National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED

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Harmony Corp. (15-CA-13913, 14102; 349 NLRB No. 74) Baton Rouge, LA April 19, 2007. The Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire or to consider for hire certain applicants on Feb. 22, April 29, May 1, and May 8, 1996, because they openly indicated their support for Electrical Workers IBEW Local 995. It decided that the General Counsel established all three elements of the legal framework set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), for determining whether an employer has discriminatorily refused to consider or hire individuals because of their union affiliation or activity. First, that the employer was hiring or had definite plans to hire at the time of the alleged unlawful conduct; second, that the alleged discriminatees had experience or training relevant to the requirements of the position, or alternatively, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and third, that antiunion animus contributed to the decision not to hire the alleged discriminatees. [HTML] [PDF]

The Board had remanded the proceeding to the administrative law judge in 2000 to reconsider his original decision in light of *FES.* The judge found that a violation occurred on Feb. 22, but he dismissed the complaint allegations regarding the Respondent's refusal to hire overt union applicants on April 29, May 1 and 8. He concluded that entry into the Respondent's hiring process was accomplished only by speaking to the Respondent's recruiter, Buddy Meaut, that signing the Respondent's applicant log did not constitute entry into the hiring process, and that the applicants who sought employment on April 29, May 1 and 8, did not actually apply for jobs because they did not insist on speaking with Meaut.

The Board disagreed. It noted the lack of evidence showing that the Respondent, through its receptionist or otherwise, ever informed the union applicants of the desirability or importance of speaking with Meaut. Instead, the record shows that the receptionist essentially dictated who spoke with Meaut, endeavored to see to it that overt union applicants did not speak with him, selectively referred the covert applicants to Meaut and falsely advised overt applicants that Meaut was unavailable, and instructed individuals who appeared at the Respondent's office seeking employment to sign the logbooks for job applicants.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IBEW Local 995; complaint alleged violation of Section 8(a)(1) and (3). Adm. Law Judge George Carson II issued his decision May 4, 1998, and his supplemental decision Aug. 28, 2000.

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Mickey's Linen & Towel Supply, Inc. (13-CA-43153; 349 NLRB No. 76) Hammond, IN April 20, 2007. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by making unlawful promises of benefits to employees, that the Respondent did not violate Section 8(a)(1) by disparately enforcing its no-solicitation and distribution policy or by encouraging its employees to sign a decertification petition, and that the Respondent did not violate Section 8(a)(5) by unilaterally changing its access provision. [HTML] [PDF]

The Board reversed the judge and found that the Respondent violated Section 8(a)(1) by assisting employees in their attempts to decertify the Union when it performed translations for an employee who was soliciting signatures for a decertification petition.

The Board found that the judge's recommended broad order requiring the Respondent to cease and desist from violating the Act "in any other manner" was not warranted. It substituted a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by UNITE-HERE Chicago Midwest Regional Joint Board; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Chicago, July 12-13, 2006. Adm. Law Judge Bruce D. Rosenstein issued his decision Oct. 2, 2006.

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Precipitator Services Group, Inc. (4-CA-24627; 349 NLRB No. 77) Elizabethton, TN April 20, 2007. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act on Jan. 23, 1996, when its Field Superintendent, Ken Fortner, implicitly threatened employees David Packer, James Neumane, and Richard Deuhaut with unspecified reprisals when they gave him a letter from the Boilermakers and displayed union insignia; and violated Section 8(a)(3) and (1) by discriminatorily refusing to consider and hire the Union's paid organizer, Millard "JD" Howell, on Jan. 25, 1996, the second time he sought employment. The Board had remanded the case to the administrative law judge in 2000 for further consideration in light of its decision in *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). [HTML] [PDF]

Contrary to the judge, the Board found that the Respondent did not violate the Act by refusing to consider or hire Howell when he first sought employment with the Respondent on or about Dec. 13, 1995, or on Jan. 9 and 10, 1996, when the Respondent hired Packer, Neumane, and Deuhaut; and did not violate Section 8(a)(3) and (1) on Feb. 5, 1996, by discriminatorily refusing to consider and hire union members Ernest Patterson, Michael Manculich, and John LaPoint. The Board concluded that the General Counsel failed to prove that the Respondent unlawfully refused to consider and to hire Howell when he sought employment on Dec. 13, 1995 and failed to prove that the individual to whom Patterson, Manculich, and LaPoint gave their applications was an agent of the Respondent.

