Ogletree Deakins

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The Practical NLRB Advisor

NLRB eases path to removing union via "anticipatory withdrawal"

In this Issue

The International Association of Machinists and Aerospace Workers (IAM) has long been a fixture at Morales Manufacturing. With the parties' sixth consecutive collective bargaining agreement (CBA) about to expire, the company was meeting twice monthly with the union's bargaining committee to negotiate a successor three-year contract. However, about six weeks before the contract's end, several employees came to see Jim Galva, Morales Manufacturing's director of labor relations, and presented a petition signed by 43 employees in the 80-member bargaining unit stating that the undersigned no longer wished to be represented by the IAM. Later that day, Galva called the head of the local's bargaining committee to inform the union that the company would be withdrawing recognition when the current CBA expired and cancelling their scheduled bargaining sessions.

The union was taken by surprise. It knew there were a few disaffected bargaining unit members who were unhappy with the outcome of their grievances, but it was unaware that the dissatisfaction was so widespread. But the union quickly regrouped, reached out to the members, and began to solicit authorization cards. The union got a few disaffected members back on board and asked to meet with Galva to show him the 45 signed cards it had collected. But Galva refused and told the union that he was "sticking with the petition." Morales Manufacturing ran out the clock on the existing contract and then implemented the terms and conditions that it had presented at the initial bargaining session.

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BRIAN IN BRIEF

With predictable regularity, proponents of organized labor have criticized the current National Labor Relations Board (NLRB) for being anti-union or pro-management. These characterizations are off base; more important, they imply a view of the National Labor Relations Act (NLRA) that is fundamentally wrong. The NLRA does not principally exist for the benefit of unions any more than it exists for the benefit of employers. The primary focus of the Act is, and always has been, employees, especially their right of free choice.

Employees' right to choose, or to continue, exclusive representation by a union, and the equal and complementary right to decline to do so, are the animating principles of the statute. Often, however, these basic statutory objectives have been sublimated to more partisan ends. Thus, under the guise of maintaining "industrial stability," procedural obstacles have been erected to ensure a union's incumbency and deprive employees of free choice; unions and employers have been permitted to circumvent meaningful employee input and impose "top-down" representation; relatively minor unfair labor practices have been utilized to invalidate electoral outcomes that reject representation; and, in an effort to punish employers, bargaining orders have imposed a union on employees who did not vote for it and may not wish to be represented by it.

Fortunately, the current Board is peeling back policies and precedent that masquerade as protecting employee rights while actually impeding employee choice. For example, the Board's newly proposed election rules would eliminate the much-abused "blocking charge" policy, which unions have routinely utilized to frustrate employee decertification efforts, and replace it with a sensible "vote and impound" regime. Also slated for rule revision are the "recognition bar" and "8(f) conversion" rules, which have effectively allowed employers and unions—not employees—to determine questions of representation without meaningful employee input.

When employees are accorded the right to choose, there is always the prospect that they will reject unionization. Given that risk, it is little wonder that some in organized labor would seek to deceptively conflate enhanced employee choice with anti-union bias.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

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Anticipatory withdrawal. The National Labor Relations Board (NLRB) has created a new framework for determining whether an incumbent union has lost the support of a majority of bargaining unit members in circumstances where an employer informs a union that it will withdraw recognition when the current CBA expires.

The Board has overruled its "last in time" doctrine, first established in *Levitz Furniture Co. of the Pacific, Inc.* (2001), under which an incumbent union could defeat an employer's "anticipatory withdrawal" of recognition by filing an unfair labor practice (ULP) charge and presenting evidence that it had reacquired majority support in the interim period between anticipatory withdrawal and the expiration of the CBA when the actual withdrawal would occur.

As a practical matter, the new framework provides greater certainty and a better guarantee of employee free choice.

Pursuant to the divided four-member opinion in *Johnson Controls, Inc.*, issued on July 3, 2019, the Board will now require a union seeking to restore recognition to file a petition for a Board-conducted, secret-ballot representation election in order to establish that it once again enjoys majority support.

Disaffection. In *Johnson Controls*, a unionized automobile parts manufacturer received a union disaffection petition signed by 83 of 160 bargaining unit employees. Later that same day, the employer notified the union that it would no longer recognize the union as the employees' bargaining representative and would cease bargaining for a successor contract. The union, however, had not received any verifiable evidence that it no longer enjoyed majority support. It responded to the employer's assertion by soliciting new authorization cards from unit employees. It collected 69 signatures, 6 of which were from "dual signers" who also had signed the disaffection petition. The union informed the employer that it had credible evidence that it retained majority support, but the employer declined the union's offer to meet to compare evidence and thus withdrew recognition.

The union filed a refusal-to-bargain charge with the NLRB, effectively blocking a petition for a decertification election. At the ULP hearing, four of the six dual signers testified that on the day the employer withdrew recognition, they did not want the union to represent them. Based on the disaffection petition and the testimony of the four dual signers, the Board majority concluded that on the critical date in question—the date the employer withdraw recognition—the union did not have majority support. Therefore, it dismissed the union's complaint.

A new framework. Under the *Levitz* standard, all six dual signers would have been counted as supporting the union since they signed union authorization cards *after* they signed the disaffection petition. Under such circumstances, their earlier signatures on the petition would have been disregarded. Thus, despite the employer's good-faith belief that anticipatory withdrawal was warranted based on the objective evidence of the disaffection petition, the employer would, nonetheless have committed a ULP by refusing to bargain further once the contract expired. In the Board majority's view, this approach was both unfair and unworkable.

