National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

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C A S E S S U M M A R I Z E D
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Air Climate Systems, Inc. and All Climate Systems, Inc. (30-CA-17695; 352 NLRB No. 75) Janesville, WI May 30, 2008. The Board, granting the General Counsel's motion for default judgment, found that the Respondents (Air Climate Systems, Inc. and All Climate Systems, Inc.) were alter egos and a single employer and that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, by failing to apply two collective-bargaining agreements, and by failing to provide information requested by the Union. The Respondents filed the answer 1 day late and offered no explanation for the late filing. The Board issued an order inviting the Respondents to file a response explaining the late filing of the answer. The Respondents filed the response late and offered no explanation for the late filing of the response. The response explained the late filing of the answer by stating that, on the day the answer was due, Respondents' counsel was delayed in returning to his office from a hearing. The Board, applying Section 102.111(c) of the Board's Rules whereby a document may be filed late "only upon good cause shown based on excusable neglect," rejected the response as untimely filed. The Board further found that the Respondents' explanation for the late filing of the answer set forth in the response showed only counsel inattention and noted that the Board has consistently rejected counsel inattention as an excuse for the late filing of an answer. [HTML] [PDF]

Chairman Schaumber noted that, as explained in his dissent in *Patrician Assisted Living Facility*, 339 NLRB 1153, 1156-1161 (2003), he would give weight to additional factors in deciding whether to grant a default judgment motion based on a late-filed answer. However, he also noted that his view is not current Board law and that the additional factors were outweighed here by the weakness of the excuse for the late filing of the answer and by the late filing of the response.

(Chairman Schaumber and Member Liebman participated.)

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Allied Mechanical Services, Inc. (7-CA-40907, 41390; 352 NLRB No. 83) Kalamazoo, MI May 30, 2008. The Board denied the Respondent's motion for reconsideration of the Board's Sept. 28, 2007 supplemental decision and order (351 NLRB No. 5). In that decision, the Board granted the General Counsel's and Union's motions for reconsideration and found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Plumbers Local 357, revising its job application procedure without notice to Local 357, and failing to provide a response to Local 357's information request. [HTML] [PDF]

In its motion for reconsideration, the Respondent contended that the Board erred in retroactively applying its decision in *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB No. 19 (2007). In *Kravis*, the Board overruled the "due process" standard for union mergers and held that, following a union merger or affiliation, an employer's obligation to recognize and bargain with the union continues regardless of whether the union members were provided an opportunity to vote on the merger or affiliation. The Respondent also contended that the Board erred in finding that the parties had a Section 9(a) relationship and in ordering the Respondent to recognize and bargain with the Union. Additionally, the Respondent argued that the Board should remand the case to the judge to apply the Board's decision in *Toering Electric Co.*, 351 NLRB No. 18 (2007).

The Board found that the Respondent's motion failed to present extraordinary circumstances warranting reconsideration. In finding its application of *Kravis* proper, the Board found that the Respondent could not have relied on the due process standard overruled by *Kravis* as well settled when it withdrew recognition of the union, because the Supreme Court's earlier decision in *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192 (1986), cast grave uncertainty on that standard. The Board also found that retroactive application of *Kravis* would further the purposes of the Act and that no particular injustice would arise from its retroactive application.

Regarding the parties' bargaining relationship, the Board found no basis to reconsider its finding that the parties' 1991 settlement agreement demonstrated that the parties had established a 9(a) relationship. That settlement agreement resolved a complaint that sought a *Gissel* bargaining order and alleged that the Respondent had committed numerous violations of Section 8(a)(1) and (3). The Board noted that the settlement agreement's language, which required the Respondent to recognize and, upon request, bargain with the Union and embody in a signed collective-bargaining agreement any understanding reached, replicated the language of the complaint, which clearly contemplated a 9(a) relationship.

The Board also found no basis to reconsider its separate finding that the Board's prior decision in *Allied Mechanical Services,* 332 NLRB 1600 (2001), was necessarily premised on the existence of a 9(a) relationship and barred the Respondent, under the principles of collateral estoppel, from relitigating whether the parties had a 9(a) bargaining relationship. The Board rejected the Respondent's contention that the question of whether the parties' relationship was governed by 8(f) or 9(a) was not actually litigated in that case.

