



NATIONAL LABOR RELATIONS BOARD

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Discussions of Job Security

- ***Sabo, Inc.*, 359 NLRB No. 36, Board Case No. 36-CA-010615 (Dec. 14, 2012) (Pearce, Hayes & Griffin), *petition for review pending*, No. 13-1010 (D.C. Cir.)**
 - The Board found that the employer unlawfully discharged an employee for “gossiping” and “being untrustworthy” after she saw job advertisements in the paper and asked her coworkers whether they thought their positions could be in jeopardy.
 - Although there was no evidence the employees contemplated group action, the Board held that “employee conversations about job security are inherently concerted.”

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Right to Engage in Concerted Activity on the Employer's Property

- ***Nova Southeastern University*, 357 NLRB No. 74, Board Case No. 12-CA-25114 (Sept. 26, 2011) (Liebman, Becker & Pearce), petition for review pending, No. 11-1297 (D.C. Cir.)**
 - Applying *New York New York, LLC*, 356 NLRB No. 119 (2011), enforced, 676 F.3d 193 (D.C. Cir. 2012), the Board found that the university violated Section 8(a)(1) by applying its no-solicitation rule to prohibit an employee of its maintenance contractor from engaging in organizing activity in a campus parking lot.
 - Board relied on “the utter lack of evidence connecting Nova’s asserted interests with a prohibition on such handbilling.”

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- ***Sodexo America LLC/Keck Hospital of USC, 358 NLRB No. 79, Board Case No. 21-CA-039086 (D&O, Jul. 3, 2012; MFR, Sep. 27, 2012) (Pearce, Hayes & Griffin), petition for review pending, No. 12-1413 (D.C. Cir.)***
 - the Board found that a hospital violated Section 8(a)(1) by maintaining a policy allowing off-duty employees access only while performing “hospital-related business,” which the policy defined as “the pursuit of the employee’s normal duties or duties as specifically directed by management.”
 - Because the Hospital maintained the sole right to define “hospital-related business,” the policy “allowed [the Hospital] unlimited discretion to decide when and why employees may access the facility.”
 - Member Hayes dissented. “A reasonable employee would not equate the exception for ‘hospital-related business’ to what the majority describes as ‘unfettered discretion’ to permit or deny off-duty employee access.”

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Facebook Activity Protected by Section 7

- ***Hispanics United of Buffalo, Inc., 359 NLRB No. 17, Board Case No. 03-CA-27872 (Dec. 14, 2012) (Pearce, Hayes, Griffin & Block), petition for review pending, No. 13-390 (2d Cir.)***
 - Board found that the employer violated Section 8(a)(1) by firing five employees based on comments that they had posted on Facebook. In the initial post, one employee informed her co-workers that another employee had criticized their job performance, and solicited responses to that criticism. The Board found that the post and the responses to it constituted concerted activity because the actions were “undertaken . . . with other employees” and the responders made “common cause” with the original poster. In addition, because the employee under discussion in the Facebook posts had suggested that she would take her complaints to management, the Board also found that the posts constituted concerted activity as preparation for possible group action by the posters to defend themselves against such complaints.
 - Hayes dissented contending the posts were “mere griping.”

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- ***Design Technology Group d/b/a Bettie Page Clothing, 359 NLRB No. 96, Board Case No. 20-CA-035511 (Pearce, Griffin & Block) (Apr. 19, 2013), petition for review pending, Nos. 13-71702, 13-71858 (9th Cir.)***
 - After a dispute arose between the store manager and employee Holli Thomas, Thomas took to Facebook, posting that she “needs a new job” and was “physically and mentally sickened.” Two coworkers chimed in supporting Thomas. Thomas posted in response: “hey dudes it’s totally cool, tomorrow I’m bringing a California Workers’ Rights book to work. My mom works for a law firm that specializes in labor laws and BOY will you be surprised by all the crap that’s going on that’s in violation.” Management discovered the post, and ultimately discharged all three employees.
 - The Board found that the employer unlawfully discharged the three for their concerted activity in complaining about the unsafe store hours *and* their subsequent Facebook posts about the company’s reaction. But the Board also explained that “the Facebook postings would have constituted protected concerted activity in and of themselves. The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns.”

