National Labor Relations Board

Weekly Summary of NLRB Cases

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C A S E S S U M M A R I Z E D
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CBI Na-Con, Inc. (15-CA-13906, et al.; 343 NLRB No. 88) Geismar, LA Nov. 30, 2004. Subsequent to the issuance of the administrative law judge's initial decision, the Board remanded the case to the judge for further consideration pursuant to *FES*, 331 NLRB 9 (2000). In his supplemental decision, the judge reaffirmed his previous finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to consider or to hire 14 applicants for employment and Section 8(a)(1) by interrogating employees concerning their union membership and sympathies. [HTML] [PDF]

The Board, in this supplemental decision, adopted the judge's finding that the Respondent violated Section 8(a)(1) by coercively interrogating employees concerning their union membership and sympathies. However, it reversed the judge's finding that by failing to consider or hire 14 applicants for employment, the Respondent violated Section 8(a)(3) and (1) of the Act. The Board wrote: "[W]e find that the Respondent's hiring decision, and its consideration for hire of the alleged discriminates, were undertaken pursuant to a valid, neutral preferential hiring system, were not applied disparately, and were not discriminatory in practice."

(Chairman Battista and Members Schaumber and Meisburg participated.)

Charges filed by Plumbers Local 198; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Baton Rouge, May 5, 6, and 7, 1997. Adm. Law Judge Howard I. Grossman issued his decision on Sept. 25, 1997 and supplemental decision on Dec. 21, 2000.

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Children's Studio School Public Charter School (5-CA-31624; 343 NLRB No. 89) Washington, DC Nov. 30, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) of the Act by terminating the employment of Maria Firmino-Castillo because she had engaged in concerted activity protected by Section 7 of the Act. Her activity included initiating and participating in a number of meetings with other teachers and staff members to discuss various issues relating to their terms and conditions of employment, assisting in the preparation and submission of a letter on behalf of a group of faculty members protesting their midyear performance evaluations, and the preparation of proposals concerning improvements in their terms and conditions of employment that they wanted the Respondent to implement. [HTML] [PDF]

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Maria Firmino-Castillo, an Individual; complaint alleged violation of Section 8(a)(1). Hearing in Washington, DC, June 14-15, 2004. Adm. Law Judge Richard A. Scully issued his decision Aug. 31, 2004.

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Crown Bolt, Inc. (21-CA-33846, et al., 21-RC-20192; 343 NLRB No. 86) Cerritos, CA Nov. 29, 2004. The Board, in a 3-2 decision involving Crown Bolt, Inc., held that an employer's threat to close its facility in the event employees vote for union representation will not be presumed disseminated throughout the bargaining unit. The Board's holding, however, is prospective only. In all pending cases involving threats of plant closure, the Board will continue to rebuttably

presume that such threats were widely disseminated. The majority opinion is signed by Chairman Battista and Members Schaumber and Meisburg. Members Liebman and Walsh dissented in part. [HTML] [PDF]

The decision overrules the Board's decision 4 years ago in *Springs Industries, Inc.*, 332 NLRB 40 (2000), which held that plant-closure threats are presumed disseminated throughout the plant absent evidence to the contrary. *Springs Industries*, in turn, overruled *Kokomo Tube Co.*, 280 NLRB 357 (1986), where the Board declined to presume dissemination of a threat of plant closure made to a single employee. The *Crown Bolt* majority concluded that *Kokomo Tube* "represents the better evidentiary rule in requiring the party that seeks to rely on dissemination throughout the plant to show it."

In overruling *Springs Industries*, the *Crown Bolt* majority relied on several considerations. First, because the burden of proof in election-objection cases rests with the objecting party, *Springs Industries* "runs counter to the burden-allocation norm." Second, while the holding of *Springs Industries* is limited to plant-closure threats, its rationale is not, so "there is no apparent basis for declining to extend [the dissemination presumption] to other kinds" of statements. Third, the presumption is unnecessary: if dissemination of plant-closure threats is "all but inevitable," as the Board stated in *Springs Industries*, then it should be easy for the objecting party to prove. Fourth, employers face an undue burden in proving a lack of dissemination. Finally, circumstantial variations affect the probability of dissemination in any particular case, arguing against presuming dissemination in all closure-threat cases.

