National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

August 11, 2006 W-3064

VISIT WWW.NLRB.GOV FULL TEXT

CASES SUMMARIZED

OTHER CONTENTS

Abbott Ambulance of Illinois (14-RC-12491; 347 NLRB No. 82) Belleville, IL Aug. 2, 2006. Members Liebman and Kirsanow, with Chairman Battista dissenting, affirmed the hearing officer's recommendations and directed the Regional Director to open and count the ballot of Kelly Grant and thereafter, prepare and serve on the parties a revised tally of ballots and the appropriate certification. The tally of ballots for the election held April 15, 2004 showed 28 votes for and 28 against the Petitioner, Professional EMTs & Paramedics (PEP), with 3 challenged ballots, a number sufficient to affect the results. The Regional Director approved the parties' agreement to sustain challenges to two ballots. [HTML] [PDF]

The majority agreed with the hearing officer that Grant was on disability leave and was neither affirmatively discharged nor had resigned at the time of the election and was therefore eligible to vote under *Red Arrow Freight Lines*, 278 NLRB 965 (1986). The majority noted that the Board has recently reaffirmed the *Red Arrow* standard in *Home Care Network, Inc*., 347 NLRB No. 80 (2006) and has responded in that decision to the Chairman's expressed disagreement with the standard.

Contrary to his colleagues, Chairman Battista contended that on the date of the election, Grant had no reasonable expectancy of returning to her EMT position, or any other job in the bargaining unit. He would therefore sustain the challenge to her ballot. He wrote:

> For the reasons discussed in my partial dissent in *Home Care Network*, 347 NLRB No. 80 (2006), I would not apply the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986), to determine the voting eligibility of individuals who are absent from their unit positions for medical reasons. Rather, consistent with the Board's eligibility standard for laid-off employees, I would assess whether the employee, as of the date of the election, has a reasonable expectancy of returning to the unit. Applying that test, I would find that Kelly Grant was not eligible to vote in the election.

(Chairman Battista and Members Liebman and Kirsanow participated.)

***

Airo Die Casting, Inc., a subsidiary of Leggett & Platt, Inc. (6-CA-34769; 347 NLRB No. 75) Loyalhanna, PA July 31, 2006. In affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Ronald W. Lawson III because of his union activities, including participating in a lawful strike. [HTML] [PDF]

Lawson was discharged because while stationed on the picket line outside the Respondent's facility, he made an obscene gesture accompanied by an obscene utterance and a racial epithet directed at a security guard in the car who was tape recording. The judge noted that the picket line misconduct was not accompanied by any threats or any coercion, or any intimidating conduct, and while Lawson's comment and gesture were clearly impulsive and offensive, in particular the racial epithet, it did not occur during his working time or in his working place. He further wrote that as argued by the General Counsel, "the Board has found that a striker's use of the most vile and vulgar language, including racial epithets, does not

deprive him of the protection of the Act, so long as those actions do not constitute a threat." *Detroit Newspaper*, 342 NLRB 223 (2004).

Members Schaumber and Kirsanow agree with the judge's conclusion, but in their view there may well be circumstances, absent here, in which a picketing employee's use of the word "nigger" might cause the employee to lose the Act's protection, even in the absence of violence or explicit threats of violence. Member Liebman finds it unnecessary to pass on this hypothetical case here.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Laborers Local 1357; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Pittsburgh on Feb. 2, 2006. Adm. Law Judge Karl H. Buschmann issued his decision April 4, 2006.

****

C&K Insulation, Inc. (3-CA-24151; 347 NLRB No. 71) Binghamton, NY July 31, 2006. The Board adopted the recommendations of the administrative law judge and found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire union applicants Paul Raymond Johnson, Keith Wagner, and Thomas Davitt because of their affiliation with Asbestos Workers Local 38. [HTML] [PDF]

The Board found that the Respondent's owner, Chester Ingraham, accepted the completed application forms from Johnson, Wagner, and Davitt on Jan. 7, 2003. After not hearing from Ingraham about their applications, the applicants returned to the facility on Feb. 4. Ingraham told the applicants that he was not hiring, but evidence showed that he hired Duane Harty on Feb. 3, James Jardine on March 11, and Tom Disbrow and Scott Disbrow on March 24. Ingraham directed the Disbrows to backdate their applications to make it appear they had applied in December, before the union applicants, and told them this was to "help him from getting involved in the union."

The Respondent argued that it did consider the applicants and in support of its assertion, points to the physical acceptance of the application. However, the Board found no merit in the Respondent's argument and concluded that the Respondent's antiunion animus contributed to its decision not to consider the applicants for employment.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Asbestos Workers Local 38; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Binghamton, July 23-24, 2003. Adm. Law Judge Joel P. Biblowitz issued his decision Sept. 29, 2003.