Citing *Eckert Fire Protection*, 332 NLRB 1988 (2000), the judge found that the Respondent unlawfully refused to consider and hire Howell on Jan. 9 and 10, when the Respondent hired the three employees who responded to the newspaper ad for welders, saying Howell's Dec. 13, 1995 "attempt for employment was within 30 days of the noted hiring and was 'fresh.'" The Board disagreed. It noted that here, unlike in *Eckert Fire Protection*, where the employer considered job applications to be current for 30 days, there was no showing that the

Respondent had any such "freshness" policy. The Respondent was free to consider and hire exclusively from among those employees who applied for work in response to the Jan. ad. Howell admitted that after Dec. 13, he did not contact the Respondent about the advertised welder positions and did not attempt to reapply until Jan. 25. The Board, in agreeing with the judge that the Respondent discriminatorily refused to hire Howell on Jan. 25, found that the General Counsel met his burden of proof under *FES* and that the Respondent failed to show that it would not have hired Howell even in the absence of his union affiliation.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by the Boilermakers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia on May 1, 1997. Adm. Law Judge Richard H. Beddow issued his decision Sept. 5, 1997 and his supplemental decision Oct. 27, 2000.

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SEIU Heathcare Workers West (Kaiser Foundation Health Plan, Inc., et al.) (32-CB-5893-1; 349 NLRB No. 73) Walnut Creek, CA April 17, 2007. The administrative law judge found, with Board approval, that the Respondent violated Section 8(b)(1)(A) of the Act when Union Representative/Organizer Greg Tegenkamp urged the stewards' council to suspend shop steward Charles Barnes for filing an unfair labor practice charge with the Board, and suspending and then removing Barnes from his position as a steward to the Kaiser Foundation Hospital in Walnut Creek, CA. The judge found "that Respondent failed to prove that its council suspended and removed Barnes for abusing his steward's position in any manner and that assertions to that effect are a pretext designed to mask its retaliation against Barnes for filing an NLRB charge." [HTML] [PDF]

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Charles Barnes; complaint alleged violation of Section 8(b)(1)(A). Hearing at Oakland on Aug. 29, 2006. Adm. Law Judge William L. Schmidt issued his decision Dec. 7, 2006.

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Special Touch Home Care Services, Inc. (29-CA-26661; 349 NLRB No. 75) Brooklyn, NY April 18, 2007. Members Liebman and Kirsanow accepted the Respondent's revised 38-page exceptions to the administrative law judge's Sept. 15, 2005 decision, but rejected the Respondent's revised 73-page accompanying brief. The Respondent on Nov. 23, 2005 timely filed an exceptions document that was 92 pages long and a 50-page brief in support. By order dated July 6, 2006, the Associate Executive Secretary advised the Respondent's counsel that the arguments in the exceptions combined with the 50 page-brief, exceeded the 75 pages of permitted argument, cited cases for guidance, and afforded the Respondent an opportunity to

resubmit exceptions and a brief in compliance with the Board's Rules and Regulations. Members Liebman and Kirsanow noted that the Respondent filed another noncompliant document despite the order. They wrote:

> Striking the defective exceptions, however, may impair the Respondent's right under Section 10(e) of the Act to appeal. Under the present circumstances, we believe it strikes a fairer balance to deny the [General Counsel's] motion to strike the exceptions and instead strike the brief. Thus, our ruling on the motion serves to uphold the Board's rules without unduly penalizing the Respondent. Moreover, we do not think that the Respondent will be unfairly prejudiced by our rejection of the brief that was filed on its behalf, given the substantial amount of factual and legal argument contained in the exceptions, which will be considered in our review. [HTML] [PDF]

The General Counsel and the Charging Party may file answering briefs and cross-exceptions no later than 14 days from the date of the Board's supplemental order.

Chairman Battista, dissenting in part, did not agree that the Respondent's exceptions were improper. He noted that the Board's rules are not a "model of clarity," as the excepting party must not 'argue' in its exceptions, but must set forth, in the exceptions, the concise "grounds" for the exception. The Chairman believes that the Respondent made a good faith and successful effort "to resolve the dilemma." He disagreed with the majority that eight exceptions—2, 3, 5, 21, 22, 26, 31, and 87—contain argument, noting that all, except 87, challenge the judge's failure to find and give weight to specific alleged facts, which would be relevant to the argument set forth in the brief. Viewing the exceptions as a whole, Chairman Battista found that the General Counsel failed to prove that the Respondent's exceptions were deficient under the Board's Rules. He would accept the exceptions and would not impose any sanctions.