In their partial dissent, Members Liebman and Walsh characterized *Kokomo Tube* as an aberration from the Board's "traditional practice" of presuming dissemination of plant-closure threats. Emphasizing the severity of such threats, the dissent rejected the majority's view that circumstantial variations from case to case sufficiently affect the probability that such threats will be disseminated to warrant dispensing with the *Springs Industries* presumption. The dissent disagreed that dissemination should be easy for the objecting union to prove, stating that "employees are often reluctant, even afraid, to testify against their employer." Correspondingly, the dissent suggested that the majority had exaggerated the difficulties faced by employers in rebutting the dissemination presumption. The dissent also defended the *Springs Industries* presumption on the ground of administrative efficiency. Finally, the dissent noted the consistency of the *Springs Industries* presumption with the analogous "lore of the shop" principle, under which the Board assumes that plant-closure threats and other serious unfair labor practices will live on in the lore of the shop by being disseminated to new employees months and even years after the event.

(Full Board participated.)

Charges filed by Teamsters Local 848; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, Sept. 26-28, 2000. Adm. Law Judge Lana H. Parke issued her decision Dec. 29, 2000.

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Essex Valley Visiting Nurses Association (22-CA-24770; 343 NLRB No. 92) East Orange, NJ Nov. 30, 2004. The Board agreed with the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring four nurses from the administrative in-house positions of utilization management to field nurse positions. Chairman Battista and Member Schaumber held, contrary to the judge, that the Respondent did not violate Section 8(a)(5) when it discharged the nurses and that the nurses' discharge did not violate Section 8(a)(3). Member Walsh disagreed with his colleagues on this issue. [HTML] [PDF]

The majority found that the Respondent did not apply a unilaterally changed term or condition of employment to discharge the nurses but applied long-standing and understood requirements that employees must possess basic skills and the appropriate attitude necessary to do their job. In the majority's opinion, the nurses were discharged because they lacked basic skills and displayed an unprofessional attitude, because they could not perform the work, and because they showed a lack of interest in the training provided to them. In their view, the General Counsel failed to establish that the Respondent's discharge of the utilization management nurses was motivated by their demand for training.

Dissenting in part, Member Walsh agreed with the judge that "since it is clear that [the nurses'] terminations resulted from this unilateral transfer, the terminations are also violative of Section 8(a)(1) and (5) of the Act." He would find that the Respondent's unlawful unilateral action in transferring the utilization management nurses into the field—including its refusal to bargain over the necessary training—was a factor in their discharge.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Health Professionals and Allied Employees Local 5122; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Newark, June 12 and 13 and July 10 and 11, 2002. Adm. Law Judge Steven Fish issued his decision March 27, 2003.

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NYES Corp. (3-RC-11327; 343 NLRB No. 87) Oneonta, NY Nov. 30, 2004. The Board adopted the recommendations of the hearing officer, set aside the election of May 8, 2003, and directed that a second election be conducted. The revised tally of ballots showed 5 for and 7 against, Teamsters Local 813, with no challenged ballots. [HTML] [PDF]

In finding objectionable conduct, the hearing officer relied on *Springs Industries*, 332 NLRB 40 (2000), in which the Board presumed that threats of plant closure are disseminated among employees, absent evidence to the contrary. The Board noted that its decision in *Crown Bolt, Inc*., 343 NLRB No. 86 (2004), overrules *Springs Industries*; however, it does so prospectively only and, therefore, it will continue to apply the *Springs Industrie*s presumption to pending cases, including this case.

(Members Schaumber, Walsh, and Meisburg participated.)

