National Labor Relations Board

Weekly Summary of NLRB Cases

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Air Serv Corp. (26-RC-8548; 353 NLRB No. 11) Memphis, TN Sept. 23, 2008. The issue in this case is whether Air Serv Corp. and its employees, who are the subject of the Union's representation petition, are covered by the National Labor Relations Act or the Railway Labor Act. The Regional Director transferred the proceeding to the Board and the Board, thereafter, referred the case to the National Mediation Board for a jurisdictional opinion. The Employer provides aviation-related shuttle transportation services for an undisputed Railway Labor Act carrier and the Board found, in accord with the National Mediation Board's decision (35 NMB 201), that it is covered under the Railway Labor Act. Accordingly, the Board dismissed the petition filed by Petitioner Teamsters Local 984. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

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Domsey Trading Corp., Domsey Fiber Corp. and Domsey International Sales Corp., a Single Employer (29-CA-14548, et al.; 353 NLRB No. 12) Brooklyn, NY Sept. 25, 2008. On Sept. 30, 2007, the Board issued a Supplemental Decision and Order in this compliance proceeding. 351 NLRB No. 33. In its supplemental decision, the Board, inter alia, reversed the administrative law judge and found that the strike benefits which the Union paid the discriminatees during the backpay period were interim earnings deductible from backpay and therefore remanded the claims of 164 discriminatees who received such benefits to Region 29 for a recalculation of their backpay. The Board also reversed certain of the judge's findings on other issues relating to 18 discriminatees, all but one of whom were also included in the remand for the deduction of strike benefits, and remanded their claims to Region 29 for recalculation of their backpay based on the Board's findings regarding their failure to mitigate damages and/or their interim earnings. The Board separately remanded to the judge the claims of six other individuals for a determination of whether they were authorized to be present and employed in the United States during the backpay period and thus entitled to backpay. In response to the Board's remands, Region 29 filed with the Board various motions for summary acceptance of its recalculations of backpay and for issuance of a second supplemental decision and order, and the judge issued a second supplemental decision. [HTML] [PDF]

In this second supplemental decision, the Board ordered the Respondent to pay the discriminatees the recalculated backpay awards set out by the Region. The decision also ordered that the backpay claims of two discriminatees remanded to the judge be withdrawn, and that the Respondent pay certain other discriminatees the amounts set out in his second supplemental decision. Finally, the Board adopted the judge's recommendation to place in escrow the backpay award of one discriminatee whom the General Counsel could not locate pursuant to the remand and whose authorization status therefore remained unresolved.

(Chairman Schaumber and Member Liebman participated.)

Adm. Law Judge Michael A. Marcionese issued his second supplemental decision July 1, 2008.

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Fluor Daniel, Inc. (15-CA-12544, et al.; 353 NLRB No. 15) Baton Rouge, LA Sept. 25, 2008. In an earlier proceeding, the Board found that the Respondent unlawfully refused to hire certain union-affiliated applicants, and ordered the Respondent to provide instatement and backpay to the discriminatees. 333 NLRB 427 (2001), enfd. 332 F.3d 961 (6th Cir. 2003). In the compliance proceeding, the administrative law judge specified that those remedies would be subject to the limitations established in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). The General Counsel, the Charging Parties, and the Intervenor filed requests with the Board for special permission to appeal this ruling, as well as the administrative law judge's rulings that the discriminatees were "salts" within the meaning of *Oil Capitol*, and that it was the General Counsel's burden to establish both the length of time the discriminatees would likely have remained at their jobs and that they would have joined the Respondent's preferential database. [HTML] [PDF]

The Board granted the requests for special permission to appeal and denied the appeals on the merits, finding that the judge did not abuse his discretion by ruling that *Oil Capitol* applies to the proceedings and that the discriminatees at issue were salts. With regard to the judge's rulings concerning the General Counsel's burden of proof, the Board denied the appeals but noted that factual findings made in the underlying proceeding—that the discriminatees had "agreed to accept employment if offered, [and] to stay until laid off," and that the Respondent used a preferential database of former employees in staffing new projects, 333 NLRB at 430--may not be relitigated in the compliance proceeding. The Board left to compliance whether these findings are sufficient to satisfy the General Counsel's burden of proof under *Oil Capitol*.

