National Labor Relations Board

Weekly Summary of NLRB Cases

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Milford Manor Nursing & Rehabilitation Center (22-CA-26745; 346 NLRB No. 7) West Milford, NJ Dec. 13, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish all of the information requested in SEIU 1199 New Jersey Health Care Union's letter dated July 23, 2004. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by SEIU 1199 New Jersey Health Care Union's; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, June 7 and 17, 2005. Adm. Law Judge D. Barry Morris issued his decision Aug. 18, 2005.

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Neptco, Inc. (11-CA-18576; 346 NLRB No. 6) Granite Falls, NC Dec. 13, 2005. The Board agreed with the administrative law judge's dismissal of allegations that the Respondent threatened employees and prohibited them from wearing union insignia in violation of Section 8(a)(1) of the Act and discharged employees Ken Price and Gordon O'Meara because of their activities for Teamsters Local 61 in violation of Section 8(a)(3) and (1). [HTML] [PDF]

Chairman Battista and Member Schaumber reversed the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging employees Donald Parnell and Alesa Tingler because of their union activities, and dismissed the complaint in its entirety. They found, unlike the judge, that the General Counsel failed to satisfy his initial *Wright Line* burden by showing that the discharges of Parnell and Tingler were motivated by union animus.

Dissenting in part, Member Liebman would affirm the judge's finding that the Respondent's discharges of Parnell and Tingler were motivated by antiunion animus and therefore violated Section 8(a)(3) and (1). Contrary to her colleagues, she found that the General Counsel has met his burden of establishing that the discharges were unlawfully motivated. Member Liebman concluded that the Respondent's explanation for summarily firing these two leading union supporters—job performance, socializing after being told to move on, and being away from their respective work areas during work time—without affording them the normal course of progressive discipline under its established disciplinary policy does not stand up.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Teamsters Local 61; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Morganton, June 12-15, 2000. Adm. Law Judge Richard J. Linton issued his decision Oct. 25, 2000.

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Media General Operations, Inc., d/b/a Richmond Times-Dispatch (5-CA-29157, et al.; 346 NLRB No. 11) Richmond, VA Dec. 16, 2005. In agreement with the administrative law judge, the Board found that the Respondent violated Section 8(a)(5) of the Act by failing to

negotiate over a change regarding paying union negotiators for time spent in bargaining sessions and that it did not violate the Act by unilaterally terminating the holiday bonus or by refusing to provide financial data requested by the Richmond Newspapers Professional Assn. [HTML] [PDF]

Chairman Battista and Member Schaumber agreed with the judge that the Respondent did not unilaterally change its past practice in refusing to pay a unit employee for time spent conducting official collective-bargaining functions during arbitration, noting there was no established practice of paying the Union's representatives at arbitration. Member Liebman would find that the Respondent violated Section 8(a)(5) and (1) because the Respondent's practice of paying employees for time spent performing collective-bargaining functions had become an implied term and condition of employment, and the unit employee's role as the Union's representative at the arbitration was such a function.

The Board reversed the judge's finding that Section 10(b) barred the allegation that the Respondent violated Section 8(a)(1) by its disparate enforcement of its computer/e-mail policy. However, it adopted his alternative finding that the Respondent disparately enforced its rule by informing the Union on July 13 and 20, 2000, that it was prohibited from utilizing the Respondent's email and computer systems to send union bulletins and other union-related notices.

The Union filed the unfair labor practice charges alleging disparate enforcement of the computer/e-mail policy on Aug. 7, 2000. The judge found that the Union had clear notice of the policy in 1999, when Union President Jonathan Pope was informed that the computers and e-mail were not to be used for union business. Contrary to the judge, Members Liebman and Schaumber viewed each incident of disparate enforcement of the Respondent's computer/e-mail policy as a separate independent act for purposes of Section 10(b). They noted the breadth of the e-mail usage permitted by the Respondent, which included a wide variety of e-mail messages unrelated to the Respondent's business, and found this case analogous to *Seton Co*., 332 NLRB 979 (2000). There, the Board held that the employer violated Section 8(a)(1) by discriminatorily enforcing a no-solicitation/no distribution rule against employees' prounion activities while knowingly allowing employees to solicit and distribute antiunion materials. Although the Board found evidence of disparate enforcement that occurred outside the 10(b) period, it emphasized that it was only relying on a warning within the period to establish the violation.

