

EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical **NLRB** Advisor

NLRB: 2018 in review

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Judging solely by the number and substance of opinions issued, 2018 was a fairly quiet year at the National Labor Relations Board (NLRB). There were no landmark decisions undoing decades of precedent, no piecemeal erosion of employer prerogatives, and no sweeping course corrections.

However, the Board's published decisions alone do not tell the whole story. Although the agency was distracted by an extraordinary turn of events—caught up in “palace intrigue” and stymied by a recusal imbroglio that resulted in its vacating its landmark decision in *Hy-Brand Industrial Contractors, Ltd.*—there was much happening at the Board over the past 12 months.

Throughout the year, General Counsel Peter B. Robb pursued an aggressive reform agenda, seeking to streamline operations, control costs, and recalibrate agency authority between the Board's regional offices and its Washington, D.C., headquarters. Robb also issued several noteworthy guidance memoranda, flagging the legal issues likely to capture the Board's interest in the near future and signaling how the Republican-majority Board will likely interpret the National Labor Relations Act (NLRA) in resolving those issues. Moreover, under the leadership of Board Chairman John F. Ring, the agency embraced rulemaking as a means of providing more doctrinal and procedural stability—embarking on efforts to clarify the joint-

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BRIAN IN BRIEF



A colleague recently pointed out to me that if you visit the NLRB's public website and click the tab marked "Notable Board Decisions," it responds by advising you that the Board has released "no Notable Board Decisions" this year. "Not exactly great self-promotion," he pointed out.

In the agency's defense, and as this issue of the *Practical NLRB Advisor* notes in detail, there are a number of reasons for the dearth of important Board decisions. Additionally, as is clear from the general counsel's actions and the Board's regulatory initiatives, a lack of "groundbreaking" decisions does not equate with agency inactivity. Most importantly, however, the more deliberate pace of the current NLRB hopefully reflects a more measured, and less partisan, approach—one more concerned with creating a long-term, stable labor/management environment than with seizing on every

opportunity to upend long-standing precedent to the benefit of one side.

Clearly, the excesses of the Obama Board need to be undone. However, the current Board appears sensitive to the need to do so in a deliberate and measured way, and to avoid the "reversal of the week" pattern that characterized its predecessor Board. The frequent overturning of long-settled Board law did much to harm the NLRB's credibility. Apparently, the current Board is attempting to right the ship without further damaging its credibility. It's a worthwhile goal, but at the current pace, will there be enough time to complete the task?

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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employer standard and address a number of issues created by the Obama Board's radical revision of the agency's representation case procedures. These actions sent clear signals that the NLRB would be heading in a new direction.

Meanwhile, although the circuit courts offered little that was groundbreaking as they carried out their traditional function of reviewing the Board's decisions and orders, the Supreme Court of the United States issued two opinions of great consequence in the labor law arena. These decisions and the Board's actions to date have effectively set the table for a new year of significant evolution in labor/management relations.

Pearce nomination lapses

The recusal issue has become even more complicated and consequential with the end of Democrat, and former chairman, Mark Gaston Pearce's term in August of last year and his subsequent and, many believe, inexplicable renomination by the White House. At present, only four of the five Board seats are currently occupied. With three Republican appointees (Chairman Ring and Members Emanuel and Marvin E. Kaplan) and one Democrat (Member Lauren McFerran). There had been enormous business opposition in the Senate to Pearce's renomination, both because he is viewed as one of the principal architects of the Obama Board's pro-union agenda and because of the implications of the unresolved recusal issue. Thus, if it turns out that Ring *and/or* Emanuel, both of whom have an extensive background in private practice, are subject to a broad recusal standard, *and* Pearce (or a similarly disposed Democratic nominee) were to be confirmed, the "Trump Board" would then, at best, be ideologically split at 2-2 or, at worst, have a 2-1 Democratic *majority*.

Because no action was taken on Pearce's nomination during the last session of Congress, it has lapsed. However, it is unlikely Pearce will be renominated in the new session of Congress. The most likely scenario is that no action will be taken with respect to filling the fifth Board seat until the next member's term expires (Member McFerran, in August of 2019).

Hy-Brand and its aftermath

A year ago, the *Practical NLRB Advisor* reported that joint employer "sanity" had been restored at the NLRB. The newly installed Republican majority overruled the Board's controversial 2015 decision in *Browning-Ferris Industries of California, Inc.*, which had gutted a decades-old standard for determining whether a business entity was a "joint employer" of a group of workers for purposes of unfair labor practice (ULP) liability and collective bargaining obligation. Prior to the Obama Board's *Browning-Ferris* ruling, an entity had to exert direct control over the essential terms and conditions of workers' employment in order to be deemed a joint employer under the NLRA. Now, it was enough for a company to have an *indirect*, or even *reserved*, right to control some employment conditions for individuals employed by a third-party contractor. Such rights, which are often found in any typical vendor agreement or service contract, potentially were enough to find that the user employer was a joint employer. However, in December of 2017, during the waning days of then-chairman Philip Miscimarra's term, a divided NLRB issued its decision in *Hy-Brand Industrial Contractors, Ltd.*, hitting the reset button on the joint-employer standard and restoring the long-standing traditional standard, much to the relief of the business community.

But the reprieve would be short-lived. In a bizarre turn of events, the NLRB's inspector general issued what many believe to be an extremely poorly reasoned opinion, in which he **determined** that Board Member William J. Emanuel, a management-side attorney prior to his NLRB appointment, should have recused himself from the *Hy-Brand* case on conflict grounds because his prior law firm had represented the staffing agency involved in *Browning-Ferris*. Consequently—and unbeknownst to Emanuel—in late February of 2018, a three-member Board panel voted to **vacate** *Hy-Brand*, leaving the *Browning-Ferris* ruling and its draconian joint-employer standard intact.

Should Emanuel have recused himself? This and larger questions loomed—not just about where that left us with regard to joint employment under the NLRA, but about the Board's recusal practices and the inspector general's authority to unilaterally make the call. (We discussed the ensuing internal disarray in detail in our **Spring 2018** issue of the *Practical NLRB Advisor*.)

The state of affairs remains largely unresolved, as the agency grapples with esoteric issues of administrative law and recusal in the middle of a politically heated environment. The lingering effect of these unanswered legal issues has hamstrung the Republican-controlled Board from using case adjudication to revisit, and potentially overturn, some of the more radical decisions of the Obama Board. In June of 2018, the Board **announced** it would undertake a review of its recusal process, with plans to issue a formal report and establish clear procedures for addressing recusal matters going forward.

As for the underlying joint-employer issue that began this controversy in the first place, the Board **stated** in May 2018 that it would address the matter through formal rulemaking rather than through case adjudication. Rulemaking has very different recusal standards than case adjudication, and any legal challenge to rulemaking participation by either Emanuel or Ring would likely fail.

... Browning-Ferris remains the law for now, and it may well remain so for some time.

However, the attempt to clarify the joint-employer standard through rulemaking has itself been recently muddied. On December 28, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued its long-awaited **decision** in the underlying *Browning-Ferris* case. A divided circuit panel held that indirect or unexercised control were permissible factors to apply in evaluating joint employment but found the NLRB's formulation of those factors didn't square with the common-law construction of joint employment. Therefore, the appeals court sent the case back for the Board to "erect some legal scaffolding that keeps the inquiry within traditional common-law bounds." The D.C. Circuit's decision may complicate the pending rulemaking, although many observers believe the decision affords the Board sufficient flexibility to promulgate a rule largely along the lines of its proposed rule. In other words, in the final analysis, the decision may not prevent the Trump Board from issuing a rule that significantly modifies the Obama Board's decision and substantially raises the bar for finding that two separate entities constitute a "joint employer." The decision will, however, likely make the already lengthy rulemaking process even longer.

Thus, as 2018 drew to a close, the controversial joint-employer standard established by the Obama Board in

Browning-Ferris remains the law for now, and it may well remain so for some time.

Stability through rulemaking

Under Chairman Ring, who was sworn in and tapped to head the NLRB in April 2018, the Board has shown its willingness to engage in rulemaking to effectuate changes to the agency's interpretation and enforcement of federal labor law. Although Board law and policy has traditionally evolved through case adjudication, the Obama NLRB attempted to implement more permanent and radical change through regulation, and the Trump Board appears prepared to follow suit in service of a more moderate doctrinal course. Indeed, Ring recently said he is contemplating establishing a division in the agency expressly focused on rulemaking.

As noted, the Board issued a **proposed rule** in September 2018 establishing a formal joint-employer standard. (See

"NLRB issues proposed joint-employer rule" on page 9).

Previously, in late 2017, it published a request for comments

on the representation election rule promulgated by the Obama NLRB, with an eye toward revision. The comment period for the representation case rules was extended into April and drew nearly 7,000 **comments**. Ring and Robb have indicated the Board may tackle election rule changes in discrete pieces—starting with revisions to the agency's "blocking charge" and "voluntary recognition bar" doctrines. These policies, which have become entrenched through Board case law, have proven to substantially interfere and restrict the right of employees to decertify an incumbent union. Also on the agenda, they signaled these two items: formal rules covering ethics and recusal requirements—a welcome addition, in light of the *Hy-Brand* debacle—and regulations governing access to employer property—an especially convoluted area of NLRB common law.

Thus, as we await at least some formal revisions to the Board's election rules, and issuance of a comprehensive formal rule defining the joint-employer standard, Board observers may well witness an agency with a more robust regulatory agenda than in years past.

Request for briefs

Despite relative quiet at the NLRB with respect to published case decisions, the Board has signaled its intent to take on

several issues of Board law via case adjudication by soliciting interested-party briefing in several significant cases pending before the agency:

- In February 2018, the Board [solicited comments](#) in *Velox Express, Inc.*, a case that raises the question under what circumstances, if any, an employer's act of misclassifying statutory employees as independent contractors should be deemed a violation of the NLRA. Currently, independent contractor misclassification is one of the most significant and controversial points of contention in labor and employment law, both within and beyond the traditional labor context.
- On August 1, 2018, the NLRB [invited briefs](#) on “whether the Board should adhere to, modify, or overrule its 2014 decision in *Purple Communications, Inc.*” The case pending before the agency, *Caesars Entertainment Corporation*, provides a vehicle for the Board to reverse a controversial Obama Board decision that opened up employer's email systems to employees engaged in union-related communications. While this is a critical issue in and of itself, still larger questions are implicated, including, as a practical matter, whether the holding in *Purple Communications, Inc.* would feasibly extend to other employer communication systems and, more fundamentally, the scope of an employer's inherent right of control over its property.
- In September 2018, the Board issued a [call for briefs](#) in *Loshaw Thermal Technology, LLC*, to address a key issue regarding “Section 8(f)” bargaining relationships, which are unique to the construction industry. This is an exclusive but limited bargaining relationship in which an employer can enter into a bargaining agreement with a union that does *not* represent a majority of employees. The question: what evidence does a union need in order to establish that such a relationship has “ripened” into a typical Section 9(a) relationship (*i.e.*, one in which the union *has* been chosen by a majority of employees, and which can only be terminated when employees themselves vote to decertify the union)? Very likely sensing an unfavorable outcome, the union that was the charging party in *Loshaw* withdrew the underlying ULP charge, thus mooting the case the Board had intended to use as a vehicle to address the issue. The Board formally granted the union's request to withdraw the underlying charge on December 14, 2018, and said it will consider the issues raised in a future proceeding. Thus, it will now need to tee up another case addressing the question in order to reconsider its precedent.