Finally, the Board denied the Respondent's motion to remand the case to the judge to apply *Toering Electric.* The Board found that the motion in this regard was untimely, because it concerned a portion of the case that the Board had decided in 2004. Additionally, the Board found the motion without merit, because the Board's supplemental decision and order in this case issued before *Toering* was decided and, thus, did not fall within the ambit of the cases to which *Toering* applied.

(Chairman Schaumber and Member Liebman participated.)

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American Standard (8-CA-33352, et al.; 352 NLRB No. 80) Tiffin, OH May 30, 2008. The Board adopted the administrative law judge's findings that the Respondent committed numerous unfair labor practices during and after the parties' bargaining for a successor collective-bargaining agreement in April 2002. The major issue was whether the parties reached a successor agreement in the late hours of April 30 and the early morning hours of May 1. The Board adopted the judge's finding that the parties had not reached agreement or impasse, and that consequently the Respondent violated Section 8(a)(5) by abandoning negotiations. The Board concluded that the parties had agreed to continue negotiating over outstanding noneconomic issues and in fact did so in the early morning of May 1 after the private mediator

employed by the parties had gone to bed. Thus, the Board found it unnecessary to reach the issue of whether the judge erred in excluding the parties from introducing evidence involving the private mediator that the Respondent contended would establish that the parties reached agreement because the parties' subsequent conduct during the early hours of May 1—when the mediator was not present—established that there was no "meeting of the minds" on a successor agreement. [HTML] [PDF]

The Board rejected the General Counsel's request for extraordinary remedies, agreeing with the judge that its traditional remedies were sufficient to address the unfair labor practices found. The Board also rejected the Respondent's argument that it had already remedied several violations as part of a set-aside settlement agreement. The Board concluded that because the settlement had subsequently been set aside, the notices posted pursuant thereto had no effect and a new posting was appropriate.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Glass, Molders, Pottery and Plastics Workers Local 7A; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Tiffin on 22 days between July 23, 2003 and Sept. 29, 2005. Adm. Law Judge Jane Vandeventer issued her decision Sept. 18, 2006.

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Baptista's Bakery, Inc. (30-CA-17104, 17268, 30-RC-6604; 352 NLRB No. 72) Franklin, WI May 30, 2008. The Board reversed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act under a "mass layoff" theory by laying off five employees in order to discourage union activity. Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board found that even assuming the General Counsel proved that antiunion animus was a motivating factor in the layoffs, the Respondent proved that it would have implemented the layoffs for economic reasons even in the absence of union activity. The Board observed that at the time of the layoffs, the Respondent was entering its seasonal slow period with an increased workforce due to a prior expansion, that the expansion had been undertaken largely to accommodate anticipated business from two major customers, and that sales of those customers' products were not meeting expectations. Having found that the layoffs were not unlawful, the Board sustained the Respondent's challenges to ballots cast by three of the alleged discriminatees. [HTML] [PDF]

The Board adopted the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by laying off employee Kathi Szuszka. The Board agreed with the judge that Szuszka was not laid off.

The Board found it unnecessary to pass on whether the Respondent violated Section 8(a)(1) by giving employees free jackets in order to discourage support for the Union. The Board found that the additional violation would be cumulative, because the judge had found

that the Respondent violated Section 8(a)(1) by providing other benefits to employees, and the Respondent did not except to those findings.

In the absence of exceptions, the Board affirmed the judge's findings that the Respondent committed various violations of Section 8(a)(1) and affirmed the judge's dismissal of certain other Section 8(a)(1) allegations**.** The Board also adopted the judge's recommendation for a second election based on objectionable conduct by the Respondent.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Teamsters Local 344; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Milwaukee, Feb. 21-24, April 3-7, and May 23-25, 2006. Adm. Law Judge Mark D. Rubin issued his decision Dec. 22, 2006.