(Chairman Battista and Members Liebman and Kirsanow participated.)

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Young Women's Christian Association of Western Massachusetts (1-CA-42618; 349 NLRB No. 78) Springfield, MA April 18, 2007. Members Liebman and Walsh affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to reduce to writing and sign a contract reached with Auto Workers Local 2322 and ratified by employees on April 20, 2005, and by withdrawing recognition from the Union when it received evidence that the Union had lost majority support after the parties had reached a final agreement. [HTML] [PDF]

Chairman Battista, dissenting, found that the April 20 agreement did not render unlawful the withdrawal of recognition. Citing *Appalachian Shale Products Co*., 121 NLRB 1160, 1161 (1958), he noted that the Board has held that a document containing substantial terms and conditions of employment can serve as a contract bar only if it is signed by the parties. The

Chairman decided that the contract-bar principles are applicable to this case, saying if there is no signed contract as a bar, an employer can withdraw recognition based upon the union's loss of

majority status. He acknowledged that an oral agreement followed by an uncertainty or doubt as to the union's majority status, will not privilege a refusal to sign a contract. Chairman Battista pointed out however that in this case, the oral agreement was followed by the fact of loss of the union's majority status and that under *Levitz Furniture*, 333 NLRB 717 (2001), an employer can withdraw recognition based on the fact of loss of majority status. The only exception is that majority status cannot be challenged during the term of a sign contract, which is not applicable here.

Members Liebman and Walsh rejected their colleague's contention, also advanced by the Respondent, that because, under *Appalachian Shale*, an unwritten, unsigned agreement does not bar the Board from processing an employee decertification petition, such an agreement should not preclude an employer's unilateral withdrawal of recognition, based on evidence of the union's actual minority status. They explained:

> The Respondent and the dissent fail to recognize the crucial distinction between employees challenging a union's representational status by asking the Board to hold an election and an employer withdrawing recognition from a union unilaterally. The Board, with court approval, has repeatedly stated that the decertification election process, with the safeguards for Section 7 rights, is the preferred method of resolving questions regarding employees' support for an incumbent union. See *Levitz*, supra at 723, 727. Employer self-help, by contrast, has always been judged by different standards. As the judge pointed out, the distinction that the Board makes between the effect of an unwritten, unsigned agreement concerning, on the one hand, the processing of a decertification election petition, and, on the other, an employer's withdrawal of recognition, is fully consistent with the Board's duty to balance stability in collective-bargaining relationships against the effectuation of employees' representational desires.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Auto Workers Local 2322; complaint alleged violation of Section 8(a)(1) and (5). Adm. Law Judge David I. Goldman issued his decision Feb. 10, 2006.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Laborers Local 334 (Detroit Building Group, LLC) (an Individual) Detroit, MI April 16, 2007. 7-CB-15224; JD(ATL)-13-07, Judge John H. West.

Jackson-Vinton Community Action, Inc. (Ohio Association of Public School Employees (OAPSE) Local 4) Athens, OH April 16, 2007. 9-CA-43026; JD-25-07, Judge Jane Vandeventer.

Loyalhanna Health Care Associates (Individuals) Latrobe, PA April 16, 2007. 6-CA-28609, et al.; JD-26-07, Judge Arthur J. Amchan.

United States Post Office (Letter Carriers Branch 86) Hartford, CT April 18, 2007. 34-CA-11588(P); JD(NY)-21-07, Judge Joel P. Biblowitz.

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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 RESULTS OF ELECTION

Printpack, Inc., Hazelwood, MO, 14-RD-1864, April 20, 2007 (Chairman Battista and Members Schaumber and Kirsanow)

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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)

Brusco Tug and Barge, Inc., Longview, WA, 19-RC-13872, April 18, 2007 (Chairman Battista and Members Liebman and Walsh)

(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)

Guardsmark, LLC, Buffalo and Williamsville, NY, 3-RC-11739, April 18, 2007 (Chairman Battista and Members Liebman and Walsh)

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