A take-charge GC

The NLRB's general counsel oversees the agency's regional offices, where the Board's day-to-day work unfolds. Shortly after taking office, General Counsel Robb made clear his intention to implement sweeping changes to the way in which the agency and its regional offices conduct business. Cost-cutting was one reason, but the more pressing goal was to streamline procedures for carrying out the agency's mission of resolving ULP charges and representation cases. A reform agenda set out in [ICG 18-06](#), a July 2018 memorandum from the GC's Division of Operations Management, also said it aimed to centralize greater decision-making authority at Board headquarters. (These and other internal organizational changes were outlined in the [Fall 2018 issue](#) of the *Practical NLRB Advisor*.)

In other procedural directives, Robb issued [GC Memo 18-05](#) in June 2018, addressing the use of Section 10(j) injunctions, urging the regional staff to continue pursuing such relief in active cases when doing so was the only way to ensure that employees' statutory rights and/or the Board's remedial authority was protected. In addition, in [GC Memo 18-06](#), issued August 1, 2018, he instructed the regions to permit employees who have circulated or filed union decertification petitions to intervene in ULP proceedings in which the outcome could impact the validity of the decertification (or withdrawal of recognition) process.

Addressing a substantive matter of considerable import, the general counsel in June 2018 issued a detailed guidance to the regions, [GC Memo 18-04](#), on how common employer work rules fit into the rubric established by the NLRB in its significant December 2017 decision in *The Boeing Company*, which reset the standard by which employer handbook policies and other work rules will be reviewed for their potential impact on employees' Section 7 rights. *Boeing* marked one of the most important reversals of Obama-era precedent, reining in agency overreach and restoring a more common-sense approach. While the guidance is directed to the Board's regional office staff, it is a valuable resource for employers seeking to understand and predict how the Board will apply the law to common employer policies.

In another course change, in [GC Memo 19-01](#), issued in October 2018, Robb signaled a departure from an approach

historically used by the agency's regional directors in interpreting unions' duty of fair representation under the NLRA. While characterized as a "clarification," the directive minimizes the extent to which a union will be allowed to assert the "mere negligence" defense in response to charges it failed to pursue member grievances or to communicate decisions not to pursue a grievance. A union won't be able to claim negligence for having misplaced, forgotten, or lost a member's grievance unless it can show it has a reasonable system in place for tracking grievances. Moreover, the failure to respond to inquiries regarding a grievance amounts to more than mere negligence in the revised approach implemented by Robb. Instead, it rises to the level of arbitrary conduct, unless there is a reasonable

The 2017-18 Supreme Court term brought two extremely significant labor law decisions...

excuse or meaningful explanation. In issuing the guidance, Robb explained that the regions have seen a measurable increase in the number of cases in which unions defend duty of fair representation charges simply by asserting the "mere negligence" defense.

Robb closed out the year with two more memoranda. On December 7, 2018, he issued [GC Memo 19-02](#), which accompanied the agency's [strategic plan](#) for fiscal years 2019 through 2022 and set forth significant changes for the handling of ULP charges by the Board's regional offices. (This development is discussed in greater detail on page 13.) Finally, as 2018 drew to a close, Robb reversed his predecessor's directive and clarified the standard to be used by the regions in deciding whether to defer to a contractual grievance and arbitration process whenever a party has also filed a ULP charge over the same issue.

The Board's *Dubo* policy, set forth in *Dubo Manufacturing Corp.*, is to defer processing a ULP case "where the matter in dispute in that case is being processed through the grievance-arbitration machinery and there is a reasonable chance that the use of that machinery will resolve the dispute or set it at rest." In 2015, on the heels of the Obama Board's decision in *Babcock & Wilcox Construction Co.*—addressing when the Board should defer to an arbitral decision, once issued—then-general counsel Richard F. Griffin, Jr. released [GC 15-02](#). He instructed the regions that, pursuant to *Babcock*, the burden

of proving that deferral to arbitration is appropriate is to be placed on the party urging deferral; moreover, he instructed that deferral is appropriate only when the arbitrator had been explicitly authorized to decide the statutory issue at hand. Griffin also extended this directive to questions of deferral pre-arbitration—*i.e.*, cases implicating *Dubo* deferral, in which an individual pursues grievance arbitration and also files a ULP charge regarding the same matter but an arbitration decision has not yet issued.

Although *Babcock* did not address pre-arbitral deferral under *Dubo Manufacturing Corp.*, Griffin nonetheless concluded that the Board had extended *Babcock* to Section 8(a)(3) and (1) cases in which *Dubo* deferral is raised, Robb noted, in [GC 19-03](#), issued on December 28, 2018. "The current General Counsel believes that Memorandum GC 15-02 was incorrect in that regard and that,

by its own terms, the *Babcock* decision does not apply to *Dubo* deferrals." Thus, Robb directed the regions to continue to apply the *Dubo* deferral standard to Section 8(a)(1), (3), and (5), and Section 8(b)1(A) and (3) cases where a charging party or grievant "has previously filed a grievance in a contractual process leading to binding arbitration."

A landmark Supreme Court year

The 2017-18 Supreme Court term brought two extremely significant labor law decisions: one in the private sector and one in the public sector. The latter upheld employees' constitutional rights while delivering a financial blow to public-sector unions. The former was an equally decisive win for employers that utilize pre-dispute arbitration agreements.

In May 2018, the high court, in *Epic Systems Corp. v. Lewis*, held that the NLRA does not bar employers from using arbitration agreements that include a class waiver, putting to rest an issue that had vexed employers ever since the Obama NLRB, in *D.R. Horton, Inc.*, found that the right to bring class or collective actions in court constitutes protected concerted activity under the NLRA. Parties arguing that class waivers violate the NLRA contended that the Federal Arbitration Act's savings clause renders an arbitration agreement unenforceable if it violates some other federal law, and that class waivers interfere with statutory rights guaranteed under Section 7 of the NLRA. The Supreme Court majority rejected this notion, which came

as no surprise to most observers in light of the high court's decidedly pro-arbitration jurisprudence in recent years.

The Board decided *D.R. Horton* in 2012, and over the course of the six years the holding was in effect, the agency invalidated many employer arbitration agreements and policies. In *NLRB v. Murphy Oil USA, Inc.*, one of two companion cases to *Epic Systems* before the high court, the Board was seeking review of a Fifth Circuit decision denying enforcement of an NLRB order applying *D.R. Horton*. With the high court definitively ruling that employers may maintain and enforce class-action waiver agreements without running afoul of the NLRA, the Board was now tasked with resolving 55 pending cases alleging that mandatory arbitration agreements with class waivers violated the NLRA in accordance with the

Court's holding. Additional Board decisions applying *D.R. Horton* already were pending review in the circuit courts. Since the circuits are clearly bound by the Supreme Court's decision, they will either deny enforcement of the Board's order or remand the case to the Board to reissue the case "in accordance with the decision" in *Epic Systems*.

What is the broader impact of *Epic Systems*? Clearly, nonunion employers now may confidently enter into and enforce arbitration agreements with class waivers and no longer risk being caught up in litigation before the NLRB while seeking to compel arbitration of a putative class action lawsuit pursuant to the terms of those agreements. Moreover, labor unions have lost an important tool in their organizing arsenal, as they can no longer use an

Top 10 targets: a status check

In the [Summer 2017](#) issue of the *Practical NLRB Advisor*, we identified the top 10 targets (of Obama-era NLRB rulings and actions) likely to be reversed by the Trump Board. Here's a look at where they currently stand:

OBAMA NLRB ACTIONS

1. *Browning-Ferris* joint-employer case
2. "Micro" bargaining units
3. Constraints on managerial control
4. Strict scrutiny of work rules
5. "Ambush" election rule
6. Union access to employer email
7. "Supervisor" definition narrowed
8. Graduate students allowed to organize
9. Questioning motive for replacing strikers
10. Hamstringing employee discipline

STATUS

- Reversed**
- Reversed**
- Reversed, mostly**
- Old analysis overruled; new balancing test adopted**
- Rule revisions under active consideration**
- Slated for likely reversal**
- More rational analysis likely to develop incrementally in particular with respect to what "effectively recommend" should actually mean**
- In an appropriate case, revision or outright reversal possible**
- Clear candidate for reversal or modification, but no known case in the pipeline**
- It is likely that case-by-case, the board will take a narrower view of what employee conduct is "protected" and what is "concerted." Also quite possible that it will reverse the requirement for bargaining over discipline with a newly certified union if the appropriate case comes up for review.**

** Class action waivers

***D.R. Horton* invalidated; waivers upheld by Supreme Court**

employer's arbitration agreement to draw ULP charges during representation elections. Finally, *Epic Systems* should bring a measure of comfort to all employers covered by the NLRA. For many years, the Board has been steadily expanding the notion of what constitutes protected concerted activity. The broader the definition, the more employer policy and conduct is subject to Board scrutiny and the greater the range of protected employee

All employers will need to carefully track these state and local developments while continuing to keep a vigilant eye on events unfolding at the NLRB.

conduct. However, the decision in *Epic Systems*, authored by Justice Neil Gorsuch, portends a much narrower reading of Section 7's shield for protected concerted activity by the current Court majority, which has signaled it will conform to the NLRA's statutory text and legislative roots.

In the public-sector sphere, as the 2017-18 term neared its end, the Supreme Court in June 2018 handed down its groundbreaking decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. The outcome, though widely anticipated, nonetheless marked a rare high court reversal, overturning a 40-year-old precedent and now holding that public-sector agency-shop arrangements violate the First Amendment to the U.S. Constitution. Under the long-standing decision in *Abood v. Detroit Board of Education*, it had been permissible for unions to charge (and for public employers to deduct) "agency fees" from public workers who are in a union-represented bargaining unit but are not union members. The extent to which *Janus* alters the balance of power in public-sector labor relations cannot be overstated. Moreover, to the extent that unions suffer a sharp financial blow as mandatory agency fees dry up, organized labor as a whole faces a sharp setback.

We discussed the implications of these landmark Supreme Court decisions in detail in our [Fall 2018 issue](#).

The year ahead

In 2019, the NLRB will make good on its rulemaking agenda and continue to effectuate those policy shifts established through

both Board decisions and agency guidances. For example, the Board will continue to kick back pending "handbook" cases to the agency's law judges so that they may reconsider their rulings in accordance with the rubric set forth in the *Boeing* decision. Similarly, it will dismiss pending class waiver cases, or vacate rulings decided under the faulty premise of *D.R. Horton*, in light of the Supreme Court's *Epic Systems* opinion. These actions will unfold in routine fashion, with little fanfare.

