Filed October 22, 1999

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. SUPERIOR COURT

STATE OF RHODE ISLAND
DEPARTMENT OF LABOR AND
TRAINING (Formerly known as the
Department of Employment and Training)

V. C.A. NO. 98-1467

THE RHODE ISLAND STATE LABOR :
RELATIONS BOARD, LOCAL 2884, :
RHODE ISLAND COUNCIL 94, AFSCME, :
AFL-CIO, SALVATORE LOMBARDI, :
In His Capacity as President of LOCAL :
2884, COUNCIL 94, AFSCME, AFL-CIO, :
And CAROL FARIS, In Her Capacity as :
Secretary of LOCAL 2884, COUNCIL 94, :
AFSCME, AFL-CIO, and RHODE ISLAND :
COUNCIL 94, AFSCME, AFL-CIO :

DECISION

SHEEHAN, J. This is an appeal from a February 26, 1998 decision of the Rhode Island State Labor Relations Board (the Board). In its decision, the Board determined that the State of Rhode Island Department of Labor and Training (Department of Labor), formerly known as the Department of Employment and Training (Department of Employment), committed unfair labor practices. Jurisdiction in this Court is pursuant to G.L. 1956 §§ 28-7-29 and 42-35-15

Facts/Travel

In 1985, the State Department of Economic Development within the Division of Job Development and Training (Department of Economics) merged into the Department of

Employment Security (Department of Security), which subsequently became the Department of Employment. (3/27/97 Tr. at 11). The Department of Employment is presently called the Department of Labor (Department of Labor). (3/27/97 Tr. at 11). Hereinafter, this Court will refer to the Departments of Security, Employment, and Labor all as the Department of Labor.

As a result of the aforementioned merger, approximately eighteen employees of the Department of Economics became employees of the Department of Labor. (3/27/97 Tr. at 14-5). The Department of Economics employees were union employees represented by Local 2884 of Rhode Island Council 94, AFSCME, AFL-CIO (Council 94). The certified bargaining unit representative for non-management employees at the Department of Labor was Rhode Island Employees' Security Alliance, Local 401 (Local 401). Subsequent to the merger, Local 401 initiated a unit clarification action before the Board to determine whether the former Department of Economics employees were still represented by Council 94, or whether they were then represented by Local 401. The Board found in the unit clarification action, EE 3270, that the Department of Economics employees should not be accreted into the bargaining unit represented by Local 401 The Board determined that "[t]he existing bargaining unit represented by Council 94 [was] an appropriate bargaining unit for the purposes of collective bargaining [and] [t]he employees in question [had] not been abandoned during contract negotiations with the State by the certified bargaining agent." See EE-3270 Decision and Order, dated 2/21/89, pp. 2-3.

Thereafter, within the Department of Labor, some job positions were represented by Council 94, some were represented by Local 401, and others, that were historically non-union positions, remained unrepresented. In some instances, identical job classifications existed

simultaneously within two or more different groups. Prior to the merger, the position of Senior Electronic Computer Programmer (Computer Programmer) was both a union position within the Department of Economics, represented by Council 94, and a non-union position within the Department of Labor.

After the merger, in July 1994, the Department of Labor experienced budgetary problems due to cuts in federal funding. As a result, the Department's associate directors were forced to implement cost-saving measures, with layoffs being the last resort. Findings of Fact, ¶ 5.

In or around August 1994, the Department of Labor posted a job vacancy for a non-union Computer Programmer (job posting), a position which had remained vacant for two years due to retirement. (6/10/97 Tr. at 7). At the time of the posting, Judith Magarian (Magarian), a former Department of Economics employee, held an identical classification as a Council 94 bargaining unit member. Magarian bid for the non-union position and was given the job. On September 18, 1994, Magarian transferred to her new position as Computer Programmer. The job titles and duties were exactly the same. The only difference between the two positions was that the new position was a non-union position. (3/27/97 Tr. at 31-2; 6/10/97 Tr. at 21).

