

RECENT SIGNIFICANT NLRB DECISIONS

Appropriate Bargaining Units

Macy's, Inc., 361 NLRB No. 4 (2014)

The Board majority found that, under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the petitioned-for unit of cosmetics and fragrances employees at the Employer's Saugus retail department store constitutes an appropriate unit for bargaining. The Board majority first found that the cosmetics and fragrances employees are readily identifiable as a group, share a community of interest, and that any differences among these petitioned-for employees are insignificant compared to the strong evidence of a shared community of interest. Next, the Board majority found that the Employer had not established that the cosmetics and fragrances employees share an overwhelming community of interest with the other employees at the Saugus store. In so finding, the majority emphasized that (1) there is virtually no record evidence concerning the nonselling employees, and (2) although there are similarities between the cosmetics and fragrances employees and other selling employees, there are clear distinctions between the two groups. The Board majority emphasized that it was not reaching the question of whether other subsets of selling employees at this, or any other, retail department store may also constitute appropriate units.

The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 NLRB No. 11 (2014)

The full Board unanimously rejected the Regional Director's decision ordering an election among the petitioned-for bargaining unit of all women's shoe sales associates at a retail store. The Board found that the petitioned-for unit is not appropriate because, although the women's shoes sales associates in the store's separate departments of Salon Shoes and Contemporary Shoes are a readily identifiable group, they do not share a community of interest. Women's shoes sales associates in Salon Shoes and Contemporary Shoes do not track any administrative or operational boundaries drawn by the Employer, do not share common supervision, do not interchange with one another on either a temporary or a permanent basis, do not have significant contact with one another, and do not share any specialized skills or training.

Electronic Communications Policies

Purple Communications, Inc., 361 NLRB No. 126 (2014)

The full Board reviewed the Administrative Law Judge's finding that the Respondent's electronic communications policy, which prohibits employees' non-business use of its email network, was lawful and not objectionable under *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir.

2009). A Board majority overruled *Register Guard*'s holding that employees have no statutory right to use their employer's email system for Section 7 purposes. The majority concluded that an employer that gives its employees access to its email system must presumptively permit the employees to use the email system for statutorily protected communications during nonworking time. But an employer can rebut the presumption by showing that special circumstances make its restrictions necessary to maintain production and discipline.

The majority concluded that *Register Guard* had focused too much on employers' property rights and too little on the importance of email as a means of workplace communication. Instead, the majority adopted an analysis that accommodates the competing rights under an approach based on that of *Republic Aviation*, 324 U.S. 793 (1945). The majority also explained that its decision was limited: it applies only to email, only to employees who use their employer's email system for work, and only to employees' nonworking time. Employers may still monitor email use for legitimate management reasons and tell employees that they have no expectation of privacy when they use the email system. The majority rejected claims that the decision violates employers' free-speech rights. Rather than ruling on the Respondent's electronic communications policy at this time, the Board remanded the case for the Respondent to present evidence of special circumstances justifying its restrictions on employees' use of the email system.

Jurisdiction and Managerial Status of University Faculty

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)**

The Board issued a Decision on Review and Order after review of a Regional Director's Decision and Direction of Election asserting jurisdiction over the University under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and found that the University's full-time contingent faculty are not managerial employees within the meaning of *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The Board acted after issuing a notice and invitation to file briefs on February 10, 2014. The Board reexamined the standard it will apply for determining, in accordance with *Catholic Bishop*, when the Board should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities, and reexamined the standard by which it will determine the managerial status of faculty pursuant to *Yeshiva University*.

The Board majority adopted a new jurisdictional test under *Catholic Bishop*. That test requires that when a college or university argues that the Board cannot exercise jurisdiction over a petitioned-for unit of faculty because the university is a religious university, the university "must first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment." Once that threshold requirement is met, the university "must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representation to current or potential students and faculty members, and the community at large."

The Board majority also refined the standards under *Yeshiva University* to determine whether faculty actually or effectively exercise control over decision-making pertaining to central university policies by examining the faculty's participation in the following decision-making areas: academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, and giving greater weight to the first three areas than the last two.

