



## Labor & Employment Practice

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### First Circuit Upholds NLRB's Authority to Issue Two-Member Decisions and Affirms Ruling That Confidentiality Provision in Employment Contract Violated Federal Labor Law

In *Northeastern Land Servs. Ltd. d/b/a NLS Group v. NLRB*, No. 08-1878 (1st Cir., March 13, 2009), the First Circuit held in a case of first impression that the NLRB's "delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of [S]ection 3(b)" of the National Labor Relations Act ("Act"). Northeastern Land Services ("NLS") argued that the board lacked a quorum to issue the decision because the board cannot delegate all of its powers to a two-member panel. On Dec. 28, 2007, the board delegated the board's powers to a three-member group. However, a few days later, the recess appointment of one member expired and a two-member quorum remained. Since Jan. 1, 2008, the board has been composed of two members and has issued more than 350 decisions. Although many of these decisions are being challenged on the same procedural ground, this is the first decision affirming the current two-member board's power to issue decisions. The First Circuit found that the later vacancy "may not, under the terms of [S]ection 3(b), impair the right of the two-member quorum to exercise all powers of the Board."

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The First Circuit also enforced the board's ruling that a temporary agency had inserted an overly broad confidentiality provision in its employment contracts and had unlawfully fired a worker for violating the provision. NLS provides temporary employees to companies in the natural gas and telecommunications industries. In July 2001, NLS hired Jamison Dupuy to work for El Paso Energy as a right-of-way agent on a project in Massachusetts. Dupuy signed a temporary employment contract. This employment contract contained a confidentiality provision which stated that the terms of the employment, including compensation, were confidential to Dupuy and NLS and that "[d]isclosure of these terms to other parties may constitute grounds for dismissal."

During his employment, Dupuy spoke with NLS employees about problems, including delays in receiving his paycheck and reimbursements for lodging costs and other expenses. In September 2001, when Dupuy requested that NLS pay the hotel bill directly or provide him with a per diem for lodging, an NLS manager informed him that the arrangements were required by the contract between NLS and El Paso. In October 2001, Dupuy informed El Paso about the payment issues and requested to work for El Paso through a different employment agency. In October 2001, Dupuy also complained to NLS because it started deducting \$3 from his \$15 per diem for the work-related use of his personal computer. Dupuy sent an e-mail to NLS, with a copy to El Paso, requesting that El Paso pay the \$3 difference or else he would stop using his computer. Dupuy was subsequently terminated on Oct. 11, 2001 for disclosing the terms of his employment to outside parties and thereby violating the confidentiality provision in his employment contract.

Dupuy filed an unfair labor practice charge on Oct. 24, 2001, and an amended charge on Dec. 17, 2001. Thereafter, the NLRB general counsel issued a complaint and an ALJ dismissed the complaint because the confidentiality provision did not violate Section 8(a)(1) and NLS had a legitimate and substantial business justification for the provision. On June 27, 2008, the board reversed this decision and found that the confidentiality provision prohibited activity protected by Section 7. The Board also found that NLS violated Section 8(a)(1) by terminating Dupuy for violating the confidentiality provision.

The First Circuit stated that “Section 8(a)(1) of the [Act] has been read to bar employer interference with employees’ right to discuss the terms and conditions of their employment with others under [S]ection 7 of the [Act].” The court upheld the board’s decision that the confidentiality provision violated Section 8(a)(1) of the NLRA because employees could reasonably construe the language of the provision as prohibiting activity protected by Section 7 of the Act. In so holding, the court enforced the board’s use of the test articulated in *Lutheran Heritage*, 343 N.L.R.B. 646 (2004) which stated:

[E]ven if the rule does not explicitly restrict [S]ection 7 activity, it is nonetheless unlawful if ‘(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The court found that the mere maintenance of a rule that would tend to chill employees in the exercise of their rights under Section 7 is unlawful. Therefore the court stated “there need not be any evidence of actual chilling of union activity.” The court also affirmed the board’s finding that the termination of Dupuy was also a violation of the Act, stating the board “supportably relied on its own precedents to determine that any discharge pursuant to an unlawful rule is itself unlawful.”

The court rejected a balancing test sought by NLS. The court acknowledged NLS’ legitimate interest in minimizing disruption with its customers, but found the board’s rejection of a balancing test was within its discretion.

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