Later, in September 1994, the Department of Labor laid off employees from management, Local 401, Council 94, and non-union positions. On September 28, 1994, in response to the layoffs and the job posting, Council 94 filed an unfair labor practice charge

against the Department of Labor, alleging violations of R.I.G.L. §§ 28-7-13, subsections 1, 2, 3, 5, 8, 9, and 10. Council 94 alleged that the Department of Labor "targeted members of [the Council 94] bargaining unit through layoffs and the transfer of bargaining unit positions to non union positions . . . [and] . embarked on a calculated plan for the purpose of interfering with the existence of the bargaining unit at the Department of Employment[]." See Charge to the Board, dated 9/27/94, ¶¶ 1, 2.

On February 18, 1997 and February 21, 1997, the Board issued a Complaint and Amended Complaint which asserted the same allegations as Council 94's charge. On March 10, 1997, the Department of Labor filed, with its answer, a motion to dismiss and a motion for production of documents and other information. Formal evidentiary hearings were held on March 27, 1997 and on June 10, 1997.

At the March 27, 1997 hearing, Council 94 called Sal Lombardi (Lombardi), the president of Council 94 and an investigator for the treasury department, retirement division, to testify on its behalf. Lombardi stated that, prior to the September 1994 layoffs, nine Council 94 members were in the Department of Labor. According to Lombardi, five of the nine Council 94 members received layoff notices. Lombardi claimed that he filed grievances against the Department of Labor due to the fact that three of those employees had military status and could not be laid off. (3/27/97 Tr. at 24-6, 78-9). Magarian was one of the nine aforementioned employees. (3/27/97 Tr. at 24). Lombardi spoke about Magarian's transfer from a union to a non-union position and testified that, around the same time, other employees' positions changed from union positions to non-union positions. (3/27/97 Tr. at 33-7). Lombardi did acknowledge,

however, that neither Magarian, nor any other Council 94 member, was transferred to a non-union position without first voluntarily bidding for it. (3/27/97 Tr. at 40-3).

At the June 10, 1997 hearing, Council 94 called Magarian as a witness. Magarian testified that she was not forced to bid out of her union position and into the non-union position. She did state, however, that in September 1994, she was called into the office of Bill Fagan, the Assistant Director in charge of Information Services (Fagan), and shown the job posting. (6/10/97 Tr. at 13). Magarian testified that Fagan told her that the Chief of Employment and Training Operations in the Personnel Unit, Walter McGarry, (McGarry), said to "make sure" that Magarian was shown the job posting. (6/10/97 Tr. at 13). Magarian further testified that Fagan told her that giving up her union status would "be a help to [her]" and applying for the position would "solidify her employment." (6/10/97 Tr. at 13-5). Magarian also admitted that upon transferring to the non-union Computer Programmer position, neither her benefits nor her salary changed, and her duties remained the same. (6/10/97 Tr. at 13-4).

McGarry testified on behalf of the Department of Labor. He explained that in or around September 1994, the Department of Labor was experiencing funding problems. (6/10/97 Tr. at 27). McGarry contended that the reason Fagan called Magarian into his office to ensure that she saw the job posting was because "[s]ometimes a person will bid on a position and then take the posting down so nobody else knows about it . . . ." (6/10/97 Tr. at 36).

McGarry further testified that, although the Department of Labor was in financial straits, it posted a job vacancy for a position that had been vacant for two years and for which two other, identical positions already existed. (6/10/97 Tr. at 48). McGarry insisted that, in spite

of the budgetary restrictions, it was absolutely necessary that the Department of Labor hire a third Computer Programmer. McGarry admitted, however, that subsequent to Magarian's transferring to the non-union position, her vacated union position was never posted or filled and that regardless of her former job classification, to wit: union, Magarian could have been required to perform the duties she is presently obligated to perform under her new non-union classification. (6/10/97 Tr. at 48, 53-4, 58-9).