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Mandatory Arbitration Agreements

- ***D.R. Horton, Inc.*, 357 NLRB No. 184, Board Case No. 12-CA-25764 (January 3, 2012) (Pearce & Becker, Hayes recused), petition for review pending, No. 12-60031 (5th Cir.)**
 - The Board found that the employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that did not allow its employees to file joint, class, or collective employment-related claims in any forum, arbitral or judicial. Based on the agreement, the employer rejected employees' request for class arbitration of FLSA claims.
 - The Board found that by requiring only individual arbitration of employment-related claims and excluding access to any forum for collective claims, the employer interfered with employees' Section 7 right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

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- ***Supply Technologies, LLC, 359 NLRB No. 38, Board Case 18-CA-019587 (December 14, 2012) (Griffin & Block, Hayes dissenting), petition for review pending, No. 13-1012 (D.C. Cir.)***
 - Applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board found that the arbitration agreement violated Section 8(a)(1) because employees would reasonably construe its language to prohibit filing Board charges or otherwise accessing the Board's processes.
 - The agreement required employees to use the agreement's procedures to "bring any claim of any kind" against the employer, specifically including claims relating to employment and only excluding from its coverage "criminal matters, claims for workers' compensation, and claims for unemployment compensation."
 - Although the agreement stated that an employee "can still file a charge or complaint with a government agency," it expressly provided that an employee who opts to file such a charge "waives any right [he/she] might have otherwise had to any remedy that the agency might try to obtain"
 - Hayes dissented, finding the agreement assures employees of the right to file charges.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Jefferson Standard Cases

- ***Fresenius USA Mfg. Inc., 358 NLRB No. 138, Board Case No. 02-CA-039518 (Sep. 19, 2012) (Hayes, Griffin & Block), petition for review pending, No. 12-1387 (D.C. Cir.)***
 - During a decertification campaign, the employer received complaints about three anonymous prounion comments handwritten on a union newsletter left in the employee break room. On one newsletter was written: “Dear Pussies, Please Read!” On another, in reference to the first missive, was scrawled, “Hey cat food lovers, how’s your income doing?” Finally, on a third, the author penned, “Warehouse workers, R.I.P.,” in reference to the warehouse workers’ unit facing a decertification vote. Some female employees complained, and the employer launched an investigation .
 - The Board, however, held that the employer’s discipline of the employee violated Section 8(a)(3) and (1) of the Act because his anonymous notes attempting to persuade the warehouse drivers to retain union representation did not lose protection by his indelicate execution.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Jefferson Standard Cases

- ***MasTec Advanced Technologies & DirecTV, 357 NLRB No. 17, Board Case No. 12-CA-24979 (Jul. 21, 2011) (Liebman, Becker & Hayes), petition for review pending, No. 11-1273 (D.C. Cir.)***
 - The Board found that the employer violated Section 8(a)(1) by discharging 26 service technicians who appeared on a television news show to air complaints about management practices pressuring them to push certain services on satellite-TV customers.
 - In finding that the employees' statements that they were told to lie to customers were not maliciously untrue, as the judge found, the Board explained that employer encouraged technicians to make statements known to be false "and intended to deceive customers into believing, erroneously, that their satellite receivers would not work if they were not connected to a land line telephone."
 - The Board found no evidence that the technicians intended to inflict financial harm on the employers or "acted recklessly without regard for the financial consequences."

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

Right to Petition Government

- ***Sheet Metal Workers' International Assoc., 357 NLRB No. 131, Board Case No. 4-CD-1188 (Dec. 8, 2011) (Pearce, Becker & Hayes), petition for review pending, No. 12-1047 (3d Cir.)***
 - The Board found that the union violated Section 8(b)(4)(ii)(D) by maintaining a Section 301 lawsuit against an employer after the Board issued a 10(k) award.
 - The Board explained that under *Bill Johnson's* footnote 5 ongoing lawsuits with an illegal objective can be enjoined. That was the case here where the union's ongoing lawsuit sought to obtain either work awarded by the Board under Section 10(k) to a different group of employees or monetary damages in lieu of that work.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

- ***Operative Plasterers' and Cement Masons' International Association, 357 NLRB No. 160, Board Case No. 21-CD-659 (Dec. 30, 2011) (Pearce, Becker & Hayes), petitions for review pending, No. 12-70047 (9th Cir.), No. 12-1016 (D.C. Cir) (ultimate venue yet to be determined)***
 - The Board found that international and/or local Plasterers unions violated Section 8(b)(4)(ii)(D) by filing and pursuing several legal actions with an object of forcing the Employer to assign certain plastering work to Plasterers-represented employees, contrary to prior 10(k) proceedings awarding the work to Carpenters-represented employees.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