The Board also denied Charging Party Boilermakers International's appeal of the judge's indication that he would not read or rely on the record in the underlying proceeding, without prejudice to raising this issue in a proper motion to the judge. The Board found that it lacked jurisdiction to consider the merits of this issue because the judge never ruled on it, having had no motion before him. The Board noted, however, that issues that were previously decided in an unfair labor practice proceeding may not be relitigated in a compliance proceeding.

For institutional reasons, Member Liebman concurred in the denial of the appeals. She noted that denying the appeals avoids delay in the disposition of the case. Member Liebman also stated her view that, if retroactive application of *Oil Capitol* ultimately has a demonstrably adverse effect on backpay, the General Counsel and the Charging Party would be free to pursue the manifest injustice issue. Further, Member Liebman noted her view that *Dean General Contractors*, 285 NLRB 573 (1987), is the law of the case and, therefore, should preclude the Board from applying *Oil Capitol* retroactively, but she nonetheless applied the majority decision in *Fluor Daniel*, 351 NLRB No. 14 (2007), as controlling Board precedent on the law of the case issue.

(Chairman Schaumber and Member Liebman participated.)

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Hanson Material Service Corp. (13-CA-44128 and 13-RC-21618, 21622; 353 NLRB No. 10) Thornton, IL Sept. 25, 2008. This matter consolidated representation and unfair labor practice cases. The amended complaint alleged that the Respondent violated: 1) Section 8(a)(1) of the Act by interrogating employees, prohibiting them from wearing union attire and from posting union items on its bulletin boards, threatening to discipline and lay off employees for engaging in union activities, promising employees benefits for rejecting a union, and informing employees that it would be futile to unionize; and 2) Section 8(a)(3) by discharging two employees (the day before the election) for engaging in union activities. Two unions, Charging Party Union Operating Engineers Local 150 (Union) and Laborers Local 681, had petitioned for an election in a four-employee bargaining unit of the Respondent's quality control (QC) analysts at its Thornton, IL quarry. In the representation-case, the Respondent challenged the ballots of the two discharged employees; the Union contended that, because they were unlawfully discharged, their votes should be counted. The election resulted in 1 vote for Operating Engineers Local 150, 0 votes for Laborers Local 681, and 1 vote for no Union, making the two challenged ballots outcome-determinative. [HTML] [PDF]

The Board adopted the administrative law judge's decision with certain footnote clarifications. Thus, the Board adopted the judge's dismissal of most of the alleged Section 8(a)(1) violations (the judge found Respondent's agents did not make the statements, or that such did not give rise to a violation), but not, in the absence of exceptions, two others. The Board also adopted the judge's conclusion that the Respondent did not violate Section 8(a)(3) by discharging the two QC analysts. The Board assumed arguendo that the General Counsel 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), and thus agreed with the judge's alternative finding that the Respondent proved it would have discharged these employees in any event because they falsified product test results. Finally, the Board affirmed the judge's procedural rulings relative to the admission of documents offered to prove an alleged *Johnnie's Poultry,* 146 NLRB 770 (1964), enf. denied on other grounds, *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965), violation. Because the Board adopted the judge's conclusion that the two employees were lawfully discharged, it also adopted his ruling sustaining the challenges to their ballots. Accordingly, and contrary to the judge's remand order, the Board, itself, issued a Certification of Election Results.

Member Liebman, while adopting the judge's credibility findings under the deferential standard of *Standard Dry Wall,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), footnoted that: (1) were she considering the case *de novo*, her credibility resolutions might have differed, and (2) she did not rely on the judge's comments that, because the Respondent's representatives were knowledgeable and experienced in labor relations, they were unlikely to have made certain alleged unlawful statements. The Board also footnoted that, even if the judge erred by admitting the pretrial affidavit, he committed harmless error.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Operating Engineers Local 150; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Chicago, Nov. 13-16, 2007. Adm. Law Judge Robert Giannasi issued his decision Jan. 7, 2008.