In *Johnson Controls,* the Board majority delineated a more logical and workable policy for resolving anticipatory withdrawal cases. Under the new framework, proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. A union may no longer file a ULP charge to challenge an anticipatory withdrawal of recognition. However, the union may attempt to reestablish that status by filing an election petition within 45 days from the date the employer gives notice of an anticipatory withdrawal.

As a practical matter, the new framework provides greater certainty and a better guarantee of employee free choice. It "ends the unsatisfactory process of attempting to resolve conflicting evidence of employees' sentiments concerning representation in unfair labor practice cases," the majority explained. "Instead, such issues will be resolved as they should be: through an election, the preferred method for determining employees' representational preferences."

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As a matter of policy and statutory purpose, moreover, the *Johnson Controls* decision reflects the Trump Board's desire to forge a clearer path for employees seeking to oust a disfavored union, thus making it easier for employees to exercise their free choice of bargaining representative—including removing a union that no longer serves their needs.

The Board has indicated it will apply this new framework retroactively.

Proceed with caution. Previously, in the hypothetical, Morales Manufacturing would have engaged in anticipatory withdrawal at its peril. Indeed, given that the union later obtained a new card majority, it would have been exposed to ULP liability. Under *Johnson Controls*, that risk has now dissipated.

However, companies like Morales Manufacturing must continue to exercise caution. For example, although the end-of-contract withdrawal is now permissible, an employer will need to proceed carefully when implementing new employment terms and conditions after a contract expires. If the IAM had filed an election petition seeking to regain its status as bargaining representative, Morales Manufacturing could draw ULP charges for election interference. And even if employees once again reject the union in a Board-conducted representation election, the union could get yet another chance, in the form of a second election.

Caveats. The Board's *Johnson Controls* ruling is a favorable one for employers seeking to honor employees' requests to end a relationship with an incumbent union when the current CBA expires. However, there are several practical points to keep in mind:

- Objective evidence that a union no longer enjoys majority support—typically in the form of a disaffection petition—allows an employer to make an anticipatory withdrawal of recognition and suspend bargaining for a successor contract. It does *not*, however, permit the employer to cease honoring the current CBA while it remains in effect.
- If an employer is found to have *caused* employee disaffection from the union by engaging in bad-faith bargaining or other misconduct, or is found to have assisted the decertification effort, then the withdrawal of recognition will be tainted and deemed unlawful.
- An employer must consider whether a representation election petition has been filed by the ousted union before moving to implement new terms and conditions of employment once the current CBA expires. If a petition is pending, making such unilateral changes will likely constitute election interference, which could result in a rerun election as well as ULP liability. ■

NLRB proposes changes to representation case procedures

On August 12, 2019, the National Labor Relations Board (NLRB) published a notice of proposed rulemaking (NPRM) with regard to several of its election and recognition policies. According to the Board, the proposed amendments are designed to "better protect employees' statutory right of free choice on questions concerning representation."

The issuance of this NPRM is likely the first step in an ongoing overhaul of the agency's representation case rules that were the subject of substantial and controversial revision by the Obama Board.

The NPRM proposes three policy changes that are significant, although somewhat limited in scope:

1. The proposed rule would change the Board's current blocking charge policy. Under the current rubric, a scheduled NLRB election may be postponed if the union files an unfair labor practice charge that, if sustained, might affect the election results. Unions have often successfully used the blocking charge policy to indefinitely postpone a Board-supervised decertification vote. Under the new rule, the election would proceed as scheduled; however, the ballots would be impounded pending resolution of the charge and its likely impact.
2. The new rule would reinstate the Board's *Dana* policy, which provides employees with notice and a 45-day disapproval window in cases in which a union and an

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employer agree to voluntary recognition. The *Dana* policy, which was adopted to minimize the reach of so-called "top down" organizing efforts in which employees did not have a vote prior to recognition of the union, was abandoned by the Obama Board.

3. The proposed rule would require actual, contemporaneous proof of majority status before a Section 8(f) contract could be turned into a Section 9(a) agreement. In the construction industry, Section 8(f) of the National Labor Relations Act (NLRA) permits employers and unions to enter into collective bargaining agreements before the union achieves majority status. Either party may unilaterally terminate the relationship at the end of the contract. By contrast, an agreement under Section 9(a) of the Act is based on majority status, and the relationship may not be unilaterally terminated when the contract ends. The proposed rule would require actual evidence of majority status and eliminate any confusion as to whether the conversion can be achieved by any alternative method.

The proposed changes will not be finalized until after the Board reviews comments submitted by the public, including unions, employers, and other interested parties. The 60-day comment period will end on October 11, 2019. ■

Ongoing coverage

We will continue to track and report on these important developments and their broader implications for the business community on the Ogletree Deakins blog. For a more in-depth discussion of these and other issues, please join us at our Labor Law Solutions seminar in Nashville, Tennessee, December 4–6, 2019.

"Scabby the Rat" update

Federal court quashes regional director's bid to exterminate the union mascot

In Issue 12 of the Practical NLRB Advisor, we discussed recent developments in the National Labor Relations Board's (NLRB) renewed effort to limit the use of inflatable rodents by labor unions at the sites of labor disputes. "Scabby the Rat" is typically erected at a worksite where the owner or general contractor is using a nonunion company or subcontractor to perform work. The union's dispute, of course, is with the nonunion employer. However, the logistical and public relations pressure engendered by Scabby is directed at the owner or general contractor—a neutral in the underlying dispute. The Board's general counsel (GC), Peter B. Robb, has taken the position that, under these circumstances, displaying Scabby amounts to the use of unlawful secondary pressure against the neutral employer.

