National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED
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Aldworth Co., Inc., and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers (4-CA-27274, et al., 4-RC-19492; 343 NLRB No. 97) Swedesboro, NJ Dec. 8, 2004. The administrative law judge, in his supplemental decision, affirmed his previous ruling that Carl Nelson, James Everidge, Stanley Wallace, and Martin Cramer were not unlawfully terminated. The Board adopted the judge's finding and dismissed the complaint allegations that the Respondent violated Section 8(a)(5), (3), and (1) of the Act relating to the discharges of Nelson, Everidge, Wallace, and Cramer. [HTML] [PDF]

In adopting the dismissal of allegations that the discharges violated the Act, the Board focused on the manner in which the issue was litigated. The judge determined that the General Counsel failed to produce evidence showing enforcement disparities sufficient to establish that the four employees would not have been discharged under the old production standard. The Board found that the record made clear that the judge and all the parties construed the Board's remand as requiring this approach. It found no merit in the General Counsel's exceptions challenging the judge's credibility findings and assertion that she had presented sufficient evidence to meet the judge's standard. Chairman Battista noted that there were no exceptions to the judge's application of *Great Western Produce*, 299 NLRB 1004 (1990).

In its earlier decision, 338 NLRB 137 (2002), the Board concluded that the Respondent unlawfully implemented new performance standards, called the selection accuracy policy (SAP) for its warehouse employees. It remanded the case to the judge to take evidence on whether the old SAP had been enforced less rigorously than the revised SAP.

(Chairman Battista and Members Liebman and Meisburg participated.)

Charges filed by Food & Commercial Workers Local 1360; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Philadelphia on Dec. 11, 2002. Adm. Law Judge William G. Kocol issued his decision Feb. 26, 2003.

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American Gardens Management Co. and Bailey Gardens Realty Corp. (2-CA-33475, 33605; 343 NLRB No. 104) Visalia, CA Dec. 8, 2004. Pursuant to the Board's remand in the earlier proceeding, 338 NLRB 644 (2003), the administrative law judge issued a supplemental decision in which he reaffirmed his original recommendation that the complaint be dismissed. Members Schaumber and Meisburg agreed with the judge's dismissal of the complaint alleging that the Respondents violated Section 8(a)(1), (3), and (4) of the Act by discharging employees Matthew Roberts and Alfred Rosales because of their union activities and because they testified at a representation hearing and violated Section 8(a)(1) and (3) by discharging Fidencio Frias because he assisted Service Employees Local 32E and engaged in concerted activities. Member Liebman dissented. [HTML] [PDF]

The majority assumed, without deciding, that the General Counsel established a prima facie case; however, they found that the Respondents met their *Wright Line* affirmative defense of proving that the employees would have been discharged for lack of work, even absent their protected conduct.

In dissent, Member Liebman wrote that she was not persuaded that lack of work explained why Roberts and Rosales were terminated. She believes that the timing evidence in this case convincingly establishes that protected activity was a motivating factor in the discharges as Roberts and Rosales were discharged just 1 week after the Regional Director issued a decision including them in the voting unit—over the Respondents' objections—and just 2 weeks before the Dec. 22, 2000 directed election. Member Liebman further stated: "Given the powerful evidence that the discharges were driven by the union election, the Respondents had a very heavy burden here to show that they would have let both Roberts and Rosales go precisely when they did, because there suddenly was no work for them. Unlike my colleagues, I am not nearly persuaded that this was the case."

(Members Liebman, Schaumber, and Meisburg participated.)

Charges filed by Service Employees Local 32E; complaint alleged violation of Section 8(a)(1), (3), and (4). Adm. Law Judge Raymond P. Green issued his supplemental decision Jan. 31, 2003.

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CBS Broadcasting, Inc. (2-CA-35421; 343 NLRB No. 96) New York, NY Dec. 8, 2004. Members Walsh and Meisburg agreed with the administrative law judge's finding that the Respondent violated Section 8(a)(5), (2), and (1) of the Act by bargaining solely with Writers Guild of America, West, Inc. (WGW) and executing an agreement and by failing to bargain with WGW and Writers Guild of America, East, Inc. (WGAE) as the joint collective-bargaining representative of unit employees. Member Meisburg dissented. [HTML] [PDF]

Since 1958, WGAE and WGW have been the joint exclusive collective-bargaining representative of a single nationwide unit of CBS newswriters, editors, and other employees located in New York, Chicago, Washington, DC, and Los Angeles. A National Staff Agreement (National Agreement), supplemented by 11 agreements covering different localities and/or particular jobs (jointly, the collective-bargaining agreement), covers the unit. The most recent collective-bargaining agreement is effective from April 2, 2002 through April 1, 2005.

