National Labor Relations Board

Weekly Summary of NLRB Cases

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

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CASES SUMMARIZED

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Heartland Industrial Partners, LLC and Steelworkers (34-CE-9; 348 NLRB No. 72) Greenwich, CT Nov. 7, 2006. Members Schaumber and Walsh affirmed the administrative law judge's dismissal of the complaint alleging that two clauses in the Respondents' agreement governing union organizing at companies that Heartland may acquire, violate Section 8(e) of the Act because the clauses require Heartland to cease doing business with another person or employer. Chairman Battista dissented. [HTML] [PDF]

Heartland is an investment firm that invests in manufacturing firms located in the Midwest. On Nov. 27, 2000, Heartland and the Union executed the Heartland Agreement, which consists of two parts: a Side Letter and a Framework for a Constructive Collective-Bargaining Relationship (Framework). The Side Letter specifies the circumstances and conditions for applying the Framework to future acquisitions of Heartland known as "covered business entities" (CBEs). Section 3 of the Side Letter defines a CBE as one in which Heartland directly or indirectly owns more than 50 percent of the common stock; controls more than 50 percent of the voting power; or has the power, based on contracts, constituent documents or other means, to direct the management and policies of the enterprise.

Section 2 of the Side Letter provides that no less than 6 months after Heartland has invested in a CBE, the Union may notify Heartland of its intent to organize that CBE. Heartland will then cause the CBE to execute a Side Letter and Framework with the Union that is, in form and substance, identical to the Heartland Agreement. The Framework states, among others, that the CBE will adopt a position of neutrality during an organizing campaign; post a notice to its employees advising them of its neutral position; grant the Union access to its premises to distribute information and to meet with employees; furnish the Union with employee names and addresses; and recognize the Union based on a majority showing after a card check. Also, upon a showing of majority support, the CBE will bargain within 14 days of recognition, and will submit to interest arbitration any issues that remain open after 90 days of bargaining.

In early 2001, Heartland acquired Collins & Aikman Corp. and in Jan. 2003, caused Collins & Aikman to enter into a Side Letter and Framework with the Union (Collins & Aikman agreement). In June 2002, Heartland acquired Trimas Corp. and, on July 11, 2003, caused Trimas to enter into a Side Letter and Framework with the Union (Trimas agreement). The complaint alleges that the Heartland Agreement was reaffirmed by the Trimas agreement on July 11, 2003, and that Sections 2 and 3 of the Side Letter violate Section 8(e).

Members Schaumber and Walsh rejected the Respondent's contention that the complaint is time-barred by Section 10(b). And, in finding that the General Counsel has not established that the challenged clauses violate Section 8(e), they wrote:

> [T]he General Counsel does not challenge the neutrality and card check provisions of the Framework. Instead, the sole provisions alleged to be unlawful are Sections 2 and 3 of the Side Letter, which define a CBE and require Heartland to cause a CBE to execute the Side Letter and Framework under specified conditions. According to the General Counsel, this requirement, as a matter of law, establishes a prohibited cease doing business object because it operates as a restriction on Heartland's

investments. In the absence of record evidence sufficient to support the General Counsel's complaint, and in agreement with the judge, we reject the General Counsel's position.

On their face, the challenged clauses do not limit Heartland's discretion to invest in or acquire any company it chooses. Indeed, the clauses impose no obligation whatsoever on Heartland either at the time of an investment or during the ensuing 6 months. Even after the 6-month period has expired, the clauses on their face do not require Heartland to cease doing business with anyone. Rather, Heartland's obligation is to cause the company it has invested in to execute a Side Letter and Framework, if the company qualifies as a CBE and if the Union requests that it do so. There is also no evidence that the challenged clauses have had the effect of causing Heartland to refrain from investing in any company.

Chairman Battista, in dissent, concluded that the agreement between Heartland and the Union is aimed squarely at the labor relations of the CBEs and is therefore a secondary agreement proscribed by Section 8(e). He noted that the CBE must give up its statutory rights to: (1) speak freely against the Union campaign; (2) have a Board-conducted election to determine the representational desires of its employees; and (3) to determine what contractual provisions it will agree to, i.e., the CBE will proceed to interest arbitration if it does not agree to the Union's contractual demands. The Chairman wrote: "I believe that an employer's statutory right to speak freely and its right to a Board election are highly significant matters, and to take these away can reasonably be viewed as onerous. The same can be said about an employer's right to negotiate its own contract. See Section 8(b)(1)(B) of the Act."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Linda Kandel, Galen E. Raber, Juanita M. Miler, and Renate Croll, Individuals; complaint alleged violation of Section 8(e). Hearing at Hartford on March 21, 2005. Adm. Law Judge Raymond P. Green issued his decision June 16, 2005.