On the other hand, the Democratic takeover of Congress will surely ignite drama. While Senate Democrats have been hot on the heels

of the Board's leadership—pushing back at the reform agenda, giving solace to career agency employees riled by internal changes and cost-cutting, and questioning the wisdom of NLRB rulemaking—their objections, as the minority party, carried little weight. House Democrats are now emboldened, however, and are inclined to rigorous oversight of the Trump administration. The NLRB will be subject to close scrutiny as well.

In addition, look to House Democrats to eagerly pursue comprehensive legislation to overhaul the NLRA. Those measures are virtually certain to die an unceremonious death in the solidly Republican Senate; still, the contours of these bills will denote the battle lines of federal labor law for the foreseeable future.

Finally, beyond Washington, D.C., the effect of NLRB reforms will be felt at the regions, and the fallout of the Supreme Court's *Janus* decision will reverberate—both in state and local government workplaces and among private industries and entities, as organized labor moves aggressively to unionize the private sector in hopes of making up for sharp losses in public-employee agency fees. Moreover, we can anticipate a sharp uptick in union-protective legislation in labor-friendly states in 2019, as Democrats move to insulate organized labor, their largest interest group, from the harshest effects of *Janus*. All employers will need to carefully track these state and local developments while continuing to keep a vigilant eye on events unfolding at the NLRB. ■

NLRB issues proposed joint-employer rule

Frustrated in its attempt to undo the Obama-era *Browning-Ferris Industries* decision through case adjudication and likely seeking longevity for its eventual determination, the current National Labor Relations Board (NLRB) majority has determined it will utilize the formal rulemaking process to resolve the critical and contentious issue of how “joint employer” is to be defined under the National Labor Relations Act (NLRA). On September 14, 2018, the Board issued a formal [notice of proposed rulemaking](#) (NPRM) of a regulation that would more narrowly define joint employment under the NLRA.

With *Browning-Ferris*, a controversial 2015 decision, the NLRB upended decades of Board precedent and imposed a test under which business entities were far more likely to be deemed a joint employer, along with their staffing agencies, outsourcing contractors, vendors, or other business partners, under the NLRA. Under *Browning-Ferris*, a company could be deemed a joint employer if it merely exercised indirect control over the terms and conditions of employment of its business partner’s employees, or even *reserved* potential control under the terms of a vendor agreement.

The case created a major problem for companies trying to avoid NLRA entanglement while operating in an increasingly competitive business environment in which it has become a common business practice to partner with staffing agencies and other labor contractors to outsource production or noncore functions. The consequences of a joint-employment finding are significant. A joint employer can be forced to bargain with a union representing employees of the staffing agency or contractor and can be held jointly and severally liable for unfair labor practices committed by the agency or vendor. In addition, a joint employer can lawfully be picketed by those employees, as it will not be protected from such activity under the statutory provisions prohibiting secondary boycotts.

It came as little surprise to anyone that the newly formed Republican majority on the Board would seek to reverse this misbegotten decision at its earliest opportunity. It did so, initially, in its December 2017 decision in *Hy-Brand Industrial Contractors, Ltd.*. However, that ruling was subsequently vacated due to an unprecedented internal squabble over whether Board Member William J. Emanuel ought to have recused himself from the case. The Board

thereafter decided to resolve the standard through formal rulemaking, a rare move for the agency. In the [fact sheet](#) released in conjunction with its NPRM, the Board makes clear its intentions in promulgating the joint-employer rule:

The proposed rule reflects the Board's initial view, subject to potential revision in response to comments, that the Act's purposes would not be furthered by drawing into a collective-bargaining relationship, or exposing to joint-and-several liability, the business partner of an employer where the business partner does not actively participate in decisions setting the employees' wages, benefits, and other essential terms and conditions of employment.

Accordingly, the rule as proposed restores the traditional “direct and immediate” standard for determining whether a business entity is a joint employer—a narrower definition that conforms to the test that had been in place for decades prior to *Browning-Ferris*. Specifically, the NPRM states:

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

As proposed, the rule goes one step further than the traditional joint-employer test by clarifying that the “direct and immediate control” exercised by a putative joint employer must be “*substantial*,” a factor often applied, but not expressly required, until now. This addition is of special significance for the franchise industry, which is particularly vulnerable under the *Browning-Ferris* standard. Seldom is the case that franchisors exercise “substantial” “direct and immediate control” over franchisee employees; typically, any exercise of control by a franchisor is focused primarily on protecting the franchise brand, and any collateral control over a franchisee’s workforce would generally be insubstantial, at most.

While the Obama Board in *Browning-Ferris* offered little in the way of actual guidance as to how the Board would apply its vague and elastic standard, the NPRM sets out 10 “compare and contrast” examples to illustrate the new standard. For instance:

EXAMPLE 3 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B’s manufacturing plant. On-site managers employed by Company B regularly complain to A’s supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A’s supervisors decide to reassign employees and switch the order in which several tasks are performed. Company B has not exercised direct and immediate control over Company A’s line workers’ essential terms and conditions of employment.

EXAMPLE 4 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B’s manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A’s line workers. The fact that Company B conveys its supervisory commands through Company A’s supervisors rather than directly to Company A’s line workers fails to negate the direct and immediate supervisory control.

The return to a common-sense standard—one in which an entity’s potential liability for labor law violations is commensurate with the direct control it actually exercises over the essential terms and conditions of employment—will bring welcome relief to the employer community. Better still: A standard enacted as a formal rule will have more staying power than one established through Board decision. As we witnessed repeatedly under the Obama Board, even decades-long precedent can unfortunately be wiped out by gusting ideological winds. A clear, codified joint-employer regulation would provide some measure of certainty to employers frustrated by the challenge of conforming to changing criteria in this difficult area of the law.

Robb weighs in

Feedback on the proposed rule from NLRB General Counsel Peter B. Robb will carry significant weight as the Board evaluates public input received in response to its comment request. Robb submitted his comments in a December 10, 2018, [letter](#) that was posted on the rulemaking docket on December 19.

Robb applauded the Board for recognizing that the *Browning-Ferris* joint-employer standard is unworkable and for its intention to return to a standard “in greater conformity with long standing Board precedent and federal, state, and common law.” He also supported the Board’s decision to address the joint-employer issue via notice and comment rulemaking rather than relying on decisional law. In his view, however, the rule as proposed does not offer sufficient “clarity and predictability” or go far enough to limit joint-employer liability to those entities with actual control over a group of workers’ terms and conditions of employment.

“For instance,” Robb wrote, “the proposed rule does not provide sufficient guidance to entities or factfinders concerning the combination of factors that determine joint employer status. The proposed rule seems to create a ‘one size fits all’ standard without addressing how this approach will affect specific industry concerns or business realities. Equally important, the proposed rule does not address the circumstances in which a joint employer analysis is necessary or permissible, nor the legal or practical consequences to an entity that is found to be a joint employer.”

Robb urged the Board to make clear in the final rule that the joint-employer standard is merely definitional and to expressly state that a joint-employment finding by itself “does not create legal liability for the unfair labor practices of its co-employer business partner.” He recommended that the Board clarify that “a joint-employer analysis is unnecessary and should not be reached unless the putative joint employer was involved in the alleged unfair labor practice or an alleged unfair labor practice cannot be adequately remedied without the participation of the joint employer or to comply with a remedial order.”

He also emphasized that [a] joint-employer finding should rarely, if ever, be used to create a bargaining obligation with the labor representative of its co-employer’s employees.” He suggested that the final rule should clearly state that

a joint-employer finding “does not create a bargaining obligation or an obligation to sit at the bargaining table with its co-employer’s employees’ labor representative.”

Robb also wrote specifically of the franchise industry, which comprises a significant component of the putative joint-employer universe. In applying “the joint-employer definition to franchising industries,” he wrote, “the Board may need to expressly address the myriad legal and everyday realities of franchising, or at least consider the issue of how to assess the ‘control’ a franchisor exerts as part of its attempts to protect its trademark, service mark, or ‘brand,’ but which also may have some tangential effect on the franchisee’s labor relations.”

D.C. Circuit throws a wrench

Complicating the pending Board rulemaking, the U.S. Court of Appeals for the District of Columbia Circuit on December 28, 2018, issued its much-anticipated decision in the underlying *Browning-Ferris* case. A divided circuit court panel affirmed the NLRB’s controversial ruling, in part, by holding that the Board can indeed consider indirect or potential but unexercised control in deciding whether an entity is a joint employer under the NLRA. The consideration

The D.C. Circuit’s split decision does nothing to resolve the ongoing uncertainty over the status of the NLRB’s unworkable Browning-Ferris test.

of indirect control “is consonant with established common law,” the majority held, and it allowed the Board discretion in determining how much weight such indirect control should be afforded. However, the appeals court also found that the Board had exceeded the bounds of the common law in its articulation of the operative indirect control factors and had “provided no blueprint for what counts as ‘indirect’ control.”

The Board’s *Browning-Ferris* test was so broad that it reached the routine elements of most business-to-business contractual relationships—“the objectives, basic ground rules, and expectations for a third-party contractor.” These elements are intrinsic to ordinary third-party contracting relationships under the common law of agency. However, the appeals court noted that these factors are not necessarily relevant to establish indirect control over “the essential terms and conditions of employment,” which is central to the analysis of whether an entity is an “employer” under the

common law. Consequently, the court remanded the case to the Board so that it can “erect some legal scaffolding that keeps the inquiry within traditional common-law bounds.”

The D.C. Circuit’s split decision does nothing to resolve the ongoing uncertainty over the status of the NLRB’s unworkable *Browning-Ferris* test. Rather, it leaves a host of critical questions unanswered. Thus, the court sidestepped the critical issue of whether indirect or potential control *alone* is enough to establish joint employment absent the exercise of the *actual* control. Moreover, the majority instructed the Board that in formulating its prospective joint-employer rule, it “must color within the common-law lines identified by the judiciary.” Does the Board, then, have authority to promulgate a rule that defines joint employment more narrowly than the common-law meaning—one that expressly *requires* actual direct and immediate exercise of control over the terms and conditions of employment of another entity’s employees before the entity will be deemed a joint employer under the NLRA? Some have argued that the court’s decision proscribes this test, which is reflected in the Board’s proposed rule. The better view, however, seems to be that the Board has wide latitude to adopt whatever test it deems

appropriate for a joint-employer finding *under the NLRA* as long as the test does not directly conflict with the common law. Although the latter construction is likely to prevail, the appeals

court decision has virtually guaranteed that whatever rule the Board eventually adopts will be subject to further court review and that the joint-employer standard will remain unsettled for a considerable stretch of time.

In a lengthy dissenting opinion, Judge Randolph argued that the court should not have issued any opinion on the merits in light of the Board’s pending rulemaking. The court should have waited, he said, lamenting that the court had simply added to the uncertainty that the Board’s *Browning-Ferris* ruling had already engendered. As noted above, the dissent’s observation is undoubtedly true. The circuit court’s decision simply provides fodder for the legal challenges that will ensue once the Board issues its final rule.

