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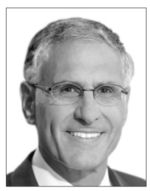
Expert Analysis

NLRB Update: Union Dues And Employer Work Rules



By **John P. Furfaro**

And **Risa M. Salins**

Employers and labor groups are grappling with the practical implications of the D.C. Circuit's monumental ruling in *Noel Canning v. NLRB*, No. 12-1115, (D.C. Cir. Jan. 25, 2013), that President Barack Obama's Jan. 4, 2012, recess appointments of National Labor Relations Board members Terence Flynn, Richard Griffin and Sharon Block were unconstitutional because they did not occur during a recess between Senate sessions. Although *Canning* may call into question the validity of hundreds of decisions rendered by the board since the recess appointments were made, on March 12, 2013, the board announced that it intends to seek U.S. Supreme Court reversal of the U.S. Court of Appeals for the D.C. Circuit ruling by the April 25, 2013, deadline. Assuming the justices grant the board's petition, a final ruling in the case might not occur until 2014.

In the wake of *Canning*, the board has issued, and stated its intention to continue to issue, new decisions, and employers should expect the board to attempt to enforce its remedies unless and until the Supreme Court says otherwise. This month's column is the second of two articles discussing significant cases recently decided by the board, both before and after *Canning*. Here, we address decisions concerning union dues and employer work rules that have important implications in both union and non-union workplaces.

Dues-Checkoff

On Dec. 12, 2012, the board in *WKYC-TV*, 359 NLRB No. 30 (2012), overturned longstanding precedent and ruled 3-1 that a collective bargaining agreement provision authorizing an employer to deduct union dues directly from an employee's paycheck, known as a dues-checkoff provision, survives the expiration of a collective bargaining agreement. The board abandoned the 50-year-old rule promulgated in *Bethlehem Steel*, 136 NLRB 1500 (1962), that a dues-checkoff provision expires when the collective bargaining agreement containing it expires. The board stated it will apply its decision prospectively only.

In *WKYC-TV*, the employer and the union had been parties to a labor contract with a dues-checkoff provision. Following contract expiration, the employer ceased honoring the dues-checkoff arrangement without first providing the union notice and an opportunity to bargain over that decision. The union alleged the employer's conduct violated Sections 8(a)(5) and (1) of the National Labor Relations Act (NLRA).

In finding the dues-checkoff provision survived after expiration of the collective bargaining agreement, the board reasoned that under settled board law, dues-checkoff is a matter related to wages, hours and other terms and conditions of employment and is thus a mandatory subject of bargaining. The board stated that, as a general rule, an employer's obligation to refrain from unilaterally changing mandatory subjects of bargaining applies when the parties' existing agreement has expired and lasts until the parties negotiate a new agreement or bargain to a lawful impasse. The board acknowledged that certain terms and conditions of employment—such as arbitration provisions, no-strike clauses and management rights clauses—do not survive contract expiration even though they are mandatory subjects of bargaining, but it distinguished those provisions on the basis that

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they involve voluntary waivers of rights guaranteed by the NLRA.

On the other hand, it found a dues-checkoff arrangement does not function as a waiver but simply as a matter of administrative convenience. Since the board has previously recognized that other voluntary arrangements that create administrative convenience—such as employee savings account arrangements and charitable contributions—survive the contracts that establish them, the board stated that dues-checkoff provisions should be treated similarly. Moreover, the board found the wording of Section 302 of the Taft-Hartley Act, which exempts dues check-off from the prohibition against employer payments to unions, indicates that Congress intended a dues check-off arrangement would continue beyond the life of the collective bargaining agreement establishing it.

Finally, the board stated the *Bethlehem Steel* decision was flawed in several respects. The board in *Bethlehem Steel* reasoned that because dues-checkoff provisions implement union-security (or "union shop") provisions which make union membership a condition of employment, and the NLRA explicitly mandates termination of union-security clauses upon expiration of a labor contract, then dues check-off provisions must also terminate upon contract termination.

The *WKYC-TV* board rejected that reasoning, noting many labor agreements do not contain both union-security and dues-checkoff provisions and are therefore independent. It further noted the *Bethlehem Steel* board ignored the fact that, unlike a union-security provision which imposes a mandatory obligation, a dues-checkoff arrangement is voluntary and must be authorized by the individual employee.

In member Brian Hayes' dissent, he asserted it would be unreasonable to think that employees generally would wish to continue having dues deducted once a union-security provision expires. Although individual employees could deauthorize the checkoff, Hayes noted it is unlikely that employees will recall the complex revocation language in their checkoff authorizations or understand how to exercise that right. Hayes further contended that an employer's ability to cease dues-checkoff upon contract expiration serves as a legitimate economic weapon in bargaining for a successor agreement, and stripping employers of that weapon significantly alters the playing field.

Employers should expect the board to attempt to enforce its remedies unless and until the Supreme Court says otherwise.

'Beck' Rights

On Dec. 14, 2012, the board *in United Nurses and Allied Professionals* (*Kent Hospital*), 359 NLRB No. 42 (2012), addressed rights of nonmember dues objectors and appears to have narrowed the scope of the U.S. Supreme Court decision in *Communication Workers v. Beck*, 487 U.S. 735 (1988). The board held 3-1, first, that the union did not violate the NLRA by failing to provide a nonmember dues objector with an audit verification letter. Second, the board held that, like all other union expenses, lobbying expenses are chargeable to nonmember objectors if they are "germane" to collective bargaining, contract administration or grievance adjustment, rejecting the view that lobbying expenses are per se nonchargeable to nonmember objectors.

