National Labor Relations Board

Weekly Summary of NLRB Cases

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CASES SUMMARIZED

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Can-Am Plumbing, Inc. (32-CA-16097; 350 NLRB No. 75) Pleasanton, CA Aug. 24, 2007. Upon remand from the United States Court of Appeals for the District of Columbia Circuit, the Board affirmed its previous holding, reported at 335 NLRB 1217 (2001), that the Respondent violated Section 8(a)(1) of the Act by maintaining and prosecuting a preempted state court lawsuit against competitor L. J. Kruse Company for accepting job targeting program funds from the Union for a construction project. The state lawsuit alleged that the acceptance of the funds violated the California Labor Code and the California Business and Professions Code, because some of the money collected by the Union for the job targeting program was derived from wages earned on state prevailing wage projects. [HTML] [PDF]

The court agreed with the Board that the state lawsuit was preempted with respect to dues from employees on projects not funded by the Davis-Bacon Act, and further ruled that preempted lawsuits are unlawful without regard to the First Amendment analysis of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003). However, the court remanded the proceeding to the Board for further consideration of whether the inclusion of dues from federal prevailing wage projects under the Davis-Bacon Act rendered the entire JTP unprotected by the National Labor Relations Act.

The Board accepted the court's decision as the law of the case. In response to the court's remand, the Board found that the Respondent did not contend in Board proceedings, including its exceptions to the administrative law judge's decision, that the Union's job targeting program was unprotected because it included money from Davis-Bacon project wages. Rather, the Respondent alleged only a conflict with state law. Therefore, the Board concluded that, under Section 102.46 of its Rules and Regulations, the Respondent waived the argument that the job targeting program violated the Davis-Bacon Act and was consequently unprotected.

In view of the Respondent's failure to raise this issue, the Board relied on its decision in *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997), that job targeting programs are protected. On that basis, and applying the court's decision, the Board affirmed its determination that the Respondent unlawfully maintained and prosecuted the preempted state court lawsuit.

(Chairman Battista and Members Liebman and Walsh participated.)

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Goya Foods of Florida (12-CA-21168, et al.; 350 NLRB No. 74) Miami, FL August 23, 2007. The Board adopted the administrative law judge's findings that Respondent violated Section 8(a)(5) and (1) of the Act by taking the following unilateral actions without giving the Union notice and an opportunity to bargain: (i) assigning a new store account to a bargaining unit driver's delivery route; (ii) reassigning a store vacated by a departing employee to another sales employee; (iii) changing the night shift starting time for warehouse employees; (iv) assigning stores previously serviced by a unit driver to non-unit agency drivers; (v) changing the delivery routes of drivers; and (vi) eliminating drivers' ability to arrange both the order of daily deliveries and the order in which goods were to be loaded onto their delivery trucks. The Board found no need to pass on whether these last two changes also violated Section 8(a)(3). [HTML] [PDF]

The Board relied on its decision in an earlier case involving the same parties to reject two common defenses raised by the Respondent against unilateral change allegations. The Respondent contended that all changes took place after it lawfully withdrew recognition from the Union as the previously certified bargaining representative of employees in two bargaining units. However, in *Goya Foods of Florida*, 347 NLRB No. 103 (2006)(*Goya I*), the Board found that the withdrawal of recognition was unlawful and ordered the Respondent to recognize and bargain with the Union as the continuing majority representative of unit employees. The Respondent also contended that it had no obligation to bargain about changes in route and store assignments because such changes were consistent with an alleged past practice of maintaining a dynamic status quo in which the stores assigned to sales employees and drivers varied daily. The Board rejected the same argument in *Goya I*, finding that the Respondent relied on "an historic right to act unilaterally, as distinct from an established practice of doing so . . . . [T]hat right to exercise sole discretion changed once the Union became the certified representative." 347 NLRB No. 103, slip op. at 3.

The Board affirmed the judge's ruling that the General Counsel did not engage in impermissible relitigation or piecemeal litigation of various allegations in this proceeding. It rejected the Respondent's contention that the judge erred by issuing a decision before the Board issued its decision in *Goya I*. Finally, the Board summarily affirmed the judge's dismissal of allegations that the Respondent violated Section 8(a)(5) by its assignment of overtime to warehouse employees and that it violated Section 8(a)(1) by threatening an employee.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by UNITE!; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, Feb. 24 and 25, 2003. Adm. Law Judge George Carson II issued his decision April 24, 2003.

