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NLRB ALTERS COURSE

Major changes in the NLRB have been expected since Bush appointees assumed a majority. The Board has recently issued a series of decisions which alter the ground rules of federal labor law. The Board's recent significant decisions are discussed below.

I. *Dana Corp: Contract Bar Rules Modified*

Since 1966, the Board has held that when a union is voluntarily recognized without an NLRB election, that recognition "bars" the employees for a reasonable period of time from filing a petition to decertify the union and also bars rival unions from petitioning for an election. The theory of the "recognition bar" was that a newly-recognized union needs a reasonable period of time to be able to bargain before its status as bargaining representative can be challenged. In *Dana Corp.*, 351 N.L.R.B. No. 28 (September 29, 2007), the Board changed this rule by permitting employees covered by a voluntary recognition to challenge that recognition before the recognition "bar" becomes effective. It is no overstatement to say that unions are up in arms at this ruling, which, unquestionably, undermines the value of a voluntary recognition to a great degree.

In reaching this decision, the Board was concerned that the predicate of voluntary recognition—a showing by authorization cards that a majority of the employees want the union to represent them—is a much less accurate reflection of employee sentiment than an NLRB election. In its decision, the Board notes that unions which have obtained a majority of cards often lose NLRB elections and that authorization cards are often signed under peer pressure and without the protection afforded by an NLRB election. At the core of the Board's decision is its intention to protect the statutory right of employees freely to chose or not chose union representation.

Under the Board's decision: (i) when a union is voluntarily recognized, the employer and/or the union must "promptly" notify the NLRB's Regional Office in writing of the recognition, the name of the union that was recognized, the date of recognition and the recognized bargaining unit; (ii) the NLRB will then send a notice to be posted by the employer which advises the employees about the recognition; states that they have a right to be represented by the union or not be represented; and that within 45 days of that notice, the employees have the right to file either a petition to decertify the union or a petition to be represented by another union. If a petition is filed within 45 days, the Board will conduct an election. If no petition is filed within 45 days, the recognition will then serve as a bar to the filing of an election petition for a reasonable period of time.

Although on first blush this decision might seem to be favorable to employers, we think that the decision is harmful to employer interests. Companies that choose not to voluntarily recognize unions and to insist on an NLRB election as a predicate for recognition, may continue to do so. The only employers affected by this decision are those who choose to extend voluntary recognition to a union. The Board's decision undermines that recognition by removing the bar which it previously provided against decertification or raiding by another union. Although the employer and union are free to bargain and sign a contract while the election process proceeds, the practical reality is that unless the employer is willing to agree to a rich contract, any other kind of contract could lead to the filing of a decertification petition. Therefore, unless the contract is a rich one, meaningful negotiations will likely be stalled until the Board's processes are

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complete. This could take months if an election is directed. As a result, the employer and union are placed in a difficult position: if they negotiate a contract that recognizes the employer's needs and is not well-received by the employees, the employer and union have invited a decertification petition; but if they delay negotiations and don't reach agreement, that delay—which could suggest to the employees that the union is powerless—could produce the same result.

Employers will also be concerned that the required notice to employees of their right to select another union could result in the substitution of a more aggressive union for the initially-recognized union, even though the more aggressive union might never have surfaced, or might have been unable to organize the employees, but for the employer's initial recognition. We believe that voluntary recognitions will continue to make sense but only if the employer is planning to sign the kind of contract that will satisfy the employees and that the recognized union can credibly defend.

2. Union "Salts": Are They "Employees"?

In 1995, the Supreme Court sustained the Board's ruling that "salts" (meaning workers paid by the union to help organize a company) are "employees" under the NLRA. In a recent decision, *Toering Electric Co.*, 351 N.L.R.B. No. 18 (2007), the present Board (by 3-2 vote) held that a salt who is denied employment is entitled to protection under the no-discrimination provisions of the NLRA only if she was "genuinely interested in seeking to establish an employment relationship with the employer" and that the General Counsel has the burden of proving that she had that interest.

The Board majority was concerned that in attempting to organize a company, unions often flood the

employer with employment applications, frequently from employees who have no real interest in working for the company. The union's purpose is sometimes to induce the employer to commit unfair labor practices, specifically, discriminatory refusals to hire. The Board stated that the definition of an "employee" in the NLRA—which says that the term "employee" includes "any employee"—"suffers from the problem inherent in defining a word in terms of that very same word" so that, according to the majority, the Board must interpret the scope of that word by looking at the purposes of the Act. In extending protection only to those genuinely interested in becoming employees, the Board reasoned that "one cannot be denied what one does not genuinely seek."

Two Board Members filed a vigorous dissent. They argued that the focus of a discrimination charge must be, and always has been, the employer's intent, not the intent of the person seeking employment. The dissent also argued that the purpose of the statute is not merely to redress the private wrong that occurs when a job applicant is discriminatorily rejected but to eliminate discrimination in the hiring process. They also noted that under the majority's view, a discrimination case would be dismissed if the applicant had no genuine interest in being hired even if the employer acted with discriminatory intent. As a result, there would be no remedy—such as an order prohibiting discriminatory hiring in the future—to sanitize the employer's hiring process in the future.