Aftermath of D.C. Circuit decision

“With regard to the D.C. Circuit’s recent decision, the case has been widely reported inaccurately,” Chairman

Ring told Robert C. “Bobby” Scott (D-Va.) and Rosa DeLauro (D-Ct.), the Democratic leadership of the House Education and Labor Committee. Ring was responding to the lawmakers’ January 8, 2019, letter urging the NLRB to withdraw its joint-employer rulemaking and to “abide by its current joint employer standard articulated in *Browning-Ferris*” which the circuit court had just upheld. However, Ring corrected this faulty assertion in his **January 17 response** to their letter, noting that the appeals court had *denied* enforcement and had “expressly disapproved of the Board’s application” of the indirect control test and the Board’s failure, in *Browning-Ferris*, to provide a “blueprint for what counts as ‘indirect control.’”

“The court’s criticism of *Browning-Ferris* is unsurprising, and the noted lack of clarity is precisely why the NLRB initiated rulemaking on the joint-employer standard,” Ring wrote. Nothing about the decision “foreclose[d]” the Board from undertaking rulemaking or required withdrawal of the NPRM, he added. Also, citing the Board’s long-standing position of non-acquiescence, Ring stressed that the Board was “not compelled to adopt the court’s position as its own, in either *Browning-Ferris* itself or the final rule on joint-employer status.” Moreover, he added, the D.C. Circuit recognized that the Board’s NPRM and its decision in *Browning-Ferris v. NLRB* “are not incompatible,” and that the proposed rule “appears to overlap with the court’s position on indirect control in certain respects.” At any rate, Ring pointed out, the appeals court handed down its ruling “notwithstanding the pending rulemaking,” and viewed its decision as responsive to “a request for judicial guidance in the rulemaking itself,” clearly not to preclude the NPRM.

“For all these reasons, a majority of the Board continues to believe that notice-and-comment rulemaking offers the best vehicle to address the uncertainty surrounding the joint-employer standard,” Ring concluded. “I can assure you that whatever standard the Board ultimately adopts at the conclusion of the rulemaking process, it will bring far greater certainty, predictability and stability to this key area of labor law, consistent with congressional intent. A majority of the Board believes we owe no less to the American public.”

While we wait...

The NLRB’s announcement that it would undertake formal rulemaking to articulate a joint-employer standard did not

DOL to issue joint-employer rule

Evidencing the significance of joint-employment issues beyond the NLRA, the U.S. Department of Labor (DOL) has signaled its intent to issue a proposed joint-employer rule as well. In the Fall 2018 Agency Rule List issued on October 17, 2018, the DOL indicated it will promulgate a rule defining joint employment under the Fair Labor Standards Act (FLSA) and suggested an NPRM was imminent. The DOL’s Wage and Hour Division said it wants to clarify the contours of the joint-employment relationship in order to assist the employer community in FLSA compliance. A joint-employer finding under the FLSA would, of course, result in joint and several liability for any violation of federal wage-and-hour law.

The fact that two government agencies are now construing the same legal concept, but under two different statutes, raises a number of questions: Will DOL follow the NLRB’s lead, or will there eventually be two different standards? What would be the practical implication for employers if the eventual standards are different? Would differing standards prompt a legislative response? As they like to say in advertising, watch this space.

moot the *Browning-Ferris* case pending before the D.C. Circuit. Indeed, the Board was emphatic that it wanted the appeals court to decide the pending petitions for review despite its intention to promulgate a rule. In fact, it expressly asked the court to proceed even after publishing the proposed joint-employer regulation in September 2018. Since the appeals court decision is by no means dispositive—and actually remands the case back to the Board—where does that leave the issue, and what can we expect next?

For now, the *Browning-Ferris* standard theoretically remains intact. However, with the pendency of the rulemaking, the Board is highly unlikely to decide any cases based on that standard. Rather, it will delay doing so until it completes the rulemaking and issues its final rule. It is then likely that the Board will reissue *Browning-Ferris* and all the other delayed cases in decisions that are consistent with its final rule. Thus, the likely scenario at the Board level is rule first, decisions to follow.

Fortunately, that rulemaking process is well underway. An initial 60-day comment period was extended, allowing stakeholders ample opportunity to weigh in on the joint-employer proposal. The final window for filing comments was extended to January 28, 2019; comments replying to *those* comments were being accepted until February 11. The Board then reviews the comments received, revises its initial proposed rule as it deems fit, and issues a final regulation. It's difficult to predict when this process will conclude, or the extent to which the substance of that rule will bear the marks of the D.C. Circuit's decision.

Whatever path the Board takes, however, it is a certainty that its joint-employer regulation will be subject to legal challenge and eventual disposition by the federal court. So while rulemaking may, in the relative short term, resolve the

issue at the Board level, that will not necessarily be the final word on joint employer.

For now, the business community remains saddled with the extant *Browning-Ferris* standard. As noted, the Board will refrain from issuing decisions under the "lame duck" standard while undertaking a rulemaking process clearly aimed at undoing or substantially altering it. Consequently, Board cases involving the joint-employer test could wind up "frozen" at the agency until the final rule takes effect. Businesses without cases currently pending remain in joint-employer limbo as well. Since *Browning-Ferris* remains the law and the future is often hard to predict, companies must continue to bear in mind the potential problems occasioned by the current broad construction of joint employment as they negotiate their business-to-business relationships and agreements. ■

NLRB strategic plan: resolve more cases, more quickly

The National Labor Relations Board (NLRB) issued its [strategic plan](#) for fiscal years 2019 through 2022, aimed at advancing four "mission-related goals" articulated by NLRB Chairman John F. Ring and General Counsel Peter B. Robb. According to the Board's December 7, 2018, [announcement](#) of the document's release, these goals are:

1. achieving a combined 20 percent increase (5 percent over each of four years) in timeliness for processing unfair labor practice charges;
2. achieving resolution of a greater number of representation cases within 100 days of the filing of an election petition;
3. achieving organizational excellence and productivity; and
4. managing agency resources efficiently and in a manner that instills public trust.

Accompanying the strategic plan was [GC Memorandum 19-02](#), "Reducing Case Processing Time," which articulates steps that the Board's leadership will implement to effectuate these goals. The guidance promises a significant revamping of how the regional offices will handle unfair labor practice (ULP) cases. These changes, which took immediate effect, will impact not just the regional offices, but also the Divisions of Advice, Legal Counsel, Enforcement Litigation, and Operations-Management, the Board noted.

"These changes will affect virtually every charge handled by the agency," notes [Harrison C. Kuntz](#), an associate in Ogletree Deakins' St. Louis office, in a [blog post](#) discussing the memorandum.

Shaving case-processing time. Looking to reduce ULP case-processing times that have crept upward over the years and to shrink the growing backlog that has resulted, the Board set a goal to shave median processing time by 5 percent annually over each of the next four years. The agency wants to cut the time spent by the regions on ULP investigations, from the filing of a charge to the issuance of a decision by an administrative law judge (ALJ), as well as the time between ALJ decision and Board order, and the time between a Board order and final case closure.

Impact Analysis program rescinded. Previously, regions were evaluated based on processing deadlines set out in the Board's Impact Analysis program, in effect since 1996. The regions were required to categorize every case as a Category I ("lowest-level impact"), Category II ("mid-level impact"), or Category III ("most significant impact") case—with Category III involving possible injunctions, employee discharges during organizing campaigns, and other high-impact issues. Separate time targets were

imposed for each: Category III cases were due in 49 days, Category 2 cases were due in 77 days, and Category 1 cases were due in 98 days. NLRB regional directors were evaluated based on their region's ability to dispose of a case by the end of the month within which the respective 49th, 77th, or 98th days fell.

Robb has rescinded this program and corresponding "end of the month" time targets. Under the new system, all cases, and case deadlines, will be equal. Moreover, regional directors will no longer be evaluated based on the percentage of "unexcused overages" at the end of each month. Instead, their performance will be measured based on "time between filing of charge to its disposition; time between issuance of Board order to closure of the case; and time between approval of an informal settlement agreement to closure of the case."

Managerial discretion for regional directors and division heads. To that end, Robb has replaced the agency-wide case-processing deadlines with individual, region- or division-specific targets and has given the offices "wide discretion" to establish whatever case-management approach and internal deadlines they deem best in order to meet those targets. "Each Region's intake, both in volume and in the variety and complexity of cases, is different and compels a more individualized approach to achieving the 5% reduction in processing time than any uniform system could successfully facilitate or otherwise ensure," Robb wrote, in eschewing "a rigid system imposed nationwide."

Other strategies. The Board's plan identified other strategies for advancing the stated goals, including making early settlement of cases more of a priority. The agency cited estimates that a 1 percent drop in its settlement rate costs the Board more than \$2 million "as the process becomes formal and litigation takes over." The Board also wants to increase the use of alternative decision-making procedures to expedite case processing, utilize the Compliance Unit to coordinate compliance in merit cases, discontinue its interregional assistance program and instead transfer cases from offices with backlogs to other offices with surplus capacity, and reduce the square footage of office space at field offices and headquarters by up to 30 percent over five years, including the identification of field offices for closure.

Key takeaways

Parties litigating before the NLRB can expect the changes introduced in the memorandum to have an immediate impact. Among the implications of Robb's directive:

- With the regional offices freed up to establish their own procedures for reducing case-processing time, employers operating in more than one region will need to adjust to varying procedures and deadlines in handling ULP charges.
- With the elimination of "impact" categories, regional offices will have an equal incentive to quickly process all cases. For example, an employee discharge during an election campaign will not take automatic precedence over an employer charge against a union. Under the old system, such latter cases were seldom, if ever, categorized as ones of exceptional impact.
- On the other hand, a case involving an election-related discharge, or similarly impactful ULP, may result in a more timely and likely resort to Section 10(j) injunctive proceedings. Robb issued a memo directing regions to seek 10(j) relief quickly, when warranted. (See [GC Memo 18-05](#).)
- Fewer investigative subpoenas will likely be issued by the regions, as the longer case-processing times that result will adversely impact the region-specific statistics.
- The processing discipline created by the new system will incentivize the early disposition of "no merit" cases and result in regions requiring that charging parties promptly produce the evidence and legal arguments in support of their charges or face dismissal. Indeed, regions may well adopt policies requiring the submission of supporting evidence and argument at the same time the charge is filed.
- That same processing discipline will also discourage the issuance of complaints predicated on "novel" or "creative" interpretations of the NLRA. Regional directors will want a clear "go-ahead" from Washington before wading into any complex or controversial legal waters.
- Regions will be less prone to grant any extensions of time requested by either party with respect to any step in the investigatory process.
- It is unclear whether a region's case-processing "clock" stops while a case is pending in the agency's Division of Advice. What is clear, however, is that just like the regions, the Division of Advice must reduce its processing time by 20 percent over the next four years. ■

Other NLRB and labor developments

Here is a summary of noteworthy case law developments from the latter half of 2018:

Circuit court decisions

Pension payments unlawfully discontinued. A staffing company violated the National Labor Relations Act (NLRA) when it unilaterally discontinued contributions to a union pension plan upon the expiration of a collective bargaining agreement (CBA), ruled the U.S. Court of Appeals for the District of Columbia Circuit. Because the underlying pension plan contained no language giving the employer a unilateral right to cease making contributions, the union had not expressly waived the right to bargain over the contributions when it agreed to be bound by the terms of the plan. In addition, the union did not impliedly waive its right to bargain by failing to timely demand bargaining; it had repeatedly requested that the employer continue the pension payments. The appeals

Adhering to its so-called “clear and unmistakable waiver” standard, the Board found a bargaining violation because the union had not waived its right to bargain over the effects of the layoff.

court also rejected the employer’s argument that making the payments would have been futile because the pension plan would reject any payment made after the CBA ended. The court noted the employer presented no evidence that the payments would have been rejected, or that it had sought an alternate method of compliance (*StaffCo of Brooklyn, LLC v. National Labor Relations Board*, May 4, 2018).