****

Dish Network Service Corp. (29-CA-26129, et al.; 347 NLRB No. 69) Farmingdale, NY July 31, 2006. The Board agreed with the administrative law judge and held that the Respondent committed various violations of the Act. [HTML] [PDF]

It found that the Respondent violated Section 8(a)(1) and (5) of the Act by: bypassing Communications Workers Local 1108 and dealing directly with employees by promising them promotions to managerial positions so they would no longer be part of the unit, and informing employees that their transfer requests were denied because they were shop stewards; urging employees to sign a petition to decertify the Union, and bypassing the Union and dealing directly with employees by promising them wage increases if they decertified the Union; bypassing the Union and dealing directly with employees by promising them wage increases, commissions and job security if they abandoned their Union support or membership, and informing employees that it would be futile for them to support the Union because it could not assist employees who were discharged; bypassing the Union and dealing directly with employees by promising them wage increases and other benefits if they decertified the Union; and engaging in surface bargaining and bad-faith bargaining with the Union.

The Board further found that the Respondent violated Section 8(a)(3) by discharging and failing and refusing to reinstate its employees because of their membership in, or support for, the Union, or any labor organization.

In a prior decision (345 NLRB No. 83 (2005)), the Board remanded the case to the Chief Administrative Law Judge for reassignment after the Respondent contended that Judge Howard Edelman had improperly copied extensive portions of the General Counsel's and the Charging Party's posthearing briefs into his decision. The Chief Administrative Law Judge subsequently assigned the case to Judge Biblowitz.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Adm. Law Judge Joel P. Biblowitz issued his supplemental decision April 6, 2006.

****

Doubletree Guest Suites Santa Monica (31-CA-26242; 347 NLRB No. 72) Santa Monica, CA July 31, 2006. The Board reversed the administrative law judge's dismissal of the instant complaint, set aside the settlement agreement in an earlier proceeding (Cases 31-CA-25696 and 31-CA-25891) to the extent that it pertains to the allegations regarding the Respondent's jewelry policy, reinstated the jewelry policy allegations, and remanded the proceeding to the judge for further appropriate action and for issuance of a supplemental decision. [HTML] [PDF]

The earlier consolidated complaint alleged that the Respondent promulgated in its employee handbook an overly broad "jewelry rule" which set forth what may be worn on uniforms, e.g., nametags, language pins, service awards, and other pins approved by Hotel management for special promotion or activities. The jewelry rule included this sentence: "Union

team members may wear one official union button to show union membership." The complaint also alleged that about September 2002, the Respondent modified the jewelry rule by deleting the quoted sentence regarding union buttons. The complaint alleged that the modified jewelry rule was overbroad because it unlawfully restricted employees from wearing union buttons or insignia.

At issue here is whether the judge erred in finding that the settlement agreement in Cases 31-CA-25696 and 31-CA-25891 bars the finding of the violation alleged in the instant complaint—that the Respondent had unlawfully forbidden employees from wearing union insignia.

The judge, in dismissing the complaint, applied the principle set forth in *Ratliff Trucking Corp*., 310 NLRB 1224 (1993), where, under limited circumstances, a settlement agreement may also bar litigation of post-settlement conduct grounded in pre-settlement conduct that would itself be settlement-barred from litigation. He found that because the Regional Director approved the settlement agreement on March 10, 2003, after having received the March 4 letter from the Respondent's attorney stating the Respondent's belief that the jewelry rule complies with that agreement, the jewelry rule constitutes pre-settlement conduct that cannot be relied upon as evidence to support allegation of unlawful post-settlement maintenance and enforcement of the jewelry rule.

The Board rejected the judge's basis for dismissing the complaint, noting that the Regional Director approved the settlement agreement on Feb. 7, not March 10 and thus, contrary to the judge's finding, when the Regional Director approved the settlement, he did not have before him the March 4 letter setting forth its understanding of the agreement. Because the judge's settlement-bar finding rests on this factual error, the Board reversed the judge's finding, reinstated the instant complaint, and remanded the case to the judge. The Board did not include the viability of the settlement agreement within the scope of the remand and addressed that issue here.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Hotel & Restaurant Employees Local 11; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles on Aug. 11, 2003. Adm. Law Judge Jay R. Pollack issued his decision Sept. 19, 2003.

***

Exelon Generation Co., LLC (4-CA-33787, 33937, 4-RC-20940; 347 NLRB No. 77) Limerick, PA July 31, 2006. In affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by threatening employee union supporter Robert Schlegel with job loss and by threatening employee union supporter Cynthia Curtin with loss of prior [HTML] [PDF]

approval to take leave without pay to attend Board hearings pursuant to subpoena. Member Schaumber found it unnecessary to pass on the latter threat finding as the result would be cumulative.

The Board also adopted the judge's findings that the Respondent violated Section 8(a)(3), (4), and (1) by requiring employee union supporters Curtin, Schlegel, and Jerome Dailey to use vacation time rather than unpaid leave to attend Board hearings pursuant to subpoena because they supported Electrical Workers IBEW Local 614.

The Board sustained the Union's Objection 1, finding that the Respondent threatened employees with changes in their work hours and shifts and with loss of flexible work hours if the employees voted for union representation; set aside the election of May 5, 2005; and directed a second election. It found it unnecessary to pass on the remaining objections. The tally of ballots showed 325 for and 328 against the Union, with no challenged ballots.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Electrical Workers IBEW Local 614; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Philadelphia, Nov. 1-4, 2005. Adm. Law Judge Wallace H. Nations issued his decision March 10, 2006.

