National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED
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Electrical Workers IBEW Local 15 (Commonwealth Edison Co.) (13-CB-17070; 341 NLRB No. 43) Chicago, IL Feb. 27, 2004. Chairman Battista and Member Walsh, with Member Schaumber concurring, adopted the administrative law judge's recommendation and dismissed the complaint allegation that the Respondent violated Section 8(b)(1)(A), 8(b)(3), and 8(d) of the Act when it bargained in bad faith with Commonwealth Edison (Com Ed) over a voluntary time off (VTO) program which Com Ed later implemented and when it threatened to discipline and did discipline members of the Union for participating in the VTO program. [HTML] [PDF]

Member Schaumber joined his colleagues in adopting the judge's findings that the Respondent did not violate the Act in any respect. He found that the parties did not engage in sufficient bargaining to support the General Counsel's burden to establish that the Respondent bargained in bad faith during negotiations regarding a VTO program. Member Schaumber concluded that the Respondent did not violate the Act by threatening and fining employee members who participated in the VTO program because it was privileged, under *Scofield v. NLRB*, 394 U.S. 423 (1969), to discipline employees who availed themselves of this voluntary benefit. Contrary to the General Counsel, he did not find that the Respondent's treatment of its employee members impaired any statutory labor law policy.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Commonwealth Edison Co.; complaint alleged violation of Section 8(b)(1)(A), 8(b)(3), and 8(d). Hearing at Chicago, Jan. 22-24, 2003. Adm. Law Judge Martin J. Linsky issued his decision April 23, 2003.

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Heartland Health Care Center d/b/a Plymouth Court (7-CA-46017; 341 NLRB No. 49) Plymouth, MI March 4, 2004. The Board adopted, in the absence of exceptions, the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of Service Employees Local 79 as the exclusive collective-bargaining representative of the Respondent's employees. [HTML] [PDF]

In exceptions, the General Counsel requested that the Board modify the judge's remedy to order the Respondent to pay the Union the dues it should have checked off and remitted during the effective dates of the contract while the Respondent refused to recognize the Union. The Board granted the General Counsel's request and modified the judge's recommended Order to require the Respondent to comply with the dues-checkoff provision of the contract and remit to the Union all union dues owed pursuant to valid checkoff authorizations, with interest.

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by Service Employees Local 79; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Detroit on Aug. 27, 2003. Adm. Law Judge Karl H. Buschmann issued his decision Nov. 4, 2003.

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Hempstead Park Nursing Home (29-CA-25339; 341 NLRB No. 41) Bronx, NY Feb. 27, 2004. Chairman Battista and Member Schaumber reversed the administrative law judge and dismissed the complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the draft collective-bargaining agreement submitted to it by the New York State Nurses Association, which the judge found accurately reflected the parties agreement. Member Walsh dissented. [HTML] [PDF]

The most recent collective-bargaining agreement between the parties expired on February 28, 2001. The parties stipulated that they agreed on a new collective-bargaining agreement by a written Memorandum of Agreement (MOA) signed by the Union and Respondent on March 21 and 22, 2002, respectively. The MOA contained the substantive terms of a collective-bargaining agreement, but was not a fully integrated contract. It specifically addressed section 9.03, "New York State Nurses Association Pension Plan," a term of the 1998-2001 contract.

On April 5, 2002, the Union's Pension Fund Office sent the Respondent a letter noting that there was no clear definition of the effective dates and duration of the contract and setting forth the Fund Office's interpretation of section 9.03. In September 2002, the Union sent the Respondent a draft of a fully integrated contract for signing which incorporated the Fund's interpretation of section 9.03. The Respondent wrote the Union, noting that corrections needed to be made with respect to the effective dates of the pension plan contributions. In response, the Union stated that the dates in the pension plan section should not be changed.

Chairman Battista and Member Schaumber held that the terms of the MOA as stated in the pension plan provision are ambiguous because they give rise to two reasonable, yet incompatible interpretations and that there was nothing to indicate that either party is to be blamed for the ambiguity. Accordingly, they found that the General Counsel did not carry his burden of proving the requisite “meeting of the minds” on the effective dates of the pension plan contributions.

Member Walsh, contrary to his colleagues, wrote that the General Counsel has established that the parties reached agreement on all the substantive terms of a new collective-bargaining agreement and that the document sent to the Respondent by the Union accurately reflected that agreement. Member Walsh noted, as did the judge, that the MOA provides that terms of the prior contract will be incorporated where not specifically addressed. Because the MOA does not contain any specific dates for the Respondent's contributions to the pension plan, the judge, applying past practice and the terms of the prior contract, determined that the Union’s interpretation of the MOA was correct and that the Respondent's failure to sign the proffered contract constituted a violation of the Act. Member Walsh agreed.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by New York State Nurses Association; complaint alleged violation of Section 8(a)(1) and (5). Hearing on March 6, 2003. Adm. Law Judge Raymond P. Green issued his decision March 27, 2003.