Step increases unlawfully discontinued. A hospital unlawfully discontinued anniversary step increases after the expiration of a CBA, ruled the D.C. Circuit. The CBAs included separate provisions regarding annual hospital-wide wage increases and recurring step increases based on 12-month date-of-hire anniversary periods. After the CBAs expired, the annual hospital-wide wage increases expired, but the employer initially agreed that unit employees would continue to receive the anniversary step increases. Later, though, the employer contended that the step increases also did not survive expiration of the contract, arguing that the provision regarding the step increase expressly referenced the expired

annual increase provision and was tied to it and, thus, that the anniversary provision had expired as well. However, the National Labor Relations Board (NLRB) found the employer breached its bargaining duty when it unilaterally ended the anniversary step increases. The appeals court agreed. The anniversary step increase provision did not, by its terms, provide for cessation at the CBA’s expiration, and without such “explicit language,” it remained part of the status quo and should have continued after expiration of the contract. The appeals court enforced the NLRB’s order requiring the employer to resume the step increases and make affected employees whole (*Prime Healthcare Services–Encino LLC, dba Encino Hospital Medical Center v. National Labor Relations Board*, May 18, 2018).

“Clear and unmistakable waiver” standard? Under a unique set of facts, the D.C. Circuit held that the NLRB did not sufficiently justify its use of the “clear and unmistakable waiver” standard in rejecting an employer’s contention that a handbook provision reserving its right to “implement” layoffs relieved it of its statutory duty to engage in effects bargaining. The employer was a so-called “Burns successor” that adopted its existing handbook as setting its initial terms and conditions of employment. The handbook contained a provision expressly reserving the employer’s right to “implement” layoffs and to establish the procedures for doing so. Soon thereafter, the successor employer laid off 12 employees without giving the union an opportunity to bargain over severance pay, preferential hiring, or other terms for the displaced bargaining unit members. Adhering to its so-called “clear and unmistakable waiver” standard, the Board found a bargaining violation because the union had not waived its right to bargain over the effects of the layoff. The D.C. Circuit, which has been somewhat unreceptive to the Board’s “clear and unmistakable” standard anyway, observed that under these circumstances “this rationale evaporates” completely, since there was no bargained-for contract, but rather only unilaterally implemented handbook provisions to which the union never agreed. Accordingly, the appeals court remanded the case for a second time—here, for a further explanation as to how the waiver standard could be properly applied when the union had no chance

to bargain in the first place (*Tramont Manufacturing, LLC v. National Labor Relations Board*, May 29, 2018).

Recognition clause “demonstrably untrustworthy.”

The D.C. Circuit recently held the NLRB had erred in finding that a cookie-cutter union recognition clause in a Section 8(f) pre-hire agreement conferred Section 9(a) status on the bargaining relationship between an employer and a national union. The employer, a fire sprinkler service and installation company, had signed on to successive pre-hire agreements that included a recognition clause containing boilerplate language claiming the employer had confirmed that the union enjoyed majority support among their employees. However, the company had signed onto the first form contract three years before it even hired a single sprinkler fitter—and thus it had exactly zero employees who supported the union. Yet the Board hung its hat on the rote language of the recognition clause to find a Section 9(a) relationship, despite the absence of any evidence indicating that the company’s employees wanted the union to serve as its 9(a) bargaining representative—no election petitions, no authorization cards, and no votes either for or against the union in the company’s 20-year history. Further still, every agreement signed by the employer was “a carbon-copy contract proffered by the Union without any input from the Company or its employees.” Under these circumstances, the appeals court found the recognition clause to be “demonstrably untrustworthy.” It concluded that the Board’s reliance on the mere language of the clause served to subvert employee choice in their bargaining representative and to “reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer.” Finding the Board’s decision arbitrary and capricious, the appeals court granted the employer’s petition for review and vacated the Board’s decision (*Colorado Fire Sprinkler, Inc. v. National Labor Relations Board*, June 8, 2018).

Nonunion shop was an alter ego. Substantial evidence supported the NLRB’s findings that a unionized manufacturer and a nonunion shop that it created were alter egos, ruled a divided D.C. Circuit. The appeals court looked to the Board’s findings on three critical factors: identity of business purpose, operations, and equipment; substantial control; and anti-union motive. The manufacturer created the nonunion entity to mass-produce a partition that the manufacturer had been exclusively producing for an architectural firm; the manufacturer maintained substantial control over the

nonunion shop; and it created the nonunion shop for the purpose of evading its bargaining obligations. Moreover, the manufacturer required its union to renounce any claim to represent the nonunion shop’s employees as a condition of renewing the parties’ CBA (*Island Architectural Woodwork, Inc. v. National Labor Relations Board*, June 15, 2018).

Full dues demand not a “mistake.” The D.C. Circuit found, contrary to the NLRB, that a union’s demand letters and garnishment actions against members it knew had opted only for “core,” not “full,” membership were not a mere “mistake” and amounted to unlawful coercion of those employees in the exercise of their right to limit their union association. The employees had notified the union in writing that rather than paying full membership dues, they elected only “core” membership and corresponding payment of the “reduced fair share amount for financial core members.” The union sent letters asking the employees to become full members. After rejecting the offer and choosing only “core” membership, the union nonetheless sent the employees letters demanding payment of full dues and asked the employer to withhold the full dues from their paychecks. A divided Board panel held the only “threat” was to suspend union membership and that the “only objectively reasonable view of the letter, in context, was that it was mistakenly directed” to the objecting employees. In vacating the Board’s decision, the D.C. Circuit took issue with the conclusion that the union sought to extract full membership dues “by mistake,” noting that just five months earlier, it had solicited the same employees to switch from core to full membership and observing that the union itself never claimed to have sent the letter in error. The Board’s decision was legally unworkable, its rationale came up “woefully short,” and its decision “makes no sense,” the appeals court found (*Tamosiunas v. National Labor Relations Board*, June 15, 2018).

Weak evidence of animus. The D.C. Circuit held there was insufficient evidence to support the NLRB’s finding that an employer that fired an employee for lying during an investigation actually did so to rid itself of a prominent union supporter. The appeals court also rejected the Board’s alternative finding that even if the employee did lie, it was within the context of an inquiry into protected activity and therefore was protected. The appeals court granted the employer’s petition for review and denied enforcement of the NLRB’s order (*Cellco Partnership, dba Verizon Wireless v. National Labor Relations Board*, June 19, 2018).

Hospital can't withdraw recognition. The D.C. Circuit agreed with the Board's decision that a hospital could not lawfully withdraw union recognition given its multiple unfair labor practices (ULPs) both before and after the union's electoral win. The hospital had committed a number of serious violations and avoided bargaining for some eight years until court enforcement of a bargaining order. According to the appeals court, substantial evidence supported the Board's finding that the union's presumption of majority support was irrebuttable because the hospital had refused to deal with the duly elected union. Moreover, a subsequent decertification petition was unreliable since the employer's previous and unremedied ULPs both before

The D.C. Circuit upheld the NLRB's determination that off-duty hospital employees holding picket signs on hospital property next to a nonemergency entrance were engaged in protected activity.

and after the election "significantly contribute[d]" to the loss of majority status, and "tainted" the decertification petition (*Veritas Health Services, Inc. dba Chino Valley Medical Center v. National Labor Relations Board*, July 10, 2018).

RD had authority under quorum-less NLRB. Because it was the choice of the parties to enter into a consent election agreement, not the NLRB's delegation of authority, which gave a regional director's decision finality in the context of a consent election agreement, the D.C. Circuit sustained, as reasonable, the Board's understanding of 29 U.S.C. § 153(b), which addresses delegation of its authority. The main issue in this case was whether a regional director retained the authority to certify a union during the 2012-13 period in which the Board itself could not take action because it had slipped below the statutorily mandated three-member quorum. If the Board itself was powerless, could a regional director, exercising delegated authority, conduct a representation election? Finding the Board reasonably saw no material distinction between stipulated and consent election agreements, the appeals court rejected the employer's challenge to bargaining unit certification based on the Board's lack of a quorum (*Hospital of Barstow Inc. dba Barstow Community Hospital v. National Labor Relations Board*, July 31, 2018).

NLRB must explain finding wildcat strike was protected. The NLRB must flesh out its explanation as to why

a wildcat strike at a Coca-Cola bottling plant in Puerto Rico was protected activity, the D.C. Circuit held in remanding the case to the Board. Nearly 100 unionized workers were laid off or fired for participating in the three-day walkout, which the union had expressly disavowed in a letter to the employer. In deciding whether the workers knew their union did not approve the strike, the Board seemed to rely only on the fact that the union's letter disavowing the strike was distributed by the employer. The decision, however, fails to explain why such fact would make any analytical difference. Without further explanation, the appeals court held it was unable to sign off on the Board's conclusion that the employer violated the NLRA when it discharged the striking workers (*CC1 Limited Partnership dba Coca Cola Puerto Rico Bottlers v. National Labor Relations Board*, August 3, 2018).

Stationary picketing outside hospital OK. The D.C. Circuit

upheld the NLRB's determination

that off-duty hospital employees holding picket signs on hospital property next to a nonemergency entrance were engaged in protected activity. The Board correctly applied the framework set forth in the United States Supreme Court's 1945 decision in *Republic Aviation Corp. v. NLRB* to reject the hospital's attempt to stop the employees' stationary display of picket signs, the appeals court held. In *Republic Aviation*, the Supreme Court approved the NLRB's application of a presumption that an employer cannot prevent off-duty employees from soliciting union support on company property. Only if the employer can present evidence of "special circumstances" making a prohibition "necessary...to maintain production or discipline" can the employer overcome that presumption. The NLRB has subsequently modified the *Republic Aviation* presumption based on the nature of the workplace. Thus, in a hospital setting, the ability to provide patient care without disturbance must be considered. Accordingly, in immediate patient-care areas, a ban on certain union solicitation activity is not presumptively invalid; outside immediate patient-care areas, however, the presumption still exists. The *Republic Aviation* presumption has been applied primarily in cases involving oral solicitation of union support or distribution of union-related literature, not in cases involving picketing, the appeals court observed. The parties did not dispute that leafletting on company property was protected Section 7 activity, but the medical center argued that picketing should be treated differently than leafletting and that the

Republic Aviation presumption should not apply. According to the court, the NLRB properly rejected that argument. The appeals court highlighted the NLRB's observation that stationary picketing is less confrontational than leafletting because those holding picket signs do not have direct contact with nonemployees. The NLRB did not hold that picketing must always be permitted on premises to the same degree as handbilling or soliciting. Instead, it noted that where such picketing disrupts operations or interferes with patient care, *Republic Aviation* would permit a hospital to bar it. The NLRB's application of *Republic Aviation* was therefore sustained as reasonable, not only as to solicitation and handbilling, but as to the picketing in this case. It must be noted, however, that General Counsel Peter B. Robb signaled his intent to revisit the Obama Board's reasoning in this case in his first **GC Memorandum**, issued on December 1, 2017 (*Capital Medical Center v. National Labor Relations Board*, August 10, 2018).