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Success Village Apartments, Inc. (34-CA-11110, et al.; 350 NLRB No. 72) Bridgeport, CT Aug. 20, 2007. The Board, reversing the administrative law judge, found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to bargain over its new policy that precluded union-represented employees from purchasing apartments at its cooperative apartment complex. The Board also found that the Respondent did not violate Section 8(a)(3) and (1) by refusing to allow employee Luis Andrade to purchase an apartment. The Board majority of Chairman Battista and Member Kirsanow found that the subject matter of housing for employees in this case was not a term or condition of employment and did not pertain to the employment relation. Accordingly, the Board found that it was not a mandatory subject of bargaining under Section 8(a)(5) or discrimination as to working conditions or tenure of employment under Section 8(a)(3). [HTML] [PDF]

The Board distinguished prior Board cases in which housing for employees was intimately connected to the employment relation, the so-called "company housing" cases. In those cases, company housing was maintained to assure or promote the continuous availability of employees and the convenience and economic benefit of the special accommodations were an important part of the employment relation. Here, in contrast, the Respondent offered housing to the general public and only a small fraction of apartments was occupied by bargaining unit employees. Further, employees had historically paid market rates and the subject of housing had never been contained in any collective-bargaining agreement or had been a subject of meaningful bargaining.

Member Liebman dissented. In her view, the former longstanding policy of permitting employees to purchase apartments was an emolument of value that was connected to terms and conditions of employment because it impacted commuting to work, enhanced the ability to work overtime, and made housing available, near their employment, at below-market cost compared to surrounding area housing. The dissent also found that the new policy was directly linked to employment tenure because the opportunity to purchase an apartment was effectively conditioned on an employee's resignation from employment and was implemented in retaliation for the exercise of Section 7 rights.

The Board unanimously found also that the Respondent violated Section 8(a)(1) when its property manager told an employee that the Respondent's board of directors did not want union-represented employees to live at the apartment complex. The Board noted that the complaint did not allege that the Respondent's new housing policy independently violated Section 8(a)(1) and that the Board was not considering whether the policy may have independently violated Section 8(a)(1).

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by Auto Workers Local 376; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hartford, Oct. 17-19 and 25, 2005. Adm. Law Judge Raymond P. Green issued his decision Jan. 25, 2006.

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United Rentals, Inc. (8-CA-34853, et al.; 350 NLRB No. 76) Columbiana and East Liverpool, OH Aug. 24, 2007. The Board adopted all of the administrative law judge's unfair labor practice findings. There were multiple Section 8(a)(1) findings as well as Section 8(a)(3) and 8(a)(5) findings. The Respondent engaged in these unfair labor practices during the Union's successful effort to organize approximately 15 employees working for the Respondent. [HTML] [PDF]

The Board affirmed the judge's findings that the Respondent violated Section 8(a)(3) by suspending annual performance evaluations and pay raises; by discontinuing its practice of permitting employees to rent equipment without charge; by imposing a stricter dress code; and by changing its practice of permitting employees to call in before a scheduled shift to advise that

they would be late. In so doing, the Board clarified the applicable legal standard. The General Counsel easily met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 399-403 (1983). The Respondent's proffered nondiscriminatory reasons for the conduct at issue were unworthy of belief and therefore pretextual. Thus the Respondent failed to show that it would have taken the same actions even in the absence of its employees' union activity. *Golden State Foods Corp.*, 340 NLRB 382,385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F. 2d 799 (6th Cir. 1982).

The Board also affirmed the judge's findings that the Respondent violated Section 8(a)(5) as well as Section 8(a)(3) concerning the conduct at issue. In so doing, the Board rejected the Respondent's contention that there was no material, substantial, and significant change with respect to the Respondent's equipment rental, uniform and call-in policies. The loss of free equipment rentals, the Respondent's enforcement of a more stringent uniform policy, and the Respondent's imposition of discipline pursuant to the changed call-in policy clearly had a detrimental effect on employees. *Vanguard Fire & Security Systems*, 345 NLRB No. 77, slip op. at 2 (2005); *Toledo Blade Co.*, 343 NLRB 385, 388 (2004).

