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Labor Relations

Expert Analysis

Changing Trends and Developments At the National Labor Relations Board

The National Labor Relations Board (NLRB) has taken a number of actions during the term of President Barack Obama considered favorable to unions in the organizing process, including, for example, expanding the joint employer concept to make companies liable for labor violations of their contractors, staffing agencies and franchisees; implementing new rules that speed up the pace of representation elections; allowing easier access to union elections for contractor/staffing agency employees; and permitting small bargaining units within a large group of employees.

This month's column focuses on significant 2016 decisions of the board which may or may not survive under a new administration. In this regard, there currently are three board members (two Democrats and one Republican) and two vacancies which we expect the new president to fill promptly.

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Organizing

In a departure from years of precedent set in *Brown University*, 342 NLRB 483 (2004), the board held graduate teaching and research assistants at Columbia University have the right to be represented by a union under the National Labor Relations Act (NLRA). *Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016). This case opens the door for graduate students at private universities across the country to unionize. The board was not swayed by concerns that graduate students, apart from their employment relationship, primarily are students with academic duties.

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In another decision vacating established precedent, the board overturned *Oakwood Care Center*, 343 NLRB 659 (2004), and made it easier for unions to organize employees in bargaining units that combine a company's regular employees and temporary workers supplied by a staffing agency. The prior rule was that in an organizing campaign, both the "user" company and "supplier" company would have to consent to the bargaining unit for the election to proceed. In *Miller & Anderson, Inc*., 364 NLRB No. 39 (2016), the board held consent of both employers is not required in certain circumstances, such as when solely and jointly employed workers share a community of interest (e.g., similarity of skills and functions, common supervision, extent of interchange between groups of employees, common work locations, and similar benefits and hours).

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Successorship

Under longstanding labor principles, a purchaser of assets ordinarily is not required to assume an existing collective bargaining agreement (where the agreement is otherwise silent), but rather may set its own initial terms and conditions of employment and bargain with the union over subsequent changes. However, if the purchaser makes "perfectly clear" it plans to retain all of the seller's employees and fails to clearly announce its intent to establish new employment terms and conditions prior to inviting those employees to accept employment, it may be required to continue the terms of the existing collective bargaining agreement at the outset. The board applied this important doctrine, known as the Spruce Up doctrine, in several 2016 rulings.

In *Nexeo Solutions, LLC,* 364 NLRB No. 44 (2016), the purchaser committed in the asset purchase agreement to offer employment to all of seller's employees and provide them with wages no less favorable than, and employee benefits substantially comparable in the aggregate to, those they were receiving from seller. Seller's communications with its employees immediately after the purchase agreement was signed made clear they would be hired by the purchaser but did not specifically address their terms and conditions of employment with the purchaser. Over three months later, the purchaser's offer letters informed seller's employees the purchaser would not adopt the collective bargaining agreement and instead would set new terms and conditions of employment, including participation in a 401(k) plan instead of a multi-employer

pension plan and a different health insurance plan.

The board held the purchaser was a perfectly clear successor and therefore unlawfully implemented new terms and conditions without first consulting with the union. It found the purchaser became a perfectly clear successor when the seller first communicated the purchaser's intent to retain the seller's employees without making explicit that employment would be conditioned on acceptance of new terms. Such communications were found attributable to the purchaser, as it authorized and ratified such communications, and waited more than three months to notify the employees that employment would be conditioned on the acceptance of new terms.

In contrast, in *Paragon Systems, Inc*., 364 NLRB No. 75 (2016), the board found the respondent company was not a perfectly clear successor and therefore did not act unlawfully by changing certain terms and conditions of employment when it began operations without giving the union notice or the opportunity to bargain. The company was awarded a federal service contract to provide guard services at a government building and therefore was subject to an executive order requiring it to offer employment on a first refusal basis to non-managerial and non-supervisory employees whose employment would be terminated as a result of the award of the successor contract.

To comply with the executive order, the company posted a memo at the workplace inviting the predecessor's employees to attend a job fair and complete the company's application process to be considered for employment. In finding the company was not a perfectly clear successor, the board explained the job fair memo did not express the company's intent to hire the predecessor's employees and there was no evidence those employees would interpret the job fair memo as an actual offer of employment.

Unequivocal Waiver

In *Graymont PA, Inc.,* 364 NLRB No. 37 (2016), the board concluded the union did not clearly and unmistakably waive its right to bargain over changes to the employer's work rules, absenteeism policy and progressive discipline schedule, and the employer violated the NLRA by unilaterally implementing such changes during the term of the collective bargaining agreement. The employer relied on a broad management rights clause in the collective bargaining agreement stating it retained the sole and exclusive right to discipline and discharge for just cause and to adopt and enforce rules, regulations, policies and procedures.

The employer denied the union's request to discuss the policy changes and provide documents related to the changes, asserting the union had waived its right to bargain by agreeing to the management rights clause; it did not inform the union the requested documents did not exist.

In a precedent-changing decision, the board in 'American Baptist Homes of the West' held a California continuing care facility violated the NLRA by hiring permanent replacements during an economic strike to punish striking employees and avoid future strikes.

Emphasizing the need for specificity in management rights clauses, the board found the clause here did not explicitly reference work rules, absenteeism or progressive discipline, and therefore it could not be construed as a clear and unmistakable waiver of the union's right to bargain over those subjects.

The board also held the employer committed an unfair labor practice by failing to timely inform the union it did not possess information the union requested about the rule and policy changes. In doing so, the board overturned its nearly decade-old rule set in *Raley's Supermarkets & Drug Centers,* 349 NLRB 26 (2007), that finding such a violation is precluded by the absence of a specific allegation in the complaint to that effect.

The board now held an employer may be found to have committed an unfair labor practice for failing to disclose the nonexistence of documents requested by a union, even absent a specific allegation in the complaint, if the issue is closely connected to the subject matter of the complaint and has been fully litigated. Thus, following *Graymont*, where no information responsive to a request exists, employers may wish to indicate that promptly and contemporaneously with any challenges to the union's right to the information.

Replacement Workers

In a precedent-changing decision, the board in *American Baptist Homes of the West,* 364 NLRB No. 13 (2016), held a California continuing care facility violated the NLRA by hiring permanent replacements during an economic strike to punish striking employees and avoid future strikes. Ever since the board's decision in *Hot Shoppes, Inc.,* 146 NLRB 802 (1964), employers have been permitted to hire permanent replacement workers for economic strikers unless the union can put forth evidence the employer was motivated by an "independent unlawful purpose." An "independent unlawful purpose" has been understood to exist when an employer's hiring of replacement workers was "unrelated or extraneous to the strike itself."

However, in *American Baptist Homes* the board held the union is not required to show an employer was motivated by an unlawful purpose extrinsic to the strike, but only that the hiring of permanent replacements was motivated by a purpose prohibited by the act (e.g., intent to discriminate or discourage union membership). This decision may limit an employer's ability to permanently replace economic strikers, as the employer may have to defend itself against an argument that its motivation was to punish the strikers or discourage striking.

Conclusion

With the new administration's anticipated appointments to the board, and a new general counsel expected in late 2017, a number of the rulings discussed in this column and others issued in recent years may eventually be overturned. However, employers are advised to be focused on these important rulings and their implications, as the board cannot overnight overturn precedents of the last eight years but must wait to rule as new matters are appealed to the full board.