Nonunit information requested was relevant. In a case that had the NLRB's Republican members bowing to a decision of the D.C. Circuit based on 50-year-old precedent, the appeals court held that substantial evidence supported the Board's finding that information requested by a union representing a college's secretarial and clerical employees was relevant and that the college was obligated to provide it. The union's effort in canvassing the college and developing a chart of 34 nonbargaining unit positions it believed were performing bargaining unit work was sufficient support for an administrative law judge's (ALJ) finding that it was reasonable to believe that unit work was being performed outside the unit, the court found, granting the Board's cross-application for enforcement of a finding that the college violated the NLRA by refusing to provide the union with the requested information (*Teachers College, Columbia University v. National Labor Relations Board*, September 4, 2018).

Retiree benefits dispute not arbitrable. In an appeal raising important questions of appellate jurisdiction and contract interpretation, the U.S. Court of Appeals for the Third Circuit ruled that where a district court compelled arbitration, dismissed a union's substantive claims, and administratively closed the case, the district court's order was an appealable final order. Further, the appeals court agreed with an employer that a dispute over retiree healthcare benefits was not subject to arbitration because retiree health benefits were not covered under a CBA, as the former employees who retired before the CBA went into effect were not "employees"

under the agreement. Further, the appeals court found that a single mention of retiree healthcare benefits in the CBA was insufficient to incorporate a memorandum of agreement (MOA) on the subject of retiree healthcare into the CBA absent an express intent to incorporate the MOA (*Cup v. Ampco Pittsburgh Corp.*, August 29, 2018).

Reasonable concern for property rights. An employer unlawfully prohibited union representatives from distributing pro-union literature in the public right-of-way adjacent to its facility and by trying to remove them from the public property, ruled the Third Circuit. However, the appeals court rejected the Board's finding that the employer violated the NLRA by threatening to summon police and then summoning the police when the union representatives refused to leave. The employer's property was separated from the shoulder of the road by a concrete curb. The curb borders a strip of grass, which borders a small parking lot, all of which was owned by the employer. The employer did not have a property interest in the shoulder of the road, but the general manager was under the mistaken belief that the company property included the shoulder of the road and that the company could exercise control over that space and exclude the union. Although the employer was mistaken, the appeals court held it should not be penalized for contacting law enforcement to vindicate its own property rights—even after they moved to the shoulder, the union reps continued to make forays onto the company's driveway to leaflet vehicles. The employer's mistake "does not negate the fact of trespass," the appeals court said, rejecting the Board's finding that the company was motivated solely by a desire to remove the union representatives from the right-of-way, not by a reasonable concern to protect its own property interest. And it is well established that there is no NLRA violation where an employer can show that its threat to call or its call to the police "is motivated by some reasonable concern, such as public safety or interference with legally protected interests" (*National Labor Relations Board v. ImageFIRST Uniform Rental Service, Inc.*, December 18, 2018).

Injunction was rightly denied. A divided U.S. Court of Appeals for the Fourth Circuit found that a district court did not abuse its discretion when it denied an NLRB regional director's motion for a Section 10(j) injunction pending disposition of ULP proceedings against two hospitals. The Board had previously issued bargaining orders directing the hospitals to negotiate with a union elected by the hospitals' nurses. The union rejected the hospitals' first contract proposals, alleging that

the terms amounted to bad-faith bargaining, and filed NLRB charges. The Board sought a preliminary injunction pending final disposition of the ULP proceedings, directing the hospitals to bargain in good faith. But the Board failed to demonstrate, as one of the requirements necessary to obtain preliminary injunctive relief, that there was a likelihood of irreparable injury to the Board's ability to effectively remedy the alleged ULPs in the absence of an injunction, the appeals court said. It rejected the Board's plea that the lower court had erred in refusing to infer harm from the nature of the violations committed by the hospitals and had "committed clear error" in its finding there was no substantial erosion of employee support for the union. Chief Judge Gregory dissented (*Henderson v. Bluefield Hospital Co., LLC*, August 28, 2018).

Court properly enjoined unilateral changes. The U.S. Court of Appeals for the Fifth Circuit affirmed a district court injunction barring DISH Network from unilaterally implementing wage and benefits changes after declaring a bargaining impasse. Acting on a petition filed under Section 10(j) of the NLRA, the court enjoined DISH from implementing a new pay plan and setting a lower hourly rate while contract negotiations were ongoing. In April 2016, DISH had implemented the changes, which resulted in a nearly 50 percent reduction in wages. The district court granted the request for injunctive relief and restored union workers to pre-2016 wage levels and health benefits. Both DISH and the NLRB raised issues before the appellate court. DISH claimed that the injunction was unwarranted under the Fifth Circuit's "egregiousness" test, which, it argued, required the NLRB to demonstrate that the enjoined ULPs were, by comparison to other cases, particularly serious. However, the appeals court found there was no such requirement and that the district court was only required to determine whether "the unfair labor practice, in the context of that particular case, had caused identifiable and substantial harms"—a standard the district court's decision met. The NLRB, on the other hand, argued the injunctive relief did not go far enough, since it did not enjoin future unilateral changes. The appeals court rejected that argument as well, finding that district courts should provide only relief that is necessary and must issue specific factual findings that detail the harm requiring Section 10(j) injunctive relief (*Kinard v. DISH Network Corp.*, May 18, 2018, amended June 5, 2018).

Public image didn't justify button ban. The Fifth Circuit enforced an NLRB order finding that In-N-Out Burger

violated Section 8(a)(1) when it barred employees at an Austin, Texas, restaurant from wearing buttons supporting the Fight for \$15 movement under its detailed appearance and uniform code, which prohibited "wearing any type of pin or stickers." The company could not overcome the presumption that a blanket ban on such insignia is unlawful under the NLRA, failing to convince the court of appeals that public image considerations or food safety concerns constituted "special circumstances" justifying the prohibition (*In-N-Out Burger, Inc. v. National Labor Relations Board*, July 6, 2018).

Charter school under NLRB jurisdiction. A charter school was a private organization, not a political subdivision of the state, and was thus not exempt from the collective bargaining provisions of the NLRA, ruled the Fifth Circuit. Charter schools are "independent public schools" under Louisiana law and are treated as part of the public school system for some purposes; however, that didn't render them political subdivisions of the state, the appeals court held. The lack of political influence over Louisiana charters was a choice the legislature made in the enabling legislation. Consequently, because Louisiana chose to insulate its charters from the political process, they are privately controlled employers subject to the NLRA (*Voices for International Business and Education, Inc. dba International High School of New Orleans v. National Labor Relations Board*, September 21, 2018).

Board's unit determination trumps arbitrator's.

Because an arbitration award addressing a bargaining unit determination conflicted with a NLRB regional director's representation decision, the award was unenforceable, ruled the U.S. Court of Appeals for the Seventh Circuit. The dispute involved which union should properly represent a group of staff members at Columbia College who also taught on a part-time basis—the staff union or the part-time faculty association. The NLRB's regional director determined the employees in question should be part of the faculty bargaining unit. However, before the Board issued a final decision, an arbitrator, resolving a separate grievance, concluded that the employees had been *excluded* from the faculty unit. A district court subsequently vacated the arbitrator's decision, finding the award unenforceable because it conflicted with the NLRB's representation decision. The Seventh Circuit agreed, holding that in light of the broad authority conferred upon the NLRB under Section 9 of the NLRA to determine appropriate bargaining units, the Board had primacy over representation decisions and

the countervailing arbitration award could not stand (*Part-Time Faculty Association at Columbia College Chicago v. Columbia College Chicago*, June 15, 2018).

Union may have steered jobs to gain votes. The Seventh Circuit ruled a Chicago concert promoter's claim that a union interfered with an NLRB representation election by steering higher-paying stagehand jobs to employees shortly before the vote warranted an evidentiary hearing. The stagehands' work schedules were irregular, and their assignments were sporadic. However, in the weeks before the election, the employer contended that the union had provided employees

The Ninth Circuit revived a legal challenge to a 2016 ordinance enacted by the City of Seattle that permits independent-contractor drivers to collectively bargain with rideshare companies[.]

with premium, higher-paid work at union venues in an attempt to influence employees to vote in favor of the union. The employer offered employment records to demonstrate that the pre-election assignment pattern was aberrational and identified three individuals who could provide further detail about how the referrals were given and which specific employees had received union work. The regional director, however, concluded the employer's offer of proof in support of its objection fell short of demonstrating "substantial and material factual issues" that would warrant setting aside the election. The NLRB declined the employer's request for review and certified the union. Finding that the employer presented enough evidence to warrant a hearing on the validity of the election results, the appeals court denied the Board's petition for enforcement and remanded the case for an evidentiary hearing (*Jam Productions, Ltd. v. National Labor Relations Board*, June 28, 2018).

NLRB misapplied *Wright Line*. The NLRB misapplied its *Wright Line* standard when it held the General Counsel is not required to establish a nexus between an employee's discharge and an employer's antiunion animus, the U.S. Court of Appeals for the Eighth Circuit ruled. The appeals court denied the Board's petition for enforcement in a case involving a leading union proponent who was fired for Internet surfing and sleeping on the job, six weeks after being reprimanded for discussing the union with coworkers. The Board adopted its ALJ's reasoning that there was no "nexus element" to the General Counsel's initial burden under *Wright Line*. This

was in error, the appeals court said; the General Counsel must connect the employer's antiunion animus to the actual discharge in order to establish that "the employee's protected conduct was a substantial or motivating factor in the adverse action." The appeals court also rejected the Board's finding that the employer violated the NLRA when it interviewed the employee's coworker in preparation for the ULP hearing. The court noted it had previously rejected the Board's per se rule that interviews conducted of another employee in preparation for a Board hearing are unlawfully coercive and noted, on the facts of the case, that the questioned employee's testimony belied any supposedly coercive effect of the interview

(*Tschiggfrie Properties, Ltd. v. National Labor Relations Board*, July 24, 2018).

Tribal casino violated NLRA.