***

Factor Sales, Inc. (28-RC-6290; 347 NLRB No. 66) San Luis, AZ July 31, 2006. Chairman Battista and Member Schaumber, contrary to the hearing officer, overruled the Petitioner's (Food & Commercial Workers Local 99) Objection 7, and certified the results of the election. The tally of ballots for the election held March 11-12, 2005 showed 109 votes for and 169 against the Petitioner, with 41 challenged ballots, an insufficient number to affect the results of the election. Member Walsh dissented. [HTML] [PDF]

The Petitioner's Objection 7 alleged that "[t]he Employer prevented off-duty employees from talking to Union representatives." The hearing officer found that the Employer engaged in objectionable conduct by promulgating and enforcing an overly broad no-talking rule and by engaging in surveillance of its employees' concerted protected activity and, therefore, recommended sustaining Objection 7 and setting aside the election.

The Employer argued that it was deprived of due process because the objections set for hearing did not allege the conduct that the hearing officer found objectionable. The Employer observed that none of the Petitioner's objections alleged that the Employer promulgated and enforced an overly broad no-talking rule or that it engaged in surveillance through the security guards. The majority agreed that the Employer was denied due process and, therefore, overruled Objection 7.

Dissenting, Member Walsh would reject the Employer's "due process" defense and adopt the hearing officer's recommendation to sustain Objection 7. He wrote:

> I would not allow the Employer to avoid the consequences of its preelection misconduct simply by pointing to a legally irrelevant inaccuracy in the pleadings. The majority ignores the basic principle that procedural due process requires that the defending party be afforded *reasonable* notice of the charges against it. The mere inclusion of the phrase "off duty" in the language of Objection 7 was not so misleading as to deprive the Employer of reasonable notice of the grounds on which its conduct interfered with its employees' representational rights.

No exceptions having been filed, the Board adopted pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 1, 2, 8, and 9. Objections 3, 4, 5, and 6 were withdrawn at the hearing.

(Chairman Battista and Members Schaumber and Walsh participated.)

****

General Motors Corp. (7-CA-48275, et al.; 347 NLRB No. 67) Ypsilanti, MI July 31, 2006. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(3) of the Act by selecting employees Steve Bonzack and Don McConnaughey for promotion to wastewater treatment operator as a favor to Auto Workers Local 735 in disregard of existing selection criteria; and violated Section 8(a)(1) by informing employees that the promotions were made as a political favor to the Union. [HTML] [PDF]

In finding that the selection of Bonzack and McConnaughey for promotion violated Section 8(a)(3), the Board held, contrary to the judge who applied *Nor-Cal Beverage Co*., 330 NLRB 610 (2000), that the *Wright Line* test applies and has been satisfied. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Unlike the judge, the Board did not find relevant that McConnaughey applied 8 months early for the job posting, noting that the record indicates that other employees also applied before the position was formally posted by the Respondent. And, in affirming the judge's finding that employee Paul Thomas belonged to a group of applicants "head and shoulders" superior to McConnaghey and Bonzack, the Board made no determination that he necessarily would have been selected for promotion if the Respondent had acted in a nondiscriminatory manner.

The Board amended the judge's recommended remedy, saying "the remedial situation is more akin to that presented by a refusal-to-hire violation where the number of applicants exceeds the number of available positions." Therefore, although the Board found the 8(a)(3) violation under *Wright Line*, it modified the judge's recommended Order to comport with *FES*, 331 NLRB 9, 15 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). It

also modified the judge's Order to remove the 14-day limits in the provisions requiring rescission and promotion.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by Sharon Bell, Robert John Mullins, and Edward Otis Morning; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, Sept. 26-27 and Oct. 27, 2005. Adm. Law Judge John H. West issued his decision March 7, 2006.

****

Home Care Network, Inc. (8-RC-16635; 347 NLRB No. 80) Mansfield, OH Aug. 2, 2006. Members Liebman, Schaumber, Kirsanow, and Walsh directed the Regional Director to open and count the ballots of Tonya Davis, Kelly Bays, and Teasha Woods-Boyd and thereafter prepare and serve on the parties a revised tally of ballots and issue the appropriate certification. The tally of ballots for the election held July 29, 2004 showed 23 votes for and 23 against the Petitioner, SEIU District 1199, with 3 challenged ballots, a number sufficient to affect the results of the election. Chairman Battista concurred in part and dissented in part. [HTML] [PDF]

At issue is the eligibility of the three challenged voters. Before the election, all three voters sustained injuries that prevented them from working. It is undisputed that they are not "absent without leave," the Employer has never terminated or notified any of them that they were terminated, and none of the three voters had resigned.

The hearing officer applied the well-established Board standard that presumes an employee on sick or disability leave to be eligible to vote absent an affirmative showing that the employee has resigned or been discharged. Under the standard set forth in *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Pepsi-Cola Co*., 315 NLRB 1322 (1995), he found that Davis, Bays, and Woods-Boyd all were eligible voters. Applying the same standard, the majority reached the same result. Member Schaumber concurred in the result, based on extant Board law, but he would modify the test in *Red Arrow Freight Line* for the reasons set forth by former Member Hurtgen in *Supervalu, Inc.*, 328 NLRB 52, 52-53 (1999) (Member Hurtgen dissenting).