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Bashas', Inc. (28-CA-21435, et al.; 352 NLRB No. 82) Phoenix, AZ May 30, 2008. The Board granted the General Counsel's request for special permission to appeal from the administrative law judge's ruling that the General Counsel must furnish the Respondent's counsel with the names of witnesses whom the General Counsel intends to call at the hearing, and reversed the judge's ruling. The Board reasoned that by ordering the General Counsel to provide a list of witnesses in advance of their testimony, the judge effectively established a procedure for discovery, and that no provision of the Act or the Board's Rules and Regulations authorizes an administrative law judge to authorize discovery. The Board noted that the General Counsel voluntarily agreed to provide advance notice of the dates on which current employees or managers of the Respondent, who are under subpoena, will be called, found that such voluntary agreements can aid in the efficient administration of the Act. The Board further noted that there was no indication that the Respondent demonstrated a need for an advance witness list that could not have been met by alternative measures, e.g., granting a continuance after the General Counsel's witnesses have testified. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

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MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing (18-CA-18216, et al.; 352 NLRB No. 71) North Branch, MN May 30, 2008. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by discharging employees Donald Doty and Steven LaMont in retaliation for their protected activity in furtherance of a pay dispute with the Respondent. In the absence of exceptions, the Board further adopted the judge's other findings that the Respondent violated Section 8(a)(1) and (5). [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Plumbers Local 34; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Minneapolis on Oct. 16, 2007. Adm. Law Judge David I. Goldman issued his decision Dec. 28, 2007.

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(Chairman Schaumber and Member Liebman participated.)

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CNN America, Inc. and Team Video Services, LLC, Joint Employees (5-CA-31828, 33125 (formerly 2-CA-36129); 352 NLRB No. 85) Washington, DC May 30, 2008. The administrative law judge ruled, during the hearing, that (1) the Respondent must produce documents subpoenaed by the General Counsel and the Charging Party except to the extent that he specifically rules otherwise or defers making a decision on particular issues; and (2) the Respondent is not required to disclose confidential sources but must otherwise produce requested documents that the Respondent argues are subject to a reporter's privilege against disclosure. [HTML] [PDF]

The Board granted the Respondent special permission to appeal the judge's denial of its petition to revoke the subpoenas. The Board found, without reaching the merits of the Respondent's arguments that the subpoena requests are unduly burdensome, that the costs and burden of producing the vast number of documents requested in electronic format should be balanced against the relevance of and need for the documents. The Board directed the chief administrative law judge to assign a separate administrative law judge to act as a special master and analyze these issues using the framework provided in a document called *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition* (The Sedona Conference Working Group Series, 2007).

Regarding the Respondent's claim of a reporter's privilege, the Board denied the Respondent's special appeal on the merits, finding that even assuming, without deciding, that the privilege applies, the General Counsel can overcome the privilege under the balancing test urged by the Respondent (whether the information sought can be obtained from alternative sources, whether the information is crucial to establishing the claim, and whether the need for the information outweighs the interest in protecting the substance of the reporter's newsgathering). Accordingly, the Board remanded the proceeding to the chief administrative law judge for assignment of an administrative law judge to act as a special master to resolve the issues described above concerning the subpoenas.

(Chairman Schaumber and Member Liebman participated.)

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Dickens, Inc. (29-CA-28229; 352 NLRB No. 84) Commack, NY May 30, 2008. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by ordering, instructing and requesting its employees to refrain from discussing bonuses with other employees, and by terminating Wenqing Lin for engaging in the protected concerted activity of requesting an increase in bonus rates. Although the judge's finding that Respondent

violated Section 8(a)(1) by instructing its employees not to discuss their bonuses with other employees was based on an unalleged violation, the Board found that the violation was related to the complaint. [HTML] [PDF]

Chairman Schaumber recognized that the finding of a violation was consistent with extant Board law, which he applied for institutional reasons for the purpose of deciding this case. Member Liebman found that the unalleged violation was closely connected to the subject matter of the complaint and was fully litigated.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by an individual; complaint alleged violations of Section 8(a)(1). Hearing at Brooklyn, Aug. 20-21, 2007. Adm. Law Judge Steven Fish issued his decision Dec. 4, 2007.

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Engineered Steel Concepts, Inc. and ESC Group Limited, Alter Egos (13-CA-43235; 352 NLRB No. 73) East Chicago, IN May 30, 2008. The Board adopted the administrative law judge's findings that Respondent ESC Group Limited was the alter ego of Respondent Engineered Steel Concepts, Inc., that the Respondents and the Union had a Section 9(a) bargaining relationship, and that the Respondents violated Section 8(a)(1) of the Act by conditioning job offers to employees upon their working for a nonunion company without union wages and benefits; violated Section 8(a)(3) and (5) by laying off and subsequently terminating employees Wagner, Roop, and Miletich; and violated Section 8(a)(5) by failing and refusing to recognize and bargain collectively with the Union by refusing to apply the terms and conditions of their collective-bargaining agreement, including wage rates, fringe benefit fund contributions, and hiring hall provisions and by abrogating the agreement including the subcontracting of bargaining unit work. [HTML] [PDF]