During negotiations for the current collective-bargaining agreement, the Respondent proposed adding to the National Agreement a sideletter (proposal 7) covering future consolidations of operations by the Respondent. The joint bargaining committee rejected proposal 7. The parties reached agreement on a revised proposal, which was incorporated into the collective-bargaining agreement as sideletter 15 to the Los Angeles supplement to the National Agreement. Several months later, a WGW representative and the Respondent entered into an agreement (the Duopoly Agreement) that revised sideletter 15. In pertinent part, the Duopoly Agreement created a new position—supervisory writer/producer—that was in the unit, but which was excluded from the arbitration process in case of discharge.

The majority held that the Respondent was not privileged to negotiate the substantive change to the collective-bargaining agreement solely with WGW despite the Respondent's alleged "long history" of separate dealing with WGAE and WGW on nonsubstantive matters within their respective jurisdictions. They also agreed with the judge that WGAE did not waive its right to bargain by not requesting that the Respondent cease bargaining with WGW, noting that WGAE repeatedly voiced to WGW its objections to the Respondent's negotiating with only one of the unions and that the Respondent continued bargaining solely with WGW on a substantive change.

Member Schaumber would dismiss the complaint in its entirety, finding that the joint representative is stopped from objecting to the Respondent's negotiation and execution of the Duopoly Agreement without WGAE's participation. He noted that the record showed that the parties had a past practice whereby the Respondent dealt independently with each of the Unions on issues within their respective geographic jurisdictions; and that the issues addressed by the Duopoly Agreement are local to Los Angeles and affect only those employees within WGW's jurisdiction. Member Schaumber wrote that the Respondent reasonably believed that it could negotiate the Duopoly Agreement with WGW and should not now suffer prejudice from the lack of diligence by WGAE in assertion of its rights.

(Members Schaumber, Walsh, and Meisburg participated.)

Charge filed by Writers Guild of America, East, Inc.; complaint alleged violation of Section 8(a)(1), (2), and (5). Hearing at New York City, Feb. 26-27, and March 17-18 and 22-23, 2004. Adm. Law Judge D. Barry Morris issued his decision June 29, 2004.

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Facchina Construction Co., Inc. (5-CA-29940; 343 NLRB No. 98) La Plata, MD Dec. 8, 2004. The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating job applicants Elton Floyd and Salvatore Astarita about their union membership. Chairman Battista and Member Liebman affirmed the judge's finding with regard to Floyd but reversed the judge's finding with regard to Astarita. They found that Job Superintendent Gerard Ours did not violate the Act by questioning Astarita, who openly advertised his support for the Carpenters. [HTML] [PDF]

The majority agreed with the judge's finding that Respondent's foreman, Mike Spargo violated Section 8(a)(1) by: (1) prohibiting employees from distributing union literature off of the Respondent's premises on nonworking time, and (2) by telling employee William Salbeck that Spargo had to get rid of all union carpenters because he was bringing in workers from other jobs to take their places. They also agreed with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging employees William Salbeck, Lester Smith, Lynwood Keene, and Alfred Keene for engaging in union activity. The majority found no merit in the Respondent's argument that the General Counsel failed to meet his *Wright Line* burden of establishing that the discharges were motivated by antiunion animus.

Dissenting in part, Member Meisburg would reverse the judge and dismiss the complaint allegation of a violation of Section 8(a)(3) and (1). In his view, the General Counsel has failed to meet his burden of proving that the Respondent discharged the four alleged discriminatees because of their union affiliation and activities.

(Chairman Battista and Members Liebman and Meisburg participated.)

Charge filed by Carpenters Regional Council Baltimore and Vicinity; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Baltimore, June 10, 12, 13, 14, and 27 and July 30 and 31, 2002. Adm. Law Judge Earl E. Shamwell Jr. issued his decision June 13, 2003.

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Fairfield Tower Condominium Assn. and Fairfield Presidential Management Corp., Joint Employers (29-CA-24243; 343 NLRB No. 101) Brooklyn, NY Dec. 8, 2004. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate striking employees upon their unconditional offer to return to work and Section 8(a)(5) and (1) by unilaterally entering into a subcontracting agreement with another employer to provide services previously performed by striking employees. [HTML] [PDF]

(Members Liebman, Schaumber, and Meisburg participated.)

Charge filed by Service Employees Local 32B-32J; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Brooklyn on May 1, 2002. Adm. Law Judge Howard Edelman issued his decision Sept. 24, 2002.