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JS Mechanical, Inc. (4-CA-29973; 341 NLRB No. 46) Ivyland, PA March 3, 2004. The Board, in agreement with the administrative law judge, dismissed the complaint in its entirety, including allegations that the Respondent violated Section 8(a)(1) of the Act by telling organizers/applicants that it did not want "union guys" at the facility, thereby indicating that it was futile for the organizers/applicants to apply for employment and threatening to call the police if the organizers/applicants did not leave the facility, and Section 8(a)(1) and (3) by refusing to hire and consider for hire Patrick Keenan and Robert DiOrio because they are members of Sheet Metal Workers Local 19. [HTML] [PDF]

The Board agreed with the judge that there was no evidence that the Respondent harbored antiunion animus or was motivated by animus in its treatment of applicants Keenan and DiOrio and that the Respondent did not exclude Keenan and DiOrio from its hiring process. Addressing the refusal to hire allegations, the Board reasoned that even assuming that the Respondent was unlawfully motivated, the evidence as found by the judge establishes, although he did not specifically so find, that the Respondent met its burden to prove that it would have hired Matthew Cahill instead of the organizers based on qualifications alone. *FES*, 331 NLRB 9, 12 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

Member Liebman did not rely on the finding that there is no evidence of antiunion animus, but only on the judge's finding that the organizer applicants were not excluded from the hiring process. Member Schaumber, in dismissing the refusal-to-hire allegation, relied solely on the judge's finding that the General Counsel failed to establish antiunion animus. He would not reach the question whether the Respondent has shown that it would have made the same hiring decision absent the organizer's union activity.

While agreeing with her colleagues that the judge correctly dismissed the allegation arising from the Respondent's calling the police to evict union organizers, Member Liebman adopted the judge's analysis only insofar as it is based upon the disruptive behavior of the organizer applicants, and not insofar as it relied on their intentions. She would not rely on *Yellow Freight Systems*, 313 NLRB 309, 329-332 (1997), cited by the judge in dismissing the allegation that the employer unlawfully evicted a union representative from its premises.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 19; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on July 12, 2001. Adm. Law Judge Paul Bogas issued his decision Dec. 10, 2001.

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McAllister Towing & Transportation Co., Inc. and its wholly owned subsidiary, McAllister Brothers, Inc. (2-CA-30974, 31457; 341 NLRB No. 48) New York, NY March 5, 2004. Members Liebman and Walsh affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by accelerating the timing of a mid-year wage increase from July to June, extending its 401(k) plan to the unit employees, and granting the employees five paid holidays. Member Schaumber dissented in part. [HTML] [PDF]

Members Liebman and Walsh decided that the Respondent did not engage in what the Board and courts have characterized as "hallmark" violations, (e.g. threats of plant closure, job loss, and discharge) justifying a *Gissel* bargaining order to remedy the violations, but that additional remedial action was warranted because a notice posting alone likely will be insufficient to permit the holding of a fair rerun election. Accordingly, they required that the Respondent permit a Board agent, at its Staten Island yard, to read aloud to employees the notice in the presence of a responsible management official at the yard. Having decided not to issue a bargaining order, Members Liebman and Walsh reversed the judge's findings that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with Longshoremen Local 333 since June 6, 1997 and by unilaterally granting benefits.

As a result of the Respondent's failure to produce documents subpoenaed by the General Counsel, the judge imposed limited sanctions against the Respondent under *Bannon Mills*, 146 NLRB 611 (1964). Members Liebman and Walsh found that the judge reasonably concluded, on the record before her, that *Bannon Mills'* sanctions were indeed warranted. They did not pass on the judge's recommendation that the Board warn Respondent's counsel on his handling of the subpoenas, his answer to the complaint, and other incidents arising during the hearing, explaining that allegations of misconduct are not to be submitted to the Board in the first instance but are to be submitted to the investigating officer under Section 102.77 of the Board's Rules and Regulations.

Member Schaumber joined his colleagues in finding that the Respondent violated the Act by its 1-month acceleration of a scheduled wage increase and that a remedial bargaining order is not the appropriate remedy for the violations found. He concluded that the record does not establish deliberate defiance or abuse of the Board's subpoena procedures sufficient to impugn the integrity of the hearing process and concluded that the judge erred in imposing *Bannon Mills* sanctions without first: (1) determining the scope of Respondent's prehearing compliance, and (2) making some effort to ascertain how long it would take for Respondent to fully comply with her ruling on the petitions to revoke. Since Member Schaumber believes the judge's erroneous *Bannon Mills'* ruling renders the record inadequate to find the two postelection 8(a)(1) violations, he would remand the case for reconsideration of these two violations and disagreed with the majority's notice-reading remedy.

