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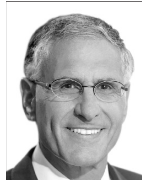
Expert Analysis

NLRB Update: Groundbreaking Rulings, but Will They Survive?



By John P. Furfaro And Risa M. Salins

The National Labor Relations Board recently issued a number of precedent-changing decisions with significant implications for employers, many reached in the final days of Member Brian Hayes' term ending Dec. 16, 2012. This month's column is the first of two articles discussing these board rulings touching on a variety of issues, including the confidentiality of internal investigations and witness statements, the obligation to bargain over discipline of bargaining unit employees where there is no collective bargaining agreement in place, whether a mandatory dispute resolution policy interferes with Section 7 rights and employer obligations in connection with backpay awards.

Over the last year, there were five board members, including Chairman Mark Pearce (D), Brian Hayes (R) and three members who were recess appointments by President Barack Obama on Jan. 4, 2012: Terence Flynn (R) who resigned July 2012, Richard Griffin (D) and Sharon Block (D). Significantly, on Jan. 25, 2013, the U.S. Court of Appeals for the D.C. Circuit issued a decision finding Obama's three recess appointments unconstitutional, in part because the appointments did not occur during a recess of the Senate. *Noel Canning v. NLRB*, No. 12-1115, D.C. Circuit (Jan. 25, 2013). We can expect the board to seek review of the D.C. Circuit's ruling by the U.S. Supreme Court. However, if upheld, this ruling calls into question the validity of the board's decisions dating back to Jan. 4, 2012, including the cases discussed here, on the basis that they were not made with the required three-member quorum.

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Internal Investigations

In a 2-1 decision, the board in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), ruled that an employer violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by maintaining a rule prohibiting employees from discussing the employer's investigation of employee misconduct while the investigation was in progress.

In *Banner Health System*, a hospital technician expressed concerns to his supervisors and coworkers about the manner in which he was instructed to clean surgical instruments. He was subsequently issued a coaching by his supervisor for his refusal to follow instructions, and told by the employer's human resources consultant not to discuss the matter with his coworkers while the employer's investigation was ongoing.

The board found that the hospital's generalized concern with protecting the integrity of internal investigations is insufficient to outweigh employees' Section 7 rights, among other things, to discuss workplace matters with other employees. It held that unless an employer makes a determination in a particular investigation that a witness is in need of protection, evidence is in danger of being destroyed or testimony is in danger of being fabricated, an employer cannot require or even request confidentiality from employees during an ongoing investigation.

Witness Statements

The board considered the topic of internal investigations once again in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012). In this controversial 3-1 decision, the board overturned its 34-year old precedent set in *Anheuser-*

Busch, 237 NLRB No. 982 (Aug. 25, 1978), which created a bright line rule exempting employee witness statements gathered in an internal investigation from the general obligation to honor union requests for information under Sections 8(a)(1) and (5) of the NLRA. The board determined instead that going forward employers must apply the balancing test articulated in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), when arguing there is a confidentiality interest in protecting witness statements from disclosure.

In this case, a charge nurse at a continuing care facility notified the employer's human resources director that she had seen a certified nursing assistant (CNA) sleeping while on duty. The charge nurse prepared a written statement so the employer could begin an investigation, and two other coworkers also provided the employer with written statements documenting incidents when they had allegedly seen the CNA sleeping while on duty. Two of the employees were expressly promised that their statements would be confidential. The employer reviewed the statements and then terminated the CNA. The union filed a grievance disputing the CNA's termination and requested from the employer all witness statements used as part of the employer's investigation but the employer, relying on *Anheuser-Busch*, refused to produce them.

The board found the rule announced in *Anheuser-Busch* which categorically exempted all witness statements from disclosure to unions, no matter the circumstances, is unwarranted. The board ruled that the balancing test set forth in *Detroit Edison* should be applied when a union requests production of witness statements. Under the *Detroit Edison* balancing test, "if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information."

Moreover, the party asserting the confidentiality defense must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. The board will then consider the specific facts of each case to consider whether the information at issue is confidential. Acknowledging the unique nature of its decision, the board stated that it will apply the *Detroit Edison* test prospectively.

In rejecting the *Anheuser-Busch* rule, the board reasoned that witness statements are not fundamentally different from other types of information such as witness names to which the *Detroit Edison* test has been applied. The board acknowledged that in some cases, legitimate and substantial confidentiality interests will exist, but the board reasoned the same risks are presented by disclosure of witness names, for which there is no exemption, and the flexible approach of *Detroit Edison* adequately protects the interests of the employer and witnesses.

In Hayes' dissent, he asserted that the majority's decision will negatively impact the confidentiality of employers' investigations and employers' ability to prevent harassment and intimidation of and retaliation against witnesses. Member Hayes also stated that the case-by-case approach articulated in *Detroit Edison* would breed uncertainty, delays in arbitration processes and additional unnecessary litigation.