However, in a setback for the GC, a federal court in New York on July 1, 2019, in *King v. Construction & General Building Laborers' Local 79, Laborers International Union of North America,* denied an NLRB regional director's request for a preliminary injunction under Section 10(l) of the National Labor Relations Act (NLRA), barring Construction & General Building Laborers' Local 79 from picketing a grocery store with inflatable rats and cockroaches. While the agency was hopeful that a federal judge's ruling could deflate Scabby for good, the judge was unwilling to prohibit what he deemed expressive conduct, citing "serious constitutional concerns" and rejecting the Board's position that the inflatable rat's presence amounted to unlawful economic coercion. For the regional director, it was the second such defeat; weeks earlier, another district court judge had rejected her motion for a temporary restraining order in the case, finding it doubtful the NLRB could succeed on the merits of its claim in light of the extant case law on unions' use of inflatable rats.

Although the court denied injunctive relief, the underlying unfair labor practice charge, which alleges that the union violated the NLRA by engaging in unlawful secondary picketing, is still pending before an NLRB administrative law judge. Meanwhile, another Scabby case is currently

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Other NLRB developments

Supreme Court of the United States decision

***Auer* deference remains, but its power is diluted.** In an administrative law decision that has implications in the labor law arena, the Supreme Court of the United States declined to completely overturn the *Auer* doctrine, under which federal courts must accord deference to a federal agency's reasonable interpretation of its own regulation when the regulatory provision in question is "genuinely ambiguous." For nearly a century, Congress has let this deference regime work side by side with both the Administrative Procedure Act and the many statutes delegating rulemaking power to agencies. The Court said that it would need a particularly "special justification" to reverse *Auer*, and nothing in this case persuaded the justices that federal courts should take over agencies' expertise-based policymaking functions. However, the justices did impose significant limitations on the doctrine, clarifying for reviewing federal courts the limited instances in which *Auer* deference is due (*Kisor v. Wilkie*, June 26, 2019).

The justices were unanimous in finding that the court below misapplied *Auer* in the case under review. However, Justices Neil Gorsuch and Brett Kavanaugh each filed separate concurrences criticizing the majority's decision to keep *Auer* on "life support." Writing at length about this decision in an Ogletree Deakins blog post, John F. Martin, shareholder in the firm's Washington D.C. office, noted, "Although the Supreme Court allowed *Auer* to live another day, the justices could not agree on its future." Justice Gorsuch called the decision merely a "stay of execution," adding that with the "many new and nebulous qualifications and limitations on *Auer*" imposed by the majority opinion, the Auer doctrine "emerges maimed and enfeebled—in truth, zombified."

"Justice Gorsuch's prediction will likely come true," according to Martin. "[W]e will see *Auer* deference pay another visit to the Supreme Court sometime in the future."

Circuit court decisions

Union entitled to see unredacted third-party contract. An installation and services contractor for DirecTV was required to provide a full, unredacted copy of its home services provider (HSP) agreement with DirecTV to the union representing its installation technicians, ruled the U.S. Court of Appeals for the District of Columbia Circuit. The HSP was not presumptively relevant because it did not pertain directly to bargaining unit employees. It was relevant, however, because DirecTV incorporated the HSP agreement by reference in its bargaining proposal, which stated that any new work that arises during the term of the agreement would not count as bargaining unit work unless it was "pursuant to its Home Service Provider agreement with DirecTV." The union needed the unredacted agreement so that it could evaluate the extent of unit work covered by the employer's bargaining proposal. As the Board had explained,

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teed up before the Board, giving the Republican majority an opportunity to alter the trajectory of NLRB common law on this issue.

Tort claims also deflated. In a related development since our last issue, the U.S. District Court for the District of New Jersey rejected a commercial laundry service's defamation and tortious interference claims arising from a union's conduct in a labor dispute, which included displaying an inflatable rat to inform the company's customers of its alleged unfair labor practices. In the court's view, "the allegations show the Union conducted a peaceful labor protest intended to exert economic pressure on Ritz hotel customers. That is constitutionally protected conduct." The court found the employer's tort claims were thus preempted by the NLRA (*Ritz Hotels Services, LLC v. Brotherhood of Amalgamated Trades Local Union 514*, June 27, 2019).

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the union "'cannot be reasonably expected to integrate another agreement between the employer and a third party into its own collective-bargaining agreement without having a complete understanding of the contents of the incorporated document and the context of the relevant portions within the document as a whole'" (*DirectSat USA LLC v. National Labor Relations Board*, June 7, 2019).

Union work slowdown enjoined. The D.C. Circuit affirmed a preliminary injunction stopping a union from encouraging pilots to "block out on time," call in sick on short notice, and refuse to volunteer for overtime shifts in an attempt to gain leverage over two commercial air carriers during contract negotiations. Congress permits courts to issue injunctions in rare cases, and this was one of them, the appeals court found. Not only did the district court have jurisdiction under the Railway Labor Act to enter a status quo injunction in this major dispute, but it did not abuse its discretion in enjoining the union's conduct. The carriers demonstrated a likelihood of success on the merits, and the injunction was not overbroad (*Atlas Air, Inc. v. International Brotherhood of Teamsters*, July 5, 2019).

