

**NLRB Law Memo 01/08/2008**  
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**NLRB - Staff summarized 8 decisions.**

Grenada Stamping and Assembly, Inc. (26-CA-22031, et al.; 351 NLRB No. 74)  
Grenada, MS Dec. 21, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35174.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35174.htm)

The Board, in a unanimous decision involving Grenada Stamping, a Grenada, MS auto components manufacturer, affirmed the administrative law judge's determination that the Respondent was a successor employer and violated Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment. The Board further held that Respondent unlawfully polled its employees to determine whether they supported the Union, and also unlawfully told employees they could not discuss the Union at work.

ICE Industries, Inc. (ICE), through its subsidiary GMAC, assumed control of Grenada Manufacturing, LLC (GML) in 2004. The Union and GML were parties to a collective-bargaining agreement, which the parties extended. Thereafter, they negotiated changes to terms and conditions of employment and agreed that GMAC would negotiate a contract with the Union representatives after it formally acquired GML's assets.

In March, 2005, however, GMAC refused to further extend the agreement. Shortly before the sale of GML's assets to GMAC was completed, the Respondents polled the unit employees to determine if they still wanted the Union to represent them. That same day, the Union faxed GMAC a letter requesting recognition and bargaining. GMAC responded by letter dated March 30, stating that it would not recognize the Union based on the results of the poll. Also on March 30, GMAC changed its name to Grenada Stamping (GSA).

Some time before the sale was completed, Respondents told employees that they would have to fill out new applications based on new ownership. On March 30 or 31, Respondents told employees that everyone was going to be hired. Between April 1 and June, GSA conducted employee meetings to inform employees of changes that GSA intended to make concerning their terms and conditions of employment. Also, shortly after April 1, Respondents posted a copy of the new personnel policies and procedures on the facility's bulletin board. On April 7, GSA informed unit employees of a new 401(k) plan. On April 14, GSA told unit employees about certain health benefits changes. On April 19, GSA announced the creation of a voluntary retirement plan. About the same time, GSA advised employees of a change in their vacation year from fiscal year to calendar year. GSA also changed vacation pay rates and discontinued the

contractual grievance procedure. Finally, on or around April 24, GSA removed the Union bulletin board.

The Board found that the poll was unlawful because it failed to comply with the advance notice requirement of *Texas Petrochemical Corp.*, 296 NLRB 1057 (1989), *enfd.* as modified 923 F.2d 398 (5th Cir. 1991), and failed to poll the employees by secret ballot as required by *Struksnes Construction Co.*, 165 NLRB 1062 (1967). Because a failure to comply with just one of the Struksnes safeguards is sufficient to find a violation of the Act, Member Schaumber and Member Kirsanow found it unnecessary to pass on the judge's additional findings that GML and GSA failed to provide assurances against reprisals and created a coercive atmosphere. Member Walsh found the poll unlawful for each of the reasons given by the judge.

The Board also concluded that GSA was a "perfectly clear" successor to GML at least as of March 30, 2005. The Respondents admitted in their answer to the complaint that GSA became a successor to GML on March 30, 2005. In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), the Supreme Court stated that although a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Because GSA clearly invited GML's employees to accept employment and informed them of its intent to hire them during employee meetings on March 30 or 31, without any announcement at this time that GSA intended to establish unilaterally new terms and conditions of employment, GSA made it "perfectly clear" that it intended to retain "all of the employees in the unit." *NLRB v. Burns International Security Services*, *supra*.

Member Walsh expressed no view on his colleagues' finding that GSA became a perfectly clear successor to GML at least as of March 30, 2005. He adopted those same 8(a)(5) and (1) violations, however, because he found, in agreement with the judge, that GSA became a legal successor to GML on about March 4, 2004. Member Walsh found it unnecessary to pass on the judge's finding that GSA at that time was a "perfectly clear" successor to GML under *Burns* because even if GSA was only an ordinary *Burns* successor, its unilateral action more than a year later clearly could not be regarded as the permissible setting of "initial" terms and conditions of employment.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers; complaint alleged violations of Section 8(a)(1). Hearing at Grenada on Dec. 12, 13, and 14, 2005. Adm. Law Judge

John H. West issued his decision June 12, 2006.