Deferral Standard

***Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014)**

In this case, the Board majority adopted new standards for determining whether to defer to arbitral decisions, the arbitral process, and grievance settlements in cases alleging violations of Section 8(a)(1) and (3) of the Act. The Board majority found that the existing deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. The majority reasoned that the existing standard created excessive risk that the Board would defer when the arbitrator had not adequately considered the unfair labor practice issue, or when it was impossible to tell whether he or she had done so.

The new standard retains the *Spielberg* requirements that the arbitral proceedings appear to be fair and regular and that all parties have agreed to be bound. In addition, the new standard places the burden on the party urging deferral to show that 1) the arbitrator was explicitly authorized to decide the unfair labor practice issue (either by the collective-bargaining agreement or by the parties themselves); 2) the arbitrator was presented with and considered the statutory issue (or was prevented from doing so by the party opposing deferral); and 3) Board law reasonably supports the arbitral award.

The Board determined that it would apply the new postarbitral deferral standard prospectively rather than retroactively because parties had relied on the preexisting framework in negotiating contracts and processing grievances.

Protected Publicity Campaign

***MikLin Enterprises, Inc., d/b/a Jimmy John's*, 361 NLRB No. 27 (2014)**

The panel majority affirmed the ALJ to find that MikLin Enterprises unlawfully disciplined three employees and unlawfully discharged six employees because of their involvement in a protected publicity campaign, which sought support for employees' desire for sick leave benefits. Relying on *Jefferson Standard*, 346 U.S. 464 (1953), and related cases, including *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011), the majority agreed with the Administrative Law Judge that nothing in the posters or press release was so disloyal,

reckless, or maliciously untrue to cause employees to lose the Act's protection. Member Johnson disagreed. In his view, the posters that contained images of MikLin's signature product and statements implying the product would make the public ill, and which were distributed and posted by employees in public places near MikLin's stores, not only contained maliciously untrue statements, but also disparaged MikLin's product with an intent to injure MikLin's reputation in a manner that showed unprotected disloyalty pursuant to the *Jefferson Standard* doctrine. In contrast to his colleagues and the Judge, Member Johnson would have dismissed the allegations related to the poster campaign.

Social Media

Three D, LLC d/b/a Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014)

The Board unanimously found that the Respondent violated Section 8(a)(1) of the Act by unlawfully discharging two employees for their protected, concerted participation in a Facebook discussion in which they complained about perceived errors in the employer's tax withholding calculations. One of the discharged employees was terminated for selecting the "like" option in responding to a Facebook posting. The other referred to the company co-owner with an expletive. In finding the unlawful discharges, the Board stated that the test set out in *Atlantic Steel*, by which the Board determines whether an employee loses the Act's protection for opprobrious workplace conduct occurring during otherwise protected activity, is not well-suited to address statements involving employees' off-duty, off-site use of social media to communicate with other employees or with third parties. Rather, the Board assessed the comments under the Supreme Court cases *Jefferson Standard* and *Linn* and concluded that the statements were neither disloyal nor defamatory under those standards and did not lose the Act's protection.

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

The Board panel found that the Respondent did not violate Section 8(a)(1) when, solely based on a Facebook conversation, it rescinded two teen-center employees' rehire letters for the next school year. The Board agreed with the judge that the Facebook posts lost the Act's protection, as they contained extensive, detailed advocacy of insubordination during the next school year that the Respondent reasonably feared would be acted upon.

Mandatory Arbitration Agreements

Murphy Oil USA, Inc., 361 NLRB No. 72 (2014)

Reaffirming *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the Board majority found that the Respondent violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration. The Board found that mandatory arbitration agreements – that bar employees from bringing joint, class, or collective workplace

claims in any forum – restrict employees’ substantive right, established by Section 7 of the Act, to improve their working conditions through administrative and judicial forums. The Board majority also found that finding a mandatory arbitration agreement unlawful under the Act does not conflict with the Federal Arbitration Act (FAA) requirement that arbitration agreements must be enforced according to their terms.