Concurring in part and dissenting in part, Chairman Battista wrote:

> I would not apply the test of *Red Arrow Freight Lines* to determine the voting eligibility of employees who are absent from their employment for medical reasons. Rather, I agree with former Member Babson's dissent in *Red Arrow*, and the views of several subsequent Board Members, that the appropriate standard is whether the absent employee, as of the date of the election, has a reasonable expectancy of returning to his or her unit employment. Applying that standard, I concur in my colleagues' overruling of the challenge to the ballots of Kelly Bays and Teasha Woods-Boyd, but I would sustain the challenge to the ballot of Tonya Davis.

(Full Board participated.)

****

Horizon Group of New England (22-CA-26318, 26441; 347 NLRB No. 74) Albany, NY July 31, 2006. Members Liebman and Walsh adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to apply to jobsites in Trenton and Newark, NJ, the terms and conditions of a collective-bargaining agreement that the Respondent entered into by signing a short-form agreement at its Burlington, NJ jobsite. Chairman Battista dissented. [HTML] [PDF]

The Respondent argued that it was not obligated to adhere to the collective-bargaining agreement because its signature on the short-form agreement was procured by "fraud in the execution." The judge rejected the Respondent's defense, finding that although Carl Styles, a business agent for Southern New Jersey Laborers, misrepresented to Doug Robbins, Respondent's project manager, that the short-form agreement was part of the project labor agreement, when it was not, the short-form agreement was nevertheless unambiguous and could not now be modified. *Quality Building Contractors*, 342 NLRB 429, 430-431 (2004); *America Piles*, 333 NLRB 1118, 1119 (2001); *NDK Corp*., 278 NLRB 1035 (1986).

The judge went on to find that "fraud in the execution" did not occur and observed that the Respondent did not sign the short-form agreement because of any misrepresentation by the Union, but because the Union threatened not to refer it any laborers and to make "trouble" for the Respondent if it did not sign. He concluded that the Respondent "knew full well" when it signed the short form agreement that it would be obligated to apply the contract to all jobs in New Jersey.

The majority agreed that the Respondent failed to establish factual prerequisites of the defense and therefore found it unnecessary to pass on the judge's finding that the word of mouth evidence rule precludes consideration of the evidence the Respondent relies on in support of its defense. It concluded that the Respondent has not met its burden of showing that it did not know of the character or essential terms of the proposed contract at the time it signed the agreement.

In dissent, Chairman Battista found, contrary to his colleagues, that the Union misrepresented the essential terms of the short-form agreement, that the Respondent reasonably relied on this misrepresentation, and that the Respondent's signature on the short-form agreement was procured through fraud in the execution. He asserted that the contract was procured through fraud in the execution and thus is not binding on the Respondent. He would therefore dismiss the complaint.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Laborers Southern New Jersey District Council and Laborers Local 1153; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, NJ on March 2, 2005. Adm. Law Judge Steven Fish issued his decision Sept. 21, 2005.

***

Hospital Cristo Redentor, Inc. d/b/a Hospital Cristo Redentor (24-CA-9069; 347 NLRB No. 65) Guayama, PR July 31, 2006. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Carlos Garcia Santiago (Garcia) regarding his union activities, and threatening Garcia through suggestions that his union activities would impede his prospects for a promotion or would result in disciplinary action; and violated Section 8(a)(3) and (1) by discharging Garcia as a result of his union activities. [HTML] [PDF]

Chairman Battista and Member Liebman, with Member Schaumber dissenting, further agreed with the judge that by suspending Garcia because of his union activities, the Respondent violated Section 8(a)(3) and (1). They found that the Respondent failed to establish that it would have suspended Garcia even in the absence of his union activities.

Dissenting Member Schaumber would reverse the judge's finding and dismiss the complaint allegation that the Respondent violated the Act when it suspended Garcia for leaving his emergency room workstation with the only key to the narcotics cabinet not once, but twice, during the same shift, preventing the administration of medication to a convulsing patient on each occasion. He believes that the Respondent met its rebuttal defense by proving that it would have suspended Garcia absent his protected activity.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Unidad Laboral de Enfermeras(Os) y Empleados de la Salud; complaint alleged violation of Section 8(a)(1) and (3). Hearing at San Juan, Sept. 30 and Oct. 1-4, 2002. Adm. Law Judge Paul Buxbaum issued his decision Feb. 24, 2003.