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Ogihara America Corp. (7-CA-47071, 7-RC-22589; 343 NLRB No. 91) Howell, MI Nov. 30, 2004. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act and engaged in objectionable conduct by issuing employee Stefan Mikulka a written warning for distributing literature in a nonworking area on nonworking time to an employee who was also on nonworking time. The Board found it unnecessary to pass on whether the Respondent's enforcement of its uniform policy on the day of the election was objectionable because it determined that Mikulka's unlawful discipline was independently sufficient to warrant a rerun election. Accordingly, it set aside the election of Jan. 9, 2003, and directed a second election. The revised tally of ballots showed 148 votes for and 159 against, the Auto Workers. [HTML] [PDF]

In setting aside the election based on the discipline of Mikulka, the judge relied on *Dal-Tex Optical Co*., 137 NLRB 1782 (1962). Chairman Battista contended that the Respondent's unlawful conduct would warrant a new election even under *Cambridge Tool & Mfg. Co*., 316 NLRB 716 (1955), because that conduct had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." Member Schaumber concurred in the result and agreed with Chairman Battista's comments. Because the Respondent has not excepted to the Sec. 8(a)(3) violation found by the judge, he found it unnecessary to address the merits of the judge's discussion of *Wright Line*, 251 NLRB 1083 (1980).

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Auto Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit on May 25, 2004. Adm. Law Judge George Carson II issued his decision July 12, 2004.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

W.B. Mason Company, Inc. (Food & Commercial Workers Local 371) North Haven, CT November 29, 2004. 34-CA-10551, 10600; JD-114-04, Judge Wallace H. Nations.

Alexander Painting, Inc. and Silver Palette, Inc. (Painters District Council 21) Bethlehem, PA November 29, 2004. 4-CA-32867, et al.; JD-115-04, Judge David L. Evans.

Independent Steel Products, LLC (Carpenters Local 2947) Farmingdale, NY December 2, 2004. 29-CA-26283; JD(NY)-50-04, Judge Raymond P. Green.

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NO ANSWER TO COMPLAINT

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

Homak Mfg. Co., Inc. (Teamsters Local 714) (13-CA-41619; 343 NLRB No. 90) Bedford Park, IL November 30, 2004. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(***In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)***

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

Robie Window Systems, Inc., Ipswich, MA, 1-RC-21801, November 29, 2004
(Chairman Battista and Members Liebman and Schaumber)

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

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

Waste Management of Nevada County, Grass Valley, CA, 20-RC-17982, December 2, 2004
(Members Liebman, Schaumber, and Walsh)

DECISION AND DIRECTION OF SECOND ELECTION

Diam U.S.A., Long Island City, NY, 29-RC-10260, November 29, 2004
(Chairman Battista and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Titterington's Olde English Bake Shop, Inc., Woburn, MA, 1-RC-21779, November 29, 2004
(Chairman Battista and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Harborside Health Care-New Lebanon, New Lebanon, OH, 9-RC-17919, November 30, 2004 (Chairman Battista and Members Liebman and Schaumber)

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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)

Stepan Company, Elwood, IL, 13-RC-21254, December 1, 2004 (Members Liebman, Walsh, and Meisburg)
Semco Energy Gas Co., Port Huron, MI, 7-RC-22787, December 1, 2004 (Members Liebman, Schaumber, and Walsh)

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Miscellaneous Board Orders

ORDER [granting request for review of Regional Director's decision and direction of election with respect to the supervisory status of the doctors and nurses and denying request in all other respects]

Community Health Center La Clinica, Pasco, WA, 19-RC-14551, November 30, 2004 (Chairman Battista and Member Schaumber; Member Walsh dissenting)

ORDER [remanding to Regional Director for appropriate action consistent with *Oakwood Care Center*, 343 NLRB No. 76 (2004)]

Ameron International Corp., Lakeside, CA, 21-RC-20721, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
Massey Metals Co., Inc., et al., Tampa, FL, 27-RC-8142, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
Nursing Care Center at Medford, Inc., et al., Medford, NY, 29-RC-10099, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
Sprint/Central Telephone Co. of Texas, Overland, KS, 16-UC-200, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
Treasure Island Job Corps Center and Alutiiq Professional Services, LLC, 20-RC-17984, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
U-Haul of California, Fremont, CA, 32-RC-5268, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)
Valmont Microflect, Salem, OR, 36-RC-6056, November 30, 2004 (Chairman Battista and Members Schaumber and Meisburg)

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