In adopting the judge's finding that the parties' relationship was governed by Section 9(a) rather than Section 8(f), the Board noted that the threshold question in determining the applicability of Section 8(f) is whether the employer is engaged primarily in the building and construction industry and that the burden of establishing that status lies with the party seeking to avail itself of the Section 8(f) statutory exception. The Board found that the Respondents, which were engaged principally in hauling steel byproduct between steel mills did not meet that burden because they failed to show that they were engaged primarily in the building and construction industry.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Teamsters Local 142; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Chicago, Feb. 12-13, 2007. Adm. Law Judge Eric M. Fine issued his decision July 3, 2007.

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Fresenius USA Mfg., Inc. (2-RC-23145; 352 NLRB No. 86) Chester, NY May 30, 2008. The Board, reversing the administrative law judge, set aside the election of Nov. 3, 2006, and directed that a new election be held. The tally of ballots showed 9 votes for and 7 against the Petitioner, Teamsters Local 445. [HTML] [PDF]

Two units of employees voted in this election (units A and B). Unit A voted with green ballots and unit B with yellow ballots. The Board agent, who was colorblind, incorrectly identified a ballot during the preelection conference. During the election, although the party observers identified the color ballot voters should receive, the Board agent also incorrectly identified a ballot. During the ballot count, the Board agent required that the Employer stand 6 to 8 feet away from the counting table, failed to display ballot markings, and refused the Employer's request to examine ballots. These actions prevented the Employer from seeing any ballot markings. Additionally, the Board agent took counted ballots home without securing them against any tampering, mishandling, or damage.

Applying the standard set forth in *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970), the Board found that the cumulative effect of these irregularities raised a reasonable doubt as to the fairness and validity of the election. The Board noted that "election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure." *Paprikas Fono*, 273 NLRB 1326, 1328 (1984). The Board found that the Board agent prevented the Employer from verifying the accuracy of his count and interpretation of voter intent. Additionally, the Board found that the agent's conduct after the count prevented the Board from saying with confidence that ballots remained in the identical condition as during the count. Finally, the Board found that the agent's two mistakes in ballot identification cast further doubt on the fairness and validity of the election.

(Chairman Schaumber and Member Liebman participated.)

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Medco Health Solutions of Spokane, Inc. (19-CA-30143; 352 NLRB No. 78) Liberty Lake, WA May 30, 2008. The Board found that Section 8(a)(1) of the Act – refusal to furnish information and 8(a)(5) refusal to bargain allegations were not deferrable to arbitration and remanded the case to the administrative law judge for a full hearing on the merits. [HTML] [PDF]

The case arose when the Respondent announced and implemented new performance standards and discipline structures for employees in its pharmacist and pharmacy units, but allegedly failed and refused to furnish information about the standards and structures when requested by the Union. The information was relevant to the Union's requests for bargaining and its determination whether to grieve the performance standards and discipline structures. The judge found that the 8(a)(5) allegation was arbitrable because the management rights provisions of the applicable collective-bargaining agreements addressed performance standards. He found

that the 8(a)(1) allegation also was arbitrable based loosely on the language of the agreements' recognition clauses and because the Respondent agreed not to challenge timeliness in an arbitration proceeding.

Citing *Team Clean, Inc.*, 348 NLRB No. 86 (2006), in which the Board reaffirmed its commitment to a policy against deferring information allegations, the Board found that the 8(a)(1) allegations should not have been deferred. (Chairman Schaumber dissented in *Team Clean*, but concurred in applying it here for institutional reasons.) Further, because the 8(a)(5) refusal to bargain allegations are inextricably related to the nondeferrable 8(a)(1) allegations, the Board found that they were not deferrable.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Steelworkers Local 12-369; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Spokane on Aug. 22, 2006. Adm. Law Judge William G. Kocol issued his decision Sept. 12, 2006.