We are sympathetic with the Board's concern that persons who seek jobs solely to assist in organizing and/or to induce employer unfair labor practices should receive limited protection under the law. The problem is that the Supreme Court has recently upheld an earlier decision of the Board holding that "salts" are "employees" under the NLRA. While the Supreme Court technically held in that case that the Board's conclusion to that effect was reasonable, the Court's decision was unanimous and the rationale of that decision seems to undercut the Board's decision in *Toering Electric*. For example, while the Board

found the statutory definition of "employee" to be circular and confusing, the Supreme Court found that that definition was very broad and reflected the dictionary definition of employee—namely, "a person who works for another." Thus, according to the court, all employees are covered by the NLRA unless they are specifically excluded, such as "supervisors" or government employees. If salts are "employees" under the Supreme Court's reasoning, it is far from clear how the Board can find that they are not "employees" entitled to the protections of the NLRA. In a nutshell, we question whether the *Toering Electric* decision will withstand court review.

3. When Can the Filing of a Lawsuit Be an Unfair Labor Practice?

The Board and the courts have struggled through the years to determine whether and under what circumstances a lawsuit might constitute an unfair labor practice. In 1983, the Supreme Court held that a lawsuit could not be enjoined as an unfair labor practice even if the lawsuit had been filed with an intent to discriminate against legitimate union activity. *Bill Johnson's Restaurant Inc. v. NLRB*, 461 U.S. 731 (1983). That case involved a lawsuit that was pending when the unfair labor practice charge was filed. In 2002, another case came before the Court in which the issue was whether a lawsuit which had been dismissed could be found to be an unfair labor practice. The Board found that when a case is dismissed, an unfair labor practice could be found if the purpose of filing the lawsuit was to retaliate against protected activity. *BE & K Construction*, 329 N.L.R.B. 717 (1999). The Supreme Court, however, denied enforcement of the NLRB's decision, sending the case back to the Board for further consideration as to whether a dismissed retaliatory lawsuit could be found to be an unfair labor practice if the suit, although unsuccessful, was not "objectively baseless." 536 U.S. 516 (2002). The Court's concern was that attaching unfair labor practice

liability to the filing of a lawsuit that had some arguable merit would unduly hamper one of the “precious liberties safeguarded by the Bill of Rights”—namely, the right to petition to the courts. The Court stated that “sham petitioning” would not be protected but that, at least in the anti-trust context, a plaintiff who files a lawsuit that has some arguable merit cannot be sued for filing that lawsuit even after it was dismissed and even if the motive for filing the lawsuit was illegitimate.

On remand from the Supreme Court, the Board adopted the approach applied by the Supreme Court in anti-trust cases. It held, consistent with the Supreme Court’s approach in anti-trust cases, that the filing of a “reasonably based” lawsuit could not constitute an unfair labor practice regardless of the motive for filing that suit. A lawsuit would lack “reasonable basis” if “no reasonable litigant could realistically expect success on the merits.” The two-Member minority argued that the Supreme Court had not suggested that every reasonably based lawsuit was immune from liability under the NLRA, and it cited Justice Breyer’s concurring opinion in which he suggested that an employer who was indifferent to the suit’s outcome and sued simply to impose litigation costs on the union could be subject to unfair labor practice liability.

This case has stirred strong reaction from unions, albeit not as intense as the union reaction to the *Dana* case, because it protects a tactic used by employers responding to corporate campaigns, namely, to commence litigation against a union simply to impose litigation costs on the union.

4. Discipline That Results from Illegal Surveillance

In past newsletters, we have discussed the NLRB decisions which require companies to bargain with unions before they install surveillance cameras in the workplace. We always had questions about these decisions

because bargaining with the union over whether and where to install surveillance cameras alerts employees to the existence of those cameras and makes it all the more difficult to apprehend wrongdoers. Nonetheless, our views were not shared by the NLRB or some circuit courts, which enforced the Board’s decisions requiring bargaining before surveillance cameras can be implemented.

A related issue is the remedy for employees who are disciplined based on unlawful surveillance. The Board has flip-flopped on this issue over the years. Some cases hold that the disciplined employee is entitled to back pay because the discipline was the by-product of illegal surveillance, *i.e.*, the “fruit of a poisoned tree.” Other decisions deny back pay based on section 10(C) of the NLRA which says that “No order of the Board shall require the reinstatement of any individual . . . or the payment to him of any back pay, if such individual was suspended or discharged for cause.” In a recent case, the “Bush Board” adopted the second approach and denied back pay. The court of appeals, however, sent the case back to the Board, saying that section 10(C) “does not expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees’ misconduct but-for its own unlawful action.” The court also said that the Board had failed to reconcile or explain why it was following one line of Board cases instead of another.

On remand, the Board undertook to provide that explanation and re-affirmed that employees disciplined for cause are not entitled to reinstatement or back pay. The Board first noted that “cause” for purposes of section 10(C) means absence of a prohibited reason for the discipline. That’s an interesting definition because it means that an employee fired for union activity has not been fired for “cause” but that an employee disciplined for lateness has been fired for “cause” for purposes of an NLRB back pay claim. An arbitrator, however, might well find that the same employee was not disciplined for “cause” within the meaning of the collective bargaining agreement. In sum, an employee who has no claim for

reinstatement and back pay at the Board when he is fired based on illegal surveillance might well be successful on the same claim in arbitration.