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HCL, Inc. a/k/a A.B., Inc. (9-CA-39526; 343 NLRB No. 95) Louisville, KY Dec. 10, 2004. The Board, on a stipulated record, reversed the administrative law judge's dismissal of the unfair labor practice allegations and found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective-bargaining agreement with Laborers Local 576 and by bypassing the Union and dealing directly with its bargaining unit employees concerning their terms and conditions of employment. [HTML] [PDF]

The Board noted that the Respondent has admitted that the 2002-2005 agreement was the new agreement and that it was obligated to execute that agreement by virtue of the Letter of Intent signed by the parties on June 14, 2002. It held that the parties' stipulation is consistent with Board law, citing *Cowboy Scaffolding*, 326 NLRB 1050 (1998), where the Board found that an individual employer's agreement to be bound by "all subsequent agreements between the Association and the Union" was sufficient to bind the employer to successor agreements between the Union and the Association. The Board found *James Luterbach Construction Co*., 315 NLRB 976 (1994), applied by the judge, is inapposite, saying in *Luterbach*, the issue was "whether an

8(f) employer, in a multi-employer unit, is bound, by inaction, to the successor multi-employer unit." 315 NLRB at 979.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Laborers Local 576; complaint alleged violation of Section 8(a)(1) and (5). Parties waived their right to a hearing. Adm. Law Judge Arthur J. Amchan issued his decision April 17, 2003.

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Kentucky Tennessee Clay Co. (11-CA-18925, 18968; 343 NLRB No. 102) Langley, SC Dec. 8, 2004. The Board affirmed the administrative law judge's findings that the Respondent, through Supervisor Murray Penner and Plant Manager David Forrester, violated Section 8(a)(1) of the Act by: (1) threatening Adelbert Quackenbush and three truck drivers with discharge in December 2000 if they went on strike; (2) creating the impression of surveillance among its employees in December 2000; (3) threatening employee Patrick Scott on January 15, 2001 with futility in selecting union representation; and (4) threatening employee Renew with discipline for engaging in union and/or protected activity on January 16, 2001. It also found that the Respondent violated Section 8(a)(3) by reducing employee Scott's work hours in August 2000 and then discharging him in January 2001. [HTML] [PDF]

In a related proceeding, 334 NLRB No. 33 (2001), the Board found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain or to supply information to the Boilermakers after it had been certified as the collective-bargaining representative. The U.S. Court of Appeals for the Fourth Circuit, however, found on review that the Respondent's election objections were meritorious and that the Union should not have been certified as the bargaining representative. Accordingly, the court denied enforcement of the Board's order.

In view of the Court's ruling that the underlying representation election was invalid, the Board reversed the judge's finding that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union in September 2000 and by unilaterally changing certain terms and conditions of employment in late 2000 and early 2001.

(Members Liebman, Walsh, and Meisburg participated.)

Charges filed by Boilermakers; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Aiken on Oct. 17, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision Dec. 28, 2001.

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Lexus of Concord, Inc. (32-CA-18925, 19003; 343 NLRB No. 94) Concord, CA Dec. 8, 2004. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring employee Dave Burman into a unit position without prior notice to Machinists District Lodge 190, Local Lodge 1173 and without affording the Union an opportunity to bargain with respect to the transfer and the effects of the transfer; and by failing to provide the Union with requested information that was relevant and necessary to the Union's performance of its duties as exclusive representative. [HTML] [PDF]

Members Schaumber and Meisburg, with Member Walsh dissenting, disagreed with the judge's finding that the Respondent's withdrawal of recognition from the Union on June 1, 2001, was lawful. The majority found no barriers to the Respondent's reliance on the employees' expression of disaffection from the Union—a decertification petition filed on April 17, 2001 and signed by a majority of the unit employees. Contrary to his colleagues, Member Walsh found that the Respondent could not rely on the petition to withdraw recognition because the signatures on it, obtained on April 16 and 17, 2001, were tainted by the Respondent's refusal to bargain with the Union from March 26 through April 19. He found that the Respondent unlawfully withdrew recognition and thereafter unlawfully granted an across-the-Board wage increase to which the Union had expressly refused to agree prior to the Respondent's withdrawal of recognition.

(Members Schaumber, Walsh, and Meisburg participated.)

Charges filed by Machinists District Lodge 190, Local Lodge 1173; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland, Dec. 10-12, 2001. Adm. Law Judge Mary Miller Cracraft issued her decision Feb. 11, 2002.

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Pennsylvania Academy of the Fine Arts (4-RC-20710; 343 NLRB No. 93) Philadelphia, PA Dec. 6, 2004. Chairman Battista and Member Meisburg found, contrary to the Regional Director, that the petitioned-for artists' models, who model for art classes at the Academy, are independent contractors under the Act, and dismissed the petition filed by AFSCME District Council 47. Member Walsh disagreed with his colleagues. [HTML] [PDF]

To determine whether individuals are statutory employees or independent contractors, the Board applies the common-law agency test, which considers all the incidents of the individual's relationship to the employing entity and considers the 10 factors derived from the common-law Restatement of Agency. See *BKN, Inc*., 333 NLRB 143, 144 (2001), *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998). After considering the factors, the majority concluded that the evidence demonstrates that the models are independent contractors.