Remedies

Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 360 NLRB No. 73 (2014)

The Board panel unanimously adopted the ALJ’s findings that the Respondent violated Section 8(a)(5) and (1) by: (a) refusing to bargain with the Union over the terms of an initial collective-bargaining agreement; (b) refusing to bargain with the Union over employee discharges and their effects; and (c) refusing to furnish the Union with relevant, requested information concerning employee discharges. In addition, the Board majority the Judge’s finding that the Respondent violated Section 8(a)(5) and (1) by refusing to submit proposals or counterproposals during the first eight bargaining sessions until it received a full set of the Union’s proposals, and further found that the Respondent unlawfully conditioned bargaining on unit employees abandoning the use of certain Union forms. The same Board majority also reversed the Judge and ordered a full 1-year extension of the certification year and reimbursement of the Union’s negotiating expenses.

Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (2014)

A Board panel majority adopted the ALJ’s findings that the Respondent violated Section 8(a)(5) and (1) by refusing to offer proposals or counterproposals until the Union offered a full contract proposal and by prematurely declaring impasse and refusing to bargain unless the Union directed employees to stop using a Union-provided “Assignment Despite Objection” form. The same Board panel majority affirmed the judge’s recommendation for a full 1-year extension of the certification year, and also ordered reimbursement of the Union’s negotiating expenses. Member Johnson, dissenting, found that an award of negotiation expenses is not warranted and he would only extend the certification year by 6 months.

HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel, 361 NLRB No. 65 (2014)

The full Board affirmed the ALJ’s rulings, findings, and conclusions in this case involving the recidivist Respondents and multiple violations of the Act. Based on the facts of the case and the Respondents’ recidivist behavior exhibiting a continuing disregard for its obligations under the Act, the Board majority ordered other appropriate remedies, including litigation costs to the General Counsel and Union, as well as certain other costs incurred by the Union as a direct result of the Respondents’ unfair labor practices. It also ordered a 3-year notice-posting period and required mailing of the notice, the Decision and Order, and an additional Explanation of Rights to current and former employees and supervisors, as well as provision of the material to

new employees and supervisors for a period of 3 years. The majority applied the historically recognized remedies of publication of notices in local media of general circulation and rescission of unlawful changes regarding access rights of union representatives. It also required supervisory attendance at notice readings and imposed a narrowly-crafted 3-year visitation remedy to ensure the Respondents' compliance with the mailing, posting, and publication components of the remedy over the extended period ordered.

Weingarten Rights

***Ralphs Grocery Company*, 361 NLRB No. 9 (2014)**

The Board agreed with the ALJ's finding that the Respondent violated Section 8(a)(1) by requiring an employee to submit to a drug and alcohol test, notwithstanding his request for *Weingarten* representation. A Board panel majority also agreed with the Judge's finding that the Respondent unlawfully suspended and discharged the employee for his refusal to take the test without representation. Accordingly, they found that because the reason for the employee's suspension and discharge was inextricably linked to his assertion of *Weingarten* rights, the Judge's make-whole remedy is appropriate.

Successor Employer

***Pressroom Cleaners*, 361 NLRB No. 57 (2014)**

The Board adopted the Administrative Law Judge's findings that the Respondent Pressroom Cleaners violated Section 8(a)(1) in making nonunion statements; Section 8(a)(3) and (1) by discriminatorily refusing to hire six employees of Pressroom Cleaners' predecessor, Capitol Cleaning, because of their union affiliation; and that, as the statutory successor to Capitol Cleaning, Pressroom Cleaners violated Section 8(a)(5) and (1) by unilaterally imposing new terms and conditions of employment on the employees it hired. The employees were represented by a union while working for Capitol Cleaning. In accordance with *Planned Building Services*, 347 NLRB 670 (2006), the judge ordered a remedy that included a provision allowing Pressroom Cleaners to have the opportunity in compliance to limit its liability by showing that, even absent its unfair labor practices, it would not have agreed to the monetary provisions of the Union's contract with Capitol Cleaning. A Board majority overruled this portion of *Planned Building Services* to the extent that it allows an employer to limit its backpay liability in compliance through an evidentiary showing, returning to the approach set forth in *State Distributing*, 282 NLRB 1048 (1987), holding that the predecessor's terms and conditions of employment should continue until the parties bargained to agreement or impasse.

