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LABOR RELATIONS

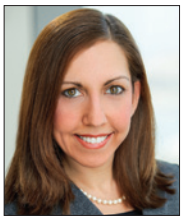
Expert Analysis

NLRB Developments: Unilateral Action, Union Rejection and More

Continuing a trend that began in 2017, the National Labor Relations Board (Board) issued many decisions in recent months rolling back employee protections. A number of these decisions overturn years-old precedent. This column, the second of two examining developments from the Board, highlights important rulings impacting both unionized and non-unionized workplaces.

Unilateral Action

In *MV Transportation*, 368 NLRB 66 (Sept. 10, 2019), the Board reversed nearly 70 years of precedent and adopted a new standard for evaluating whether a collective bargaining agreement permits unilateral action by an employer. At issue was whether the employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by implementing new work policies concerning light duty assignments and disciplinary standards without first bargaining with the union to impasse.



By **David E. Schwartz**

And **Risa M. Salins**

Since the 1940s, the Board applied the "clear and unmistakable waiver" standard when analyzing whether a collective bargaining agreement permits an employer's unilateral action. That standard, reaffirmed in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), required an employer to establish the contract "unequivocally and specifically" permitted the unilateral action at issue. This standard proved to be difficult for employers to meet and was expressly rejected by several courts of appeals, including the D.C. Circuit. See *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

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In *MV Transportation*, the Board overruled *Provena St. Joseph* and replaced the clear and unmistakable waiver standard with the "contract coverage" standard, which previously had been adopted by the D.C. Circuit. Under this standard, the Board will first examine the plain language of the parties' collective bargaining agreement to determine whether a provision authorizes unilateral action, and whether the employer's unilateral action is within the "compass or scope" of that provision. If an employer's action is found to be outside the scope of such a provision, then the employer may act unilaterally only if it can point to evidence, such as past practice and bargaining history, that the union actually did waive its right to bargain over the action.

Among other reasons for adopting the contract coverage standard, the Board majority reasoned the clear and unmistakable waiver standard required perpetual bargaining over contract terms instead of encouraging parties to negotiate comprehensive collective bargaining agreements from the outset.

Applying the contract coverage standard retroactively, the *MV Transportation* board found the

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broad "management rights" clause in the parties' agreement granting the employer the right to "assign all schedules," "discipline and discharge for cause," and "adopt and enforce reasonable work rules" authorized unilateral implementation of the new work policies at issue.

Following *MV Transportation*, it is anticipated employers will have more flexibility to act unilaterally, even when a collective bargaining agreement does not explicitly authorize a particular action. However, employers should expect unions will be cautious not to agree to language in management rights clauses that might result in an open door to unilateral changes during the contract term.

Anticipatory Repudiation

In *Johnson Controls*, 368 NLRB 20 (July 3, 2019), the Board adopted new rules for an employer's anticipatory withdrawal of union recognition. Under long-standing precedent, when an employer receives objective evidence, within a reasonable period of time before a collective bargaining agreement expires, that a majority of employees no longer wish to be represented by the union, that employer may lawfully announce it intends to withdraw recognition of that union after the contract expires. The employer must continue to comply with the existing contract through the end of its term, but may cease bargaining for a successor agreement.

However, the Board's decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001), allowed unions the chance to re-establish majority support—by, for example, collecting authorization cards from a majority of bargaining unit employees—in the period between an employer's anticipatory and actual withdrawal of recognition. The union's "last in time" proof of majority status would render the employer's post-contract expiration withdrawal unlawful and a violation of NLRA Section 8(a)(5). In such a case, the employer would be required to recognize and bargain with the union for at least one year ("certification bar" period) and, should a contract be reached, during the term of the contract, up to three years ("contract bar" period).

The *Johnson Controls* board overruled *Levitz Furniture* in two important respects. First, it held the "reasonable period of time" prior to contract expiration within which recognition may be anticipatorily withdrawn is no more than ninety days before the expiration date. Second, in order to re-establish majority support, rather than collecting signatures on authorization cards, a union must now petition the board for an election within 45 days of the employer announcing its anticipatory withdrawal. If such a petition is timely filed, the union's representative status following contact expiration will be determined through a board-conducted secret-ballot election. If no such petition is timely filed, the employer may safely withdraw recognition at the time of contract expiration. The Board reasoned that its new framework safeguards employee free choice about representation.