- ***Operative Plasterers' and Cement Masons' International Association*, 357 NLRB No. 179, Board Case No. 21-CD-673 (Dec. 31, 2011) (Pearce, Becker & Hayes), petitions for review pending, No. 12-70086 (9th Cir.), No. 12-1020 (D.C. Cir.) (ultimate venue yet to be determined)**
 - Ruling on cross-motions for summary judgment, the Board found the Plasterers local and international unions violated Section 8(b)(4)(ii)(D) by arbitrating a grievance with an object of forcing the employer to assign certain plastering work to Local 200-represented employees, contrary to a prior Board 10(k) award of the work to Carpenters-represented employees, and by filing a counterclaim to enforce that arbitration award in a district-court case brought by the employer to vacate the award.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

- ***Allied Mechanical Services, Inc., 357 NLRB No. 101, Board Case 7-CA-41687 (December 29, 2011) (Pearce & Becker, Hayes dissenting), application for enforcement pending, No. 12-1235 (6th Cir.)***
 - The Board found that the employer, a fabricator and installer of heating and air conditioning systems, violated Section 8(a)(1) of the Act when it filed and maintained a lawsuit against four unions (two locals and their internationals) arising from one of the local union's refusal to grant the employer job-targeting funds. The district court ultimately dismissed the employer's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and the Sixth Circuit affirmed.
 - Board noted that case was dismissed under stringent 12(b)(6) standard.
 - Motive to retaliate found where employer's ULPs reflected a "deep" and "enduring" animus against the union; hostility directed at all four unions, not just the union that refused to grant the funds; the lawsuit's lack of merit; and the fact that the employer sought money damages from the unions based on their statutorily-protected conduct.
 - Hayes dissented, finding insufficient evidence of retaliatory motive.

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- ***Venetian Casino Resort, LLC, 357 NLRB No. 147, Board Case No. 28-CA-16000 (Dec. 21, 2011) (Pearce, Becker & Hayes), petition for review pending, No. 12-1021 (D.C. Cir.)***
 - The Board had found in an earlier decision, enforced in all other respects by the D.C. Circuit, *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601 (2007), that the hotel violated 8(a)(1) by summoning the police to remove demonstrators from a temporary sidewalk in front of its premises, which the Board and the federal courts ultimately found to be public property.
 - On remand from the DC Circuit, the Board reaffirmed., finding that the hotel's summoning the police involved no effort to influence the passage of any law and that its communication with the police involved no interaction with any official with policymaking authority.
 - The Board emphasized that it was not presented with the question whether the hotel's prior communications with the county district attorney and the police regarding its property claims constituted petitioning protected by *Noerr-Pennington*. Nor, the Board noted, was there any contention that the hotel acted unlawfully in presenting its property claims to the federal courts.

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- ***Ampersand Publishing, LLC, 358 NLRB No. 155, Board Case No. 31-CA-029253 (September 27, 2012) (Pearce, Griffin & Block), petition for review dismissed, Nos. 12-1449, 12-1472, cross-application for enforcement pending, No. 12-1488 (D.C. Cir.)***
 - The Board found that the employer violated Section 8(a)(1) of the Act by serving subpoenas on current and former employees seeking their confidential Board affidavits.
 - The employer claimed that the subpoenas were direct petitioning for redress of a grievance because it had petitioned the regional director for the subpoenas to help it defend against a pending complaint. In rejecting this claim, the Board explained that federal courts have “limited *Noerr-Pennington* immunity to petitions that seek the passage of a law or a significant policy decision regarding enforcement.”
 - The Board found that the employer acted with an illegal objective because, in 2007, when the judge ruled on the subpoenas, he made it clear that under established Board rules and Supreme Court law, the employer was not entitled to the affidavits prior to the employees’ testifying at the Board hearing. When the employer again demanded affidavits in 2009, it knowingly acted contrary to established Board rules and Supreme Court precedent.