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M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express (16-CA-24374; 348 NLRB No. 73) Harlingen, TX Nov. 8, 2006. Affirming the administrative law judge's conclusions, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Teamsters Local 657, and violated Section 8(a)(3) and (1) by discriminatorily refusing to hire nine employees who worked for its predecessor Act Fast Delivery of Corpus Christi, Inc. (Act Fast) in order to avoid a successor collective-bargaining obligation. [HTML] [PDF]

On April 13, 2005, the Union was certified as the exclusive collective-bargaining representative of a unit of employees working for Act Fast at its Harlingen, TX facility. On July 5, 2005, the Respondent commenced operations at a DHL facility in Harlingen, TX (the

HRL Station) pursuant to a cartage agreement with DHL. Pursuant to the agreement, the Respondent picked up and delivered freight in the McAllen, TX area. Prior to July 5, Act Fast provided courier services out of the HRL Station pursuant to a similar cartage agreement. Act Fast picked up and delivered freight in the Harlingen and McAllen areas. Upon termination of Act Fast's cartage agreement, DHL divided the area serviced out of the HRL Station into two separate areas—the Harlingen area and the McAllen area—and bid them out separately. The Respondent was awarded the contract for the McAllen area and Third Garage was awarded the one for the Harlingen area. Third Garage and the Respondent have operated out of the HRL Station since July 5, 2005. The judge found that other than the geographical separation in the McAllen and Harlingen contracts, Respondent MSK's operations were similar, in most respects, to that of Act Fast.

In agreeing with his colleagues that the Respondent unlawfully failed to recognize and bargain with the Union, Chairman Battista noted that the Respondent did not argue that there can be no violation because the Union did not request bargaining. Accordingly, he does not pass on the validity of precedent arguably holding that there can be a violation even absent a union demand for bargaining. See *Smith & Johnson Construction Co*., 324 NLRB 970 (1997). Chairman Battista, in finding that the Respondent unlawfully refused to hire the nine discriminatees, relied solely on credited testimony that the Respondent's owner John Gunn, its General Manager Glynn Smith, and its Manager Anthony Soto made several statements evidencing animus to DHL's Manager Hugo Moya, Act Fast Supervisor Omar Juarez, and former Act Fast employee Margarito Garcia.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 657; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Harlingen, Feb. 6-7, 2006. Adm. Law Judge Lawrence W. Cullen issued his decision June 16, 2006.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Newcor Bay City, Division of Newcor, Inc. (Autoworkers Local 496) Bay City, MI Nov. 7, 2006. 7-CA-48339; JD(ATL)-40-06, Judge Keltner W. Locke.

Nichols & Wright Paving, Inc. (Operating Engineers Local 132 and Laborers District Council, Charleston, WV Local 543) Huntington, WV Nov. 9, 2006. 9-CA-41612, 41729; JD-78-06, Judge Martin J. Linsky.

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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)

Condado Motors, Inc. d/b/a L&M Car Rental, Aguadilla, Ponce, Isla Verde, Condado, and Fajardo, PR, 24-RC-8531, Nov. 8, 2006 (Chairman Battista and Members Liebman and Walsh)

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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)

Denek Contracting, Inc., Macomb Township, MI, 7-RD-3543, Nov. 9, 2006 (Chairman Battista and Members Liebman and Walsh)

FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc., Wilmington, MA, 1-RC-22034, 22035, Nov. 8, 2006 (Members Liebman and Walsh; Chairman Battista dissenting)

Prewitt Organizing Fund, Bethesda, MD, 14-RC-12630, Nov. 8, 2006 (Chairman Battista and Members Liebman and Walsh)

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Miscellaneous Board Orders

DECISION ON REVIEW AND ORDER
[affirming Acting Regional Director's decision and order]

Airgas Dry Ice, Santa Fe Springs, CA, 21-UC-418, Nov. 8, 2006 (Chairman Battista and Members Kirsanow and Walsh)

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