The McBurney Corporation *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 26–CA–17564, 26–CA–17979, and 26–CA–18017

July 23, 2008

ORDER DENYING MOTION FOR RECONSIDERATION[1]

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 29, 2007, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding, finding that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to hire certain union-affiliated applicants, including two named union salts.[2] The Board ordered the Respondent to remedy its unlawful conduct by providing instatement and backpay to all of the discriminatees. The Board specified, however, that those remedies would be subject to the limitations established in *Oil Capitol,* 349 NLRB 1348 (2007).[3]

On November 19 and December 18, 2007, respectively, the Charging Party and the General Counsel each filed a motion for reconsideration of that decision, arguing that *Oil Capitol* should not be applied at the compliance stage of this case. Specifically, both argued that *Oil Capitol* should not be applied retroactively in this case because it would cause "manifest injustice."

On February 29, 2008, the Board issued an Order denying those motions for reconsideration.[4] The Board found that neither the General Counsel's nor the Charging Party's motion presented "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. In reaching its conclusion, the Board considered and rejected the argument that *Oil Capitol* should not be retroactively applied in this case.[5]

On March 28, 2008, the General Counsel filed a Motion for Reconsideration of the Board's February 29 Order. The Charging Party filed a brief in support of that motion,[6] and the Respondent filed an opposing brief. The General Counsel's motion asserts that the Board failed to consider adequately whether applying *Oil Capitol* here would cause manifest injustice. As described, however, that issue was considered and rejected by the Board. Accordingly, the General Counsel's motion does not establish extraordinary circumstances within the meaning of Section 102.48 of the Board's Rules.

IT IS ORDERED, therefore, that the General Counsel's motion for reconsideration is denied.[7]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] *McBurney Corp.,* 351 NLRB 799 (2008).

[3] Id. at 1350–1351.

[4] *McBurney Corp*., 352 NLRB 241 (2008).

[5] Id. at 1349.

[6] The Board rejected as untimely the Charging Party's own Motion for Reconsideration of the Board's February 29 Order.

[7] For institutional reasons, Member Liebman, who dissented in *Oil Capitol*, a controlling decision by the full Board, concurs in the denial of the General Counsel's motion. While Member Liebman believes that claims of manifest injustice resulting from the retroactive application of a new legal rule should be considered on a case-by-case basis, denying the present motion avoids delay in the disposition of this case, including the completion of a compliance proceeding. In Member Liebman's view, if the retroactive application of *Oil Capitol* ultimately has a demonstrably adverse effect on the backpay award in this case, the General Counsel or the Charging Party would be free to pursue the manifest injustice issue.