Chairman Battista concurred in the conclusion that there was no 10(b) bar to the complaint's allegation that the Respondent selectively and disparately enforced its policy concerning the use of the Respondent's computers, but he found *Seton Co*., is inapposite. In his view, where a party, outside the 10(b) period, gives clear and unequivocal notice of a discriminatory practice, and acts consistent with that practice, Section 10(b) would bar an attack on the practice as it continues into the 10(b) period. The Chairman noted that this Respondent gave such clear and unequivocal notice of its discriminatory conduct in May or June 1999, well

outside the 10(b) period. However, the Union thereafter used the computers for union business, and the Respondent did not seek to enforce that discriminatory practice. Chairman Battista wrote:

> Thus, the Union would reasonably believe that a discriminatory practice was no longer being followed, and would reasonably forego the filing of a charge. However, in July 2000, within the 10(b) period, Respondent renewed its disparate treatment of union activity, and there is no suggestion that it thereafter desisted in this practice. The Union filed its charge in August 2000. In these circumstances, I would find no 10(b) bar to an attack on the July 2000 action.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Richmond Newspapers Professional Assn.; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Richmond, March 18-20, 2002. Adm. Law Judge Bruce D. Rosenstein issued his decision June 4, 2002.

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Wisconsin Bell, Inc., an Ameritech Corp. d/b/a SBC Midwest (30-CA-16442-1; 346 NLRB No. 8) Milwaukee, WI Dec. 15, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide information relating to the extent of subcontracting requested by Communications Workers Local 4603 that was relevant to the Union's grievance handling duties, but not by failing to provide copies of so-called contracts or information concerning pricing. Unlike the judge, the Board found that the Respondent complied with the Union's request for information concerning the subcontractors' identities and the nature and location of subcontracted work. Member Liebman did not participate in the decision on the merits. [HTML] [PDF]

(Chairman Battista and Member Schaumber participated.)

Charge filed by Communications Workers Local 4603; complaint alleged violation of Section 8(a)(5). Hearing at Milwaukee, July 22-23, 2004. Adm. Law Judge George Carson II issued his decision Sept. 15, 200.

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Siemens Building Technologies, Inc. (3-CA-24624; 346 NLRB No. 9) Rochester, NY Dec. 14, 2005. In affirming the administrative law judge's recommendations, the Board found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Operating Engineers Local 832 as the exclusive bargaining representative of its employees at its Fleet facility. [HTML] [PDF]

In an earlier decision reported at 345 NLRB No. 91 (2005) (*Siemens I)*, the Board found that the Respondent became a successor employer to Monroe County, New York when it took over the operations of the County's Iola power plant, that a subsequent poll of employees' union sentiments was unlawful, and that the Respondent violated Section 8(a)(1) and (5) by failing to recognize and bargain with the Union. The Respondent began operating the Fleet facility, the facility involved herein, when the Iola plant was decommissioned.

The judge, relying on the standard articulated in *Rock Bottom Stores*, 312 NLRB 400, 401 (1993), found that the Respondent had a continuing obligation to recognize and bargain with the Union because the operations at the Fleet facility are substantially the same as those at the Iola plant, and because employees formerly employed at Iola constitute a substantial percentage of the Fleet facility's employee complement. Chairman Battista and Member Schaumber noted that a majority of the Fleet employees were former unit employees from the Iola facility, and found it unnecessary to pass on whether the bargaining obligation would exist if some lesser percentage of employees had been transferred.

The Respondent asserted that it has no obligation to bargain regarding its employees at the Fleet facility, contending that it was not a successor of Monroe County at the time it took over the operation of the Iola plant, and that the poll it conducted in June 2003 was valid and demonstrated that the bargaining unit employees "oppose[d] representation by IUOE Local 832." The Board found no merit in the Respondent's exceptions, as to the issue of successorship, in light of its decision in *Siemens I*. See *Detroit Newspapers*, 326 NLRB 782 fn. 3, 784-85 (1998) (applying collateral estoppel), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000). The Board also found without merit the Respondent's contention that the judge erred in denying its motion to postpone the hearing in this case until the issuance of *Siemens I*. See *Detroit Newspapers*, 326 NLRB at 785.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Operating Engineers Local 832; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Buffalo, May 4-5, 2004. Adm. Law Judge C. Richard Miserendino issued his decision Aug. 25, 2004.

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Tap Express, Inc. (5-CA-32130, 32181; 346 NLRB No. 10) Virginia Beach, VA Dec. 14, 2005. The Board granted the General Counsel's motion for summary judgment on the basis of the Respondent's failure to comply with the terms of a settlement agreement which required the Respondent to: (1) pay backpay owed to the discriminatees according to a set schedule; (2) offer reinstatement to five of the discriminatees; (3) expunge all references to unlawful discipline and terminations; and (4) post a notice to employees regarding its unlawful conduct. [HTML] [PDF]

The Board determined that by the terms of the settlement agreement, the Respondent's answer to the complaint has been withdrawn and all allegations of the complaint are now deemed to be true. It found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act, which, among others, restrained employees in the exercise of the rights guaranteed in Section 7 of the Act; discriminated in regard to the hire or tenure, or terms and conditions of employment of its employees; and interfered, restrained, and coerced employees, and discriminated in regard to the hire, tenure, or terms and conditions of employment of its employees, thereby discouraging membership in the labor organization.