Discipline

In *Alan Ritchey Inc.*, 359 NLRB No. 40 (Dec. 14, 2012), a three-member panel of the board (Hayes recused himself) unanimously overruled precedent and held that an employer violates the NLRA by not providing bargaining unit employees with notice or the opportunity to bargain before enforcing preexisting, discretionary disciplinary rules when no operating collectively bargained grievance procedure exists. The board acknowledged that its ruling constitutes a significant change in the law and so it also declined to apply this ruling retroactively.

In *Alan Ritchey Inc.*, employees voted to be represented by a union, but the parties had not yet entered into a collective-bargaining agreement or other binding agreement governing discipline. The employer imposed the disciplinary actions at issue for absenteeism, insubordination, threatening behavior and the failure to meet efficiency standards according to its preexisting progressive disciplinary system. However, the employer admitted that it exercised discretion in deciding whether to impose discipline and what type of discipline to impose. The employer did not provide the union with notice or an opportunity to bargain about any of the disciplinary actions at issue.

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The board concluded that the imposition of discipline that alters terms or conditions of employment in a material, substantial and significant way triggers the duty to bargain if the employer is unconstrained by preexisting policies or practices and instead exercises discretion over whether and how to discipline individuals. The board specified that the duty to bargain is triggered before an employer imposes a suspension, demotion, discharge or analogous sanction, but may be deferred until after it issues an oral or written warning or analogous lesser sanction.

The board's decision overruled *Fresno Bee*, 337 NLRB No. 180 (Aug. 1, 2002), which held that an employer may impose discretionary discipline without first bargaining over the decision with the union. In doing so, the board reasoned that its new ruling here will not be unduly burdensome for employers.

First, the pre-imposition obligation attaches only to the discretionary aspects of disciplinary actions that have

an "inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion, or discharge." Second, the employer will not be required to bargain to agreement or impasse before it imposes such disciplinary actions; if the parties have not reached agreement, the duty to bargain continues after imposition. Third, an employer may unilaterally impose disciplinary actions in exigent circumstances.

Dispute Resolution

In a 2-1 decision, the board ruled in *Supply Technologies*, 359 NLRB No. 38 (Dec. 14, 2012), that an employer's mandatory dispute resolution program for nonunion workers violated the NLRA because the program could reasonably be construed to interfere with Section 7 rights.

In this case, the employer implemented a mandatory grievance-arbitration program called "Total Solutions Management" (TSM) as the only means of resolving any claims with the employer. The employer provided employees with three documents describing TSM, one of which was "densely packed with legalese" and was clearly designed to be broad in scope. That document specifically stated that all claims, including federal statutory claims, must be brought under TSM. It stated only three limited exceptions to that requirement, which were for claims concerning criminal matters, Workers' Compensation and unemployment compensation.

The board found that the employer violated Section 8(a)(1) by maintaining TSM, threatening employees with discharge if they did not accept the policy and actually discharging 20 employees who refused to sign the policy. The board reasoned that given TSM's broad scope, its limited exceptions and its requirement that federal statutory claims be brought under TSM, employees could reasonably construe the language to prohibit filing claims with the board or otherwise accessing the board's processes, activities protected by Section 7. Even though the NLRA was not one of the statutory claims specifically subject to TSM, the TSM policy stated that the list of statutes was nonexhaustive and each of the statutes named, like the NLRA, concerns workplace rights. The board rejected the employer's argument that employee's rights were adequately protected by language appearing later in the policy that stated employees may file charges with a government agency. The board found that provision of the policy did not explicitly name any statute or government agency or explain that filing an administrative charge is intended to be an exception to the broad and nonexhaustive list of claims required to be brought in TSM.

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Hayes' dissent asserted that the majority's decision demonstrates the board's "continuing antipathy" towards private mandatory dispute resolution programs for nonunion employees.

Backpay Awards

In a unanimous decision, a three-member board (Hayes did not participate) ruled in *Latino Express*, 359 NLRB No. 44 (Dec. 18, 2012), that an employer owing a backpay award must (1) submit documentation to the Social Security Administration (SSA) allocating the backpay to the calendar years in which it would have been earned by the employee and (2) reimburse backpay recipients for any excess income taxes recipients may owe as a result of receiving a lump-sum backpay award covering more than one calendar year. The board ruled that it will apply this decision retroactively.

The board explained that normally, backpay is paid in one lump sum and has been posted to the employee's Social Security earnings in the year it is received. This practice may disadvantage an employee by potentially depriving the employee of Social Security credits and certain monthly benefits. The board further explained that an employee who receives a lump sum backpay award covering more than one calendar year may be categorized as a member of a higher tax bracket and incur additional income tax liability. The board's rulings in this case are an effort to address both of these adverse consequences for recipients of lump sum backpay awards.

Conclusion

The next article in this series will address a number of other notable cases recently decided by the board, including those in the areas of social media, dues checkoff provisions and *Beck* rights. In the meantime, in a statement released by the board following the D.C. Circuit's ruling in *Noel Canning*, Pearce stated the existing board consisting of himself and Griffin and Block would continue to operate and issue decisions.

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