NLRB must decide if judicial estoppel applies. The D.C. Circuit declined to enforce an NLRB decision in which it assumed jurisdiction over a university hospital and a union despite the fact that the union had repeatedly taken the position that the parties were under the jurisdiction of a state labor board. The union originally filed a representation petition with the Pennsylvania Labor Relations Board (PLRB) arguing that the state agency had jurisdiction. Over the next several years, the union filed more than 20 unfair labor practice (ULP) charges with the PLRB. However, when the union sought to add a group of employees to an existing bargaining unit, it filed its claim before the NLRB. The hospital argued the union was judicially estopped from invoking NLRB jurisdiction because it had argued in prior proceedings that the Board lacked jurisdiction. The threshold question was whether the doctrine of judicial estoppel applies in NLRB proceedings. The Board failed to address the question and merely assumed that the doctrine applied. Thus, while the appeals court ultimately found the Board's holding was in error and overturned the Board's jurisdictional determination on the merits, the court declined to answer whether judicial estoppel applies in NLRB proceedings, finding it more appropriate for the Board to consider the issue in the first instance. It remanded the case for the Board to first address the question of whether the doctrine applies and, if so, to explain whether the hospital made a sufficient showing of unfair advantage or unfair detriment, and whether the balance of equities favored estoppel (*Temple University Hospital, Inc. v. National Labor Relations Board*, July 9, 2019).

Employer engaged in unlawful direct dealing. The D.C. Circuit found that substantial evidence supported the Board's finding that an employer engaged in direct dealing with employees and denigrated their union. An employer violates the NLRA if it directly solicits employees' input on a subject of pending negotiations. The employer acknowledged that its chief negotiator spoke to at least five employees during a visit to the plant, but it asserted that his "impromptu conversations" were too "brief and general" to constitute direct dealing. The employer pointed to nothing in the record, however, that would cause the court to doubt the reasonableness of the Board's finding. The appeals court also found that the employer prematurely declared

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In our next issue

The National Labor Relations Board (NLRB) recently issued several significant decisions that reassert the right of employers to assert control over their property.

The NLRB overturned the longstanding "public space" exception, setting a new standard for nonemployee (i.e., union organizer) access to public spaces within an employer's facilities, such as hospital cafeterias. The NLRB reversed Obama-era precedent and restored the right of a business to bar subcontractors and employees of other third parties from engaging in labor protests on company property. Finally, the Board held that an employer is not required to grant a non-employee union agent access to its property to solicit its customers to boycott its store. These important rulings restore an employer's right to decide what types of activities, if any, it will allow by nonemployees on its property.

We will discuss these latest Board rulings, and employer property rights generally, in the forthcoming issue of the *Practical NLRB Advisor*.

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an impasse in negotiations and unilaterally implemented new terms and conditions without first reaching an overall impasse. Additionally, the court found no merit to the employer's contentions that the Board violated its due process rights and improperly imposed a notice-reading remedy (*National Labor Relations Board v. Ingredion, Inc. dba Penford Products Co.*, July 19, 2019).

Arbitrator had authority to impose lesser discipline. The U.S. Court of Appeals for the First Circuit upheld an arbitration award finding that a nurse's inappropriate touching of a coworker's face did not warrant termination, and imposing less severe discipline. The nurse squeezed a coworker's cheek during a dispute over a vacation schedule, and her hospital employer deemed this an "assault"—a Group III offense under its formal discipline policy, which was incorporated into the operative bargaining agreement. Group III offenses, the most serious of infractions, include such actions as "threatening, intimidating, or coercing fellow employees," and call for immediate termination. However, the appeals court reasoned that the arbitrator could have plausibly interpreted the nurse's conduct as less severe than the other offenses listed in Group III and thus outside this category. Therefore, even if the arbitrator lacked authority to overrule the hospital's decision to terminate an employee for committing a Group III offense, nothing in the collective bargaining agreement (CBA) or the relevant hospital policy required the arbitrator to classify the nurse's conduct in question as a Group III offense. The court also rejected the hospital's argument that once the arbitrator concluded just cause existed for any form of discipline, he lacked authority to modify the employer's chosen discipline in any way, whether or not it was for a Group III offense. Rather, it held the arbitrator acted within his authority by imposing discipline short of discharge (*Steward Holy Family Hospital, Inc. v. Massachusetts Nurses Association*, August 1, 2019).

Question about "this Union stuff" was not coercive. A manager's single question to an open union supporter—"what's going on with this Union stuff?"—was not unlawful interrogation, a divided panel of the U.S. Court of Appeals for the Second Circuit held, refusing to enforce an NLRB order to the contrary. Employers have a First Amendment right to communicate with employees about union activity; such communications do not constitute ULPs so long as they do not contain a threat of reprisal or promise of benefit. Here, the question was not accompanied by any threat of reprisal or promise of benefits, so the question was not coercive. The court also rejected a Board finding that the employer unlawfully discharged an employee who refused to attend a mandatory meeting with management. The employer arranged the meeting because the employee had claimed that the company was manipulating its labor standards each day for the purpose of cheating employees; managers brought in the company's industrial engineers to explain that the targets were not subject to manipulation. Although the appeals court upheld other Board ULP findings, it found the violations and the employer's history did not warrant the extraordinary remedy of directing the employer to read aloud the Board's remedial notice at an employee meeting. The appeals court's decision on this latter point is noteworthy since many management-side observers have argued that the NLRB is routinely imposing "extraordinary" remedies without sufficiently articulating the grounds for doing so (*Bozzuto's Inc. v. National Labor Relations Board*, June 24, 2019.).