In dissent, Member Walsh wrote that while there are factors that tend to support independent contractor status, those factors are much less significant and are clearly outweighed by the factors supporting employee status. He agreed with the Regional Director that the models are statutory employees, and in reaching this conclusion, he relied on the models' lack of entrepreneurial risk and opportunity for gain, the level of control over the models exercised by the Academy, the lack of skill or training necessary to obtain a modeling position with the Academy, and the extent to which the Academy relies on models to operate its business.

(Chairman Battista and Members Walsh and Meisburg participated.)

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Shaw's Supermarket (1-RM-1267; 343 NLRB No. 105) Mansfield, MA Dec. 8, 2004. Chairman Battista and Member Meisburg, with Member Walsh dissenting, reversed the Acting Regional Director's administrative dismissal of the Employer-Petitioner's petition, reinstated the petition, and remanded the case to the Regional Director for a hearing. The Acting Regional had administratively dismissed the petition without a hearing, finding that Food and Commercial Workers Local 791's demand for recognition at the Employer's new store in Mansfield, MA based on an after-acquired store clause in the parties' collective-bargaining agreement does not entitle the Employer to demand an election under Section 9(c)(1)(B). [HTML] [PDF]

The majority defined the issues as: (1) whether the Employer clearly and unmistakably waived the right to a Board election; and (2) if so, whether public policy reasons outweigh the Employer's private agreement not to have an election. It wrote: "We do not resolve these issues at this stage. We merely hold that they are worthy of review. Thus, the difference between our dissenting colleague and ourselves is that we would consider these important issues, and our colleague would not." The majority noted that the clause provides that the Employer will recognize the Union and apply the contract when a majority of employees have authorized the Union to represent them, that the clause does not cover such matters as to what the appropriate unit is or who the eligible employees are, and that is not clear that the Employer waived its right to a Board decision. Representation case issues (e.g. appropriateness of unit, eligibility to vote) are for the Board to decide and the issues would be left to the grievance arbitration process that the Union has invoked should they dismiss the petition, the majority explained.

Member Walsh wrote in finding that the Acting Regional Director correctly dismissed the petition and that review should be denied: "[T]he Board, at the direction of the D.C. Circuit, has long held that such clauses waive the Employer's right to demand an election. Further, the Board has expressly held that a union's demand for recognition based on such a clause does not support an RM petition. Nevertheless, my colleagues cast doubt on established Board and court precedent by questioning whether the clause in the present case constituted a waiver and whether 'policy concerns' outweigh the parties' agreement."

(Chairman Battista and Members Walsh and Meisburg participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

St. John's Mercy Health System d/b/a St. John's Mercy Medical Center (Food & Commercial Workers Local 655) St. Louis, MO December 6, 2004. 14-CA-27851; JD-116-04, Judge Paul Bogas.

Sheet Metal Workers Local 15 (Galencare, Inc. d/b/a Brandon Regional Medical Center and Energy Air, Inc.) Tampa, FL December 7, 2004. 12-CC-1258, et al., 12-CG-13; JD(ATL)-61-04, Judge George Carson II.

Milwaukee Dustless Brush Co. (PACE Local 7-0852) Milwaukee, WI December 10, 2004. 30-CA-16640; JD-118-04, Judge Robert A. Giannasi.

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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, DIRECTION AND ORDER [that Regional Director open and count ballots]

Nations Rent, Inc., Perrysburg, OH, 8-RC-16629, December 7, 2004 (Chairman Battista and Members Schaumber and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Dairy Farmers of America, Inc., Turlock, CA, 32-RC-5277, December 8, 2004 (Members Liebman, Schaumber, 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 REPRESENTATIVE

Big Foot Express, Inc., Huntington, WV, 9-RC-17937, December 7, 2004 (Members Liebman, Schaumber, and Walsh)

Massachusetts Institute of Technology, Cambridge, MA, 1-RC-21759, December 7, 2004 (Members Liebman, Schaumber, and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

RM Clark, Inc., Findlay, OH, 8-RC-16658, December 7, 2004 (Members Liebman, Schaumber, and Walsh)
Metro Networks Communications, Inc., Southfield, MI, 7-UD-531, December 8, 2004 (Members Liebman, Schaumber, and Walsh)
Alliance Imaging, Inc., Andover, MA, 1-RD-2033, December 9, 2004 (Members Liebman, Schaumber, and Walsh)

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

Georgia-Pacific Corporation, Wheatfield, IN, 25-RC-10238, December 7, 2004 (Members Liebman, Schaumber, and Walsh)

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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)

Maramont Corporation, Philadelphia, PA, 4-RC-20865, December 8, 2004 (Members Liebman, Schaumber, and Walsh)

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