5. After-Acquired Shop Clauses: Are they Mandatory Subjects of Bargaining?

Employers and unions are only obligated to bargain over “mandatory” subjects of bargaining. Insisting to impasse on a mandatory subject of bargaining is an unfair labor practice. In another blow to unions, the Board held that a union’s insistence on a clause which requires the employer to recognize the union at a new location based on a card check is not a mandatory subject of bargaining. *Supervalu, Inc.*, DLR, October 10, 2007. That means in practical terms that the union can ask for such a clause but can not insist on it as a condition of agreement.

A mandatory subject of bargaining is defined as one that settles “an aspect of the relationship between the employer and employees” within the bargaining unit. An issue that affects employees in one bargaining unit may be a mandatory subject in another unit if that issue “vitaly affects” the employees in the other bargaining unit.

Unions have long sought to obtain “after-acquired shop” clauses in their collective bargaining agreements. Those clause require the employer to recognize the union in a new bargaining unit if the union obtains authorization cards from a majority of employees in that unit. Effectively, the clause amounts to a waiver by the employer of its right to demand an NLRB election when a union demands recognition. In *Supervalu*, the Board held that recognition of the union in another bargaining unit does not “vitaly affect” the working conditions of the employees in the originally-recognized unit. Not surprisingly, the dissent argued that unionization of other units does vitaly affect employees in an already-recognized unit because the bargaining strength of employees is directly affected when

the same union is recognized by the employer in other bargaining units.

The bottom line is that these clauses, which unions consider to be critically important organizing tools, are lawful, but the unions cannot now insist on these clauses in collective bargaining. That also means that a strike to obtain such a clause is an unprotected strike under the NLRA.

6. The Union Reaction

Unions have referred to the Board's decisions as the "Autumn slaughter." They have taken a number of steps—the success of which is problematic at best—to control what they regard as a Labor Board hostile to the organizing process. For example, the AFL-CIO has filed a complaint with the International Labor Organization charging that the NLRB, through its decisions, is engaging in a "systematic effort to deny workers' rights in violation of "international labor standards." Its theory is that by reason of the Bush Board decisions, the United States has violated two international Conventions on the Right to Organize and Bargain Collectively. Even though the United States has not signed those conventions, the complaint claims that they are binding on the US because it is a member of the International Labor Organization, the Constitution of which guarantees the right of workers to freedom of association, including the right to bargain collectively. It argues that the ILO has authority—which has frequently been exercised by it—to determine whether legislation of member companies complies with the principles of freedom of association and collective bargaining established by international Conventions.

On another front, the Steelworkers Union and six other unions have filed a petition with the Board asking the Board to issue a rule stating that employers are obligated to recognize unions even if they don't represent a majority of the

employees in a bargaining unit. In effect, the petition seeks to revive what are referred to as "members only" contracts, namely, contracts under which a union is recognized as bargaining agent for part of an appropriate bargaining unit. "Members only" contracts are lawful under the NLRA. That means that an employer and a union are not committing unfair labor practices by signing such a contract. However, it always been the law under the NLRA that the Board would not recognize or enforce such contracts because they cover less than an "appropriate bargaining" unit. If the union's petition succeeded, that result would effectively impose bargaining obligations on thousands of non-union companies if they employ people who join the union which doesn't represent a majority of the employer's employees. One has to wonder about the motivation of the Steelworkers in filing such a petition with any Labor Board, much less one considered by unions to be so hostile to their interests.

UPS OPTS OUT OF TEAMSTER PENSION PLAN

Of interest to companies which participate in multi-employer pension plans is the agreement recently reached between UPS and the Teamsters under which UPS opts out of the Teamster's Central States Pension Fund. About 42,000 UPS employees are currently covered by that plan. UPS will pay over \$6 billion dollars to cover its share of the unfunded liabilities of the plan. The underfunding of that plan has increased from 4.95 billion in 2002 to \$17.6 billion at year-end 2006. As part of the agreement, UPS has agreed to recognize the Teamsters without NLRB elections if the union can produce authorization cards from a majority of the employees in a bargaining unit.

This agreement, coupled with the recent agreements in the automobile industry, reflect the escalating concern of companies with the underfunding of multi-employer pension plans. The degree of that concern is reflected both by UPS' willingness to pay \$6 billion to extricate itself from the Central States plan and by its willingness to allow increased

unionization of the company as a result of card check recognition.

We suspect that the UPS-Teamster deal presages similar agreements in other industries in which companies recognize the uncertainty and vulnerability they face because of escalating deficits in their multi-employer plans.

FIRM NEWS

We are pleased to welcome Michael Futterman to our Firm. Michael has practiced general litigation in New York focusing on commercial, labor and employment, and other business-related matters. He will work in all phases of our labor/employment law practice. We hope and expect that many of you will soon have the opportunity to meet and work with Michael.

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