Employers have a First Amendment right to communicate with employees about union activity[.]

Selective implementation of pre-impasse proposals unlawful. An employer violated the NLRA when, after reaching an impasse in negotiations for a successor bargaining agreement with the union, it eliminated retiree healthcare benefits without implementing proposed wage increases that were "inextricably intertwined" in its final comprehensive offer of settlement, ruled the U.S. Court of Appeals for the Sixth Circuit. After parties bargain to impasse, an employer may lawfully make unilateral changes "that are reasonably comprehended within [its] pre-impasse proposals and are consistent with the offers the Union has rejected." However, an employer "may not implement changes which are substantially different from . . . any which the employer has proposed during its negotiations." Thus, an employer violates the NLRA when it selectively

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implements "proposals that are 'inextricably linked' with unimplemented proposals." Here, the wage increases were inextricably intertwined with, and a *quid pro quo* for, the employer's proposal to eliminate retiree health benefits (*FirstEnergy Generation, LLC v. National Labor Relations Board*, July 2, 2019).

Employer fired workers to get union to "back off." Firing union crane operators to persuade a union local to be more reasonable in the face of a weak market, in addition to the employer's unwillingness to deal with aggressive new union leadership, constituted unlawful discharge due to union advocacy on the workers' behalf. The discharged employees credibly testified that the company owner said he would "keep letting guys go until I get to the guy I want unless this stuff stops" and that the layoffs "could be reversed" if the workers would "get the Union to back off." The general counsel need not show that each discharged employee engaged in protected activity where the employer fired the group in order to discourage union activity generally, the Sixth Circuit noted. The ALJ reasonably concluded that the employer fired the workers not because of "any particular union activity on their parts," but rather "to send a message to the Union." Substantial evidence supported the Board's affirmance of that finding, the appeals court held. Concluding that the employer had one motive for firing the employees—anti-union animus—the court granted the NLRB's petition for enforcement (*Erickson Trucking Service, Inc. v. National Labor Relations Board*, July 10, 2019).

Employer's communiques were not unlawful threats. An employer's letter to employees stating that "contract negotiations would begin from scratch" if they voted for a union, as well as a PowerPoint presentation suggesting that the company culture would change after unionization, were not unlawful threats, the Sixth Circuit found, in granting an employer's petition for review and denying the NLRB's cross-petition for enforcement of its contrary decision. The plant manager wrote that unionization would not guarantee a pay raise; rather, the parties would "begin the negotiation process from scratch." The PowerPoint urged employees not to vote for a union and stated that when a plant unionizes, "relationships suffer" and "flexibility is replaced by inefficiency." The NLRA prohibits coercive threats to discourage union participation. However, Section 8(c) of the Act guarantees employers' free speech rights. Thus, an employer is free to communicate its views on unionization provided that the communication does not contain any threat of reprisal or promise of benefit. In this case, the appeals court found that the letter was simply meant to counter the notion that unionizing would automatically lead to increased pay. The PowerPoint presentation acknowledged that while there could be benefits to union membership, there could also be disadvantages. It further implied that the employer would be tough in bargaining. However, an employer is legally entitled to engage in hard bargaining. The court also found that comments such as "the culture will definitely change" merely reflected the employer's predictions of the effects of unionization and were not a threat of any adverse action. Finally, the court rejected the Board's contention that the company was required to present the pros and cons of unionizing. There is no precedent requiring an employer to present both sides of the question or arguments that would be contrary to its opposition to unionization (*Hendrickson USA, LLC v. National Labor Relations Board*, August 1, 2019).

High-speed highway incident loses NLRA protection. Substantial evidence supported the NLRB's determination that an employee lost the protection of the NLRA when she repeatedly cut off a company truck driven by a member of management while on a four-lane highway, with the vehicles traveling at speeds of 45 to 55 mph. The incident took place during the course of strike-related activity brought on by stalled negotiations for a successor contract. The employee was driving to corporate headquarters to participate in picketing when she saw a company truck on the highway. She was followed by another striking employee in a second vehicle. Once the strikers caught up to the truck, the coworker passed both vehicles and then returned to the right lane in front of the truck. The employee then passed the truck but remained in the left lane, traveling alongside, at the speed limit, the two drivers boxing in the company truck. She eventually moved to the right to allow other traffic to pass, but when the company truck moved to the left lane to pass, she returned to the left to block the truck from doing so. The union argued that the employee did not intend to impede or intimidate, but only to follow the company vehicle so she could set up an ambulatory picket at the job site, as the union had encouraged. Moreover, her conduct was not as severe as other incidents, where strikers drove recklessly, hurled tomatoes or eggs, or tailgated or harassed replacement workers. But the U.S. Court of Appeals for the Seventh Circuit held that the employee's conduct, although it lasted

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only a moment or two, was serious enough to forfeit the Act's protection (*Local 702, International Brotherhood of Electrical Workers, AFL–CIO v. National Labor Relations Board*, August 9, 2019).