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Hempstead Lincoln Mercury Motors Corp. (29-CA-27601; 351 NLRB No. 73)  
Hempstead, NY, Dec. 20, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35173.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35173.htm)

The Board adopted the administrative law judge's decision, dismissing the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify or bargain with the Union about the Respondent's refusal to tender or otherwise set aside increased payments requested by the Union's Pension Fund. The Fund, asserting that it faced a future funding deficiency, had declined to accept payments made by the Respondent at the established contribution rate. The Board agreed with the judge's finding that the Respondent, having complied with its contractual obligations and having made no change in its terms and conditions of employment, had no duty to bargain with the Union about its refusal. The Board also agreed that the Respondent, by notifying the Union that it could not afford the requested increase and asking for concessions, had attempted to bargain with the Union about the Fund's demand for increased payments.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Teamsters Local 917; complaint alleged violation of Section 8(a)(5) and (1). Hearing held at Brooklyn, June 27, 2007. Adm. Law Judge Joel P. Biblowitz issued his decision Aug. 9, 2007.

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Martinelli Interior Construction Co., Inc. (4-CA-35167; 351 NLRB No. 79) Wayne, PA Dec. 28, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35179.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35179.htm)

The Respondent operates a small family-owned carpentry subcontracting business and hired Michael Long, a skilled journeyman carpenter on Nov. 21, 2006. During most of his employment, Long worked as a covert salt until he openly wore a Carpenters Union sweatshirt to work on the day before he was discharged. Alfred "Buddy" Martinelli, the company part owner and vice president, decided to discharge Long after he had received complaints about Long's unsatisfactory behavior from a customer who also threatened to terminate its contract with the Respondent unless Long was removed from the projects. A month earlier, Greg Martinelli, a working foreman for the Respondent, told Long that he did not want Long to take offense but that he had Long checked out because he thought that Long was a union "plant."

The administrative law judge found that Greg Martinelli had unlawfully created the impression that the employees' union activities were under surveillance by the Respondent. No exceptions were filed to the judge's finding that Greg Martinelli's comment violated Section 8(a)(1) of the Act. However, the judge was not persuaded that Long was unlawfully terminated by Buddy Martinelli because of Long's protected concerted activities. The judge recommended that the Board dismiss the 8(a)(3) allegation arising out of Long's discharge. In adopting the judge's recommendation, the Board found that the Respondent proved that it would have discharged Long in any event, based on the customer's negative reports about him, even assuming that the General Counsel had met his initial burden under Wright Line, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Carpenters Metropolitan Regional Council, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland; complaint alleged violations of Section 8(a)(1) and (3). Hearing held at Philadelphia, PA on July 11 and 12, 2007. Adm. Law Judge Bruce D. Rosenstein issued his decision on Oct. 1, 2007.

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Otay River Constructors (21-CA-37294; 351 NLRB No. 69) Chula Vista, CA Dec. 14, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35169.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35169.htm)

The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to furnish the Union with requested information. The Board found that the information was relevant and necessary to the Union in order to perform its representational duties.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by the Building Material, Construction, Industrial, Professional and Technical Teamsters Local 36; complaint alleged violation of Section 8(a)(5) and (1). Hearing at San Diego, CA, Mar. 26, 2007. Adm. Law Judge James M. Kennedy issued his decision June 5, 2007.

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District Council 711, International Union of Painters and Allied Trades, AFL-CIO (JC Two, Inc.) (4-CC-2484; 351 NLRB No. 72) Cherry Hill, NJ Dec. 20, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35172.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35172.htm)

The Board affirmed the administrative law judge's findings that the Respondent

violated Section 8(b)(4)(i) and (ii)(B) by picketing a common jobsite at a gate reserved for neutral employers. The Board rejected the Respondent's argument that the reserve gate system was "tainted" by the alleged misuse of the neutral gate by the primary employer's employees. In doing so, the Board found it unnecessary to pass on the judge's statement that even if the primary employer's four employees had entered the jobsite through the neutral gate, one instance of misuse would be insufficient to taint the gate system. However, the Board agreed with the judge's other reasons for finding that the claimed misuse of the neutral gate did not privilege the Respondent's picketing there, including the judge's credibility finding that no such misuse occurred.

The Board also found it unnecessary to pass on the Respondent's argument to the judge that "merely holding banners" does not "threaten, coerce, or restrain" under Section 8(b)(4)(ii)(B). The Board noted that the Respondent did not except to the judge's rejection of that argument, and, in any event, the Respondent's activities in the present case involved patrolling, not a stationary banner display.

In the absence of a proper exception, the Board also affirmed the judge's finding that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by threatening to picket the jobsite without indicating that the picketing would comply with the guidelines in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), governing common situs picketing.