***

Laborers Local 500 (8-CD-500; 347 NLRB No. 68) Toledo, OH July 31, 2006. Relying on the relevant factors of employer preference and economy and efficiency of operations, the Board determined that employees of Helm & Associates, Inc., represented by Laborers Local 500 are entitled to perform the work in dispute:

> All work in connection with the installation of the water filtration/treatment system at the City of Toledo Detwiler pool project, including the installation of piping inside of the filtration plant; installation of piping from the plant to the filter; removal of the existing system; removal and replacement of concrete; setting and rigging equipment; construction of a concrete pad for the filter and setting the filter on the pad; core drilling and patching of walls; reworking of steel ladders, rails, and platform; removal and replacement of doors; erection of fencing; and landscaping. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

***

Marriott Hartford Downtown Hotel (34-RM-88; 347 NLRB No. 87) Hartford, CT Aug. 4, 2006. Chairman Battista and Members Schaumber and Kirsanow granted the Employer-Petitioner's request for review of the Regional Director's decision and order, in which he dismissed the Employer-Petitioner's petition after finding that UNITE HERE Local 217 had not claimed to represent certain employees of the Employer-Petitioner, and thus no question affecting commerce exists concerning the representation of the employees. Members Liebman and Walsh, dissenting, would deny review. [HTML] [PDF]

In Aug. 2005, the Employer began operating a Marriott hotel in downtown Hartford, CT. The Union asked the Employer to "begin discussions about a Labor Peace Agreement" at the hotel and later sought community support when the parties had not entered into any such agreement by the fall of 2005. Various members of the community wrote letters to the Employer urging it to enter into a labor peace agreement and some stated their intentions to boycott the hotel. By letter dated April 6, 2006, the Union informed the Employer that it would be "commencing an organizing drive" among the hotel's employees, and that the Union was "prepared to begin discussions to determine whether we might reach a 'labor peace agreement' setting ground rules for organizing."

On April 18, 2006, the Employer-Petitioner filed an election petition. Thereafter, on April 22, 2006, a local newspaper reported that union organizers and others had planned a rally in front of the hotel and that the Union was seeking a labor peace agreement that would "set the ground rules for an organizing campaign . . . ." Citing *New Otani Hotel & Garden*, 331 NLRB 1078 (2000), and other cases, the Regional Director found that the Union's activities for seeking the Employer's acceptance of a process that would enable it to eventually obtain recognition does not constitute evidence of a present demand for recognition that would support the processing of an employer petition.

The majority noted that this case presents many of the same issues currently under Board review. See *Dana Corp*., 7-CA-46965 and 7-CB-14083; *Dana Corp*., 341 NLRB 1283 (2004), granting review in Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519; *Shaw's Supermarkets*, 343 NLRB No. 105 (2004), granting review in Case 1-RM-1267; and *Rite Aid of West Virginia, Inc*., Case 9-RM-1052. The majority wrote in granting the instant request for review:

> Contrary to the assertion of our dissenting colleagues, our purpose in granting review is not to 'meddle' with the rights of employees. Employees have the right to unionize or refrain from unionizing. Our purpose here is simply to inquire further as to how best to effectuate those rights. More particularly, there is a genuine issue as to whether the Union was requesting an agreement for card-check recognition and whether such a request was a request for recognition. Further, there is a policy issue as to whether an election (through the Employer's RM petition) is the better way to ascertain employee free choice. That free choice lies at the heart of employee rights.

> We do not resolve the issues at this stage, but merely find that such issues merit review. Thus, what distinguishes us from our dissenting colleagues is the fact that we deem it necessary to consider these important issues, whereas our colleagues do not. *Shaw's Supermarkets*, supra.

Members Liebman and Walsh concluded that the Regional Director properly dismissed the Employer's petition pursuant to *New Otani Hotel & Garden*, supra, well-established precedent prior to *New Otan*i, and the Congressional purpose embodied in Section 9(c). They wrote:

> Continuing a recent trend, today the Board reaches out to reexamine well-established law which protects workers' rights to organize. There can be no other purpose to granting review in this case other than to meddle with those rights. Based on the undisputed facts, however, there is no statutory justification for going forward with the Employer's RM petition. In fact, processing the Employer's petition would be contrary to Board precedent and clear Congressional intent, both of which require a finding that the Union has made no present demand for recognition.

(Full Board participated.)

****

Moeller Aerospace Technology, Inc. (7-CA-48929; 347 NLRB No. 76) Harbor Springs, MI July 31, 2006. The Board adopted the recommendations of the administrative law judge and found that the Respondent violated Section 8(a)(1) of the Act by interrogating Bruno Carus Jr. about his union activity, threatening Frank Swarthout with discharge for having a union placard on his car's windshield, and prohibiting Tim Andersen from soliciting on a union petition on "company time" and during "working hours." [HTML] [PDF]

While Members Schaumber and Kirsanow agreed with the judge that Supervisor Davidson's statement prohibiting Andersen from soliciting signatures for a union petition on "company time" and during "working hours" violated the Act, they do not agree with the judge's implicit characterization of Davidson's prohibition as the promulgation of an unlawful rule. In light of their adoption of the judge's finding of the unlawful statement, Members Schaumber and Kirsanow found it unnecessary to pass on the General Counsel's cross-exceptions concerning the judge's failure to find, alternatively, that the Respondent violated Section 8(a)(1) by disparately enforcing its no-solicitation/no-distribution policy.

Contrary to his colleagues, Member Walsh would find merit in the General Counsel's cross-exception and would find that the Respondent discriminatorily enforced a no-solicitation policy when it prohibited Andersen from soliciting signatures on a union petition during working time while allowing employees to engage in other forms of solicitation during working time.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Auto Workers; complaint alleged violation of Section 8(a)(1). Hearing at Petoskey on Jan. 30, 2006. Adm. Law Judge George Alemán issued his decision March 23, 2006.