On February 26, 1998, the Board issued a Decision and Order. In its Decision, the Board determined that the Department of Labor "did indeed target the elimination of a union position, without a legitimate business purpose and without first negotiating the same with the Union, in violation of R.I.G.L. § 28-7-13(5) and (10)." See Decision and Order, dated 2/26/98, p. 8. The Board found, however, that Council 94 "failed to set forth specific evidence to establish a discriminatory intent or actions on the part of the [Department of Labor] in the 1994 layoffs." Id. The Board further determined that Council 94 "failed to establish that the [Department of Labor] embarked on a calculated plan to interfere with the bargaining unit." Id.

Additionally, the Board held that "investigative reports of the Board in connection with charges of Unfair Labor Practice are protected from disclosure under R.I.G.L. [§] 38-2-2 (4) (E), (K), and (P) and Article III, Section 20, and Article IV, Section 60 of the State Labor Relations Board's duly enacted Rules and Regulations." See Board's Conclusions of Law, ¶ 3. The Board thereby denied the Department of Labor's motion for production of documents. The Board also denied the Department of Labor's motion to dismiss and further ordered the Department "to cease and desist from targeting Council 94 positions for conversion to non-union

positions" . . and "to transfer any duties that traveled from the union position to the non-union position back to the union position. The non bargaining unit position [was] also [t]hereby precluded from doing work that was done by the bargaining unit position." See Decision and Order, dated 2/26/98, p. 10. It is from the February 26, 1998 Decision and Order that the Department of Labor presently appeals.

Standard of Review

Superior Court review of an agency decision is controlled by G.L. 1956 (1993 Reenactment) § 42-35-15 (5)(g), which provides:

> **"42-35-15. Judicial review of contested cases.**
> (5)(g) The court shall not substitute its judgment for that of the agency board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing a decision of an agency, a justice of the Superior Court may not substitute his or her judgment for that of the agency board on issues of fact or as to the credibility of testifying witnesses, Mercantum Farm Corp. v. Dutra, 572 A.2d 286, 288 (R.I. 1990) (citing Leviton Mfg. Co. v. Lillibridge, 120 R.I. 283, 291, 387 A.2d 1034, 1038 (1978)); Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998), where

substantial evidence exists on the record to support the board's findings. Baker v. Department of Employment and Training Board of Review, 637 A.2d 360, 366 (R.I. 1994) (citing DePetrillo v. Department of Employment Security, 623 A.2d 31, 34 (R.I. 1993); Whitelaw v. Board of Review, Department of Employment Security, 95 R.I. 154, 156, 185 A.2d 104, 105 (1962)). Findings of fact by an agency board "are, in the absence of fraud, conclusive upon this court if in the record there is any competent legal evidence from which those findings could properly be made." Mercantum Farm, 572 A.2d at 288 (citing Leviton, 120 R.I. at 287, 387 A.2d at 1036-37). Legally competent evidence is "marked 'by the presence of 'some' or 'any' evidence supporting the agency's findings.'" State v. Rhode Island State Labor Relations Board, 694 A.2d 24, 28 (R.I. 1997) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)).

Unfair Labor Practices

Council 94 argues that the Department of Labor committed unfair labor practices by embarking on a calculated plan to interfere with the existence of its bargaining unit and by targeting Council 94 positions for layoffs after the 1994 merger. Council 94 further alleges that, in addition to the layoffs, the Department of Labor coerced two of its employees into leaving their union positions for non-union positions of almost identical natures.

The Department of Labor contends that it never targeted Council 94 to "decimate" it. It maintains that it only engaged in across-the-board layoffs which were done for strictly budgetary reasons. The Department of Labor further argues that the bargaining unit "decimated"

through the normal course of state service, through retirements, and through people voluntarily bidding out. (3/27/97 Tr. at 20).

The Board found no merit to Council 94's allegations of targeted, discriminatory layoffs on the part of the Department of Labor or a calculated plan to interfere with the existence of Council 94. The Board did, however, find that the Department of Labor committed unfair labor practices in violation of R.I.G.L. § 28-7-13(5) and (10) by targeting the transfer of a union position to a non-union position without a legitimate business purpose. While Council 94 alleged that the Department of Labor committed violations with respect to two union positions, the Board found that the Department of Labor committed unfair labor practices with regard to only one union employee's position, Magarian's. As such, this Court will review the Board's findings regarding Magarian's transfer.