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Handbook Rules

- ***Hyundai America Shipping Agency, 357 NLRB No. 80, Board Case No. 28-CA-22892 (Aug. 26, 2011) (Liebman, Becker & Pearce) petition for review pending, No. 11-1351 (D.C. Cir.)***
 - The Board found that a variety of the employer's work rules violated Section 8(a)(1). The employee handbook contained rules that (1) instructed employees using the company's electronic-communications system that they "should only disclose information or messages from these systems to authorized persons"; (2) prohibited "unauthorized disclosure of information from an employee's personnel file"; (3) directed employees to voice complaints to their supervisor or HR rather than to co-workers; (4) prohibited employees from "[p]erforming activities other than Company work during working hours."
 - The Board also found the employer's oral rule prohibiting employees from discussing matters under investigation by the employer unlawful. Holding that the burden is on the employer to demonstrate that confidentiality is necessary on a case-by-case basis, the Board concluded that the employer's blanket policy violated Section 8(a)(1).

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- ***Banner Health System, 358 NLRB No. 93, Board Case No. 28-CA-23438 (July 30, 2012) (Griffin & Block, Hayes dissenting in part), petition for review pending, No. 12-1359 (D.C. Cir.)***
 - The Board found that the employer violated Section 8(a)(1) by maintaining two unlawful confidentiality policies: (1) a confidentiality agreement, in which the employee agreed to keep certain information “private and confidential.” The agreement defined “confidential information” to include “[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee.” (2) a policy of asking employees who were involved in an employer investigation not to discuss the investigation while it was ongoing, relying on *Hyundai America Shipping*.
 - Hayes dissented as to the second violation, concluding that the policy was more of a suggestion than a binding rule.

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- **Costco Wholesale Corp., 358 NLRB No. 106, Board Case No. 34-CA-012421 (Sep. 7, 2012) (Pearce, Griffin & Block), petition for review pending, No. 12-1389 (D.C. Cir.)**
 - This case tests a number of confidentiality rules in Costco’s employee agreement. Applying the standards set forth in *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board found the following rules unlawful either on the ground that they explicitly restrict protected activity or that employees reasonably would construe them to do so:
 - *Prohibition on “discussing private matters of members and other employees . . . such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information.”*
 - *Prohibition on sharing “sensitive information such as ... payroll” and on “unauthorized removal of confidential information.”*
 - *General prohibition on release of “employees’ names, addresses, phone numbers, and email addresses,” as contained in a variety of rules governing confidential information.*

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

- ***DirecTV U.S. DirecTV Holdings, LLC, 359 NLRB No. 54, Board Case No. 21-CA-39546 (Jan. 25, 2013) (Pearce, Griffin & Block), petitions for review pending, Nos. 13-70364, 13-71549, 13-71802 (9th Cir.)***
 - The struck down four rules. The first set of rules restricted employees' communication with the media in a manner that the Board found chilled employee rights. The second rule prohibited employees from talking with "law enforcement," which the Board concluded might interfere with investigations of Board charges. The third rule required employee confidentiality about "your job," "DirecTV employees," and "employee information." The final rule prohibited employees from disclosing company information on blogs, chat rooms, or other public websites.
 - Affirming the judge, the Board dismissed an attack on a fifth rule, which prohibited employee use of computer systems for "any religious, political, or outside organizational activity," as foreclosed by *Register Guard*, 351 NLRB 1110 (2007). The Board declined the Acting General Counsel's and Union's request to overrule that case.
 - The Board also denied the Union's request for expanded remedies.

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Supervisory Status

- ***New Vista Nursing & Rehabilitation, LLC, 357 NLRB No. 69, Case No. 22-CA-29988 (Aug. 26, 2011) (Liebman, Becker & Hayes), vacated, 2013 WL 2099742 (3d Cir. May 16, 2013) (Nos. 11-3440, 12-1027, 12-1936), Board petition for rehearing filed, July 1, 2013, proceedings stayed pending Noel Canning, July 16, 2013 (“New Vista I”)***
 - The Board found that the employer violated Section 8(a)(5) and (1) by refusing to bargain with the union, which had been certified to represent a unit of licensed practical nurses. The Regional Director rejected the employer’s argument that the LPNs are supervisors because they assign work, responsibly direct, and discipline, or recommend the discipline of the certified nursing assistants.
 - The employer challenged the Regional Director’s findings with respect to authority to discipline and recommend discipline, and, specifically, his failure to take into account precedent involving employers with progressive disciplinary systems.

