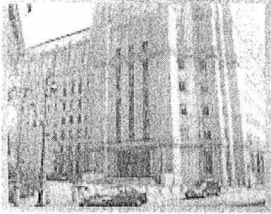


THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908



U.S. COURT OF
APPEALS FOR THE
SECOND CIRCUIT

NATIONAL LABOR
RELATIONS ACT

Vacated Decisions — Review

NLRB V. County Waste of Ulster
10-3359-ag (L)
Judges Sack, Katzmann and Parker

BACKGROUND: The National Labor Relations Board petitioned to enforce an order concluding that County Waste LLC violated section 8(a)(2) of the National Labor Relations Act by allowing a union to distribute a bonus to employees when an election was pending. The respondent County Waste cross-petitioned for review of the original decision and order, contending that the NLRB members who entered it had also sat on the panel that issued an earlier decision vacated by the court.

RULING: The Second Circuit granted the NLRB's petition to enforce the decision and order and denied County Waste's cross-petition for review. The court found that the original review panel had a sufficient quorum of three. More impor-

CaseDIGESTS

TO SUBMIT A DECISION, CONTACT
EDITORIAL@NYDAILYRECORD.COM

DECISION OF INTEREST

SUPREME COURT, ERIE COUNTY

*Thomas J. Kennedy v. South
Buffalo Railway Co.,*
Docket No. 2007-6115

BACKGROUND: The plaintiff, a union electrician, collided with a South Buffalo Railway Co. locomotive after leaving his worksite at the Steel Winds windmill project on Dec. 7, 2006. The collision occurred at a private crossing inside the former Bethlehem Steel plant in Hamburg. At the time of the incident, two box cars were set on a track adjacent to the crossing and the plaintiff alleged they obstructed his view of the locomotive as he approached the crossing. The plaintiff alleged that he suffered a number of debilitating injuries, including five herniated cervical discs, an avulsion fracture of his cervical spine, a torn rotator cuff and a ruptured biceps tendon. He alleged: (1) the railroad negligently parked the box cars, obstructing his view of the crossing; (2) SBRC negligently operated the moving train by fail-

ing to sound bells or whistles to warn individuals at the crossing; (3) SBRC's train was negligently operating above track speed; and (4) SBRC negligently failed to remedy the hazardous conditions at the crossing. Additionally, at trial, the plaintiff's counsel attempted to argue that SBRC failed to provide adequate traffic control at the crossing at the time of the collision.

The plaintiff's demand was \$3.8 million.

At trial, the railroad successfully showed it had complied with every applicable operating rule governing parking rail cars at the crossing and that the accident was caused by the plaintiff, who failed to exercise adequate caution when approaching the crossing — including failing to stop at a stop sign. The defense also argued that the plaintiff's injuries were not caused by the accident and instead were due to pre-existing degenerative conditions and a prior traumatic incident in which the plaintiff had injured his shoulder and biceps.

The defense was able to get the plaintiff's own medical expert to

admit the accident was not the cause of his shoulder or bicep injuries. Additionally, the defense was able to establish that the plaintiff did not lose any time at work and only suffered minimal special damages.

The defense team was also able to elicit testimony establishing the plaintiff was aware of the private crossing, and prior to the incident had crossed it multiple times a day for a period of over a year. There was also evidence that the plaintiff was aware of and expected train movement at the crossing and that the plaintiff had a history of failing to stop at the stop sign prior to crossing the tracks.

RULING: At the close of evidence, the jury deliberated for an hour before returning a defense verdict in favor of the railroad. The jury did not reach the issue of causation, instead answering "no" to the first of several special verdict questions, which simply asked if the railroad was negligent.

Michael Flynn and John Young of Flynn & Wirkus PC, for the defendant. Patrick Maloney and John Dempsey of Dempsey & Dempsey, for the plaintiff.

BACKGROUND: The petitioner commenced an Article 78 proceeding arguing that, as administrator of the estate of his mother, the determination of the defendants was not supported by substantial evidence. The defendants had determined that the decedent had made a number of uncompensated transfers prior to her admission to a nursing facility. At the Medicaid eligibility hearing the decedent had presented evidence that she and the petitioner had a joint checking account. A number of home improvement expenditures were paid from that account, as well as food, clothing and medicine.

RULING: The Appellate Division confirmed the determination finding the decedent ineligible for medical assistance benefits. The cash withdrawals for home improvements were determined to not be for the benefit of the decedent as she had no interest in the home. The cash withdrawals for food, clothing and medicine could not be verified. Finally, the decedent had made to cash gifts from that account to the decedent's granddaughters. Given the lack of history for such gifts, the decedent's advanced age and poor health, it was reasonable for the court to conclude that the cash transfers were for the purpose of qualifying for medical assistance.

Robert K. Hilton of Kowalczyk, Deery, Hilton & Broadbent LLP for the petitioner; Kathleen M. Treasure of the New York State Office of the Attorney General for the respondent Department of Health; John A. Herbowy for the respondents Department of Social Services

NYS ADVISORY
COMMITTEE ON
JUDICIAL ETHICS