Section 28-7-13 of the Rhode Island Labor Relations Act governs unfair labor practices. Section 28-7-13 provides:

> "**28-7-13. Unfair labor practices.** - It shall be an unfair labor practice for an employer: . . .
>
> (5) To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment; provided that nothing in this chapter shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in §§ 28-7-14 - 28-7-19 . . . .
> (10) To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12."

Subsections (5) and (10) essentially mirror their counterparts in the National Labor Relations Act. (N.L.R.A.). See §§ 8(a)(3) and (1) respectively. When appropriate, the Rhode Island Supreme Court has willingly looked to federal labor law for guidance in resolving state labor issues, See Board of Trustees of Champlin Library v. Rhode Island State Labor Relations Board, 694 A.2d 1185, 1189 (R.I. 1997); Barrington School Committee v. Rhode Island State Labor Relations Board, 608 A.2d 1126, (R.I. 1992), in light of the parallels between our system of labor regulations and the federal system. Fraternal Order of Police, Westerly Lodge No. 10 v. Town of Westerly, 659 A.2d 104, 1105 (R.I. 1995).

The Department of Labor argues that the Board's decision is clearly erroneous because there is no evidence in either the record or in the Board's findings of fact that any actions by the Department of Labor encouraged or discouraged membership in any union, discriminated with regard to hire or tenure, or interfered with, restrained, or coerced Council 94 employers. The Department of Labor further argues that the only evidence presented with regard to Magarian's transfer from a union to a non-union position illustrates that Magarian voluntarily bid for the non-union position and that she never felt threatened or pressured to take the position. (3/27/97 Tr. at 47-8; 6/10/97 Tr. at 14-5).

Pursuant to § 28-7-13(10), it is unlawful for an employer to perform any acts which nterfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12. A finding by the Board of coercive interrogation must be based upon an assessment of the entire factual context in which the questioning occurred.

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1st Cir. 1964)). "But even a single oblique remark can be considered unduly coercive in appropriate circumstances." Amber Delivery Service, 651 F.2d at 67-8 (Compare N.L.R.B. v. Pilgrim Foods, Inc., 591 F.2d 110, 114 (1st Cir. 1978), with N.L.R.B. v. Rich's of Plymouth, Inc., 578 F.2d 880, 884-85 (1st Cir. 1978)). "The Board's inference of coercive tendency will be upheld if reasonable," N.L.R.B. v. Marine Optical, Inc., 671 F.2d 11, 18 (1st Cir. 1982) (citing N.L.R.B. v. Cable Vision, Inc., 660 F.2d 1, 3, 5-7 (1st Cir. 1981); N.L.R.B. v. Haberman Construction Co., 618 F.2d 288, 296 (5th Cir. 1980)), "even if the statements are susceptible of a noncoercive interpretation." Marine Optical, 671 F.2d at 18 (citing N.L.R.B. v. Fort Vancouver Plywood Co., 604 F.2d 596, 599 n. 1 (9th Cir. 1979)). "Generally, courts will defer to the Board's special expertise on the impact of employer statements to employees." Marine Optical, Inc., 671 F.2d at 18 (citing N.L.R.B. v. Gissell Packing Co. Inc., 395 U.S. 575, 620, 89 S.Ct. 1918, 1943, 23 L.Ed.2d 547 (1969); Hedstrom Co. v. N.L.R.B., 629 F.2d 305, 314 (3d Cir. 1980) (in banc), *cert denied*, 450 U.S. 996, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981); N.L.R.B. v. Amoco Chemicals Co., 529 F.2d 427, 430 (5th Cir. 1976); Dubin-Haskell Lining Corp. v. N.L.R.B., F.2d 568, 571 (4th Cir. 1968)). In Amber Delivery Service, the United States Court of Appeals, First Circuit (the Court of Appeals) determined that the questioning of a union supporter by the company president in the president's office with another supervisor present, on the same day an employee meeting was to be held in the midst of a union organizing campaign, was unlawfully coercive under the circumstances. Amber Delivery Service, supra at 67. instant case, it is undisputed that, in spite of the Department of Labor's customary practice of posting job vacancy notices, Fagan singled out Magarian by calling her into his office and