Union ULP charge was timely. Because a union filed a ULP charge within six months of an employer's unequivocal repudiation of a CBA, the charge was timely, ruled the U.S. Court of Appeals for the Eighth Circuit. In its May 2014 answer to a lawsuit brought by the union for delinquent benefit fund contributions, the employer asserted that a valid CBA no longer existed. However, it continued to remit dues payments to the union, make benefit fund contributions, and otherwise adhere to the contract—in contrast to its stated position. In May 2015, the employer asserted it did not have a contract with the union and that it was only making payments pursuant to an unwritten agreement with its workers. It also ceased payments to the union and benefit fund. It was only at that point that the employer's litigation position aligned with its conduct, giving clear, unambiguous, unequivocal notice of its repudiation of the CBA. Thus, the union's July 2015 charge was timely filed. On the merits, the appeals court held the NLRB did not err in determining that the employer violated the Act by withdrawing recognition and repudiating its bargaining obligations (*National Labor Relations Board v. Anderson Excavating Company*, May 31, 2019).

Refusal to operate machine was protected activity. An oil refinery employee's refusal to operate a machine due to safety concerns was a "logical outgrowth" of his discussions with a coworker that morning about the same work assignment and safety concerns, and therefore constituted protected concerted activity, the Eighth Circuit ruled. Notably, the NLRB ALJ had credited the employee's testimony that, following a morning conversation with his coworker during which they both shared their concerns about safety, the employee repeatedly called for a "safety stop." Moreover, "[t]here were multiple indications of discriminatory motive," the court observed, including that the employer "abruptly indicated its hostility to [his] behavior by sending him home after his repeated refusal to work"; relied almost solely on supervisors' accounts in its internal investigation of his verbal dispute with his supervisor; failed to interview other employees, including the coworker originally assigned to the task; gave inconsistent reasons for disciplining him; and later denied him his quarterly bonus. Therefore, the court enforced an NLRB order finding that the employer unlawfully suspended him (*St. Paul Park Refining Co., LLC dba Western Refining v. National Labor Relations Board*, July 8, 2019).

NLRB rulings

Union steward's profanity was protected. A union steward who called the company owner a "stupid jack off" in Greek was unlawfully discharged for the outburst, ruled a three-member panel of the NLRB, concluding the conduct was not so egregious, under the *Atlantic Steel* test, "as to lose the Act's protection." The incident took place in the owner's office, no other employees witnessed the encounter, and the owner had provoked the employee by telling him to "get the f**k out before I throw you out," the Board found.

[T]he misconduct was part of the "res gestae" of his protected activity, as he was acting in his capacity as union steward at the time[.]

Moreover, the misconduct was part of the "res gestae" of his protected activity, as he was acting in his capacity as union steward at the time, discussing the return-to-work process for striking employees following a strike. Therefore, the employer violated the Act by firing the steward. However, the Board found the owner's suggestion that employees should have changed their union membership a week before the strike was a protected expression of opinion under Section 8(c) of the NLRA, and that the owner did not violate the Act by telling recalled bargaining unit workers that non-unit employees had lost their jobs because of the union workers' decision to strike (*Cadillac of Naperville, Inc.*, June 12, 2019).

Hiring hall use spurred boilermakers' discharge. An employer that discharged 13 welders represented by the boilermakers union after its Section 8(f) pre-hire agreement with the union expired did not unlawfully discharge them due to their union membership; rather, it did so because it had relied on union hiring halls for more than 20 years. After

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Board takes on arbitration agreements post *Epic Systems*

In a supplemental decision on remand from the D.C. Circuit, a four-member panel of the NLRB unanimously found that an employer violated Section 8(a)(1) of the NLRA by maintaining and enforcing an arbitration agreement that limited employee access to the NLRB and its processes. The NLRB has long held that an employer violates Section 8(a)(1) if it restricts an employee's right to file charges with the Board, including restrictions contained in arbitration agreements, and nothing in the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis,* which held that class and collective action waivers in mandatory arbitration agreements do not violate the NLRA, disturbed this precedent. Here, the mandatory arbitration provision did not expressly restrict the filing of charges with the NLRB. However, when reasonably interpreted, it had the effect of doing so and thus interfered with employees' Section 7 rights. Applying its standard set forth in *The Boeing Company* for evaluating an employer's facially neutral work rule or policy, the Board found the potential impact of the mandatory arbitration agreement on employees' statutory rights under the Act was profound and the policy was not justified by any legitimate employer interests (*Prime Healthcare Paradise Valley, LLC,* June 18, 2019).

Subsequently, in its first decision addressing employers' use of mandatory arbitration agreements since the Supreme Court's 2018 *Epic Systems* decision, the NLRB held that employers are not prohibited from informing employees that refusing to sign a mandatory arbitration agreement will result in their discharge. The Board further held that the NLRA does not bar employers from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or class action under state wage-and-hour laws. Finally, consistent with long-standing precedent, the Board held it is unlawful under the Act for an employer to take adverse action against employees for filing a class or collective action, which is protected concerted activity. Member McFerran dissented in part from the four-member decision (*Cordúa Restaurants, Inc.,* August 14, 2019).

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failing to reach a contract with the boilermakers, the company entered into a Section 8(f) agreement with the pipefitters and allowed the welders to continue working only if they became pipefitters union members. The employer offered to assist the discharged welders, and ultimately, eight resumed working for the company as pipefitters. In a case on remand from the D.C. Circuit, a divided NLRB found that the employer showed a legitimate and substantial business justification for the discharges under *Great Dane Trailers*, that the general counsel failed to demonstrate antiunion motive, and that the employer alternatively proved under *Wright Line* that it would have discharged the employees anyway based on its long-standing practice of hiring craft employees through the hiring hall under a Section 8(f) agreement. Dissenting, Member McFerran would have adhered to the Board's prior finding under *Great Dane* that the employer's discharge of its incumbent employees upon the expiration of the Section 8(f) agreement was "inherently destructive" to the employees' rights to membership in the union of their choosing and thus unlawful—a finding that the appeals court had rejected on review. Even if the employer had a long-standing practice of hiring through the hiring hall, she argued the "mass discharge was not required to abide by" its new Section 8(f) bargaining relationship (*Hawaiian Dredging Construction Company, Inc.*, June 17, 2019).