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Horizon Contract Glazing, Inc. (20-CA-32880; 353 NLRB No. 16) West Sacramento, CA Sept. 25, 2008. The Board reversed the administrative law judge's finding that the Respondent's failure to recall Union salt Joseph Upchurch violated Section 8(a)(3) and (1) of the Act. The Board noted that the General Counsel bears the initial burden of proving by a preponderance of the evidence that animus against protected union activity was a motivating factor in the employment action, citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 US 989 (1982), and *FES*, 331 NLRB 9 (2000) supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). [HTML] [PDF]

The Respondent had broken off relations with the Union due to an economic dispute with the Union's business manager, Gene Massey, and the Respondent's owner testified that he would not sign an agreement as long as the Union was under Massey's leadership. Nevertheless, the Respondent offered to recall Upchurch after a layoff due to a lack of work, despite its knowledge of Upchurch's union affiliation and activity. However, Upchurch had a previously scheduled vacation, but agreed to report to work on a later date, Nov. 8. After an unexpected suspension of work at the jobsite the glazing superintendent left a voice mail for Upchurch instructing him not to report. Upchurch however did not get the message and worked for 2 or 3 hours on Nov. 8. He was then informed by Michelle Klein, the Respondent's secretary-treasurer that he was not supposed to be on the job. Upchurch and Klein engaged in a heated discussion regarding the amount Upchurch was owed for his work that day. In her testimony Klein referred to Upchurch's assertions as a "little NLRB lecture...." The judge found that Upchurch's conduct during the discussion was the motivation for the failure to recall him, as it reinforced the Respondent's awareness of his union association and the judge therefore found that the failure to recall Upchurch violated Section 8(a)(3).

The Board agreed that the Nov. 8 conversation was the motivation for the Respondent's failure to recall Upchurch. However, the Board noted that there was no reference to the Union in the conversation and that Upchurch was engaged in a personal pay dispute, not union activity. The Board found that there was nothing about the Nov. 8 conversation to show that the Respondent harbored animus towards Upchurch's union affiliation and concluded that the only animus apparently arising from the conversation was the Respondent's ire of having to satisfy what it perceived to be an unjustified personal paid demand.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Painters District Council 16, Glass Workers Local 767; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Sacramento on July 18, 2006. Adm. Law Judge Jay R. Pollack issued his decision Oct. 4, 2006.

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Interstate Bakeries Corp. and Teamsters Local 523 (17-CA-23404, 17-CB-6146; 353 NLRB No. 14) Ponca City, OK Sept. 25, 2008. The Board reversed the administrative law judge's dismissal of allegations that the Respondent Employer violated Section 8(a)(3) and (1) of the Act and the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) by agreeing to endtail, rather than dovetail, the seniority of Charging Party Kirk Rammage, following a unit merger. [HTML] [PDF]

The Board found that Rammage was treated unfavorably solely on the basis of his prior lack of representation by the Union. In finding the conduct to be unlawful, the Board relied on *Whiting Milk Corp.*, 145 NLRB 1035 (1964), enf. denied 342 F.2d 8 (1st Cir. 1965), in which the Board held that it was unlawful in a unit merger situation to endtail employees who were not formerly represented by any union, while dovetailing employees represented in different units by the same local union.

The Board disagreed with the judge's assertion that *Whiting Milk* had been "obliquely" overruled by subsequent cases, observing that the Board twice explicitly reaffirmed *Whiting Milk* after the court's denial of enforcement in that case. In addition, the Board found that *Whiting Milk* had not been overruled by *Riser Foods*, 309 NLRB 635 (1992), a duty of fair representation case on which the judge relied. The Board found *Riser Foods* to be distinguishable, and held that *Whiting Milk* controlled because, as acknowledged by the judge, the facts in *Whiting Milk* are "analogous if not identical" to those here. The Board found that *Whiting Milk* remains Board law, and although Member Liebman questioned the *Whiting Milk* line of cases, she agreed that it was controlling law on the facts in this case.

The Board stated that although the Union was legitimately concerned about its duty to the employees it already represented, in the context of a unit merger, a union and an employer are not lawfully permitted to dovetail the seniority of represented employees while endtailing previously unrepresented employees. Accordingly, the Board concluded that the Respondents violated the Act by agreeing to endtail Rammage on the combined seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring Rammage to a job at the Bartlesville facility, all because he was not previously represented by the Union.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Kirk Rammage, an individual; complaint alleged violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2). Hearing at Tulsa on Aug. 15, 2006. Adm. Law Judge Gerald A. Wacknov issued his decision Oct. 31, 2006.