Finally, the Board found merit in the General Counsel's argument that the judge's recommended Order, which prohibited the Respondent from engaging in secondary picketing of Costanza, should also include language prohibiting secondary picketing of the jobsite's other neutral employers (for whom the gate at which the Respondent picketed was reserved) or "any other person." The Board modified the recommended Order and substituted a new notice to make those changes and to conform to the Board's standard remedial language.

(Members Schaumber, Kirsanow, and Walsh participated.)

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Charge filed by Costanza Builders of New Jersey, Inc.; complaint alleged violations of Section 8(b)(4)(i) and (ii)(B). Hearing at Philadelphia, Apr. 10, 2007. Adm. Law Judge John T. Clark issued his decision Sept. 4, 2007.

The Guard Publishing Company, d/b/a The Register-Guard (36-CA-8743, et al.; 351 NLRB No. 70) Eugene, OR Dec. 16, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35170.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35170.htm)

In a 3-2 decision, the Board addressed the maintenance and alleged discriminatory enforcement of a policy prohibiting employees from using the Respondent's e-mail system for all "non-job-related solicitations." The Board

also addressed whether the Respondent violated the Act by insisting on an allegedly illegal bargaining proposal that would prohibit use of the e-mail system for "union business."

The Board majority also announced and applied a new standard for determining whether an employer has violated Section 8(a)(1) by discriminatorily enforcing its policies. In deciding the case, the Board considered the exceptions and briefs of the parties, amicus submissions from various organizations, and presentations by the parties and some amici at an oral argument on March 27, 2007.

The employer's written policy prohibited the use of e-mail for "non-job-related solicitations." In practice, the employer allowed a number of nonwork-related employee e-mails, but there was no evidence that it permitted e-mails urging support for groups or organizations. The employer issued two written warnings to employee Suzi Prozanski for sending three union-related e-mails. The complaint alleged that the employer's maintenance of the policy and its enforcement against Prozanski were unlawful.

Addressing the maintenance of the policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow reasoned that under Board precedent, employees have no statutory right to use an employer's equipment for Section 7 purposes. The majority found that *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), in which the Court held that a ban on solicitation during nonworking time was unlawful absent special circumstances, was inapplicable to the use of an employer's e-mail system, because *Republic Aviation* involved only face-to-face solicitation, not the use of employer equipment. The majority noted that the use of e-mail "has not changed the pattern of industrial life at the Respondent's facility to the extent that the forms of workplace communication sanctioned in *Republic Aviation* have been rendered useless . . . . Consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." Therefore, the majority concluded, the maintenance of the policy did not violate Section 8(a)(1).

With respect to the alleged discriminatory application of the policy to Prozanski's e-mails, the majority clarified that "discrimination under the Act means drawing a distinction along Section 7 lines." The majority adopted the reasoning of the United States Court of Appeals for the Seventh Circuit, noting that in two cases involving the use of employer bulletin boards, the court had distinguished between personal nonwork-related postings such as for-sale notices and wedding announcements, on the one hand, and "group" or "organizational" postings such as union materials on the other. See *Fleming Companies v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003), denying enf. to 336 NLRB 192 (2001); and *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319-320 (7th Cir. 1995), denying enf. to 313 NLRB 1275 (1994). The Board majority found that the court's analysis, "rather than existing Board precedent, better reflects the principle that

discrimination means the unequal treatment of equals." The majority overruled the Board's decisions in Fleming, Guardian, and other similar cases to the extent they were inconsistent with its decision here.

Applying its new standard, the majority found that the employer had permitted a variety of personal, nonwork-related e-mails, but had never permitted e-mails to solicit support for a group or organization. Because two of Prozanski's e-mails were solicitations to support the union, the employer did not discriminate along Section 7 lines by applying its e-mail policy to those e-mails. However, the majority found that a third e-mail by Prozanski was not a solicitation, but simply a clarification of facts surrounding a recent union event. Accordingly, the enforcement of the policy with respect to that e-mail was unlawful.

In dissent, Members Liebman and Walsh argued that "given the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper." Therefore, the dissenters reasoned, Board decisions finding no Section 7 right to use such employer property are inapplicable. Rather, pursuant to Republic Aviation, supra, and Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978), the Board's task in cases involving employee-to-employee communication in the workplace "is to balance the employees' Section 7 right to communicate with one another against the employer's right to protect its business interests." In the dissenters' view, where an employer has given employees access to e-mail in the workplace for their regular and routine use – as the employer has done - a ban on "non-job-related solicitations" should be unlawful absent a showing of special circumstances. Finding no proof of special circumstances here, the dissenters would have found that the maintenance of the policy violated Section 8(a)(1).