After a detailed analysis of the question, the U.S. Court of

Appeals for the Ninth Circuit held that the NLRB reasonably interpreted the NLRA to apply to tribal employers. On the merits, the appeals court granted the Board's petition for enforcement of its order finding Casino Pauma, owned by the Pauma Band of Mission Indians, violated the NLRA when it threatened employees with discharge for distributing union literature to customers in nonworking areas in front of the casino during nonworking time. The appeals court agreed with the Board's interpretation of *Republic Aviation* with regard to employees' customer-directed distribution on nonwork time in nonwork areas of the employer's property (*Casino Pauma v. National Labor Relations Board*, April 26, 2018).

Challenge to Seattle "gig" ordinance revived. The Ninth Circuit revived a legal challenge to a 2016 ordinance enacted by the City of Seattle that permits independent-contractor drivers to collectively bargain with rideshare companies and to negotiate the "nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers." The U.S. Chamber of Commerce filed suit, contending that the ordinance is preempted by Section 1 of the Sherman Antitrust Act because it allows the price-fixing of ride-referral service fees by private cartels of independent-contractor drivers. A lower court had dismissed the Chamber's antitrust claim, as well as a claim that the ordinance was preempted by the NLRA. The Ninth Circuit reversed dismissal of the antitrust claim, holding that the "state-action immunity doctrine" did

not exempt the ordinance from Sherman Act preemption. It noted the exemption did not apply because the state had not clearly articulated a policy authorizing private parties to price-fix the fees that for-hire drivers pay for ride-referral services. Additionally, it held the lower court's dismissal unwarranted because the "active-supervision requirement for state-action immunity applied, and was not met." Although reversing the dismissal of the antitrust claim, the appeals court affirmed the dismissal of the Chamber's NLRA preemption claim (*Chamber of Commerce of the United States of America v. City of Seattle*, May 11, 2018).

In a related development, the Ninth Circuit found a separate lawsuit challenging the ordinance on NLRA-based grounds had been properly dismissed. The suit was brought by a group of drivers who alleged that the ordinance would result in the disclosure of personal information about them and would violate Sections 8(e) (the "hot cargo" provision), and 8(b)(4) (the "secondary boycott" provision) of the NLRA. The lower court held the disclosure claim presented no "risk of real harm" since all for-hire drivers must obtain business licenses and disclose much of the same information in a public and searchable municipal database. It further found that both NLRA-based claims were, at this point, too speculative to withstand a motion to dismiss. The Ninth Circuit sustained the lower court's dismissal (*Clark v. City of Seattle*, August 9, 2018).

Employer ordered to bargain. The Ninth Circuit held there was sufficient likelihood of success on the merits and of irreparable harm to warrant injunctive relief where a hospital unlawfully withdrew recognition and refused to bargain unconditionally with a union representing its employees. The hospital had several bargaining sessions with the union after it was certified, and reached some agreements regarding working conditions, before the employer officially challenged the union's certification. An employer may not begin unconditional bargaining and then withdraw recognition and refuse to bargain. The NLRB, however, presented evidence suggesting the employer did just that and demonstrated a sufficient likelihood it would prevail on its Section 8(a)(5) allegations to warrant injunctive relief. The appeals court agreed, upholding the injunction and requiring the employer to bargain with the union (*Coffman v. Queen of the Valley Medical Center*, July 16, 2018).

RLA did not preempt state leave law. In an *en banc* decision, a majority of the Ninth Circuit held that the federal

Railway Labor Act (RLA) did not preempt a flight attendant's rights under the Washington Family Care Act (WFCA). The attendant sought to reschedule her vacation to take care of an ailing child. The attendant, however, was covered by a CBA that did not allow scheduled vacation days to be moved for family medical reasons. Since she had no sick days left, and was denied her request to take two of her seven days of accrued vacation, her only option under the CBA was to take unscheduled leave. Doing so would result in the assessment of disciplinary "points" against her. Accordingly, she filed a complaint with the relevant Washington state labor agency alleging that the employer's refusal to allow her to use vacation days violated the WFCA, since it guarantees employees the flexibility to use accrued sick leave or other paid leave for family medical reasons. The employer argued this was a CBA dispute in disguise and, as such, the state labor agency lacked jurisdiction. It also asserted that requiring adherence to the CBA's vacation-scheduling regime was not a prohibited restriction on "the choice of leave" under the WFCA, but a permissible condition on earning leave in the first place. Meanwhile, in *separate litigation*, the employer sought an injunction against processing the WFCA claim, asserting that it was so bound up in a dispute over the terms of the CBA as to be preempted under the RLA. A **divided appellate panel** originally agreed and found the state-law action preempted. However, the *en banc* Ninth Circuit reversed, finding that the employee's claim had not arisen entirely from the CBA. Rather, she had alleged a violation of the independent right to use banked vacation days and that it did not matter if the vacation time was earned under a CBA. The meaning of all the relevant provisions in the CBA was not in dispute. Therefore, her claim did not require any interpretation of the CBA (*Alaska Airlines Inc. v. Schurke*, August 1, 2018).

Epic Systems forecloses arbitration challenges. The Supreme Court's decision in *Epic Systems Corp. v. Lewis* foreclosed a pizza delivery driver from asserting that his employer unlawfully required employees to individually arbitrate employment-related claims and to waive their right to file class or collective action suits, ruled the U.S. Court of Appeals for the Eleventh Circuit. However, such arbitration provisions cannot lawfully restrict an employee from filing charges with the NLRB, or lead an employee to reasonably believe such Board access is restricted. Because the Board had recently refashioned its test for determining how facially neutral policies are to be construed, the court remanded the matter to the Board to afford it the opportunity to apply the

new standard (*Cowabunga, Inc. v. National Labor Relations Board*, June 26, 2018). The Eleventh Circuit applied the same reasoning and reached the same conclusion in a separate class arbitration waiver case involving a college admission counselor (*Everglades College, Inc. dba Keiser University v. National Labor Relations Board*, June 26, 2018).

NLRB rulings

Selective enforcement of safety policy. A masonry contractor engaged in ULPs by suspending and discharging a known union supporter and his coworker for purportedly violating its fall-protection policy and more strictly enforcing the policy based on union activity, the NLRB ruled. The close timing to the election, the decision-maker's prior threat and collusion with the owners, and the disparate treatment of coworkers were all suggestive of anti-union animus and pretext, the Board ruled in this consolidated ULP and representation case (*Advanced Masonry Associates, LLC dba Advanced Masonry Systems*, April 13, 2018).

Email statements were threats. Employees would reasonably construe statements to a pro-union employee in an email from the company's chief operating officer (COO) just a few days before a scheduled representation election as a threat to existing benefits and working conditions, a divided NLRB panel found. The email reminded the employee of several favorable employment conditions that the COO had worked so hard to bring to the school: pay increases, personal development days, and hiring and training flexibility. In a series of rhetorical questions, the employee was asked to consider whether the board of directors would take a hard line on pay, benefits, and working conditions if employees unionized. The employee shared details of the email with three coworkers prior to the election. These statements went well beyond merely advising employees of the potential consequences of good-faith collective bargaining; they instead constituted statements threatening the loss of existing benefits, the Board majority found. The "facts" conveyed by the COO lacked any objective basis and did not predict demonstrably probable consequences beyond the employer's control. The COO offered no evidence, for example, that unionization would lead to significant new costs for the employer that would necessitate reductions in existing benefits. Nor did his remarks explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining. Employees would reasonably

understand the COO's statements to threaten them with loss of existing benefits and less favorable terms and conditions of employment if they voted for union representation, the Board found. And because the statements would reasonably tend to interfere with employee free choice in an impending election, the NLRB set aside the election results (*Franklinton Preparatory Academy*, April 20, 2018).

Hospital's "badge reel" rule unlawful. A divided NLRB panel found that a hospital acted unlawfully by maintaining an overly broad "badge reel" rule that prohibited the wearing of union insignia in nonpatient care areas. The hospital issues identification badges to all of its staff, who are required to wear them visibly at all times while on the premises. In addition to the employee's photograph, name, and job title, the badge provides the employee with swipe access to authorized areas. Certain cards were connected to a retractable badge reel to permit ease of swiping. A hospital "dress code" policy provides, in part, that only employer-approved pins, badges, and professional certifications may be worn. Another policy states that badge reels may be branded only with the employer's approved logos or text; i.e., it prohibited employees from wearing badge reels branded with union insignia. The ALJ found that the badge reel rule applied only in patient care areas and was therefore presumptively lawful. However, nothing in the rule precluded the employer from applying the restriction to nonpatient care areas. As such, a divided Board panel rejected the ALJ's conclusion, noting the scope of the policy was ambiguous and that ambiguity must be construed against the employer. Absent special circumstances, the provision was unlawful, and the employer made no such showing that employees wearing badge reels branded with union insignia would disrupt healthcare operations or disturb patients (*Long Beach Memorial Medical Center, Inc.*, April 20, 2018).

Withholding benefits improvements from voters. In a case remanded from the Third Circuit, the NLRB found a nursing facility violated the NLRA when it implemented health benefit improvements for all employees except those who were eligible to vote in an upcoming union election. An ALJ had found the employer violated Section 8(a)(3) by withholding the benefit improvements from employees in the voting unit—a finding that turned on a "but for" test of whether the employees would have received benefits "if a union was not in the picture." The NLRB adopted the ALJ ruling without comment and offered no discussion of applicable law on the issue. This failure troubled the Third Circuit,

which, in a **2015 decision**, found fault with the test used by the Board with regard to withholding favorable benefits changes from eligible voters. It concluded that the NLRB's approach could not be squared with the burden-shifting standard set forth by the Supreme Court in its 1967 decision in *National Labor Relations Board v. Great Dane Trailers, Inc.* As instructed by the appeals court, the Board reissued

The NLRB found a Puerto Rico UPS facility unlawfully conditioned bargaining on a union's acceptance of negotiation ground rules...

its decision applying the *Great Dane* analytical framework. After doing so, it reaffirmed its initial finding that the employer unlawfully withheld the benefit improvements from bargaining unit employees while granting the improvements to other employees (*Woodcrest Health Care Center*, April 26, 2018).

Workers hired away from contractor don't count. A divided NLRB panel decided that once a Las Vegas casino hired five stagehands previously employed by an on-site labor contractor, those stagehands were no longer members of the contractor's bargaining unit and therefore could not be used for purposes of determining whether the casino was a successor employer. As a consequence, the labor contractor's employees did not constitute a majority of the casino's workforce, and the casino was not a successor and did not have a duty to recognize the union that the contractor's employees had chosen. The casino took its stagehand work in-house after a union filed an election petition to represent the labor contractor's stagehands working at the casino. The casino hired the stagehands the day before the election (*Labor Plus, LLC*, June 14, 2018).