personally making her aware of the non-union position. Fagan, who was Magarian's supervisor, explicitly stated, amidst an atmosphere of rampant layoff rumors, that applying for the non-union position would "help her" and "solidify her employment." Magarian testified that she was aware of the layoff rumors. (6/10/97 Tr. at 15). After a review of the entire factual context in which the conversation between Magarian and Fagan occurred, this Court finds that there was ample evidence on the record to support the Board's finding of coercion and therefore a violation of § 28-7-13(10).

Whether an employer's actions constitute § 8(a)(3) violations turns on the employer's primary motivation. See generally NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403, 103 S.Ct. 2469, 2472-75, 76 L.Ed.2d 667 (1983). If the goal is to discourage union activity, there is a violation. If there is no anti-union motive, or if the same action would have been taken based on some other, non-discriminatory, motive, there is no violation. Motive may be inferred from both direct and circumstantial evidence. See Pilgrim Foods, 591 F.2d at 118.

In N.L.R.B. v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979), the Court of Appeals set forth a guide to be used in analyzing cases in which unfair labor practices in violation of section 8(a)(1) and (3) of the N.L.R.A. are alleged. In Eastern Smelting, the Court of Appeals referred to any employer motives which are coercive or discriminatory due to anti-union animus as "bad reasons." Eastern Smelting, 598 F.2d at 669. Those motives which are based upon business judgment and not on intentions to interfere with rights protected under the N.L.R.A. are deemed "good reasons." Id. Even where the board meets its burden of demonstrating a bad reason or improper motivation on the part of the employer, the employer

may still defend itself by producing sufficient evidence of a good reason to rebut the prima facie showing, or presumption of a violation. Id. at 671 (citing Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)); N.L.R.B. v. Wright Line, A Division of Wright Line, Inc., 662 F.2d 899, 904 (1st Cir. 1981). In circumstances where the Board lacks independent proof that an employer's actions were motivated by bad reasons, the employer's assertion of an "obviously weak or implausible good reason . . may support an inference that there was a bad reason.' Id. at 670-1

In N.L.R.B. v. Barnes and Noble Bookstores, Inc., 598 F.2d 666 (1st Cir. 1979), consolidated with Eastern Smelting, an employer was charged with unfair labor practice violations when it discharged a known union employee who worked in the children's book department of its store. The employer asserted as its "good" reason for discharging the employee that the children's department was overstaffed. The Court of Appeals found that the employer's asserted overstaffing was contradicted by the fact that three days prior to the discharge, the employer had hired another clerk; that clerks were frequently transferred to other positions throughout the store; and that due to the high turnover in the Boston location, some fifty new clerks were hired the following year. Id. at 674-5. As such, the Court of Appeals found that "the absence of factual support for [the employer's] asserted reason permitted an inference of improper motivation." Id.

In the instant case, during the relevant time period, two Computer Programmers were employed by the Department of Labor. A third, non-union Computer Programmer position had remained vacant for two years. The Department of Labor's explanation for finally deciding to fill

the vacancy at a time when budgetary restrictions were causing the Department to lay off numerous employees was that it was "absolutely necessary" for the Department to have three [] Computer Programmers[.]" (6/10/97 Tr. at 58). Ironically, however, once Magarian transferred to her new non-union position, her vacated union position was never posted or filled. The Department of Labor offered no explanation for this drastic and dramatic change in circumstances.

