National Labor Relations Board

Weekly Summary of NLRB Cases

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September 22, 2006 W-3070

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CASES SUMMARIZED

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Press Release (R-2601): Nicholas Ohanesian Appointed Resident Officer in NLRB's Jacksonville, FL Resident Office

Cibao Meat Products (2-CA-32811; 348 NLRB No. 5) New York, NY Sept. 12, 2006. Chairman Battista and Member Walsh, with Member Schaumber dissenting in part, adopted the administrative law judge's recommended order as modified (mathematical and typographical errors in the judge's decision were corrected to reflect the amount of backpay due), and ordered that the Respondent pay Jose Luis Mendez a total of $59,967.96 plus interest. [HTML] [PDF]

The Respondent unlawfully discharged Mendez after a group of coworkers, including Mendez, protested the unlawful suspension of his brother. The judge found that Mendez is entitled to backpay for the entire backpay period beginning on Jan. 18, 2000, and ending on Dec. 6, 2004, when the Respondent offered Mendez reinstatement. The Respondent, in arguing that Mendez' backpay should be denied in certain quarters because he willfully concealed his interim earnings, relied on discrepancies between the interim income figures that he provided to the Board and the interim income figures that he allegedly provided to other parties, including his 2000 and 2001 tax returns attached to a mortgage application and a credit card application.

Chairman Battista and Member Walsh decided that Mendez did not deliberately mislead the Board or withhold information concerning his interim earnings and employers, saying he made a good-faith effort to accurately report his earnings during the backpay period. They acknowledged the obvious discrepancies between the items of evidence provided by Mendez to other parties and the Board, but they do not believe that the mere existence of such discrepancies suggests willful concealment. Accordingly, Chairman Battista and Member Walsh concluded that the Respondent failed to rebut the General Counsel's interim earnings calculations. They noted that their dissenting colleague cites no Board precedent to support his "averaging" approach and in their view, such an approach erodes the Respondent's settled burden to prove willful concealment. See *Atlantic Limousine, Inc*., 328 NLRB 257 (1999).

In his partial dissent, Member Schaumber agreed with his colleagues in all respects except their decision not to reduce Mendez' backpay award. He would reduce Mendez' backpay award by averaging the interim income claimed by Mendez at the hearing and in his various tax returns and credit applications. Member Schaumber wrote: "In this way, the Board could insure that a remedy is provided for the unlawful discrimination practiced by the Respondent while still accounting for the unnecessary uncertainty caused by Mendez' misrepresentations."

(Chairman Battista and Members Schaumber and Walsh participated.)

Hearing at New York, Dec. 7, 2004 and Feb. 23-25, 2005. Adm. Law Judge Raymond P. Green issued his supplemental decision May 10, 2005.

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Dilling Mechanical Contractors, Inc. and Tradesmen International, Inc., Joint Employers (25-CA-23973, et al.; 348 NLRB No. 6) Logansport and Fort Wayne, IN Sept. 15, 2006. The Board held that Respondent Dilling Mechanical Contractors, Inc. (DMC) violated Section 8(a)(1) of the Act by entering into a non-Board settlement agreement with no intention of honoring its terms and thereafter deliberately breaching the agreement; and that DMC did not

violate Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire union-affiliated workers who applied for work in May 1995 and April 1997. [HTML] [PDF]

The first consolidated complaint alleged that DMC violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire 25 union-affiliated workers who applied for work on May 26, 1995. After the parties privately settled the allegations, DMC breached the settlement agreement. The second consolidated complaint alleged that DMC violated Section 8(a)(1) by entering into the non-Board settlement agreement with no intention of honoring its terms and by later breaching the agreement, and violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire 11 union-affiliated workers who applied for work with DMC in April 1997.

The Board reversed the administrative law judge's finding that the General Counsel was estopped from alleging in the second complaint that DMC violated Section 8(a)(1) by entering into the settlement agreement with no intention of honoring its terms and by breaching its terms. On the merits, it held that DMC's conduct violated Section 8(a)(1).

In another reversal, the Board disagreed with the judge's finding that DMC unlawfully refused to consider the May 1995 and April 1997 applicants for hire. The Board noted that the General Counsel did not allege in either complaint that DMC's hiring policies were unlawful and that the record does not show any deviations from DMC's hiring policies during the relevant timeframe and does not show that DMC disparately applied those policies in a manner that operated to exclude union-affiliated employees. It adopted the judge's finding that DMC did not unlawfully refuse to hire the May 1995 applicants.

The Board affirmed the judge's finding that DMC did not unlawfully refuse to hire the April 1997 applicants, but based on a different rationale. Although the judge erred in finding that DMC was not hiring at the time of the alleged unlawful conduct, the Board found that DMC did not violate Section 8(a)(3) because none of the April applicants qualified as "referrals" under DMC's lawful referral policy. The Board wrote: "As we have found, that policy was a legitimate employment practice, and there was no evidence of any disparate treatment or deviation from it."

