

## **A Review of Developments in NLRB Representation Case Law during 2008**

The document utilizes the structure of the Outline of Law and Procedure in Representation Cases to indicate the developments in R case law in 2008, the first year after the most recent publication of the Outline.

## Chapter 1

### Jurisdiction

#### **1-401 — State or Political Subdivision**

Charter School Administration Services, 353 NLRB #35 (2008)

Employer operating charter schools is not political subdivision.

#### **1-402 — Employers Subject to the Railway Labor Act**

Air Serv Corporation, 353 NLRB #11 (2008)

Board finds NMB jurisdiction over company that provides bus transportation for Federal Express employees at airport.

Swissport USA, 353 NLRB #18 (2008)

No NLRB jurisdiction over company that provides ramp services to airline carriers at O'Hare Airport.

Primeflight Aviation Services, 353 NLRB #45 (2008)

No NLRB jurisdiction over company providing sky cap and baggage handling services at LaGuardia.

## Chapter 7

### Existence of A Representation Question

#### **7-240 — Changes in Affiliation**

Allied Mechanical Services, Inc., 352 NLRB #83 (2008)

The Boards holding in Raymond F. Kravis Center 351 NLRB #19 overruling the due process standard for union mergers is applied retroactively.

Note: CADC enforced Board order in Kravis on December 30, 2008.

See Raymond F. Kravis Center for Performing Arts, 550 F.3<sup>rd</sup> 1185 (2008).

## Chapter 9

### Contract Bar

#### **9-310 — Fixed-Term Contracts**

Coca-Cola Enterprises, Inc., 352 NLRB #123 (2008)

Memo of understanding amending a five year contract did not constitute a new collective bargaining agreement and does not bar a petition beyond the first three years of the contract.

## Chapter 11

### **Amendment, Clarification, and Deauthorization Petitions, Final Offer Elections and Wage-Hour**

#### **11-100 — Amendment of Certification (AC)**

See 7-240 above.

#### **11-220 — Accretion v. Question Concerning Representation**

Dedicated Services, Inc., 352 NLRB #93 (2008)

Board rejects accretion defense to allegation of unlawful recognition.

## Chapter 12

### **Appropriate Unit: General Principles**

#### **12-228 — Deviation From Prior Unit Determination**

Matros Automated Electrical Construction Corp., 353 NLRB #61 (2008)

Bargaining unit history of separate unit is relevant defense to Section 8(a)(2) unlawful recognition. But historical basis for multiemployer bargaining cannot be relied upon after trade association is dissolved.

#### **12-500 — Accretions to Existing Units**

See 11-220 above.

## Chapter 13

### **Multilocation Employers**

WeCare Transportation, LLC, 353 NLRB #9 (2008)

Single facility presumption rebutted.

## Chapter 14

### **Multiemployer, Single Employer, and Joint Employer Units**

#### **14-500 — Single Employer**

Cimato Brothers, Inc., 352 NLRB #99 (2008)

No single employer in absence of sufficient evidence of common management, centralized control of labor relations and interrelation of operations.

Shane Steel Processing, 353 NLRB #58 (2008)

Single employer found where no arms length relationship between companies.

**14-600 — Joint Employer**

The Continental Group, 353 NLRB #31 (2008)  
Joint employer relationship found.

**Chapter 17**

**Statutory Exclusions**

**17-400 — Independent Contractors**

NLRB v. Friendly Cab Company, 512 F.3d 1090 (2008)  
9<sup>th</sup> circuit affirms Board finding that taxi drivers are not independent contractors.

Igramo Enterprise, Inc., 351 NLRB #99 (2007)  
Couriers found to be employees, not independent contractors.

**17-501 — Supervisors “Authority” as Defined in Section 2(11)**

JC Penney Corp. 347 NLRB #11 (2006)  
Section 2(11) authority found.

**17-502 — Assignment/Responsible Direction/Independent Judgment**

In a series of cases the Board decided no supervisory status.  
Extendicare Healthcare Services, 347 NLRB #50 (2006) (pre Oakwood):  
\*Alstyle Apparel, 351 NLRB #92 (2007)  
\*Talmadge Park, Inc., 351 NLRB #87 (2007)  
\*Loyalhanna Care Center, 352 NLRB #105 (2008)  
\*Barstow Community Hospital, 352 NLRB #125 (2008)  
\*GFC Crane Consultants, 352 NLRB #142 (2008)  
PPG Aerospace Industries, Inc., 353 NLRB #23 (2008)

The Board found supervisory status because of independent judgment in exercise of Section 2(11) authority in the following case.

\*RCC Fabricators, Inc., 352 NLRB #88 (2008)<sup>1</sup>

**17-508 — Ostensible or Apparent Authority**

Foxwoods Resort & Casino, 352 NLRB #92 (2008)  
Employee union supporter did not have apparent authority as union agent.

---

<sup>1</sup> \* - denotes cases decided after a post Oakwood remand.

## Chapter 19

### Categories Governed by Board Policy

#### **19-200 — Managerial Employees**

Solartec, Inc., 352 NLRB #52 (2008)

Large Machine Department leader held - not managerial employee.

## Chapter 22

### Representation Case Procedures Affecting the Election

#### **22-111 — Challenges**

Anchor-Harvey Components, LLC, 352 NLRB #140 (2008)

It is permissible to raise alternative grounds for a challenge ballot for the first time at a hearing.

Magic Beans, LLC, 352 NLRB #107 (2008)

Employer post election challenge rejected where no evidence that union suppressed evidence of employees possible ineligibility.

## Chapter 23

### Voting Eligibility

#### **23-112 — Voluntary Quits**

Magic Beans, LLC, 352 NLRB #107 (2008)

An intention to quit after election does not make voter ineligible.

#### **23-114 — Employees on Sick Leave**

Abbott Ambulance v. NLRB., 552 F.3d 447 (CA DC 2008)

Affirming Board Red Arrow test for eligibility of employee on sick leave.

#### **23-530 — Construing Stipulations of the Parties in Representation Cases**

Cardinal Health Care, Inc., 352 NLRB #19 (2008)

Butler Asphalt, LLC, 352 NLRB #32 (2008)

Board enforces parties stipulation where the intent is clear and unambiguous.

## Chapter 24

### Interference with Elections

#### **24-200 — Legal Background of the “Free Speech” Issue**

The Levy Company, 351 NLRB #85 (2007)

Employer statements that union “wants all strike replacements out” not threats of loss of jobs in circumstances of case.

#### **24-327 — Offers to Waive Union Initiation Fees**

Bloomfield Health Care Center, 352 NLRB #39 (2008)

No unlawful Savair waiver of dues.

#### **24-410 — Board Agent Conduct**

Fresenius USA Manufacturing, Inc., 352 NLRB #86 (2008)

Board agent improperly refused to allow parties to monitor ballot count.

#### **24-428 — Foreign Language Voters**

Bally’s Atlantic City, 352 NLRB #51 (2008)

Regional Director did not improperly reject employer request for translation of election notices into 9 foreign languages.

#### **24-441 — Ballot Reproduction**

Foster Poultry Farms, 352 NLRB #136 (2008)

Employers altered sample ballot did not contain disclaimer required by Ryder Memorial Hospital, 351 NLRB #26 (2007) that Board does not endorse choice in election and any markings on ballot were not put there by the NLRB.

#### **24-442 — The *Milchem* Rule**

Lily Transportation, 352 NLRB #121 (2008)

Union agents were not in an electioneering zone.