Furthermore, McGarry testified that the non-union position had been posted because the Department of Labor was experiencing difficulties and needed specific programming done. (6/10/97 Tr. at 52). However, it is evident from the record that Magarian's duties remained the same once she transferred from her union position to her non-union position. Moreover, since Magarian's former Computer Programmer position was already within the Department of Labor, she could have been directed to perform those necessary "specific programming" duties without ever having to be transferred to another position. (6/10/97 Tr. at 53).

After a review of the record, this Court finds that substantial evidence exists to support the Board's finding that the Department of Labor violated § 28-7-13(5). There is no factual support for the Department of Labor's asserted "good" reason for posting the long-vacated non-union position. Accordingly, this Court finds that the record supports an inference of improper motivation in violation of § 28-7-13(5) and (10).

Motion for Production of Documents and Other Information

The Department of Labor also appeals the Board's denial of its motion for production of documents and other information. In its motion for production, filed March 10, 1997, the

Department of Labor requested that the Board "furnish it with all information obtained by the Board and/or its agents or employees in the investigations of the charges submitted in these matters including but not limited to all notes, statements, documents, affidavits, reports and memoranda, together with copies of all such documentary information relied upon by the Board in their formulation of, and issuance of, the Complaint in this matter." Additionally, the Department of Labor requested "the names of those members of the Board and/or its agents and employees who gathered and/or reviewed the requested information and participated in the decision by the Board to issue Complaints in this matter."

"Section 28-7-33, titled "Access of board to evidence - Subpoena power - Oaths and affirmations," provides:

> For the purpose of all hearings and investigations which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by Secs. 28-7-14 - 28-7-25, the board . . . shall at all reasonable times have access to, for the purpose of examination and the right to examine, copy, or photograph any evidence . . . of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence.

The Board enjoys these rights, pursuant to its police power, to further its investigations into alleged unfair labor practices. Nowhere in the aforestated provision or

anywhere in the Administrative Procedures Act (A.P.A. does it provide that an employer under investigation is entitled to these same rights and privileges.

In La Petite Auberge, Inc. v. R.I. Commission for Human Rights, 419 A.2d 274 (R.I. 1980), the Supreme Court of Rhode Island recognized the importance of pre-hearing discovery. In that case, the employer under investigation sought to depose its employee prior to the hearing on a discriminatory employment claim. The Commission for Human Rights (the Commission) refused to exercise its police powers and order the employee to submit to a deposition prior to the hearing. The Supreme Court affirmed the Superior Court justice's decision ordering the Commission to afford the employer a degree of pre-hearing discovery including directing the employee to submit to the deposition. The Supreme Court concluded that nowhere in the A.P.A. is the Commission's police power limited so that it does not apply prior to the hearing.

The La Petite Auberge case is distinguishable from the instant case, however. In La Petite Auberge, the Court found that the employer was entitled to discovery materials from the employee and other related parties. Here, the department of Labor seeks discovery materials directly from the Board. The Supreme Court never intended that the Board's police powers apply to itself to produce discovery materials.

As such, this Court finds that the Board's decision was not in violation of statutory provisions. The Board's actions were neither arbitrary or capricious, nor characterized by an abuse of discretion or other errors of law.

Lastly, the Department of Labor alleges that the remedy in paragraph four of the Board's order is arbitrary, capricious, and incapable of being instituted. The Department argues

that since the duties of the union and non-union positions are the same, the Board's order that "any duties that traveled from the union position to the non-union position" be transferred back to the union position and that "[t]he non bargaining unit position is . . precluded from doing work that was done by the bargaining unit position" is incapable of being instituted. The record and the final decision clearly demonstrate that the Board did not intend to preclude non-union Computer Programmers from performing their own normally assigned duties. Rather, the Board intended only to preclude them from performing the aforementioned specific duties that traveled back to the union with Magarian. Accordingly, this Court finds that the Board's order in paragraph four was neither arbitrary nor capricious. Substantial rights of the Department of Labor have not been prejudiced.

After review of the entire record, the Board's decision in its entirety is affirmed. Counsel shall submit the appropriate order for entry.