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Summary of Recent NLRB Decisions

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The year 2007 was an important one for the NLRB, with a number of 3-2 decisions on significant topics.

Capitol Sheet Metal, Inc., 17-CA-19714, 349 NLRB No. 118

On May 31, 2007, the NLRB issued a 3-2 decision in *Oil Capitol Sheet Metal* decision which addressed the issue of union "salts." A "salt" is a union member who is sent to a nonunion employer, by the union, to seek employment, with the intent of obtaining employment and then reorganizing the employees of his new employer. A a general matter, the employer is legally prohibited from refusing to hire or terminating a "salt" because of his union affiliation or activity. This NLRB decision created a new evidentiary standard for deciding on the length of the backpay period when the individual discriminated against is a "salt." Until *Oil Capitol Sheet Metal*, the remedy available for the refusal to hire or for unlawful discharge of a "salt" included back pay from the date o discrimination until the employer made an offer of reinstatement (in cases where the employer refused to hire). The Board previously had presumed that if the "salt" had been hired, the "salt" would have remained on the job indefinitely. In construction industry cases, the Board had made a further presumption that the "salt" would have been transferred by the employer from job site to job site as projects were completed.

The majority in *Oil Capitol Sheet* refused to apply those previous presumptions about expected length of service, finding that they were inconsistent with the reality of what actually occurs with "salting." The Board observed that there are times when the "salts" only remained on the job until they were successful in their organizational efforts and then they leave to reorganize another company. There also are times when the union would allow the salt to stay at the company indefinitely. Thus, the NLRB concluded that the union is in a better position to state its intentions, and the

Board ruled that the burden should be placed on the union to prove the expected length of service for any "salt" instead of imposing the burden on the employer to establish the contrary. The majority's decision stated:

> The traditional presumption that backpay should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed, as discussed below, rote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption had no validity and creates undue tension with well established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice and that the Board's authority to command affirmative action is remedial, not punitive.

Additionally, the NLRB held that instatement to the job would not be required if the "salt" would have left the job before the NLRB's decision.

Toering Electric Co., 351 NLRB No. 18

On September 29. 2007, in another 3-2 decision, the NLRB held that in order to qualify as a Section 2(3)employee, which protects individuals against discriminatory hiring based on union affiliation or activity, the applicant must be genuinely interested in seeking to establish an employment relationship with an employer. Although some "salts" may genuinely want to work for a non-union employer, many have no desire whatsoever and are simply testing to determine if an employer discriminates against union organizers. The NLRB's decision in *Toering Electric* declared that "one cannot be denied what one does not genuinely seek." The Board ruled that the previously applied presumption that any applicant was entitled to protection against hiring discrimination was inconsistent with Section 2(3), which the Board found required "at least a rudimentary economic relationship, actual or anticipated, between employee and employer." According to the Board, there is no actual or anticipated economic relationship if the applicants have no genuine interest in employment. The Board further reasoned that it is not protected activity when applicants submit their applications with no desire to seek work, but instead, seek only to create unfair labor practice charges.

Additionally, the NLRB ruled that the union bears the burden of establishing that the individual was genuinely interested in going to work for the employer. There are two components

that must be proven:

> (1) There was an application for employment; and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf ...As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. In other words, while we no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence that an application for employment is anything other than what it purports to be.

The Board ruled that some evidence in the case before it demonstrated that the applicant had genuine interest in employment, while other evidence did not. Thus, the Board remanded the case for a determination under the Board's new analytical framework.

BE&K Construction Co., 351 NLRB No. 29

On September 29,2007, the NLRB held in another 3-2 decision that regardless of the employer's motive for filing a lawsuit, filing and maintaining a reasonably based lawsuit does not violate the National Labor Relations Act ("NLRA").

This case was before the Board on remand from the United States Supreme Court. The issues presented before the Board were: (1) whether the Respondent violated section 8(a)(1) of the Act by filing and maintaining an unsuccessful lawsuit against the Charging Party Unions in federal district court, and (2) what standard the Board should apply in making its decision.

The background of this case is as follows. Complainant filed a lawsuit in the United States District Court for the Northern District of California against several unions alleging that the unions were engaging in activities which violated the NLRA and anti-trust laws. The district court granted the union's motion for summary judgment and dismissed the employer's suit. The 9th Circuit Court of Appeals affirmed that decision. The union then filed unfair labor practices charges stating that the lawsuit was retaliatory, and therefore unlawful. The General Counsel issued a complaint.

The Board, applying a test premised on the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, found that the employer's unsuccessful suit violated Section 8(1) because it was filed to retaliate against the Unions for engaging in protected concerted activity. *BE&K Construction Company*, 329 NLRB 717 (1999). The United States Court of Appeals for the Sixth Circuit enforced the Board's decision.

The United States Supreme Court rejected the Board's analysis and reversed. It unanimously held that the NLRB cannot impose liability on an employer for filing a losing retaliatory suit, in that such actions include a substantial amount of petitioning. The Court rejected the Board's analysis on First Amendment grounds. The Court found that the threat of a NLRB adjudication was a burden on the First Amendment right to petition the government through the courts. Additionally, the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. To avoid this difficult constitutional issue, the Court adopted a limited construction of Section 8(a)(l) and invalidated the Board's legal standard because it did not comply with the limited construction. The standard applied by the Board had exceeded the scope of Section 8(a)(l). The Court remanded the case to the Board for further proceedings that were consistent with its opinion.