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by Longshoremen (ILA) Local 333; complaint alleged violation of Section 8(a)(1) and (5). Hearing in New York on various dates between July 14 and Oct. 14, 1999. Adm. Law Judge Margaret M. Kern issued her decision Dec. 29, 2000.

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Trus Joist MacMillan (6-CA-29855, et al.; 341 NLRB No. 45) Buckhannon, WV March 5, 2004. The Board agreed with the administrative law judge that the Regional Director properly revoked an earlier informal settlement agreement resolving some of the complaint allegations; that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging or disciplining pro-Union employees Roger Allman, Joe Hall, Mylinda Casey Hayes, Troy Stire, and Larry Wilson; and that it violated Section 8(a)(1) by discharging supervisor Dane Moore for refusing to commit an unfair labor practice by giving Roger Harris an unwarranted evaluation downgrade because of his prominent union activities. [HTML] [PDF]

The Board affirmed the judge's dismissal of the allegations pertaining to employee interrogations but reversed the judge and found that the Respondent maintained an unlawful no-solicitation/no-distribution rule and unlawfully restricted employee Joe Hall's access to areas within the plant.

Chairman Battista and Member Schaumber, with Member Walsh dissenting, also reversed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Harris, concluding that Harris lost the protection of the Act because of the nature of his outburst during a meeting with Plant Manager Brooker about Moore's discharge. They noted that Harris' offensive outburst was not a spontaneous or reflexive reaction to the news about Moore's termination. Rather, when advised of Moore's termination, Harris said nothing offensive and reacted calmly. Chairman Battista and Member Schaumber observed that while Harris had time to reflect, he engaged in considerable planning as to how, when, and where he would respond to the news and, thereafter, "orchestrated a confrontational, face-to-face meeting on a date of his choosing. In that meeting, Harris deliberately launched into a vituperative personal attack on Booker, replete with obscene language and gesture. Thus, it was Harris, and not the Respondent, who orchestrated this encounter . . . that gave rise to his insubordinate and profane outburst."

Member Walsh agreed with the judge that Harris was unlawfully discharged. He said Harris' behavior was substantially provoked by the Respondent's unlawful discharge of Harris' supervisor for refusing to unlawfully discriminate against Harris in retaliation for his Union support. Member Walsh found that Harris' behavior did not carry him beyond the scope of the protection of the Act.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Mine Workers and Dane Wood Moore III, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Clarksburg, Feb. 1-3, Feb. 28-29, and March 1-2, 2000. Adm. Law Judge Arthur J. Amchan issued his decision June 6, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Helwig & Farmer Transportation Co., Inc. (Teamsters Local 492) Rio Rancho, NM February 27, 2004. 28-CA-16377; JD(SF)-15-04, Judge William L. Schmidt.

O'Brien & Associates, Inc. (Operating Engineers Local 150) Arlington Heights, IL March 1, 2004. 13-CA-41013; JD(ATL)-11-04, Judge John H. West.

Double Oak Family Medicine, P.C. (an Individual) Birmingham, AL March 2, 2004. 10-CA-34648; JD(ATL)-9-04, Judge Lawrence W. Cullen.

IDS Electrical Contracting Corp. and Electrical Solutions (Electrical Workers IBEW Local 164) Marlboro, NJ March 3, 2004. 22-CA-22034; JD(NY)-10-04, Judge D. Barry Morris.

Omega Demolition Corp. (an Individual) Elgin, IL March 4, 2004. 13-CA-41041; JD(NY)-11-04, Judge Joel P. Biblowitz.

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NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Ivaco Steel Processing (New York) LLC and Theo Davis Mann, Trustee in Bankruptcy (Steelworkers Local 4447-07) (3-CA-24481; 341 NLRB No. 47) Tonawanda, NY March 4, 2004. [HTML] [PDF]

Cray Constitution Group LLC (Laborers Local 130) (4-CA-32367; 341 NLRB No. 50) Gap, PA March 5, 2004. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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

DECISION AND DIRECTION OF SECOND ELECTION

Quickway Carriers, Inc., Heath, OH, 8-RD-1949, March 4, 2004

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Flying Food Group, Inc., Newark, NJ, 22-RC-12386, March 4, 2004

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Miscellaneous Board Orders

ORDER [GRANTING PARTIES' JOINT MOTION TO REMAND TO THE REGIONAL DIRECTOR FOR FURTHER PROCESSING]

Healthlink Holdings at Bear Creek, LLC, d/b/a Riverside Trace Healthcare & *Rehabilitation Center*, Rochester, MN, 18-RC-17111, March 3, 2004

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