(Chairman Battista and Members Liebman and Schaumber participated.)

General Counsel filed motion for summary judgment Aug. 4, 2005.

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Waste Management of Arizona, Inc. (28-CA-18542, et al.; 345 NLRB No. 114) Phoenix, AZ Dec. 9, 2005. Chairman Battista and Member Schaumber found, contrary to the administrative law judge, that the Respondent did not violate Section 8(a)(1) of the Act by creating the impression of surveillance of employees' union activities when Route Manager Alan Rush told driver Samuel Wonderling that he knew employees had held a union meeting. They concluded that Rush's statement "would not have reasonably implied that Rush had monitored employees' activities, given the various other ways in which Rush might have learned of the nonsecret meeting." [HTML] [PDF]

In affirming the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by terminating Troy Hoekstra, Chairman Battista and Member Schaumber applied *Wright Line*, 251 NLRB 1083 (1980). They found that the General Counsel made an initial showing that Hoekstra's union activity was a motivating factor in the Respondent's adverse action against him, and that the Respondent showed that it would have taken the same action even in the absence of the protected conduct. Like they judge, Chairman Battista and Member Schaumber decided that Hoestra lost the Act's protection by engaging in opprobrious and abusive conduct when he complained to Rush that he had been paid less than he was owed, saying: "Hoekstra screamed profanities at Rush in a crowded work area, and repeatedly refused to speak to him in private, preferring to loudly curse at him in front of other employees. His conduct was insubordinate, it disrupted the workplace, and undermined Rush's supervisory authority."

Member Liebman, dissenting, observed that Rush's comment that he knew about the Union meeting was made in the context of other statements that he thought he had been successful in firing all of the union supporters and had tried to make sure that he did not hire any supporters. These statements, considered together, strongly suggested that Rush's knowledge of the union meeting was acquired as part of his ongoing campaign to closely monitor the employees' union activities, Member Liebman said in finding a violation.

Contrary to the majority, Member Liebman concluded that the Respondent failed to show that Hoestra would have been terminated even if he had not engaged in union activity. She noted that Hoekstra, an open and active union supporter, was the target of at least three of the Respondent's violations of Section 8(a)(1) during the union campaign: an unlawful interrogation, a threat of loss of pay, and a threat of futility of organizing. What appeared to be a second pay shortage certainly established a degree of provocation, Member Liebman reasoned, stating: "Given this, the fact that workers often used profanity in the workplace, and Hoekstra's spotless employment record (he was a 7-year veteran with excellent evaluations and no prior disciplinary record), I do not accept that the Respondent would have fired Hoekstra over this one incident, even if he had not been a union supporter. Especially in light of Respondent's clearly intent to fire all union supporters, I would find that the discharge of Hoekstra, violated Section 8(a)(3)."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 104; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Phoenix, Jan. 26-29, Feb. 17-19, and April 6, 2004. Adm. Law Judge Albert A. Metz issued his decision Aug. 16, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Bob Showers Windows and Sunrooms, Inc. (Carpenters Greater Pennsylvania Regional Council) Clearfield, PA Dec. 14, 2005. 6-CA-34287, et al.; JD-88-05, Judge Ira Sandron.

Valley Central Emergency Veterinary Hospital (AFSCME Local 488) Whitehall, PA Dec. 14, 2005. 4-CA-33631, et al.; JD-91-05, Judge Richard A. Scully.

Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons (an Individual) Harleysville, PA Dec. 15, 2005. 4-CA-33936; JD-90-05, Judge David L. Evans.

E.I. Dupont de Nemours, Louisville Works (PACE Local 5-2002) Louisville, KY Dec. 15, 2005. 9-CA-40777, 41634; JD-92-05; Judge Karl H. Buschmann.

Kings Material Handling Corp. (Teamsters Local 1205) Brooklyn, NY Dec. 16, 2005. 29-CA-26991; JD(NY)-53-05, Judge Raymond P. Green.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(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)

Tree of Life, Inc. d/b/a Gourmet Award Foods, Los Angeles, CA, 21-RC-20854, Dec. 14, 2005 (Chairman Battista and Member Liebman; Member Schaumber dissenting)

Hope Community, Inc., New York, NY, 2-RC-23016, Dec. 14, 2005 (Chairman Battista and Members Liebman and Schaumber)

Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., Rockville, MD, 5-RC-15903, Dec. 14, 2005 (Chairman Battista and Members Liebman and Schaumber)

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