The Board majority first highlighted the Court holding in *Bill Johnson's* that to protect the First Amendment right to petition, an ongoing reasonably based lawsuit could not be seen as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the NLRA. Based on these principles, the Board held that these principles should he applied to both completed and ongoing lawsuits. Specifically:

> This chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion. Indeed, the very prospect of liability may deter prospective plaintiffs from filing legitimate claims. Thus, the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits. In sum, we see no logical basis for finding that an ongoing reasonably-based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to win litigants.
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> ...Accordingly we find that just with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor

> practice. In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. at 60.

In this case. the Board agreed with the Court's decision that the employer's lawsuit was reasonably based although it applied its new standard to the facts of the case. The sit was not shown to lack a reasonable basis although, in the end it was found to be unsuccessful.. As such, the complaint was dismissed without evaluating the employer's motive for filing the suit.

Dana Corporation/Metaldyne Corporation, 351 NLRB No. 28

On September 29. 2007, in another 3-2 decision the NLRB modestly modified its "recognition bar doctrine" in attempt to protect the rights of employees to determine for themselves, in Board conducted elections, whether they would like to be represented in collective bargaining by a union, organized by their employer.

Under the former policy, an employer's voluntary recognition of a union, based on a showing of the union's majority status, prohibited a decertification petition filed by employees or a rival union's petition for a reasonable period of time. The reasoning was that stability of labor relations was promoted by a rule in which a voluntarily recognized union was insulated from challenge to its status while negotiating for a first collective-bargaining agreement.

In *Dana*, the Board ruled that although the basic justification for providing an insulated period is good, it does not warrant an immediate imposition of an election bar following voluntary recognition. Specifically, the Board held that "no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition." The union or the employer must promptly notify, in writing, the Board's regional office of the grant of voluntary recognition. The voluntary recognition must be in writing, describe the unit and set forth the date of recognition to serve as an election bar. A copy of the written recognition must be provided with the party's notice to the regional office.

Once the Board's regional office receives the notice, it will send an official NLRB notice for the employer to post in prominent workplace locations over the 45-day period

informing employees of the recognition, advising them of their statutory right to represented by a union of their choice or by no union at all, as well as also advising them of their right to file a decertification petition supported by at least 30% of the unit employees or to support another union's election petition based upon a similar 30% or more showing within 45 days of the notice being posted.

If no petition is filed during the 45 day window and the notice requirement is satisfied, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to allow the parties to negotiate a collective bargaining agreement. The new rules will apply "regardless of whether a card-check and/or neutrality agreement preceded the union's recognition." The Board further held that the ruling would only apply prospectively.

The majority stated that they had modified the approach to the recognition bar in order to "provide greater protection for employees" statutory right of free choice and to give proper effect to the court and Board recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election."

This case was brought by National Right to Work Legal Defense Foundation attorneys from employees of two automotive suppliers (Dana and Metaldyne) who were organized by the United Auto Workers Union. Since this ruling was to be applied only prospectively, the forcibly unionized employees in this case and other employees who filed similar decertification petitions after card-check cases, would remain unionized.

Ryder Memorial Hospital et. al., 24-RC-8370

In *Ryder*, the Board ruled on September 28, 2007 to modify the ballot forms used in secret ballot representation elections. The new ballot form will explicitly include language that asserts the Board's neutrality in the election process and disclaim the Board's participation in the alteration of any sample ballots. The disclaimer language will prevent any reasonable impression by employees that the Board endorses a particular individual in the election. Also, the Board no longer will be required to evaluate altered sample ballots on a case-by-case basis. Thus, the Board will no longer set aside an election based on a party's distribution of an altered sample ballot, as long as the altered sample ballot is an actual reproduction of the Board's sample ballot. However, if a party distributes a sample ballot which has been altered and does nor contain the disclaimer language, the Board will rule that the deletion is intentional and hold the altered ballot as per se objectionable.

In this case, the altered sample ballot did not include the Board's new disclaimer language. As such, the Board required a case-specific evaluation of the nature, contents and

circumstances of the distribution of the altered sample ballot. The majority found that the ballot was not objectionable. The majority based its conclusion on the following facts: (I) the petitioner distributed the ballot the sane way it distributed other campaign propaganda; (2) the ballot contained a portion of the disclaimer language that appeared on the Board's Notice of election: (3) it could be concluded by various markings on the ballot that the document was a photocopy of the Board's sample ballot; and (4) the Employer posted copies of the Board's Notice of Election, which contained the disclaimer language, throughout its facility.

Jones Plastic & Engineering Co. and United Steelworkers of America - Case 26 CA-20861

The *Jones* decision on September 27, 2007 addressed the issue of whether certain workers who had been hired to replace strikers were hired as permanent replacements, thereby making it easier for employer to exclude strikers from returning to their jobs.

In *Jones*, a majority of the plant's employees went on an economic strike, and the factory started hiring replacements by using its standard application process. The newly hired employees were under the assumption that they were being hired permanently. A little over two weeks after the strike began Jones sent letters to its striking employees advising them that they should lose their jobs to their replacements if they did not immediately return to work. The United Steelworker's arm of the AFL-CIO, the representative union for the plant, offered on behalf of the employees, an unconditional return to work which Jones rejected on the basis that they already had permanent replacements.

The strikers alleged that Jones' decision was an unfair labor practice based on the proposition that the at-will nature of the replacement's hiring meant the replacements were not permanent and the striker's former positions should still be available to them. The Board held that Jones Plastic & Engineering Company ("Jones") permanently hired the workers to replace the strikers. The new hires had signed forms and received comments by the human resources department about their permanent status. The Board rejected the argument that the replacement's at-will employment precluded permanent employment. The Board held the wording on the applications and that mutual understanding of permanency between the new hire and employer was sufficient proof to show permanency.

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