SECTION 7 RIGHTS AND PROTECTED ACTIVITY

- ***New Vista Nursing & Rehabilitation, LLC, 358 NLRB No. 55, Board Case No. 22-CA-029845 (June 15, 2012) (Pearce, Hayes, Griffin), application for enforcement pending, No. 12-3524 (3d Cir.) (“New Vista II”)***
 - The Board found the employer violated Section 8(a)(3) by altering the nurses’ duties in an effort to convert them into 2(11) supervisors and strip them of their Section 7 rights. In finding the Section 8(a)(3) conversion violation, the Board found that shortly after the Regional Director issued his decision and direction of election rejecting the employer’s assertion of supervisory status, the employer announced that the nurses would be given additional responsibilities in disciplining, instructing, monitoring, and evaluating certified nursing aides.
 - The Board rejected the employer’s explanation that the nurses were merely being re-educated on their existing duties. The Board noted that claim was contradicted by the employer’s factual assertion made in the earlier technical 8(a)(5) case that it had given the nurses new duties as part of a management restructuring plan. The Board rejected the employer’s other purported reason -- that managers were overburdened with paperwork so additional duties were shifted to the nurses -- because it was unsupported by record evidence.

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- ***Salem Hospital Corporation, 357 NLRB No. 119, Board Case No. 4-CA-64455 (Nov. 29, 2011) (Pearce, Becker & Hayes), petition for review pending, No. 11-1466 (D.C. Cir.)***
 - The Board found that the employer violated Section 8(a)(5) and (1) by refusing to bargain with the union, which had been certified to represent a unit of registered nurses, including some who serve as charge nurses. The Regional Director found that, with the exception of two surgical nurses, none of the charge nurses are statutory supervisors.
 - The Regional Director found that, for the most part, the assignment of patients is done collaboratively by the charge nurses and does not require the exercise of independent judgment.

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- ***Entergy Mississippi, Inc.*, 358 NLRB No. 99, Board Case No. 15-CA-17213 (Aug. 14, 2012) (r-case decision, Pearce, Becker & Hayes; c-case decision, Pearce, Hayes & Griffin), petition for review pending, No. 12-60644 (5th Cir.).**
 - Since 1939, two local unions have represented units at Entergy, an electrical utility company, that include dispatchers. Dispatchers play significant roles in sending utility workers to job sites to repair planned and unplanned outages. In 2003, Entergy filed a unit clarification petition seeking to remove 25 dispatchers from the units. After a lengthy procedures, including a remand by the Board following its decision in *Oakwood Healthcare*, 348 NLRB 686 (2006), the Board, ultimately found that Entergy failed to prove that its dispatchers assigned or responsibly directed within the meaning of Section 2(11).
 - In declining to exclude the dispatchers, the Board reasoned that a “reversion” to a long line of circuit court cases suggesting that utility dispatchers constituted statutory supervisors was “unwarranted” and “ignore[s] [the] significant doctrinal developments” following the Supreme Court’s decision in *Kentucky River* .
 - Applying *Oakwood*, the Board decided that the dispatchers did not responsibly direct employees since they were not held accountable for the actions of the field employees that they directed.

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- ***Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, Board Case No. 19-CA-096559 (May 20, 2013) (R-case decision, Pearce & Griffin, Hayes dissenting; C-case decision, Pearce, Griffin & Block), petition for review pending, No. 13-1190 (D.C. Cir.)**
 - This supervisory status case has a lengthy procedural history dating back to 1999 and includes a remand from the D.C. Circuit in 2001.
 - The employer claimed that the mates, who manage the tugboat while the captain was off-duty, were supervisors because they had the Section 2(11) authority to “assign” and “responsibly to direct” other tugboat employees.
 - In its decision on review, the Board found that the employer failed to meet its burden of proof. With respect to assignment of work, the Board concluded that the employer’s claims were insufficiently supported by record evidence. For example, some “assignments” were merely “ad hoc instructions” within the meaning of *Oakwood* and others did not involve the exercise of independent judgment. With respect to responsible direction, the Board found that the employer offered little more than conclusory assertions that the mates are held accountable for work of other tugboat employees.

