecessary. Because the discharge was directed at Lauria's protected activity and she never lost the Act's protection, her discharge violated Section 8(a)(3) and (1)."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Leslie Lauria, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on July 30, 2002. Adm. Law Judge Karl H. Buschmann issued his decision Nov. 26, 2002.

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Consolidated Delivery & Logistics, Inc. (22-CA-23543; 344 NLRB No. 67) Woodbury, NJ April 28, 2005. The Board granted the General Counsel's motion for partial summary judgment as to paragraph 1 of the compliance specification which identifies the 13 discriminatees and alleges that the backpay period for all discriminatees begins on August 9, 1999, and ends on February 21, 2000. It denied the General Counsel's motion to strike the records (invoices that showed Labor Ready billed the Respondent for only about 201 to 336 hours per week—not 520 per week—during the backpay period). The General Counsel's position is that all 13 discriminatees worked 40 hours per week during the backpay period. The Board's earlier decision is reported at 337 NLRB 524 (2002). [HTML] [PDF]

Chairman Battista and Member Schaumber denied the motion for partial summary judgment with respect to the gross backpay formula and calculations set forth in paragraphs 2-4 of the backpay specification. They remanded the proceeding to the Regional Director for the purpose of scheduling a hearing before an administrative law judge limited to taking evidence concerning paragraphs 2-4 of the compliance specification. Because the General Counsel did not seek summary judgment with respect to the discriminatees' interim earnings and expenses, the majority ordered a hearing on those issues as well.

Dissenting in part, Member Liebman said that she would grant the General Counsel's motion for summary judgment as to the gross backpay formula and calculations. She found that while the Respondent objects to the premise that the 13 discriminatees would have worked 40 hours per week during the backpay period, the Respondent does not allege an alternative number of hours that any of the individual discriminatees would have worked and has "failed to provide details about the application" of its alternative method of backpay calculation. Member Liebman contended that because the information provided by the Respondent is not sufficiently specific to meet the requirements of Section 102.56(b), the General Counsel is entitled to summary judgment as to the gross backpay formula and calculations.

(Chairman Battista and Members Liebman and Schaumber participated.)

General Counsel filed motion for summary judgment December 13, 2004.

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Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates, Inc. (2-CA-35437, et al.; 344 NLRB No. 65) New York, NY April 25, 2005. The Board affirmed the administrative law judge's recommendations and held that the Respondent committed numerous violations of the Act. Among others, it found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet and bargain with the Carpenters District Council of New York and Vicinity, and by unilaterally subcontracting sheetrocking and related work without first notifying the Carpenters Union and affording it an opportunity to bargain about the subcontracting; violated Section 8(a)(3) and (1) by its mass layoff of carpenters on April 16, 2003, by discharging employees Benedict Plentie and Davidson Plenty, and by subcontracting window installation work; and violated Section 8(a)(1) by threatening Sean Logan when Supervisor Sammy Superville cautioned Logan to "be careful talking to him," referring to union agent Anthony Williamson. [HTML] [PDF]

The allegations of unfair labor practices by the Respondent were in connection with two representation elections held in separate units at the Respondent's two construction sites in New York City. The Carpenters Union won the first election held on May 30, 2003 and was certified as the bargaining representative of a unit of carpenters. Laborers Local 79 lost the second election held June 16, 2003 in a bargaining unit of laborers and the judge recommended that a rerun election be held because of objectionable conduct by the Respondent. In an unpublished order dated Nov.16, 2004, the Board adopted the judge's recommendation, set aside the election, and directed a second election.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters District Council of New York City and Vicinity, Laborers Local 79, and Kelvin Greenidge and Wendell Henderson, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at New York City, Feb. 26-27 and March 1 and 5, 2004. Adm. Law Judge Raymond P. Green issued his decision May 27, 2004.

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Hotel and Restaurant Employees Local 26 (1-CA-37883; 344 NLRB No. 70) Boston, MA April 29, 2005. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by discharging Emma Johnson because of her protected concerted activities when she complained about employee leafletling schedules during the Respondent's corporate campaign against the Hilton Hotel in Boston, MA; and by telling an employee that Johnson had been discharged because of her complaints. [HTML] [PDF]

Chairman Battista and Member Schaumber granted the General Counsel's unopposed motion to withdraw the request for a special remedy made in the General Counsel's exceptions to the judge's decision. The General Counsel originally sought a remedial order requiring the Respondent to reimburse any discriminatee entitled to a monetary award, for any extra Federal and/or State income taxes that would or may result from the lump sum payment of the award.