****

North American Pipe Corp. (26-CA-21773, 21833; 347 NLRB No. 78) Van Buren, AR July 31, 2006. Chairman Battista and Member Schaumber, with Member Walsh dissenting, agreed with the administrative law judge that the Respondent did not violate Section 8(a)(5) and (1) of the Act by awarding 100 shares of stock to unit employees without notice to or bargaining with UNITE HERE. The Respondent, a subsidiary of Westlake Chemical Corp., made the one-time grant to all employees at each of its facilities in connection with the initial public stock offering of its parent corporation. The majority found, as did the judge, that the stock award was a gift and was not a mandatory subject of bargaining that required notice to and bargaining with the Union. [HTML] [PDF]

The judge also found that the Union contractually waived its right to bargain with respect to the stock award. The majority did not reach the waiver issue in light of their conclusion that there was no duty to bargain over the grant of stock.

The General Counsel and the Union argued that any benefit of substantial value given by an employer to an employee is a mandatory subject of bargaining with the employee's union representative. They reasoned that the Respondent's stock award was tied to both seniority and work performance, that the 6-months-of-service eligibility requirement tied in to seniority, and the additional-6-months-of-employment vesting requirement tied in to employee work performance. The Union also argued that the Respondent recognized that the award constituted wages when it made provision for withholding amounts necessary to fulfill tax obligation relative to the award.

Dissenting Member Walsh wrote: "The Respondent's unilateral award of 100 shares of company stock to certain employees was not a 'gift.' The grant of the stock award, worth approximately $1450 at the time, was tied to 'employment-related factors,' including an employee's past and future service and working hours, and therefore constituted a form of wages. Accordingly, the stock award was a mandatory subject of bargaining and the Respondent's unilateral action violated Section 8(a)(5) and (1) of the Act."

No exceptions having been filed, the Board approved the judge's findings that the Respondent violated Section 8(a)(1) by: (1) maintaining, giving effect to, and enforcing an overly broad no-solicitation rule; (2) selectively and disparately enforcing a facially valid employee rule; and (3) prohibiting employees from distributing union literature to other employees on the Respondent's parking lot.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by UNITE HERE; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Forth Smith, Jan. 13-14, 2004. Adm. Law Judge Margaret G. Brakebusch issued her decision March 29, 2005.

***

Planned Building Services, Inc. and United Workers of America (2-CA-31245, et al., 2-CB-17041; 347 NLRB No. 64) Fairfield, NJ July 31, 2006. The Board, in a 5-0 decision involving Planned Building Services, Inc., a New York City cleaning and maintenance contractor, and Service Employees Local 32B-32J, modified the appropriate remedy for a successor employer's unlawful refusal to hire the union-represented employees of its predecessor, in order to avoid a bargaining obligation with the Union. [HTML] [PDF]

The Board affirmed a 2000 decision of an administrative law judge that Planned Building Services was a successor to various contractors and violated the National Labor Relations Act by refusing to hire the employees of the predecessor. The remedy that the Board traditionally has imposed for such unlawful conduct seeks to make employees whole for the successor's violation of the law by ordering the restoration of the predecessor's terms and conditions of employment until the successor either reaches a new agreement with the union or bargains to impasse. In this case, the Board imposed the traditional remedy, affirming that it is appropriate to ensure that any uncertainty as to what would have happened, had the parties engaged in lawful bargaining, would be resolved against the successor employer, the wrongdoer. At the same time, however, the Board acknowledged concerns expressed by some federal appeals courts that the remedy should not amount to a penalty. Accordingly, the Board modified the traditional remedy to allow the successor employer to present evidence, in a compliance proceeding, that it would not have agreed to the predecessor's terms of employment, as well as evidence of the terms it would have agreed to, and the date it would have either reached agreement with the union or would have bargained to impasse.

The Board also clarified the legal framework for analyzing whether a successor employer has unlawfully refused to hire its predecessor's employees.

(Full Board participated.)

Charges filed by Service Employees Local 32-32J; complaint alleged violation of Section 8(a)(1) and (5). Hearing held July 19-23, Sept. 21-29, Oct. 5 and 21, 1999. Adm. Law Judge Steven Fish issued his decision Sept. 18, 2000.

***

Prince Telecom (2-RC-22988; 347 NLRB No. 73) Mt. Vernon, NY July 31, 2006. After consideration of the Employer's request for review, Chairman Battista and Member Schaumber reversed the Regional Director's Decision and Direction of Election. They found, contrary to the Regional Director, that the petitioned-for unit of installation and field technicians employees

employed at the Employer's Mt. Vernon, NY facility do not constitute an appropriate unit and that an appropriate unit must include installation and field technicians at all of the Employer's New York area facilities. As the Petitioner, Electrical Workers Local 1430, did not indicate a willingness to proceed to an election in a broader unit including installation and field technicians at all of the Employer's New York area facilities, the majority dismissed the petition. Member Liebman dissented. [HTML] [PDF]

The majority, in concluding that the Employer has rebutted the single-facility presumption, relied on the administratively centralized nature of the Employer's daily operations and labor relations, the absence of a uniquely cohesive relationship between the two systems working out of the Mt. Vernon facility, the similarity of employee skills, functions, and working conditions for the Employer's technicians throughout the New York area, and the evidence of temporary and permanent system transfers within the Employer's New York area.