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The new *Johnson Controls* process permits employers to withdraw recognition of a union immediately upon contract expiration, based on its earlier evidence of the union's loss of majority support, without facing unfair labor practice charges. However, if an election petition has been filed under the *Johnson Controls* framework, an employer should be cautious about making unilateral changes, as such changes during the critical period before a recertification election could risk tainting election results and requiring a second election.

Decertification

In *Pinnacle Foods Group*, 368 NLRB 97 (Oct. 21, 2019), the Board continued its trend of making it easier to remove unions. In this case, the Board revived a worker's petition to decertify his union despite a settlement agreement between his employer and the union that extended the period when such decertification petitions are prohibited.

Under the Board's "certification bar" doctrine, a union enjoys a year-long period after it is certified, during which its status cannot be challenged by a decertification petition. This certification year can be extended if an employer commits an unfair labor practice by failing to bargain in good faith during the original one-year period.

In *Pinnacle Foods*, 17 months of bargaining between the employer and union yielded no agreement, after which an employee filed a petition to

decertify the union. A week later, the union filed an unfair labor practice charge, alleging the employer failed to bargain in good faith. Ultimately, the employer and union settled this charge. Although the settlement agreement contained a non-admission clause, the employer agreed to extend the certification year by an additional seven months. Following the settlement, the NLRB regional director dismissed the employee's decertification petition under the Board's certification bar doctrine, finding the petition was filed during the extended certification year.

The Board held the regional director's dismissal was factually and legally flawed. Factually, the Board found the decertification petition was not filed during the certification year, but rather was filed several months after the original certification year ended and months before the parties' settlement extended the certification year. Legally, the Board held the employee's right to have his decertification petition processed could not be waived by a settlement to which the employee was not a party. The Board also noted that in order to dismiss a properly-filed decertification petition, there must be a finding or admission that the employer violated the NLRA, neither of which was present in this case.

The *Pinnacle Foods* ruling makes it more difficult for unions to interfere with workers' right to hold a decertification election. However, it demonstrates the importance of including a non-admissions clause in any unfair labor practice settlement.

Workplace Policies

In *LA Specialty Produce Company*, 368 NLRB 93 (Oct. 10, 2019), the Board ruled that an employer's "confidentiality & non-disclosure" and "media contact" policies did not interfere with employees' rights under Section 7 of the NLRA to engage in concerted activities for purposes of mutual aid and protection.

In 2017, the Board in *The Boeing Company*, 365 NLRB 154 (Dec. 14, 2017), adopted a three-tier classification for workplace policies under its review: those that do not interfere with employees' NLRA rights and are lawful, those that require case-by-case scrutiny, and those that are unlawful for an employer to maintain. In *LA Specialty Produce*, the Board applied the *Boeing* standard and explained for the first time that the Board's general counsel bears the initial burden of proving the challenged policy would be interpreted by a reasonable employee as interfering with Section 7 rights. If the general counsel is unable to meet this initial burden, the policy in question is lawful. If the general counsel does meet the initial burden, the Board then balances the policy's potential interference with Section 7 rights and the employer's asserted justifications for the policy.

The confidentiality & non-disclosure policy at issue in *LA Specialty Produce* required employees to protect information regarding "matters that are confidential and proprietary of [employer] including but not limited to client/vendor lists." Applying the *Boeing* test, the board found a reasonable employee would not interpret this policy as interfering with his or her Section 7 right to appeal to customers or vendors in labor disputes. Therefore, it held the confidentiality policy lawful without balancing the employer's purported justification for the rule.

The media contact policy stated the company's president "is the only person authorized and designated to comment on company policies or an event that may affect [the] organization," and prohibited employees from providing information to the media when approached. Applying *Boeing*, the Board found a reasonable employee would interpret this rule as only prohibiting employees from speaking on the company's behalf when approached by the media, not as restricting employees from communicating their personal opinions about wages and working conditions to the media. The Board held that since there is no Section 7 right to speak to the media on behalf of the employer, such policy does not potentially interfere with the exercise of Section 7 rights.

Union and non-union employers should take this opportunity to review workplace policies to ensure they are not reasonably interpreted to interfere with employees' rights under Section 7 of the NLRA.

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