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- ***Sub-Acute Rehabilitation Center at Kearny, LLC, 359 NLRB No. 77, Board Case No. 22-CA-093626 (Mar. 13, 2013) (R-case decision, Pearce, Hayes & Block; C-case decision, Pearce, Griffin & Block), application for enforcement pending, No. 13-1829 (3d Cir.)***
 - After the Regional Director rejected a claim of supervisory status, the Board found that the employer violated Section 8(a)(5) and (1) by refusing to bargain with the union certified to represent a unit of licensed practical nurses at its 120-bed nursing facility in Kearny, New Jersey.
 - The employer claimed that the nurses were 2(11) supervisors with the authority to discipline, assign work, responsibly direct, and adjust the grievances of certified nurse aides. Rejecting those contentions, the Regional Director found that the nurses' involvement in assignment of work was routine and did not involve the exercise of independent judgment. The Regional Director further found that authority to responsibly direct had not been shown because there was no evidence that the nurses were held accountable or risked any adverse consequence for aides' poor performance.

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- ***DirecTV/Int'l Assoc of Machinists, Lodge 947, 358 NLRB No. 33, Board Case No. 21-CA-071591 (Apr. 16, 2012) (R-case decision, Pearce & Becker, Hayes dissenting; C-case decision, Pearce, Hayes & Griffin), petition for review pending, No. 12-72526 (9th Cir.)***
 - In this technical 8(a)(5) case, the Board found that DirecTV's "field supervisors" were not statutory supervisors and thus concluded that their solicitation of authorization cards did not taint the election.
 - In finding no supervisory status, the Board focused on the fact that, even though a field-supervisor may independently initiate an Employee Consultation Forms and his recommendation is followed the majority of the time, the ECF goes through three levels of review. The operations manager, the site manager, and human resources all have veto power over language in the ECF or its issuance. The Board noted, DirecTV's "evidence demonstrates, at most, that the supervisors' recommendations are 'ultimately followed' in the majority of instances, not that the recommended action is taken without independent investigation."
 - Hayes dissented. "Merely because an ECF initiated by a field supervisor is subject to a three-level review process does not negate that the field supervisor 'effectively recommends' discipline and does not reflect a lack of Section 2(11) authority."

SECTION 8(a)(3)

Mass Refusals to Hire

- ***Massey Energy Co., 358 NLRB No. 159, Board Case No. 9-CA-042057 (Sep. 28, 2012) (Hayes, Griffin & Block), petition for review pending, Nos. 12-1400, 12-1401 (D.C. Cir.)***
 - This case arises out of Mammoth Coal's 2004 purchase of a unionized West Virginia mine from Horizon Natural Resources and its refusal to hire unionized employees and bargain as a successor. Before assuming control, Mammoth offered interviews to all of the nonunionized employees, but barely informed the 250 unionized workers about the application process, doing nothing more than leaving applications at a guard station. At the same time, however, Mammoth aggressively advertised for experienced miners elsewhere.
 - The Board determined that Mammoth was a successor employer that unlawfully refused to hire 85 named applicants to avoid a bargaining obligation. In so finding, it relied on Mammoth's strict control and awareness of the number of prounion employees it could hire to avoid a bargaining obligation, its explicit anti-union bias, the low number of union employees hired, and the pretextual reasons for not hiring them.

SECTION 8(a)(3)

Discrimination

- ***Fort Dearborn Co., 359 NLRB No. 11, Board Case No. 13-CA-046331 (Sep. 28, 2012) (Pearce, Hayes & Block), petition for review pending, No. 12-1430 (D.C. Cir.)***
 - The Board found that the employer unlawfully suspended union steward and negotiator Marcus Hedger for purportedly walking a friend through the plant in violation of a policy prohibiting nonemployee access and then refusing to cooperate in the investigation.

SECTION 8(a)(5)

Duty to Bargain in Good Faith

- ***The Finley Hosp. 359 NLRB No. 9, Board Case No. 33-CA-014942 (Sept. 28, 2012) (Pearce & Block, Hayes dissenting), petition for review pending, No. 12- 1421 (D.C. Cir.)***
 - The Board found that the Hospital violated Section 8(a)(5) and (1) of the Act when, after its 1-year collective bargaining agreement with the Union expired, it unilaterally discontinued the annual 3-percent pay raises provided for in the parties' contract. The contract provided that "[f]or the duration of this Agreement," the Hospital would award nurses a 3% pay increase on their anniversary dates. The Board found that the contractual wage increase was a term and condition of employment and that the unilateral cessation of the increase violated the Hospital's statutory duty to maintain the status quo when a contract expires and negotiations are pending.
 - The Board rejected the Hospital's argument that the contractual language "[f]or the duration of this Agreement" was a "clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo." The language limited the Hospital's *contractual* duty to provide the increase, but it did not limit the *statutory* duty to refrain from making post-expiration changes to the employees' terms and conditions of employment.