Union reps' conduct exceeded contractual rights, not protected. Eight nonemployee union representatives lost the protection of the NLRA when the group visited a retail employer's facility to talk to bargaining unit employees on the selling floor, ruled a three-member panel of the NLRB on remand from the D.C. Circuit. Although their exercise of rights embodied in the CBA was protected, that protection was forfeited when the reps' conduct exceeded the scope of those rights, dramatically departing from established past practice and breaching the contract's visitation policy going back at least 20 years. The policy provided that when they visit a store or contact employees on union business, union representatives are to contact the store manager first, and speak only briefly with employees on the floor, outside the presence of customers. Moreover, although there was no express term setting forth how many reps could visit the store at once, long-standing past practice established that the parties had agreed visitations would be limited to one or two union representatives at a time. The Board also found the

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employer acted lawfully when it told the union representatives not to speak with employees on the selling floor, only in the breakroom. The union representatives who had fanned out across the selling floor did so for the purpose of soliciting employees to sign a petition—a process that would arguably take more than a brief chat would allow; therefore, the conversation would have to take place in the breakroom (*Fred Meyer Stores, Inc.*, June 18, 2019).

No evidence wage increase was timed to thwart union. An employer did not time the announcement and implementation of a long-planned wage increase in order to discourage union activities, the NLRB concluded. In the case, the employer started to revise its pay structure in mid-March, and the company president approved the plan on June 20. Employees testified that they knew in June about the upcoming wage increase and, by July 1, the company's human resources manager had circulated a spreadsheet reflecting the proposed new pay rate for each employee. Company officials scheduled a July 9 meeting to finalize the new wage rates. However, before the meeting took place that day, the employer discovered two "Vote Union" signs posted at the plant entrances. The new pay plan was formally announced to employees the next day. The Board rejected an ALJ's finding that the employer had accelerated the timing of the announcement upon discovering the pro-union signs. Rather, the Board found the employer had already set a "firm date" to unveil the wage increase. Also, there was no evidence that the employer would have otherwise implemented the wage increase at a later date or that the increases were timed to dissuade employees from supporting a union (*U.S. Cosmetics Corporation*, July 8, 2019).

Walmart employees' "Ride for Respect" was part of an unprotected strike. OUR Walmart, a group formed and supported by the United Food and Commercial Workers Union, organized a series of job actions against the retail giant in which employees would cease working to participate in a scheduled event, then return to work for a period of time, only to cease working again for the next event. The third of these four planned events was the so-called "Ride for Respect," in which more than 100 Walmart employees stopped working for five to six days in order to travel to, and demonstrate at, Walmart's annual shareholders' meeting. (These job actions were essentially sequential strikes, in support of the broad goal of improving wages, hours, benefits, and other working conditions.) The employer discharged the participants. A divided NLRB panel found that the discharges did not violate the Act since the employees' activities were part of an unprotected "intermittent strike." While the Act protects the right to strike, it does not protect serial or sequential work stoppages as envisioned by the OUR Walmart scheme. Because such strike activity is not protected by the NLRA, employers do not contravene the Act by disciplining participating employees. Accordingly, Walmart did not violate Section 8(a)(1) by discharging participants in the work stoppage (*Walmart Stores, Inc.*, July 25, 2019).

While the Act protects the right to strike, it does not protect serial or sequential work stoppages as envisioned by the OUR Walmart scheme.

Statement did not create impression of surveillance. A statement made by a vice president of human resources disclosed only a general awareness of employee union organizing activities, but not any detailed knowledge. Therefore, employees would not reasonably assume that their union activities were under surveillance, a three-member panel of the NLRB found. In the case, a company official overheard employees talking about a union, and the news made its way to other members of management. Shortly thereafter, the vice president of human resources held discussions with groups of employees, asking whether they had complaints, requesting that they "give us an opportunity to fix issues," and writing down their responses. She also made speeches urging employees not to unionize. Discussing the organizing campaign, she stated, "I know that some of you have been approached and talked to about perhaps going in the union." The Board found that this statement disclosed a general awareness of an organizing effort but did not reveal detailed knowledge of specific activities, including which employees had been approached and what was said and when. Moreover, employees were open about the existence of an organizing campaign, and because they were not conducting their

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organizing activities in secret, the Board found that the employees would not reasonably assume their union activities were under surveillance. On the other hand, the employer "violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them, and by advising employees that they could not be rehired [to their seasonal jobs] for the following year until after the union election, and possibly even longer if the Union won." The Board also agreed with the ALJ's decision to overrule the employer's election objections. Therefore, the Board certified the union as the exclusive bargaining representative of the unit employees (*National Hot Rod Association*, July 29, 2019).

Although the extent and severity of an employer's numerous ULPs would typically warrant imposition of a bargaining order, the passage of time rendered that remedy unwarranted[.]