Turning to another alleged violation, the Board reversed the judge's finding that DMC and Respondent Tradesmen International, Inc. (TI), as joint employers, unlawfully refused to hire 23 union-affiliated workers who applied for work with DMC in June 1997 pursuant to the non-Board settlement agreement. It noted that neither the first nor the second complaint alleged that DMC's or TI's June 1997 hiring practices violated Section 8(a)(1) and thus, reversed the unalleged violation.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Plumbers Local 166; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Fort Wayne and Indianapolis, 18 days between Dec. 15, 1998 and June 18, 1999. Adm. Law Judge Robert M. Schwarzbart issued his decision Aug. 18, 2000.

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John Kopp and Natalie Kopp d/b/a N & J Construction, a sole proprietorship (7-CA-49046; 348 NLRB No. 7) Metamora, MI Sept. 12, 2006. In the absence of exceptions, the Board adopted the administrative law judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire union applicant Charles Coburn, and violated Section 8(a)(1) by informing Coburn that it would not hire him because he was a member of Bricklayers Local 9 and by telling employees that it would not consider for hire applicants who "looked" and "acted like" union laborers. In the absence of exceptions, it also adopted the judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) by refusing to consider Coburn for hire or by refusing to consider for hire or hire an unknown individual. [HTML] [PDF]

In accordance with the General Counsel's exceptions, the Board modified the judge's recommended order to reflect the violations found and to more closely conform to the Board's standard remedial language. The Board affirmed the judge's denial of the Charging Party's request for litigation expenses because it found that this case does not present the level of "truly frivolous litigation" that warrants such an "extraordinary" remedy. *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995), enf. denied; *Unbelievable Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997); *Waterbury Hotel Management LLC*, 333 NLRB 482 (2001) (denying costs where "[t]he Respondent's defenses, although generally meritless, were debatable rather than frivolous and therefore do not warrant the extraordinary remedy requested"), enfd. 314 F.3d 645 (D.C. Cir. 2003).

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Bricklayers Local 9; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on April 17, 2006. Adm. Law Judge Bruce D. Rosenstein issued his decision June 22, 2006.

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Parts Depot, Inc. (12-CA-16449, 16741; 348 NLRB No. 9) Miami, FL Sept. 15, 2006. Chairman Battista and Member Liebman, in this backpay proceeding, ordered that the Respondent pay four of the five discriminatees amounts totaling $185,027.83, together with interest and minus tax and withholdings required by Federal and State laws. Member Schaumber, dissenting, would remand the case and instruct the judge to reopen the record and allow the Respondent to fully explore the reasonableness of the claimants' job search efforts. [HTML] [PDF]

The judge ordered that the backpay due Enrique Flores, whose whereabouts are presently unknown, be held in escrow in Flores' name for a period not to exceed 1 year. Chairman Battista

and Member Schaumber found that the backpay for Flores raises significant issues of law and policy and accordingly, severed the backpay issues relating to him. In Member Liebman's view, Flores' gross backpay and the Respondent's matching FICA were appropriately determined under extant law, and should be placed in escrow. See *Starline Cutting, Inc*., 284 NLRB 620 (1978).

Contrary to Member Schaumber, Chairman Battista and Member Liebman rejected the Respondent's contention that the judge erred by precluding it from eliciting testimony from its expert witness, Dr. John M. Williams, that, based on his review of employment trends and job advertisements, the backpay claimants did not exercise reasonable diligence in seeking work. Unlike the dissent, they also rejected the Respondent's contention that the judge abused his discretion by limiting the Respondent's examination of the claimants and the compliance officer, finding that the judge acted within his broad discretion when he balanced burdensomeness against probity and imposed a reasonable limitation on the Respondent's ability to cross-examine claimants.

Member Schaumber wrote that in a backpay proceeding, an employer may mitigate its liability by showing that a claimant did not make "a reasonably diligent effort to obtain substantially equivalent employment." *Glenn's Trucking*, 344 NLRB No. 41 (2005). He contended that the judge's restrictive evidentiary rulings unfairly limited the Respondent's ability to meet its evidentiary burden and because the judge's rulings deprived the Respondent the right to a full opportunity to make its record, he would remand the case and instruct the judge to reopen the record and allow the Respondent to fully explore the reasonableness of the claimants' job search efforts.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Ira Sandron issued his supplemental decision Nov. 10, 2004.

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Wye Electric Co., Inc. (15-CA-11993, et al.; 348 NLRB No. 8) Monroe, LA Sept. 14, 2006. The Board, in this supplemental decision and order, adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire Steve Barthel, Wayne Divine, Herbert Goudeau, Floyd Sandiford, Ronnie Fontana, Jerry Goudeau, Jerry Lambert, Joe Gallien, Mark Greer, and Sammy Yelverton, and by failing to rehire Donald Phillips. It also agreed with the judge that by threatening and interrogating employees and by supervisor Marc Conerly's threat to send employee Wallace out of state and terminate him, the Respondent violated Section 8(a)(1). [HTML] [PDF]

The Board reversed the judge's finding that the Respondent violated the Act by threatening employee Robert Hill with possible layoff if there was unionization and by failing to hire Hugh Britt, Michael Butler, Jackie Kuykendal, and Eric Sumrall. The judge found that the Respondent lawfully failed to hire Charles Jewell because there was no written application for

Jewell. However, Chairman Battista and Member Liebman noted that the record contained his application and showed considerable job experience and qualifications. Therefore, they reversed the judge and found that the Respondent violated Section 8(a)(3) by its failure to hire Jewell.