Dissenting Member Liebman concluded that the Regional Director correctly decided that the Employer failed to rebut the presumption favoring the petitioned-for, single-facility unit. She explained that her colleagues, in reversing the Regional Director, minimized the significance of the local autonomy that Mt. Vernon-based project managers and supervisors exert over technicians, ignored evidence of commonalities between the Bronx and Mamaroneck system technicians not shared by the Employer's other New York area technicians, diminished the importance of the geographic separation between the New York area facilities, and exaggerated the weight of the Employer's evidence of technician interchange. She found little evidence of substantial interchange between the Mt. Vernon based employees and the employees working out of the Employer's other New York area facilities.

(Chairman Battista and Members Liebman and Schaumber participated.)

***

South Coast Hospice, Inc. (36-RD-1607; 347 NLRB No. 81) Coos Bay, OR Aug. 2, 2006. Members Liebman and Walsh, with Chairman Battista dissenting in part, adopted the recommendations of the hearing officer and directed the Regional Director to open and count the ballots of Michelle Whitus, Kim Kyllo, and Barbara Bates and thereafter, prepare and serve on the parties a revised tally of ballots and the appropriate certification. The tally of ballots for the election held Aug. 15, 2002 showed 11 votes for and 12 against the Petitioner, Longshoremen ILWU Local 5, with 7 challenged ballots, a number sufficient to affect the results. [HTML] [PDF]

The Regional Director directed a hearing on six of the challenges, concluding the question of whether or not voter Staci Standlee was an employee on the date of the election would be determined through the parties' grievance procedure. No exceptions were filed to the hearing officer's recommendation to overrule the challenges to the ballots of Whitus and Kyllo, and to sustain the challenge to voter Wendy Kohanes. The majority agreed with the hearing officer that Cherrill Corliss and Lori Barton were ineligible to vote under *Davison-Paxon Co.*, 185 NLRB 21 (1970), and that Bates was on disability leave and had neither resigned nor been

affirmatively discharged as of the time of the election, and was therefore eligible to vote under *Red Arrow Freight Lines*, 278 NLRB 965 (1986). The majority noted that the Board has recently reaffirmed the *Red Arrow* standard in *Home Care Network, Inc*., 347 NLRB No. 80 (2006).

Dissenting in part, Chairman Battista would sustain the challenge to the ballot of employee Barbara Bates. He wrote:

> As discussed in my partial dissent in *Home Care Network*, 347 NLRB No. 80 (2006), I would not apply the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986) to determine the voting eligibility of individuals who are absent from their unit positions for medical reasons. Rather, consistent with the standard applied by the Board regarding laid-off employees, I would examine whether, as of the date of the election, the employee has a reasonable expectancy of returning to the unit. Applying that standard, I would find Bates ineligible to vote in the election.

(Chairman Battista and Members Liebman and Walsh participated.)

****

State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel (5-CA-31346; 347 NLRB No. 70) Washington, DC July 31, 2006. Chairman Battista and Member Liebman agreed with the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Luis Osorio because he presented other employees' grievances to a supervisor. Member Schaumber dissented. [HTML] [PDF]

The Respondent argued that it terminated Osorio because he violated the Respondent's rules regarding clocking in and out, misrepresented the time that he worked, and later lied about this misconduct. The majority agreed with the judge's finding that the General Counsel established the requisite element of the Respondent's animus against Osorio's protected activity. The judge noted that "where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised," citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). The judge found that such an inference could properly be drawn in this case and was reinforced "by the feebleness of the Respondent's excuse for the delay-action discharge of Osorio."

Member Schaumber argued that the Respondent implemented and enforced rules to prevent misconduct, and that the record demonstrated that it applied those rules to conduct similar to Osorio's. He wrote: "I find nothing suspicious or unusual in the Respondent's efforts to investigate the misconduct before imposing discipline, nor do I consider it out province to second-guess an employer's judgment that theft and dishonesty constitute terminable offenses. In short, the General Counsel failed to prove that the Respondent violated Federal Law by disciplining Osorio for unquestionably dishonest disregard of its timeclock policies."

No exceptions were filed to the judge's findings that the Respondent violated Section 8(a)(1) by soliciting its employees' grievances, by promising to remedy those grievances, and by threatening its employees that it would sell its business if they selected the Union as their collective-bargaining representative; and violated Section 8(a)(3) and (1) by granting its employees various benefits alleged in the complaint. No exceptions were filed to the judge's finding that the Respondent did not violate Section 8(a)(3) by terminating Luis Osorio.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Hotel & Restaurant Employees Local 25; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Washington, Feb. 18-19, 2004. Adm. Law Judge David L. Evans issued his decision May 19, 2004.