Member Schaumber agreed with his colleagues and the judge that the Respondent violated Section 8(a)(3) by withholding annual evaluations and pay raises, and by changing its equipment rental, uniform, and call-in policies. However, he found it unnecessary to pass on the judge's additional findings that the Respondent's conduct also violated Section 8(a)(5) because the additional findings would not materially affect the remedy. *Strand Theatre of Shreveport Corp.*, 346 NLRB No. 51, slip op. at 1, fn. 2 (2006).

(Members Liebman, Schaumber and Kirsanow participated.)

Charges filed by Operating Engineers Locals 66, 66A, B, C, D, O, and R; complaint alleged violations of Sections 8(a)(1), (3), and (5). Hearing at Columbiana, Feb. 1-3, March 15, and Aug. 30, 2005. Adm. Law Judge Michael A. Rosas issued his decision Jan. 30, 2006.

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Virginia Mason Medical Center (19-CA-29046; 350 NLRB No. 73) Bainbridge Island, WA Aug. 21, 2007. The Respondent is a non-profit corporation, and operates an acute-care hospital in Seattle, Washington, and 19 non-acute care outpatient facilities, one of which is located in Winslow, Washington on Bainbridge Island. The Board adopted the administrative law judge's findings that per diem employees Denise Janetos and Maree Zawoysky were terminated pursuant to an established past practice of terminating per diem employees when the extent of their availability was insufficient to justify their retention. Accordingly, the Board adopted the judge's dismissal of the complaint allegation that the Respondent had violated Section 8(a)(5) and (1) of the Act by making a series of decisions concerning the restructuring of its Winslow facility, resulting in the layoffs, without prior notice to the Union, and without affording the Union an opportunity to bargain. [HTML] [PDF]

The majority adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, on September 26, 2003 (based on a September 23, 2003 decertification petition) during the certification year.

There had been nearly a year-and-a-half delay from the certification of the Union as the exclusive bargaining representative of unit employees until the D.C. Court of Appeals enforced the Board's bargaining order. The Board's majority noted that where an employer refuses to bargain with a certified union while pursuing judicial review of the certification, the certification year begins on the date of the parties' first bargaining session, unless "there is a significant delay in the start of bargaining attributable to inexcusable procrastination or other manifestation of bad faith on the part of the union," citing *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 fn. 4 (1990), enfd. 939 F.2d 402 (6th Cir. 1991).

The majority noted that only four months had passed from the court's enforcement of the bargaining order to the start of bargaining. Less than a month after the enforcement of the order the Union requested information, and it sought bargaining within 2 months of receiving the requested information. The Respondent accepted the first bargaining date, October 1, 2002, suggested by the Union, and the parties first bargaining session was held on that date. There was no evidence of bad faith on the Union's part, nor any evidence that the Respondent complained about the delay or requested an earlier bargaining date. The majority thus found that the delay was not inexcusably long and agreed with the judge that the Respondent had not shown that the delay was attributable to inexcusable procrastination or bad faith on the part of the Union, and that therefore the certification year began on October 1, 2002. The majority therefore found that recognition was withdrawn from the Union during the certification year, and that it was thus unnecessary to pass on the judge's finding that the Respondent was also precluded from relying on the petition, because the petition predated the expiration of the certification year.

In dissent Member Schaumber would reverse the judge's finding that the Respondent violated Section 8(a)(5)and (1) by withdrawing recognition from the Union on September 26, 2003. Member Schaumber would rely on the 4 months delay between the date that the court's order issued and the parties' first bargaining session, the fact that none of the delay was attributable to the Respondent, and the absence of any explanation from the Union for the delay.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Staff Nurses Local 141, a/w UFCW; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Seattle, March 23 and 25 2004. Adm. Law Judge Clifford H. Anderson issued his decision on June 14, 2004.

