

NLRB Law Memo 08/07/2023

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NLRB Staff summarized the following decisions:

United Scrap Metal PA, LLC ([04-CA-315904](#); [372 NLRB No. 107](#)) Philadelphia, PA, July 18, 2023.

The Board granted the General Counsel's Motion for Summary Judgment in this test-of-certification case on the grounds that the Respondent failed to raise any issues that were not, or could not have been, litigated in the underlying representation proceeding in which the Union was certified as the bargaining representative. The Board found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union and by failing and refusing to furnish the Union with requested relevant and necessary information. The Board severed for further consideration the issue of whether the Board should adopt a compensatory, make whole remedy for the Respondent's refusal to bargain.

Charge filed by Laborers' International Union of North America, Local 57. Chairman McFerran and Members Wilcox and Prouty participated.

Cognizant Technology Solutions U.S. Corporation and Google LLC, Joint Employers ([16-RC-305751](#); [372 NLRB No. 108](#)) Austin, TX, July 19, 2023, issued to the July 19, 2023 Decision. [Errata](#) [Amended Decision](#).

The Board denied review of the Employers' Requests for Review of the Regional Director's Decision and Direction of Election as they raised no substantial issues warranting review. The Board agreed with the Regional Director that, under Section 103.40 of the Board's Rules, Google LLC and Cognizant Technology Solutions U.S. Corporation are joint employers of the petitioned-for unit of employees. Specifically, the Board agreed that Google exercises direct and immediate control over employees' supervision, benefits and hours of work as defined in Section 103.40(c)(2), (3) and (7), although it did not rely on the Regional Director's finding regarding the direction of employees under Section 103.40(c)(8). Based on the totality of the relevant facts, the Petitioner established that Google possesses and exercises such substantial, direct and immediate control over one or more essential terms and conditions of the petitioned-for employees' employment as to warrant concluding that Google "meaningfully affects matters relating to the employment relationship" of those employees under Section 103.40(a).

Petitioner—Alphabet Workers Union—Communications Workers of America, Local 1400. Chairman McFerran and Members Wilcox and Prouty participated.

District Hospital Partners, L.P. d/b/a The George Washington University Hospital, a Limited Partnership, and UHS of D.C., Inc., General Partner ([05-CA-216482, et al.](#); [372 NLRB No. 109](#)) Washington, DC, July 25, 2023.

The Board vacated its Decision and Order reported at 370 NLRB No. 118 (2021), based on the improper participation of then-Member Emanuel. After that decision issued, the Board's Designated Agency Ethics Official (DAEO), based on an investigation conducted by the Inspector General (IG), determined that Member Emanuel was disqualified because of a financial conflict of interest. The Board then issued a Notice to Show Cause to the parties, disclosing Member Emanuel's disqualification, which asked whether the Decision and Order should be vacated. Consistent with its prior decisions in *ExxonMobil Research and Engineering*, 371 NLRB No. 128 (2022), and other cases involving Member Emanuel's improper participation, the Board (Chairman McFerran and Member Prouty; Member Kaplan, dissenting) found it appropriate to vacate its Decision and Order, primarily to preserve public confidence in the integrity of the Board's decision-making process. Dissenting, Member Kaplan contended that the Board majority erred by not independently reviewing the DAEO's and IG's conclusions and, based on his own review, concluded that Member Emanuel's participation was harmless error, absent a showing of actual bias. The case will now be re-adjudicated by the Board.

Charges filed by 1199 Service Employees International Union, United Healthcare Workers East, MD/DC Region. Administrative Law Judge Michael A. Rosas issued his decision on September 4, 2019. Chairman McFerran and Members Kaplan and Prouty participated.

Drs. Mesh, P.C. ([07-CA-308836; 372 NLRB No. 106](#)) Fenton, MI, July 25, 2023.

The Board granted the General Counsel's Motion for Default Judgment based on the Respondent's failure to file an answer to the complaint. The Board found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union.

Charge filed by an individual. Chairman McFerran and Members Wilcox and Prouty participated.

Local 242 of the Laborers International Union of North America (LIUNA!), a/w the Washington and Northern Idaho District Council of Laborers and the Laborers Northwest Regional Organizing Coalition ([19-CA-275836; 372 NLRB No. 111](#)) Seattle, WA, July 28, 2023.

The Board adopted the Administrative Law Judge's conclusion that the Respondent did not violate Section 8(a)(1) by discharging an employee and dismissed the complaint. Applying the Board's mixed-motive analysis under *Wright Line*, 251 NLRB 1083 (1980), the Respondent demonstrated that it would have discharged the employee even in the absence of his protected conduct because the Respondent successfully

proved that the discharge was because of the Respondent's legitimate and substantial concerns about the employee's poor job performance and unacceptable behavior, all of which were unrelated to his protected concerted activity.

Charge filed by an individual. Administrative Law Judge Brian D. Gee issued his decision on January 6, 2023. Members Kaplan, Wilcox, and Prouty participated.

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