***

T.C. Broome Construction Co., Inc. (15-CA-16185, et al.; 347 NLRB No. 63) Pascagoula, MS July 31, 2006. The Board affirmed the findings of the administrative law judge, with modification, and held that the Respondent violated Section 8(a)(1) and (3) of the Act by: a) informing employees that they and/or other employees had been laid off because of their union activities or the union activities of others; b) telling employees that they would be considered for promotion if they promised not to engage in union activity; c) coercively interrogating employees about union support or union activities; d) creating an impression among its employees that their union activities were under surveillance; e) conditioning employees' employment on their assurances that they would not engage in union activities; f) telling employees that they had been contacted for the purpose of misleading other employees into believing they were not being laid off because of their union activities; g) threatening employees with termination if they talked about the Union; h) informing employees that other employees had been terminated because of their union activities; i) informing employees that it would not hire union electricians; j) informing employees that it was blackballing former employees because of their union activities; k) promulgating and maintaining an overly broad no-solicitation rule; l) laying off employees, and refusing to recall them, because they joined or assisted the Union, and engaged in concerted activities; m) discharging or otherwise discriminating against any employee for supporting the Electrical Workers or any other labor organization; n) refusing to hire job applicants because of their union membership or sympathies; and o) refusing to offer, without justification, its former striking employees, who made unconditional offers to return to work, reinstatement to their prestrike positions when those positions become available. [HTML] [PDF]

The judge's order was modified by: 1) deleting par. 1(a); 2) adding new pars. 1(a) through (o); and 3) adding the standard electronic records, expungement, and contingent notice-mailing language. The Board substituted a new notice to conform with the modified order; and amended the remedy section of the judge's decision and Conclusion of Law 3.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Electrical Workers (IBEW) Local 903; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Pascagoula, Jan. 8-9, 2002. Adm. Law Judge Pargen Robertson issued his decision Aug. 14, 2002.

***

Ybarra Construction Co. and D&P Drywall, Inc., a Single Employer (7-CA-44842; 347 NLRB No. 79) Detroit, MI July 31, 2006. The Board granted the General Counsel's motion for partial summary judgment as to (1) the specification's use of the base period hours to calculate projected backpay period hours; (2) wage rates; (3) inclusion of vacation pay in gross backpay; and (4) nondeduction of unemployment benefits from gross backpay. It remanded the proceeding to the Regional Director for the purpose of arranging a hearing before an administrative law judge on the remaining issues. [HTML] [PDF]

In an earlier decision reported at 343 NLRB No. 5 (2004), the Board ordered the Respondent to make employee Alan Kirk whole for loss of earnings and benefits resulting from the Respondent's reduction of his hourly wages, diminution in his hours, and his subsequent unlawful constructive discharge.

A controversy having arisen regarding the backpay due Kirk, the Regional Director on Dec. 9, 2005, issued a compliance specification and notice of hearing specifying the amount of backpay due to Kirk under the Board's order. Although advised that its answer to the specification was insufficient and failure to file a proper answer by Jan. 10, 2006 would result in the filing of a motion for summary judgment, the General Counsel asserted that no amended answer was filed.

(Chairman Battista and Members Liebman and Kirsanow participated.)

General Counsel filed motion for summary judgment January 12, 2006.

***

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)

Hagadone Printing Co., Inc., Honolulu, HI, 37-RC-4113, July 31, 2006 (Members Liebman, Schaumber, and Kirsanow)

American Red Cross, Arizona Region, Tucson, AZ, 28-RC-6452, August 2, 2006 (Members Liebman, Schaumber, and Kirsanow)

Hughes Supply, Inc., Fort Wayne, IN, 25-RC-10209, August 2, 2006 (Members Liebman, Schaumber and Kirsanow)

Sunrise Senior Living, Inc., Columbus, OH, 9-RC-18066, August 2, 2006 (Members Liebman, Schaumber and Kirsanow)

***

FOR IMMEDIATE RELEASE **R-2599**
Friday, August 4, 2006 **202/273-1991**
www.nlrb.gov

KATHLEEN MCKINNEY NAMED DEPUTY DIRECTOR IN THE NLRB'S NEW ORLEANS, LA REGIONAL OFFICE

Ronald Meisburg, General Counsel of the National Labor Relations Board, announced today the appointment of Kathleen McKinney as Deputy Director in the Agency's Regional Office in New Orleans, LA (Region 15). In her new position, Ms. McKinney will assist Regional Director Rodney D. Johnson in enforcing the National Labor Relations Act in Louisiana and portions of Mississippi, Alabama, and Florida.

The NLRB investigates and remedies unfair labor practices and conducts secret-ballot elections to determine whether employees desire union representation.

Commenting on the appointment, General Counsel Meisburg remarked:

> A veteran NLRB attorney, Kathy McKinney brings a wealth of experience and a very high level of professionalism and dedication to her new position. She demonstrated her strong leadership skills as part of the management team re-establishing the Agency's operations in New Orleans after Hurricane Katrina. We are fortunate to have such an excellent candidate as the Deputy Director in this office.

A career NLRB employee, Ms. McKinney began her service in 1990 as an attorney in the New Orleans Office. In 2000, she was promoted to Deputy Regional Attorney and in 2003 she was promoted to Regional Attorney. Ms. McKinney has served as a Government Fellow to the Committee on the Development of Law under the NLRA of the American Bar Association Labor and Employment Law Section.

Ms. McKinney earned a B.A. degree in chemistry from Jacksonville University in 1984. She received her J.D. degree in 1989 from Wake Forest University of Law. Ms. McKinney lives in Kenner, LA.

# # #