Regarding the alleged discriminatory enforcement of the policy, Members Liebman and Walsh stated that they would adhere to Board precedent, under which they would find a violation as to all three of Prozanski's e-mails. They contended that the "discrimination" analysis applied by the Seventh Circuit and adopted by the majority, which focused on whether the other activities permitted by the employer were "equal" to Section 7 activity, was not appropriate in Section 8(a)(1) cases. In the dissenters' view, the essence of a discriminatory enforcement violation is interference with the employees' Section 7 rights, and "[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification" for prohibiting the activity.

In addition to the issues relating to maintenance and enforcement of the employer's existing e-mail policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow also dismissed an allegation that the employer violated Section 8(a)(5) and (1) of the Act by insisting on a bargaining proposal that would prohibit use of the e-mail system for "union business."

Without passing on whether the proposal was unlawful, the majority found insufficient evidence that the employer had "insisted" on the proposal. In dissent, Members Liebman and Walsh found that the evidence as a whole did show "insistence," and that the proposal was an illegal codification of a discriminatory practice of allowing e-mail use for a broad range of nonwork-related messages, but not for union-related messages.

The Board also unanimously affirmed the judge's finding that the employer violated Section 8(a)(1) by maintaining an overly broad rule, in the absence of special circumstances, prohibiting employees from wearing or displaying union insignia while working with the public.

(Full Board participated.)

Charges filed by Eugene Newspaper Guild, CWA Local 37194; complaint alleged violations of Sections 8(a)(1), (3), and (5). Hearing at Eugene, Nov. 14-16, 2001. Adm. Law Judge John J. McCarrick issued his decision Feb. 21, 2002.

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TTS Terminals, Inc. (13-CA-43370; 351 NLRB No. 68) Chicago, IL Dec. 14, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35168.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35168.htm)

The Board affirmed the finding of the administrative law judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute the collective-bargaining agreement reached on April 21, 2006 and forwarded to the Respondent on May 25, 2006.

The Board adopted the judge's finding that the Respondent and the Union reached a "meeting of the minds" on all substantive terms of their collective-bargaining agreement when the Union unconditionally accepted the Respondent's final proposal on April 21, 2006. The judge also rejected the Respondent's argument that assuming agreement was reached on April 21, it was not final because the agreement had not yet been ratified. Chairman Battista included a personal footnote finding that by "unconditionally" accepting the Respondent's offer, the Union dispensed with its self-imposed ratification procedure and formed a binding and effective agreement. Following the Union's unconditional acceptance, the Respondent could not lawfully refuse to execute the collective-bargaining agreement.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Teamsters, Local 705; complaint alleged violation of Section

8(a)(5) and (1). Hearing at Chicago, IL, Sept. 14, 2006. Adm. Law Judge John T. Clark issued his decision April 11, 2007.

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U. S. Recycling and Disposal, LLC (13-CA-43702; 351 NLRB No. 67) Plainfield, IL Dec. 17, 2007.

[http://www.nlr.gov/shared\\_files/Board%20Decisions/351/v35167.htm](http://www.nlr.gov/shared_files/Board%20Decisions/351/v35167.htm)

The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening to reduce overtime if the Union was selected as the employees' collective-bargaining representative. The Board also affirmed the judge's finding that, under Wright Line, the Respondent violated Section 8(a)(3) of the Act by disciplining employee Richard Mann because of his union activities. The Board further affirmed the judge's ruling denying the General Counsel's motion to adjourn the hearing pending enforcement of a subpoena ad testificandum.

The panel majority (Members Schaumber and Walsh) affirmed the judge's finding that the Respondent also violated Section 8(a)(3) by discharging Mann because of his union activities. In so finding, the majority relied additionally on the evidence of disparate enforcement of the Respondent's reporting policy that Mann allegedly violated. Concurring, Chairman Battista relied solely on this evidence of disparate treatment, and did not rely on the other reasons cited by the judge for finding the violation.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by General Chauffeurs, Sales Drivers and Helpers Local 179; complaint alleged violations of Sections 8(a)(1) and (3). Adm. Law Judge George Carson II issued his decision May 21, 2007.

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