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Wal-Mart Stores, Inc. (28-CA-16831, et al.; 350 NLRB No.71) Las Vegas, NV Aug. 20, 2007. This case involved alleged violations of Section 8(a)(1) and (3) arising in the context of a union organizational campaign conducted at three of the Respondent's retail stores in Las Vegas, Nevada. The stores were located at South Rainbow Boulevard, East Tropicana Avenue, and West Craig Road. [HTML] [PDF]

Regarding the allegations of unfair labor practices at the South Rainbow store, a panel majority consisting of Chairman Battista and Member Walsh affirmed the judge's finding that the Respondent violated Section 8(a)(1) when a district manager told employee Avis Hammond that he was not "worthy" of working for the Respondent if he believed the contents of a union press release. The majority found that the district manager's comment disparaged the employee for engaging in protected activity and suggested that his protected activity was incompatible with continued employment. Member Schaumber, dissenting, would have dismissed the complaint allegation on the ground that the comment was an off-the-cuff expression of personal opinion. A different panel majority consisting of Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(1) by warning Hammond for distributing union literature on the sales floor. The majority found that the record did not support the judge's finding that the Respondent had disparately enforced its no-solicitation rule against union activity. Member Walsh, dissenting, agreed with the judge's disparate enforcement finding.

Regarding the unfair labor practice allegations at the East Tropicana store, the Board unanimously affirmed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to employee Diana "Angie" Griego. However, citing *IBM Corp*., 341 NLRB 1228 (2004), which issued after the judge's decision, the Board unanimously reversed the judge's finding that the Respondent violated Section 8(a)(1) by denying Griego's request for a coworker representative to be present at an interview with managers. A panel majority consisting of Chairman Battista and Member Schaumber also reversed the judge's finding that the Respondent violated Section 8(a)(1) by creating the impression of surveillance of its employees' union activities. The facts showed that when Griego handed another employee a union pen, an assistant manager told them to "take this to the break room." The majority relied on the principle that it is lawful for management officials to observe open union activity, particularly when it occurs on company premises, unless the officials act in a manner that is out of the ordinary. Member Walsh, dissenting, would have found the violation on the ground that the assistant manager was paying unusual attention to employees' union activities.

Regarding the unfair labor practice allegations at the West Craig store, the Board unanimously affirmed the judge's finding that the Respondent violated Section 8(a)(1) by interfering with union handbilling, as well as his dismissal of the allegation that the Respondent unlawfully created the impression of surveillance by observing the handbilling.

Finally, a panel majority consisting of Chairman Battista and Member Schaumber amended the judge's remedy in two respects. First, the majority removed the provision ordering the Respondent to offer Griego instatement to the position of pharmacy clerk, and limited her

entitlement to backpay to the period from the date she was denied this position to the date she voluntarily resigned from the Respondent's employ. Second, the majority ordered the Respondent to post separate notices conforming to the specific violations found at each store. Member Walsh, dissenting, would have granted Griego the standard instatement and make-whole remedy and left to compliance the issue of whether she would have quit even in the absence of the Respondent's unlawful conduct. In addition, Member Walsh would have required the Respondent to post the same notice to employees at all three stores.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Food and Commercial Workers International; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Las Vegas on various trial dates between Jan. 15 and Feb. 28, 2002. Adm. Law Judge Albert A. Metz issued his decision Sept. 24, 2002.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Mustangs Unlimited, Inc. (Individuals) Manchester, CT Aug. 21, 2007. 34-CA-1137, 11441; JD-57-07, Judge John T. Clark.

Solartec, Inc. and Sekely Industries, Inc., a single Employer (UAW Region 2B) Salem, OH Aug. 23, 2007.
8-CA-31778, et al.; JD(ATL)-22-07, Judge Margaret G. Brakebusch.

American Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc. (Electrical Workers [IBEW] Local 2) St. Louis, MO Aug. 23, 2007. 14-CA-27386, et al.; JD-35-07, Judge Paul Buxbaum.

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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 CERTIFICATION OF RESULTS OF ELECTION

Bozzuto' s, Inc., Cheshire, CT, 34-RC-2204, Aug. 23, 2007 (Chairman Battista and Members Kirsanow and Walsh)

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Miscellaneous Decisions and Orders

DECISION ON REVIEW [reinstating petition] AND ORDER REMANDING [to Regional Director for further appropriate action]

Lenox Hill Hospital, New York, NY, 2-RC-23182, Aug. 22, 2007 (Members Liebman, Schaumber, and Kirsanow)

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