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New Process Steel, LP (25-CA-30470; 353 NLRB No. 13) Butler, IN Sept. 25, 2008. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the parties' binding collective-bargaining agreement on the grounds that the Union did not ratify the contract by a majority vote of unit employees. [HTML] [PDF]

The Union was certified as the exclusive bargaining representative for a unit of the Respondent's employees on Aug. 25, 2006. On Aug. 9, 2007, after 11 months of contract negotiations, the Union accepted and signed the entire proposed agreement. The Respondent, however, stated that it would not sign the agreement until it was ratified. On Aug. 12, 2007, the Union ratified the contract according to its established internal procedures. The Union then informed the Respondent that the agreement was accepted, and the Respondent signed it.

In the following weeks, the Respondent learned that the contract was not accepted by a majority vote of unit members. On Sept. 11, 2007, the Respondent informed the Union by letter that, because a majority of bargaining unit members voted against the agreement, it was never ratified, and thus the parties never reached a binding contract. The Respondent therefore refused to recognize or honor the contract's provisions.

The Union filed an unfair labor practice charge alleging that the Respondent unlawfully repudiated the contract. The Board adopted the judge's findings that the Respondent did not have standing to dispute the Union's ratification procedures, the parties reached a binding agreement, and thus the Respondent violated 8(a)(5) and (1) by repudiating that agreement.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Machinists District Lodge 34; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Auburn on March 11, 2008. Adm. Law Judge David I. Goldman issued his decision May 1, 2008.

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Postar Coal Co., Inc. (9-CA-43865; 353 NLRB No. 17) Cucumber, WV Sept. 25, 2008. The Board found that Postar Coal Co. violated Section 8(a)(5) and (1) of the Act by failing to continue established terms and conditions of employment by failing to provide health care benefits to laid-off employees following the closure of its coal mine. Citing precedent, the Board rejected Postar's claim that an economic inability to pay excused its failure to provide the benefits. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

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Sacred Heart Medical Center (19-CA-29150; 353 NLRB No. 19) Spokane, WA Sept. 26, 2008. Following remand from the U.S. Court of Appeals for the Ninth Circuit, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a policy prohibiting employees from wearing union buttons in areas where they might "encounter patients or family members." [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

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Swissport USA, Inc. (13-RC-21719; 353 NLRB No. 18) Chicago, IL Sept. 26, 2008. The Board dismissed the Petitioner's representation petition, deferring to the opinion of the National Mediation Board (NMB) that the Employer and its employees are subject to the Railway Labor Act. In so doing, the Board found that although the Employer had previously acquiesced to the

jurisdiction of the National Labor Relations Board, having received the NMB's opinion, the issue of whether the case was improvidently referred to the NMB was moot. Thus, the Board gave the NMB's opinion the substantial deference ordinarily accorded to NMB's opinions. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Akal Security, Inc. (Government Security Officers Local 118) Boise and Coeur d'Arlene, ID Sept. 23, 2008. 19-CA-30891, et al.; JD(SF)-38-08, Judge Lana H. Parke.

Kama Corp., Jaber Food Corp., Coro Food Corp., et al., d/b/a Trade Fair Supermarkets (Food & Commercial Workers Local 338) Queens, NY Sept. 23, 2008. 29-CA-28448; JD(NY)-37-08, Judge Steven Davis.

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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 or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Lakeland Neurocare Center, LP, Southfield, MI, 7-RC-23184, Sept. 23, 2008 (Chairman Schaumber and Member Liebman)

Mark 1 Restoration, Dolton, IL, 13-RC-21766, Sept. 25, 2008 (Chairman Schaumber and Member Liebman)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Lockheed Martin Services, Inc., Bethesda, MD, 5-RC-16189, Sept. 24, 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

Santa Cruz Community Counseling Center, Inc., Santa Cruz and Watsonville, CA, 32-RD-1557, Sept. 23, 2008

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Rhema-Wayne Total Living Center Operating LLC d/b/a The Manor of Wayne Continuing Care Center, Wayne, MI, 7-RC-23198, Sept. 24, 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)

AT&T Teleholdings, Inc., Anaheim, CA, 21-UD-413, Sept. 25, 2008
(Chairman Schaumber and Member Liebman)
HTI/Hydraulic Technologies, LLC, Galion, OH, 8-RC-16918, Sept. 25, 2008
(Chairman Schaumber and Member Liebman)

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