In *Kent Hospital*, several employees resigned their union membership and objected to the union's assessment of dues and fees for lobbying activities. The union then provided the objectors with charts showing the main categories of union expenses, but it failed to provide an audit verification letter. The board found that unlike cases involving public-sector unions, where union conduct is evaluated under a heightened First Amendment standard, a private-sector union's conduct is properly analyzed under the duty of fair representation, which is violated if a union's actions are so far outside a "wide range of reasonableness." The board found that the private-sector union in *Kent Hospital* acted reasonably by providing the objectors with its categories of expenditures and an assurance that the figures were independently verified.

Next, the board addressed whether the union unlawfully charged the nonmember dues objectors for expenses incurred in connection with the union's lobbying efforts. In *Beck*, the Supreme Court held that the NLRA does not permit a union, over the objection of nonmember employees, to expend funds collected from employees under a union-security provision on activities unrelated to collective bargaining, contract administration and grievance adjustment. The *Beck* court found that unions were not permitted "to expend compelled agency fees on political causes." However, the board in *Kent Hospital*, pointing to principles later recognized by the Supreme Court, held that lobbying expenses are chargeable to objectors if they are germane to collective bargaining, contract administration or grievance adjustment, and it will make such a determination on a "case-by-case" basis.

Furthermore, the board held that a union may charge objectors for otherwise germane lobbying activities even if they are extra-unit, as long as they are for "services that may ultimately inure to the benefit of members of the local union by virtue of their membership in the parent organization." The board invited briefing from interested parties on how it should define and apply the "germaneness" standard in the lobbying context.

In his dissent, Hayes asserted that relevant Supreme Court precedent compels holding there are only very limited circumstances, if any, in which lobbying expenses may be chargeable as incurred during the union's performance of statutory duties as the objector's exclusive bargaining agent.

Work Rules

On Jan. 25, 2013, in *DirectTV*, 359 NLRB No. 54 (2013), a unanimous three-member panel found that the employer unlawfully interfered with employees' rights under the NLRA by maintaining four work rules in the company's employee handbook and on its intranet system that could reasonably be read by employees as restricting those rights.

The board found the first work rule at issue, which instructed employees not to contact the media, was unlawful. It stated that Section 7 of the NLRA, which protects employees' right to engage in concerted activities, encompasses employee communications about labor disputes with newspaper reporters. Moreover, the board found the employer's related corporate policy that "[e]mployees should not contact or comment to any media about the company unless pre-authorized by Public Relations," was unlawful because it required employees to secure permission from their employer as a precondition to engaging in protected concerted activity.

The second work rule at issue provided that if law enforcement would like information regarding an employee, the employee should contact the employer's security department. The board found the rule unlawful because employees would reasonably construe board agents as "law enforcement," and it would lead reasonable employees to conclude that they were required to contact the employer before cooperating with a board investigation.

Third, the employer's confidentiality rule instructed employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" and "[n]ever give out information about customers or DIRECTV employees," including "employee records." The board found the prohibition on releasing information concerning the "job" or fellow "DIRECTV employees" and "employee records" was unlawful because it would reasonably be understood by employees to restrict discussion of terms and conditions of employment. In addition, the board stated employees would reasonably interpret the rule as prohibiting communications with the board and other government agencies concerned with workplace matters.

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The fourth work policy at issue, posted on the employer's intranet, stated that employees may not disclose company information that is not already disclosed as a public record. The employee handbook defined "company information" as including "employee records." The board found the policy to be unlawful because employees would understand the policy to prohibit disclosure of employee records, which would include information concerning their own or other employees' wages, discipline and performance.

The board also held the employer's efforts to clarify its rules did not amount to a repudiation of its unlawful conduct because they were untimely and the employer did not admit wrongdoing.

Salary Information

On Feb. 8, 2013, the board again addressed employer rules and policies in *Jones & Carter*, 16-CA-027969 (Feb. 8, 2013). The board upheld the administrative law judge's (ALJ) decision that a non-union firm violated the NLRA by discharging an employee for disobeying its confidentiality rule that prohibited employees from discussing salary information with each other.

Specifically, the rule provided that financial matters concerning either the employer's clients or the employer will not be discussed with outsiders or friends under any circumstances. Conflicting testimony existed as to whether the employer terminated an employee for allegedly harassing and badgering coworkers about their salaries or for discussing salary information in violation of the employer's confidentiality rule.

The ALJ found that the employer's confidentiality rule was widely viewed in the workplace as prohibiting employees from discussing salaries and that the employee was terminated for violating this rule. The ALJ noted that the employer's shifting reasons for terminating the employee undermined the employer's attempts to depict its discharge of the employee as based on anything other than her protected activity, that is, discussing salary information with another employee. A coworker testified that she felt the employee's discussions about employee salaries were "wrong and deceptive," but the ALJ stated there was no credible evidence that the employee harassed the coworker or "engaged in conduct that would have been so egregious that she lost the protection of the [NLRA]."

Following Decisions

Until the U.S. Supreme Court renders a final decision in *Canning*, employers are advised to consider all recent board decisions as having continuing applicability.