In a footnote, Member Schaumber stated he would find no violation in the Respondent's refusal to hire Joe Gallien and Charles Jewell. Gallien, Jewell, and Richard Wynn all applied for employment at the same time and the Respondent knew that they were union members. The Respondent's president, Young, believed that Gallien and Jewell would not be satisfied with the salary the Respondent was offering and although Gallien said he would, Young did not believe him. As a result, he offered neither applicant a job but did offer Wynn a job after Wynn convinced Young that he really wanted to work for the Respondent at the wage level being offered. Member Schaumber disagreed with his colleagues' contention that it is clear that the judge discredited Young's explanation for his failure to hire Gallien and Jewell. He would also reverse the judge and find no violation in Conerly's threat to Wallace.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge J. Pargen Robertson issued his supplemental decision Sept. 29, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Paulus Enterprises, Inc. d/b/a The Ford Store San Leandro (East Bay Automotive Council (Machinists Local 1546, District Lodge 190, Painters Local 1176, Teamsters Local 78)) San Leandro, CA Sept. 12, 2006. 32-CA-22464-1; JD(SF)-45-06, Judge Jay R. Pollack.

Medco Health Solutions of Spokane, Inc. (Steelworkers Local 12-369) Liberty Lake, WA Sept. 12, 2006. 19-CA-30143; JD(SF)-47-06, Judge William G. Kocol.

The Oaks of West Kettering, Inc. (SEIU District 1199) Kettering, OH Sept. 12, 2006. 9-CA-42153; JD-67-06, Judge Eric M. Fine.

Virginia Mason Hospital (Washington State Nurses Association) Seattle, WA Sept. 12, 2006. 19-CA-30154; JD(SF)-49-06, Judge Gregory Z. Meyerson.

LVI, Inc. (Sheet Metal Workers Local 105) City of Industry, CA Sept. 12, 2006. 21-CA-36866; JD(SF)-44-06, Judge William L. Schmidt.

McKenzie Drywall Finishers Corp. (Carpenters Local 52) Bronx, NY Sept. 14, 2006. 29-CA-27336, 27351; JD(NY)-39-06, Judge Joel P. Biblowitz.

Dish Network Services, LLC (Machinists District Lodge 15) Orange, NJ Sept. 15, 2006. 22-CA-27104; JD-70-06, Judge David I. Goldman.

Igramo Enterprise, Inc. (Individuals) Queens, NY Sept. 15, 2006. 29-CA-27247, 27320; JD(NY)-40-06, Judge Raymond P. Green.

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TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Blue Man Vegas, LLC (Theatrical Stage Employees Local 720) (28-CA-20868; 346 NLRB No.10)
Las Vegas, NV Sept. 14, 2006. [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 CERTIFICATION OF REPRESENTATIVE

CFF Hotels Services, Inc., Cleveland, OH, 8-RC-16826, Sept. 13, 2006 (Members Schaumber, Kirsanow, and Walsh)

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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 RESULTS OF ELECTION

The Renovated Home Limited, Long Island City, NY, 29-RC-11274, Sept. 12, 2006 (Members Schaumber, Kirsanow, and Walsh)
Millard Refrigerated Services, Inc., Allentown, PA, 4-RC-21158, Sept. 14, 2006 (Members Schaumber, Kirsanow, and Walsh)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Raritan Bay Medical Center, Perth Amboy and Old Bridge, NJ, 22-RD-1446, Sept. 15, 2006 (Members Schaumber, Kirsanow, and Walsh)

DECISION AND DIRECTION [that Regional Director open and count ballots]

Colony Liquor and Wine Distributors, LLC, Kingston, NY, 3-RC-11697, Sept. 14, 2006 (Members Schaumber, Kirsanow, and Walsh)

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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)

Civista Health, La Plata, MD, 5-RD-1392, Sept. 13, 2006 (Members Schaumber, Kirsanow, and Walsh) [remanded to Regional Director]

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(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)

Matheson Mail Transportation, Inc., San Francisco, CA, 20-RD-2430, Sept. 11, 2006 (Members Liebman, Schaumber, and Kirsanow)

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Miscellaneous Board Orders

ORDER REMANDING PROCEEDING [to hearing officer for consideration of the disputed evidence and the issuance of a supplemental report]

Safeway Transportation, Inc., Detroit, MI, 7-RC-22950, Sept. 11, 2006 (Members Liebman, Kirsanow, and Walsh)

DECISION AND ORDER REMANDING [to Regional Director for further appropriate action]

Boro-Wide Recycling Corp., Maspeth, NY, 29-RC-11303, Sept. 13, 2006 (Members Schaumber, Kirsanow, and Walsh)

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