Objectionable Conduct

Labriola Baking Company, 361 NLRB No. 41 (2014)

A majority of the full Board, reversing the hearing officer, found merit to one of the Union's objections to the decertification election. The objection involved a statement made one week before the election by the Chief Operating Officer ("COO") to employees at a captive audience speech, and the translation of that statement to the predominately Spanish-speaking audience. According to the COO's scripted remarks, he said, "If you chose Union Representation, we believe the Union will push you toward a strike. Should this occurs [sic], we will exercise our legal right to hire replacement workers for the drivers who strike." The hearing officer found that the translated version ended with the statement that the Employer would replace the workers with "legal workers" or a "legal workforce." The hearing officer held that the evidence was insufficient to sustain the objection because the translated version did not threaten that the Employer would report employees to immigration authorities if they supported the Union.

The majority held that the hearing officer erred by analyzing the objection only in terms of whether the COO's translated statement threatened to report employees to immigration authorities. The Board majority found that it was not precluded from considering whether the statement amounted to a more generalized threat. The majority then found that the translation was objectionable because the import of the reference in the translation to "legal workers" was that the Employer would use immigration, i.e., "legal" status, to take action against employees in the event of the strike that the Employer claimed the Union all but inevitably would cause. The majority further stated that the objectionable statement was highly coercive and widely disseminated at a captive audience meeting held shortly before a close election. Thus, the majority concluded that the threat interfered with employees' freedom of choice, and warranted setting aside the election and holding a second election.

Independent Contractors

FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc., 361 NLRB No. 55 (2014)

A Board panel majority found that drivers who operate out of the Respondent's Hartford, Connecticut terminal are employees under the Act, rather than independent contractors, excluded from coverage. The Board therefore concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union that represents the drivers.

In reaching this decision, the Board restated and refined its approach for assessing independent-contractor issues. First, it reaffirmed that in evaluating independent-contractor status "in light of the pertinent common-law agency principles," "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." Second, the Board more clearly defined the analytical significance of a putative independent contractor's

entrepreneurial opportunity for gain or loss. The Board stated that it will give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it will necessarily evaluate constraints imposed by a company on the individual's ability to pursue this opportunity. The Board also stated that it will evaluate – in the context of weighing all relevant common-law factors – whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.

Rules

***Target Corp.*, 359 NLRB No. 103 (2013)**

The Board panel, affirming the ALJ, found that the Employer violated Section 8(a)(1) by maintaining, and, in some instances, enforcing unlawful confidential information, no-solicitation/no-distribution, off-duty access, and dress code policies. The Board, however, reversed the ALJ's ruling that the Employer's parking lot policy was unlawful.

The Board agreed with the ALJ that the Employer's no-solicitation/no-distribution rule was unlawful to the extent it banned solicitation and distribution "at all times on Target premises" for "commercial purposes." Since the rule separately banned solicitation for "personal profit" and during the Employer's anti-Union campaign it had characterized the Union as a business attempting to make money, employees would reasonably conclude that the ban on solicitation for "commercial purposes" included lawful solicitation on behalf of the Union.

The Board also affirmed the ALJ's finding that the Employer's off-duty access rule, which barred employees from the premises during their off-duty hours, violated the Act because the bar on access was not limited to the interior of the store as required by *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001), and the Employer failed to provide a sufficient justification for its prohibition on access to areas outside of the store, such as parking lots, as required by *Tri-County Medical Center*, 222 NLRB 1089 (1976).

Further, the Board affirmed the ALJ's finding of a violation regarding the Employer's dress code policy, which prohibited employees from wearing "any buttons or logos on [their] clothing (unless approved by [their] team leader)." The employees' right to wear union buttons is protected by *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) unless special circumstances exist, and neither customer contact nor the requirement that employees wear a uniform (in this case, red shirts and khaki pants) alone have been deemed a special circumstance. *See UPS*, 312 NLRB 596, 597 (1993). Moreover, the evidence demonstrated that other pins and buttons were tolerated by the Employer without concern that they interfered with the Employer's public image.