SECTION 8(a)(5)

- ***Fred Meyer Stores, Inc.*, 359 NLRB No. 34, Board Case No. 36-CA-010555 (December 13, 2012) (Pearce, Hayes & Griffin), *petition for review pending*, No. 12-1486 (D.C. Cir.)**
 - The Board found that the employer, the operator of a chain of grocery stores, violated Section 8(a)(5) and (1) of the Act by limiting the union's right to contact employees on the retail floor as part of its campaign to maintain support for its bargaining proposals. Specifically, the employer unilaterally changed the past practice established under the union-access provision of an expired contract. That past practice permitted union representatives to have short, substantive conversations with employees on the sales floor. As a result of the unilateral change, union representatives were restricted to introducing themselves and distributing business cards to employees on the floor.
 - Hayes dissented, faulting the judge for failing to acknowledge an employer's rights under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and finding that the union's conduct did not fall within past practices, and to the extent that it did, the employer's change was not "material, substantial, and significant."

SECTION 8(a)(5)

- ***Embarq Corp., 358 NLRB No. 134, Board Case No. 28-CA-022804 (Sep. 14, 2012) (Pearce & Block, Hayes dissenting), petition for review pending, No. 12-1385 (D.C. Cir.)***
 - The Board, agreeing with the judge, found that a management rights clause giving the employer the right to “classify,” “reassign,” “lay-off,” and “discharge” did not privilege its decision to eliminate its stores’ retail cashier position in favor of ATM bill-paying machines without bargaining. The Board found that the unilateral change violated Section 8(a)(5) and (1) of the Act.
 - Member Hayes dissented. Referencing the management rights clauses granting power to reassign, classify, lay-off, and discharge, he concluded that, even under the clear and unmistakable waiver standard, Embarq “did exactly what the parties’ contract expressly permitted it to do.”

SECTION 8(a)(5)

Duty to Provide Information

- ***American Baptist Homes of the West d/b/a Piedmont Gardens, 359 NLRB No. 46, Board Case No. 32-CA-063475 (Dec. 15, 2012) (Pearce, Griffin & Block, Hayes dissenting in part), petition for review pending, No. 13-1011 (D.C. Cir.)***
 - The Board overruled the bright-line rule that confidential witness statements are exempt from the employer's duty to provide relevant information to a union representing employees accused of misconduct. *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). In place of the bright-line rule, the Board announced that it would apply the balancing test articulated by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).
 - Finding no reason to categorically exclude all witness statements from the duty to provide information under the Act, the Board held that balancing the union's interests in reviewing the statements against the employer's interests in the statements' confidentiality "will effectively protect both the employer and the witnesses where the employer demonstrates a reasonable concern regarding confidentiality, harassment, or coercion, while also safeguarding the union's statutory right to obtain information relevant to grievance processing."

REMEDIES

- ***Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, Board Case No. 20-CA-33367 (Aug. 25, 2011) (Liebman, Becker & Pierce), petition for review pending, No. 11-1310 (D.C. Cir.)**
 - The Board found that the employer committed numerous unfair labor practices during an organizing campaign, including interrogations, threats, the creation of the impression of surveillance, a grant of wage increases to discourage unionization, the solicitation of employees to withdraw union cards, and the discharge of a union supporter.
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 - Reversing the judge, the Board issued a *Gissel* bargaining order. The Board explained that the nature and extent of the violations had a strong tendency to undermine the union's majority support, particularly given the small size of the 13-member unit. The Board also relied on hallmark violations, including the discharge of the employee whom it perceived to be the leader of the organizing effort, and the participation of the employer's highest management officials in the unfair labor practices.