Member Liebman would deny the General Counsel's motion to withdraw the request for a tax compensation remedy, noting that the General Counsel has not adequately explained his reasons and only cited the passage of time and "changed circumstances." She pointed out that since the Board is free to consider remedial issues sua sponte and a victim of discrimination who receives a lump sum backpay award may incur a heightened tax burden, the Board is wasting an opportunity to align its remedies with the realities of existing tax law by declining to order the tax compensation remedy.

Chairman Battista and Member Schaumber did not reach the remedial issue as discussed by Member Liebman because the General Counsel does not seek the remedy and the Charging Party never sought it. They acknowledged that the Board has the power, sua sponte, to impose its own remedies, but they also observed that where, as here, the Board is considering a significant and substantial change in remedial policy, it is important to hear and consider the parties' views, which are not presented in the instant case. Chairman Battista and Member Schaumber wrote: "In an appropriate case, a charging party can present its views, a respondent can present an opposing view, and the General Counsel can present his views, including any problems he may foresee in regard to implementation of the remedy. We invite parties to present these matters in an appropriate case."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Emma S. Johnson; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge Raymond P. Green issued his decision May 4, 2001.

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A L Investors Orlando, LLC, d/b/a The Pavilion at Crossing Pointe (12-RC-8965; 344 NLRB No. 73) Orlando, FL April 29, 2005. Chairman Battista and Member Schaumber found that challenged voter Carlos Mogollon was a regular part-time employee who had been temporarily laid off and that, as of the Sept. 13, 2003 payroll eligibility date, he had a reasonable expectation

of recall in the near future and therefore was eligible to vote in the election held Oct. 24, 2003. They overruled the challenge to Mogollon's ballot and directed that the Regional Director open and count his ballot, along with those of Mary Cooper and Kenneth Lee, and issue a revised tally of ballots and the appropriate certification. [HTML] [PDF]

Member Liebman, dissenting, would find Mogollon ineligible to vote, saying: "Even assuming that Mogollon reasonably expected to be recalled *some day*, there is no basis for finding that as of the payroll eligibility dates he would reasonably have expected recall *in the near future*."

The tally of ballots for the election shows 17 for and 14 against the Petitioner, Service Employees 1199 Florida. In the absence of exceptions, the Board adopted the hearing officer's recommendation to overrule the challenges to the ballots of Lee and Cooper and Petitioner's Objection 3. The Petitioner withdrew Objections 1, 2, and 4. The Petitioner challenged the ballot of Mogollon on the ground that he was not employed on the stipulated payroll eligibility date of Sept. 13, 2003. The hearing officer recommended that the challenge to Mogollon's ballot be sustained, finding that Mogollon was not a regular part-time employee because he worked no hours between his layoff on July 5, 2003 and his recall on Oct. 16, 2003, after the eligibility date.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Spartech Corp. (21-CA-36049, et al.; 344 NLRB No. 72) La Mirada, CA April 29, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Mauricio Pena regarding his union activity. It found it unnecessary to pass on the other interrogation allegations as any findings of additional violations would not affect the remedy. [HTML] [PDF]

Chairman Battista and Member Liebman also adopted the judge's finding that the Respondent created an impression of surveillance and violated Section 8(a)(1) when its agent, Sales Representative Zavala, told employee Soria, in the course of statements regarding the upcoming union election, that Respondent's vice president, Hiatt, knew who had attended a union meeting held a day or two prior.

Contrary to the judge and his colleagues, Member Schaumber would dismiss the complaint allegation that the Respondent created the impression of surveillance because in his view, the union meeting was held in an open park near the Respondent's plant, and there was no indication the employees were attempting to keep the meeting from the Respondent's attention. In light of the openness of the meeting and its proximity to the plant, he found that the General Counsel has not established by a preponderance of evidence that Soria would reasonably assume the Respondent had been informed of the meeting through surveillance.

The Board found merit in the General Counsel's contention that the judge failed to include in his recommended order a provision that the notice to employees be posted in both English and Spanish. Noting that a great number of the employees at the Respondent's facility are primarily Spanish-speaking, it modified the order to provide that the notice be posted in both English and Spanish.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 170; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles, Oct. 18-19, 2004. Adm. Law Judge Gerald A. Wacknov issued his decision Jan. 18, 2005.