The Board, however, disagreed with the ALJ's finding that the Employer's policy of requiring employees to notify management if they saw unfamiliar people loitering in the parking lot was unlawful. The disputed provision did not explicitly restrict Section 7 activity, and there was no evidence that it had been promulgated in response to Union activity or that it had been

applied to restrict the exercise of Section 7 rights. The Board concluded that employees would reasonably interpret the rule in this context as addressing safety issues and not as a prohibition on protected Section 7 activity. In so concluding, the Board stated that it would not read the rule to apply to Section 7 activity merely because it could be interpreted that way.

Beck

***Communications Workers of America Local 4309 (AT&T Midwest)*, 359 NLRB No. 131 (2013)**

The Board panel majority found that the Union violated its duty of fair representation by requiring employees they represent who are not union members and who seek *Beck* objector status to assert their objection on an annual basis. See *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). In *Machinists Local 2777 (L-3 Communications)*, the Board determined that a union's maintenance of an annual renewal requirement for *Beck* objectors is unlawful unless the burden it imposes on employees is de minimis or the union demonstrates a legitimate justification for the requirement. 355 NLRB 1062, 1064-65 (2010), petition for review dismissed 2010 WL 4340436 (D.C. Cir. 2010). The Board noted that the Union here did not except to the ALJ's finding that the burden imposed on *Beck* objectors by the annual renewal requirement was more than de minimis. The Union asserted, however, that it had a legitimate justification for the requirement because it used the annual *Beck* objector information to assess its performance. While recognizing that the Union has a legitimate interest in addressing dissent among the employees it represents, the Board found that the Union had not shown that it had ever used the data as a basis for taking any action. And the mere collection of data is not a sufficient justification for burdening objecting employees with an annual renewal requirement.

Employee Outbursts

***Plaza Auto Center, Inc*, 360 NLRB No. 117 (2014)**

Following a remand from the United States Court of Appeals for the Ninth Circuit that instructed the Board to reapply the four-factor *Atlantic Steel*, 245 NLRB 814 (1979), test for determining when an employee's outburst during protected activity costs the employee the protection of the Act, a Board panel majority found that an employee did not lose the protection of the Act by his outburst and, accordingly, that the Respondent unlawfully discharged him for engaging in protected concerted activity. The employee's outburst included profanity and a personal attack on the owner of the business.

***Starbucks Corporation d/b/a Starbucks Coffee Company*, 360 NLRB No. 134 (2014)**

Following a remand from the United States Court of Appeals for the Second Circuit after the Court found that the four-factor *Atlantic Steel* test is inapplicable to an employee's use of

obscurities in the presence of an employer's customer, the Board panel majority found that, even assuming that an employee lost the protection of the Act by his outburst, the Respondent failed to show that it had, in fact, terminated him for that outburst, and therefore concluded that the Respondent had unlawfully discharged the employee for engaging in prior protected concerted activity that had not lost the protection of the Act.

Refusal to Provide Information

U.S. Postal Service, 359 NLRB No. 115 (2013)

The Board, upon remand from the First Circuit and applying the law of the case as directed, reaffirmed its finding that the Employer violated Section 8(a)(5) and (1) by refusing to furnish the Union with unit employees' aptitude test scores. The Employer required all applicants for its mail handler position to take an aptitude test, which measured cognitive skills and certain personal skills. The score from that test, among other things, was included in the applicant's final rating, which determined their placement on a local hiring registry. The Employer considered the three top applicants for each job opening. In order to resolve concerns among certain of its members about their seniority standing, which was directly related to their placement on the registry and date of hire, the Union requested the registry, including the aptitude test scores. The Employer redacted the test scores for confidentiality reasons.

The Board found that the Union's need for that information to police the collective-bargaining agreement's seniority clause outweighed the employees' privacy interests. Noting that the parties had been unable to reach a reasonable accommodation during six years of litigation on the issue, the Board, rather than order the parties to engage in bargaining, devised a remedy that would fully satisfy the employees' confidentiality concerns while providing the Union with the necessary information. Specifically, it ordered the Employer to furnish the test scores in a manner that would not link an individual employee with his or her test score. In the case of three employees whose scores would be readily identifiable based on their date of hire, the Board ordered the Employer to seek their consent to disclose their test scores. If one or more refused consent, the Employer was directed to allow the Regional Director or her agent to review the information and inform the parties whether the questioned seniority status was correct.