Program coordinators are statutory supervisors. Program coordinators for an agency that serves persons with developmental disabilities were supervisors within the meaning of Section 2(11) of the NLRA. They had authority to assign clients to case managers, or at least effectively recommend assignments, and assigning clients to case managers amounted to assigning "significant overall duties." They also exercised independent judgment in assigning caseloads, taking several factors into account, including whether a case manager had the experience to handle a particular client and which case manager had the best relationship with that client. Secondary indicia buttressed the conclusion that the program coordinators were supervisors. Thus, they identified themselves as "supervisors" when signing time-off requests, performance evaluations, and other forms. They participated in management and supervisory training, and were paid more than other group staff. Further, the employer held them out as supervisors and treated them as such. Because they were supervisors, the program coordinators should not have been included in a petitioned-for bargaining unit comprised of "relief staff, assistant case managers, case managers, licensed practical nurses, physical therapy assistants, and program coordinators," ruled a three-member panel of the NLRB (*The Arc of South Norfolk,* July 31, 2019).

Failure to pay bonus was lawful. An employer did not violate the NLRA by failing to pay employees a Christmas bonus without having first given the union notice and opportunity to bargain over the change. Contrary to the judge, a three-member NLRB panel held the evidence did not establish that the failure to pay the Christmas bonus was unlawful. "In determining whether a bonus constitutes a term and condition of employment over which an employer must bargain, the Board considers both the regularity of the bonus and whether payment of the bonus was tied to employment-related factors," the Board explained. The ALJ found that the bonus "'was paid with sufficient regularity that employees would have been justified in expecting to receive such a bonus as part of their wages,'" and the credited testimony in this case reveals that employees received a holiday cash bonus for seven years in a row. However, the record was unclear as to the amount paid out in any given year and "is silent as to whether the bonus was tied in any way to employment-related factors." In the absence of evidence as to the nature and amount of the bonuses, "there is no basis to find that these payments were anything more than gifts over which the Respondent was not required to bargain," the Board concluded (*Bob's Tire Co., Inc.*, July 31, 2019).

Bargaining order unwarranted three years after ULPs. Although the extent and severity of an employer's numerous ULPs would typically warrant imposition of a bargaining order, the passage of time rendered that remedy unwarranted, the Board held. During the course of an organizing campaign, the employer and its labor consultant committed a number of serious ULPs, resulting in serial charges and postponing the election. While the election was postponed, the employer and consultant committed additional ULPs and blamed the union for postponing the election. Among numerous other violations of the Act, the Board found that the employer had also interfered with the investigation of the ULP charges. Even though only a small number of employees witnessed the ULPs, the Board noted this was nonetheless a case in which a *Gissel* bargaining order would ordinarily be appropriate. However, since some three-and-a-half years had passed since the violations, the Board tacitly acknowledged that it

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was unlikely any reviewing court would enforce a bargaining order. Under the circumstances, the Board determined that rather than imposing a bargaining order, "the wiser course is to order certain extraordinary remedies, including special union-access remedies, to dissipate the effects of the Respondent's violations." Following such remediation, the union would then be entitled to a Board-conducted, secret-ballot election if it wished to proceed. The case reflects the Board's acknowledgement that federal courts are reluctant to grant bargaining orders where there has been a significant passage of time and/or changed circumstances. Such factors substantially lessen the effect of the ULPs and permit an election free of their impact. Moreover, under such circumstances, a secret-ballot election is a far superior gauge of employees' current free choice with respect to the question of representation than a bargaining order based on a several years' old showing of majority status (*Stern Produce Company, Inc.*, July 31, 2019).

Discharge for pretextual reason was lawful. A manufacturing employee who failed to comply with a superior's directive was lawfully discharged for insubordination, the NLRB concluded. The Board found that the general counsel failed to satisfy his burden that the employee's union activity was a motivating factor in her discharge, even though the employer's stated reason for the termination was pretextual. The employee had been actively involved in union organizing efforts, and the employer generally treated insubordinate employees more leniently. Such facts, the Board noted, tended to show that the employer's stated reason for discharging the employee was pretextual. However, a Board majority held that other than the finding of pretext derived from ostensibly disparate treatment, there was no basis to infer that the employee was fired because of her union activities. Member McFerran, dissenting in part, argued that in finding the reason for her discharge was pretextual but nonetheless concluding that it was not motivated by anti-union animus, the majority had opened the door for employers to lie to the Board and get away with it (*Electrolux Home Products, Inc.*, August 2, 2019). ■

The Board found that the general counsel failed to satisfy his burden that the employee's union activity was a motivating factor in her discharge, even though the employer's stated reason for the termination was pretextual.

Misclassifying employees as independent contractors does not violate the Act

In a decision addressing one of the most critical issues in contemporary labor and employment law, the NLRB, in a 3–1 ruling, held that misclassifying statutory employees as independent contractors (i.e., workers not covered by the NLRA's protections) does not, in and of itself, violate the Act. The misclassification of employees as independent contractors can result in significant legal liability under a variety of federal and state employment laws. Those in the business community were no doubt eager for the current NLRB to weigh in on this topic. (In 2018, the NLRB issued a call for briefs in the case.) They will be relieved to know that such an error, standing alone, will not result in an unfair labor practice violation.

The Board additionally found that the employer mistakenly classified the workers in the case at hand—courier-drivers for the respondent company—as independent contractors. The drivers were in fact statutory employees under Section 2(3) and therefore were statutorily protected. However, while this error did not run afoul of the NLRA, the employer did violate the Act by discharging one of the drivers for complaining about the misclassification—a protected activity under Section 7 (*Velox Express, Inc.*, August 29, 2019).

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