REMEDIES

- ***Camelot Terrace and Galesburg Terrace, 357 NLRB No. 161, Board Case Nos. 33-CA-15584, et seq. (Dec. 30, 2011) (Pearce & Becker, Hayes dissenting in part), petitions for review pending, Nos. 12-1071, 12-1218 (D.C. Cir.)***
 - The Board adopted, without exception, the judge’s findings that the employers, operators of nursing homes, committed numerous and serious violations of the duty to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act. The employer’s numerous and egregious uncontested unfair labor practices manifested an intent to waste the union’s time and resources so as to avoid reaching a bargaining agreement; the employer persisted in this course of conduct even after executing settlement agreements with the Board establishing firm bargaining requirements.
 - As a remedy, the Board required the employers to reimburse the charging-party union “for all costs and expenses incurred in collective-bargaining negotiations” and to reimburse the Board’s General Counsel and the union “for their costs and expenses incurred in the investigation, preparation, and litigation of [the two cases] before the judge and the Board.” The Board found that the reimbursement of negotiation expenses would restore the union’s previous financial strength and ability to effectively carry out its responsibilities as the employees’ representative.

REPRESENTATION CASES

- ***Manhattan Center Studios, Inc., 357 NLRB No. 139, Board Case No. 2-CA-35394 (Dec. 13, 2011) (Pearce, Becker & Hayes), petition for review pending, No. 12-1017 (D.C. Cir.)***
 - On remand from the D.C. Circuit, the Board clarified the standard for reopening a representation proceeding where a party belatedly claims that it has newly discovered evidence of pre-election misconduct.
 - The proponent of the evidence must show that, with reasonable diligence, the evidence could not have been discovered in time to take appropriate and timely action in the representation proceeding.
 - The reasonable diligence standard does not require a party to question employees in a way that might arguably constitute either interference with Section 7 rights or objectionable conduct. But, the Board explained, reasonable diligence “entails making inquiry of available potential witnesses,” such as the asserted supervisor here, “concerning their knowledge of common forms of objectionable conduct, such as supervisory taint.” Accordingly, the Board declined “to create a blanket exception to the requirement of reasonable diligence for issues of which the proponent of additional evidence had no notice.”

BARGAINING UNITS

- ***Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174, Board Case No. 15-CA-68248 (December 30, 2011) (Pearce & Becker, Hayes dissenting), enforced, No. 12-1027 (6th Cir., August 15, 2013)**
 - In the underlying representation case, the Board held that Certified Nursing Assistants at a nursing home may comprise an appropriate unit without including all other nonprofessional employees.
 - It overruled the Board's 1991 decision in *Park Manor Care Center*, 305 NLRB 872 (1991), which had adopted a special test for bargaining unit determinations in nursing homes, rehabilitation centers, and other non-acute health care facilities, and returned to the application of the traditional community of interest approach. In addition, the Board clarified that, under the community of interest test, in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain employees, "the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees."
 - Dissenting, Member Hayes would have adhered to *Park Manor*. In addition, in his view, the majority's decision fundamentally changed the standard for determining whether the petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction.

INDIAN TRIBES

- ***Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84, Board Case No. 07-CA-051156 (March 18, 2013) (Pearce, Griffin & Block), petition for review pending, No. 13-1464 (6th Cir.)**
 - The Board asserted jurisdiction over the Indian tribe, which operates a casino and resort pursuant to the Indian Gaming Regulatory Act (“IGRA”). The Board found that provisions of the tribal labor code, which the tribal legislative body enacted, interfered with the protected activity of the employees working at the Little River Casino Resort.
 - In asserting jurisdiction, the Board applied *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enforced 475 F.3d 1036 (D.C. Cir. 2007). There, the Board adopted the *Tuscarora/Coeur d’Alene* doctrine, as well as an additional discretionary jurisdictional standard, to determine when Board jurisdiction over tribal entities is appropriate.
 - In *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), the Ninth Circuit enumerated three exceptions in which general statutes would not apply to Indian tribes absent express authorization from Congress: (1) the law “touches exclusive rights of self-government in purely intramural matters”; (2) application of the law would abrogate treaty rights; or (3) there is “proof” in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.

INDIAN TRIBES

- ***Saginaw Chippewa Indian Tribe of Michigan*, 358 NLRB No. 92, Board Case No. 07-CA-053586 (April 16, 2013) (Pearce, Griffin & Block), petition for review pending, No. 13-1569 (6th Cir.)**
 - Applying *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1036 (D.C. Cir. 2007), the Board asserted jurisdiction over a tribe-operated casino and held that the tribe committed various 8(a)(1)s and violated 8(a) (3) by suspending and then discharging an employee because of her union activity.

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