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St. Vincent Hospital, LLC (1-RC-21717; 344 NLRB No. 71) Worcester, MA April 29, 2005. Members Liebman and Schaumber directed the Regional Director to count two "void" ballots as "No" votes; to open and count the ballots of Ife Bath, Lisa Hall, Yvonne Jones, Jane Lantz, Lynne Mello, Donna Mosher, Jennifer Nedoroscik, Roberta Ohman, Kim Pilat, and Ellen Randall; and to issue a revised tally of ballots and the appropriate certification. The tally of ballots for the election held Feb. 27, 2004 shows 218 votes for and 207 against, Food & Commercial Workers Local 1445, with two void ballots and 21 challenged ballots, a sufficient number to affect the election results. The two void ballots had the word "No" written in both the "Yes" and "No" boxes. [HTML] [PDF]

The Board reversed the administrative law judge's recommendation to overrule the challenge to the ballot of Kathy Bernard, finding that the unit description did not include employees employed at the Employer's 10 Washington Square location, where Bernard was employed. Members Liebman and Schaumber, with Chairman Battista dissenting in part, adopted the administrative law judge's recommendation to overrule the Employer's objections in their entirety. The objections alleged, among others, that the Petitioner improperly used employees' photographs in its campaign materials without their permission, that the Board agents engaged in misconduct and conducted the election in a lax and inattentive manner, that the method for identifying the voters was inadequate, that certain eligible voters were disfranchised, and that improper communications occurred between Petitioner observers and voters during the election.

Contrary to his colleagues, Chairman Battista found conditional merit in the Employer's objections insofar as they allege that the integrity of the election was compromised because two employees were permitted in a voting booth at the same time. He would remand the case to the Region to: open and count the ten ballots of the above-named individuals; count the two "void" ballots as "No" votes; and prepare and serve on the parties a revised tally of ballots. If the revised tally of ballots shows that the number of compromised votes was determinative, Chairman Battista would set aside the election.

(Chairman Battista and Members Liebman and Schaumber participated.)

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Stanford New York, LLC d/b/a Stanford Hotel (2-CA-35910; 344 NLRB No. 69) New York, NY April 29, 2005. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge Joong Hyun Park if he did not agree to be excluded from the collective-bargaining unit, and violated Section 8(a)(1) and (3) by discharging Park. [HTML] [PDF]

General Manager Kevin Kim contended that Park was a supervisor and thus not eligible for union membership. At a meeting with Union Agent Leo Lanci to determine whether Park was a supervisor, Kim continued to insist that Park was a supervisor and threatened Park in Korean that if he did not tell Lanci that he was a supervisor, he would be fired. A heated discussion ensued and Park loudly called Kim a "f—ing son of a bitch" in English. Kim discharged Park that evening and sent Park a letter stating: "You are terminated as an employee of the Hotel Stanford as of October 31, 2003 for gross improprieties in your conduct with hotel management."

The Board agreed with the judge that Park engaged in protected activity when he met with Lanci and Kim and asserted his right to union representation and inclusion in the collective bargaining unit. In making this determination, the Board examined the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. It found all factors weighed in favor of protection and that Park did not lose the protection of the Act by his conduct.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Joong Hyun Park, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York on June 22, 2004. Adm. Law Judge Steven Davis issued his decision Oct. 7, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

United States Postal Service (Letters Carriers Sunshine Branch 504) Albuquerque, NM April 21, 2005. 28-CA-18682(P), et al.; JD(SF)-34-05, Judge Thomas M. Patton.

Waste Management of Arizona, Inc. (Teamsters Local 104) Phoenix, AZ April 25, 2005. 28-CA-19526; JD(SF)-37-05, Judge Gregory Z. Meyerson.

Newcor Bay City Div. (Auto Workers [UAW] Local 496) Bay City, MI April 26, 2005. 7-CA-47590; JD-31-05, Judge Paul Bogas.

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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.)

KJS Construction, Inc. (Carpenters New York District Council) (344 NLRB No. 66; 2-CA-36393-1) New York, NY April 25, 2005. [HTML] [PDF]

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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 DIRECTION OF SECOND ELECTION

Jetsetter Express, Inc., Stockton, CA, 32-RC-5298, April 26, 2005 (Chairman Battista and Members Liebman and Schaumber)

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

DECISION AND CERTIFICATION OF REPRESENTATIVE

Sectek, Inc., Washington, D.C., 5-RC-15816, April 28, 2005 (Chairman Battista and Members Liebman and Schaumber)
Harrison Associates, Somerset, NJ, 22-RC-12569, April 27, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

L & M Optical Disc, LLC, Brooklyn, NY, 29-RC-10315, April 27, 2005 (Chairman Battista and Members Liebman and Schaumber)
Elbar, Inc., Albuquerque, NM, 28-RC-6330, April 28, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(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)

Fresenius Medical Center, Union, NJ 22-RC-12580, April 26, 2005 (Chairman Battista and Members Liebman and Schaumber)

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Miscellaneous Board Orders

ORDER [granting request to withdraw petition]

Fresenius Medical Center, Union, NJ 22-RC-12580, April 28, 2005 (Chairman Battista and Members Liebman and Schaumber)

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