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Operating Engineers Local 825 (22-CD-765; 352 NLRB No. 77) Newark, NJ May 30, 2008. The Board, in this jurisdictional dispute, concluded that Market Halsey employees are entitled to continue performing the work in dispute. The work constituted "the operation of freight elevators at the Morgan Stanley construction project located at 165 Halsey Street, Newark, New Jersey." The employer is Structure Tone, Inc. Market Halsey is a party in interest. [HTML] [PDF]

In finding that the dispute was properly before the Board pursuant to Section 10(k), the Board found that there were competing claims to the disputed work and the parties did not have an agreed-upon method for voluntary adjustment of the dispute. In finding that Local 825 engaged in proscribed activity, the Board noted that this case was atypical because Local 825 directed its picketing at Structure Tone rather than Market Halsey, the party that employed the employee who performed the work in dispute. The Board nevertheless found Section 8(b)(4)(D) applicable because it is intended to "protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose." *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484, 485 (1985).

Having found that the dispute was properly before the Board for determination, the Board considered all the relevant factors and awarded the work to Market Halsey employees. Although the factor of collective-bargaining agreements favored awarding the work to employees represented by Local 825, the Board found that this factor was outweighed by the factors of employer preference and economy and efficiency of operations. In doing so, the Board found that the factors of certifications, employer past practice, area practice, relative skills and training, and Joint Board determinations did not favor awarding the work to either group of employees.

(Chairman Schaumber and Member Liebman participated.)

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Napa Ambulance Service, Inc., d/b/a Piner's Napa Ambulance Service (20-CA-32875; 352 NLRB No. 74) Napa, CA May 30, 2008. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing an employee a written warning because of her Union activities and because the Respondent equated union talk with activities prohibited by federal law. In addition, the Board adopted the judge's findings that the Respondent did not violate Section 8(a)(3) and (1) by issuing an employee a warning for loud nonwork-related conversations and by terminating an employee for abandoning her shift and being dishonest. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

Charge filed by an individual; complaint alleged violations of Section 8(a)(1) and (3). Hearing at San Francisco, Aug. 14-18, 2006. Adm. Law Judge James M. Kennedy issued his decision Dec. 20, 2006.

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Trump Plaza Associates d/b/a Trump Plaza Hotel and Casino (4–RC–21263; 352 NLRB No. 76) Atlantic City, NJ May 30, 2008. The Board affirmed the administrative law judge's overruling of the Employer's objections and adopted his recommendation for certification of the Union as the employees' representative. The Union won the election by a vote of 324 to 149, with 1 non-determinative challenged ballot. The Employer objected to the Union's use of letters and resolutions by elected officials as campaign propaganda and to elected officials' publicly conducting a mock card check and signing a "Certification of Majority Status" at a Union press conference and rally 6 days before the election. [HTML] [PDF]

Regarding the elected officials' letters and resolutions (some of which neither expressly supported the Union nor related to the election at issue), the Board relied on *Chipman Union, Inc.*, 316 NLRB 107 (1995), to find that the letters and resolutions would be recognized as the various elected officials' statements of opinion and would not confuse reasonable voters into believing that the Board favored the Union.

Regarding the "Certification of Majority Status," the Board found that the record did not show that the Certification was disseminated among the voters. Only 2 voters attended the press conference at which the Certification was signed, and no evidence was presented that any voters either saw a news report about the press conference or saw copies of the signed Certification document, which were available at the Union hall. In view of the 175-vote margin favoring the Union, the Board found that such limited evidence of dissemination could not support an inference that the Certification could have influenced enough voters to affect the results of the election.

(Chairman Schaumber and Member Liebman participated.)

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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.)

General Business Supply, d/b/a Tech Valley Printing, Inc. (Teamsters Local 259-M) (3-CA-26571, 26585; 352 NLRB No. 81) Watervliet, NY May 30, 2008. [HTML] [PDF]

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TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Palm Beach Metro Transportation, LLC (Transit Union Local 1577) (12-CA-25789; 352 NLRB No. 79) West Palm Beach, FL May 30, 2008. [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 Reports of Regional Directors and Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

J. S. Carambola, LLP, d/b/a Carambola Beach Resort, St. Croix, USVI, 24-RC-8577, May 28, 2008 (Chairman Schaumber and Member Liebman)

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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

Sun Services, Inc., d/b/a MGM Mining, Blythe, CA, 21-RC-20996, May 29, 2008

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DECISION AND DIRECTON [that Regional Director open and count ballot]

MMS East, LLC, Secaucus, NJ, 22-RC-12883, May 30, 2008

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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)

Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resorts Casino, Mashantucket, CT, 34-RC-2261, May 28, 2008 (Chairman Schaumber and Member Liebman)

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