Demanding "ground rules" unlawful. The NLRB found a Puerto Rico UPS facility unlawfully conditioned bargaining on a union's acceptance of negotiation ground rules, including a requirement that bargaining proposals be submitted in writing and in English. After the union submitted an initial 67-page proposal in Spanish, the employer insisted that future proposals be in English and that the parties split the cost of translating the initial proposal "as a condition for the negotiations to continue." The union allegedly agreed to submit future counterproposals in English but otherwise rejected the proffered ground rules. The employer then rejected all offered bargaining dates asserting that proposals had to be in English because they would be

reviewed by English-speaking individuals on the U.S. mainland. The union filed a ULP charge alleging the employer failed to bargain in good faith. An ALJ found the translation dispute was a mandatory subject of bargaining, that the employer engaged in good-faith bargaining by offering to pay half the cost of translating the initial proposal, and that the union's refusal to agree to this "reasonable accommodation" relieved the employer of responsibility for any bargaining delay. The Board disagreed, noting it is a per se violation of Section 8(a)(5) for a party to hold bargaining hostage to unilaterally imposed preconditions.

Here, the record did not show that translation was necessary for bargaining to continue. While the ground rules required proposals in English, all other communications between the parties were in Spanish—including all written correspondence, the union's initial bargaining proposal, and subsequent bargaining sessions (*UPS Supply Chain Solutions, Inc.*, June 18, 2018).

Refusal to honor resignation requests. By repeatedly and deliberately failing to respond in any manner to employees' letters, telephone calls, and/or in-person inquiries regarding revocation of their dues checkoff authorizations, a union violated Section 8(b)(1)(A), ruled the NLRB. The Board also found that the union violated the NLRA by failing to honor the employees' membership resignation requests. The union asserted that the dues revocation requests were untimely and did not conform to the requirements of the dues checkoff authorization form signed by employees, that the charges were an improper attempt to equate the members' *Beck* rights with requests to revoke dues checkoff, and that the union did not have an obligation to honor *Beck* requests because the operative CBAs were in a right-to-work state, in which application of agency shop CBA provisions was prohibited. The Board, however, found the union acted unlawfully by failing to respond with regard to requests to revoke dues checkoff authorizations. There also was evidence the union took four to nine months to respond to resignation requests. Such conduct unlawfully restrained and coerced the employees in the exercise of their Section 7 rights (*International Brotherhood of Teamsters Local 385 (Walt Disney Parks and Resorts U.S., Inc. dba Walt Disney World Co.)*, June 20, 2018).

Lawful discipline for work stoppage. Time Warner Cable lawfully suspended four employees for participating in a demonstration outside its facility. The employer issued

two-day suspensions to two foremen, one of whom was denied his *Weingarten* rights. Early the next morning, a union rep and several employees parked their cars outside the facility, blocking other vehicles from entering the facility and preventing the employer's service trucks from departing for work assignments. Over the next hour, about 50 employees gathered around the cars blocking the street, and union reps handed out flyers. The gathering broke up, and the obstructing vehicles were removed about 90 minutes later, but the obstruction caused a "ripple effect" of delayed or missed service appointments for the rest of the day. The employer identified several employees from video taken by its external surveillance cameras, and a few weeks later, employees were summoned by management and questioned about their involvement in the event. The employer issued two-week suspensions to seven employees. It also initiated a grievance against the union for damages,

An electrical cooperative violated Section 8(a)(1) when it fired an employee after he posted comments in a Facebook industry forum that ... displayed a "poor attitude" and riled coworkers.

contending that the demonstration violated the no-strike clause in the parties' CBA. An arbitrator found the union effectively impeded the employer's normal business operations in violation of the no-strike clause. The Board treated this conclusion as established fact and thus held the employees' participation in the protest was unprotected. Consequently, the employer was legally free to discipline the participants. However, several of the questions posed to employees who were interrogated—"Who was at the gathering?," "When did they receive notification of the gathering?," and "How was the event communicated to you?"—were deemed unlawfully coercive (*Time Warner Cable New York City, LLC*, June 22, 2018).

Not a valid impasse. An employer unlawfully implemented its final contract offer despite the absence of a valid impasse, a divided Board panel held. The parties held about 25 bargaining sessions until their final face-to-face meeting on November 18, 2014. They had reached agreement on many terms and conditions, but a thorny issue remained: the employer wanted to scrap its incentive-based Quality Performance Compensation (QPC) system. At that last bargaining session, the employer made a "final proposal," which included wholly eliminating the QPC system. When the union had to reschedule December

2014 bargaining dates (for legitimate reasons), the employer thereafter rejected all of the union's six proposed alternate dates. It also conditioned any further meetings on a written response to its final offer. The union replied with counterproposals via email, now offering to eliminate the QPC system for all new hires, and again asking to meet. But the employer rejected the counterproposal and said the November 2014 proposal was its "last, best and final offer." The union refused to present the offer to its membership and again asked to confer face-to-face. After negotiations languished for a year, the employer sent a letter asking the union if it was going to accept its final offer. The union repeatedly renewed its insistence that the parties meet and bargain, and the employer declared impasse, for the first time, in February 2016. Two months later, the employer implemented its final offer. Noting the

employer's repeated refusal to meet face-to-face, even after the union proposed to eliminate the QPC system for new hires—an appreciable change in position—the Board found the employer failed to carry its burden of

demonstrating impasse, even factoring in the yearlong bargaining hiatus (*Dish Network Corp.*, June 28, 2018).

Retirement incentive plan a "fait accompli."

An employer violated Section 8(a)(5) by offering employees a voluntary separation incentive plan (VSIP) without affording its union notice and an opportunity to bargain after announcing plans for a reduction in force. Although the employer had a contractual right to unilaterally implement indefinite layoffs, the fact that it offered the VSIP in conjunction with its layoff announcement did not make the VSIP part and parcel of the contractual layoff provision, the Board held. The VSIP was a mandatory subject of bargaining, and the employer had presented it as a "fait accompli." Because the union had not waived its right to bargain over it, the employer's refusal to bargain was unlawful (*Harley-Davidson Motor Co.*, June 29, 2018).

Firing for Facebook post was unlawful. An electrical cooperative violated Section 8(a)(1) when it fired an employee after he posted comments in a Facebook industry forum that, in the employer's view, displayed a "poor attitude" and riled coworkers. The comment at issue,

made in an online discussion about safety concerns in the industry, was clearly protected activity. The employer separately violated Section 8(a)(1) by enforcing two conduct rules that it cited as the basis for his discharge: a rule that prohibits “rude or surly conduct” and directs employees to use its grievance procedure to resolve complaints, and a broad “personal conduct” rule that states employees must comply with company rules and work with others to “promote the best interests” of the company. The Board ordered the employer to rescind the rules in question. The Board found it unnecessary to determine if the policies were unlawful on their face, since it would have no bearing on the remedy in the case. Nor did it address whether the discharge of the employee pursuant to the policies separately violated the NLRA (*North West Rural Electric Cooperative*, July 19, 2018).

Union entitled to copy of contract. A residential training center for disadvantaged youth unlawfully refused to provide a union with a copy of its Department of Labor (DOL) Job Corps contract, among other information requested. After bargaining unit employees rejected the employer's contract offer, the union asked to see a copy of the employer's DOL contract, as well as budget information related to pay for both unit and nonunit employees. The employer's contract proposal was based, in part, on the zero percent operational increase/inflationary rate applicable to its DOL contract. The union further sought information on DOL-established minimum and maximum pay rates, a copy of union and nonunion pay scales, the date of the last wage increase, and the source of “extra money” paid to nonunit employees during the prior year. The employer refused to turn over information pertaining to nonunit employees, the DOL contract, or amount of pay underrun (the unspent portion of its DOL-allocated budget), and the union filed ULP charges. At the next bargaining session, the employer's negotiator announced that negotiations were going to change because the union had filed Board charges. The following day, the employer made a contract proposal that included three regressive provisions. A divided NLRB found that the record evidence concerning the course of the parties' bargaining made the requested information relevant. The employer flatly refused to give unit employees a raise or bonus, citing the DOL contract. However, the union heard rumors that nonunit security employees received a raise and that some managers received a bonus. Given these circumstances, the requested nonunit information was contextually relevant, and

the employer violated Section 8(a)(5) by refusing to furnish it. It also violated Section 8(a)(1) by threatening that bargaining would change because the union filed ULP charges (*Management & Training Corp.*, July 25, 2018).

Bargaining mandatory over transfer, but not shutdown. A manufacturer was required to bargain with a union over its decision to transfer the production of its injection-molded products to another company, ruled a three-member panel of the NLRB. On the other hand, the employer did not have to bargain over its decision to shutter its blow-molding operation. It was getting out of the blow-molding business because it had suffered over \$1 million in losses, so it negotiated a deal with the supplier, which was going to make its injection-molded products using the employer's machines. Because the employer made a significant change in the scope and direction of its enterprise when it abandoned blow-molding manufacturing, it was not subject to mandatory bargaining. Nevertheless, the employer was obligated to provide the union with notice and an opportunity to bargain over the *effects* of both decisions, which it unlawfully failed to do (*Rigid Pak Corp.*, July 25, 2018).

Witness names unlawfully withheld. An emergency medical service provider failed to prove that its interest in keeping confidential the names of employees interviewed during a sexual harassment investigation outweighed a union's need for that information, the NLRB found. The alleged harasser was a bargaining unit member on whose behalf the union had filed a grievance after he was discharged, and the witnesses were members of the bargaining unit as well. The union sought the witness names to investigate the matter and determine whether to pursue the grievance to arbitration. Accordingly, the union had a legitimate reason for the information and the employer had an obligation to provide it, unless it could establish a valid defense for not doing so. However, the employer presented no argument as to why its confidentiality interests should prevail over the union's need for the information. There was no evidence that union officials had a history of threatening, intimidating, or retaliating against employees serving as a witness in a disciplinary investigation or that the union sought the witness names to that end. On balance, the Board held the employer failed to meet its burden of demonstrating that its interest in keeping the witness names confidential outweighed the union's need for the information (*American Medical Response West*, July 31, 2018).

Solicitation ban unlawfully applied to parking

lot. Rejecting a fast-food franchisee's contention that its parking lot was a "selling area" and that it could lawfully ban solicitation there, the NLRB found the employer's "loitering and soliciting" policy violated Section 8(a)(1). At retail establishments, the Board allows employers to institute a ban on employee solicitation on the selling floor, and its adjacent aisles and corridors, because active solicitation in a sales area may disrupt business. However, the ban on employee solicitation may not "be extended beyond that portion of the store which is used for selling purposes."

A meat processing company violated the NLRA by unilaterally enrolling in E-Verify[.]

The Board found that simply because customers drove through or parked their cars in the parking lot did not make it a "selling area." In addition, because the policy was unlawful, the manager violated Section 8(a)(1) by telling an off-duty union activist not to solicit other off-duty employees in the parking lot and violated Section 8(a)(3) by issuing a written warning and suspending her for doing so. The general manager also acted unlawfully by reading aloud the unlawful loitering and soliciting policy at a mandatory employee meeting. Lastly, the Board found a statement to a union supporter that he would be picking up his last paycheck if he talked about striking again was an unlawful threat of discharge (*EYM King of Michigan, LLC dba Burger King*, August 15, 2018).

Severance agreements didn't preclude Board charges.

Laid-off workers who signed severance agreements amidst an atmosphere of serious, unremedied ULPs did not waive their right to pursue Board charges against their employer based on their discharge shortly after a union election, ruled a divided three-member panel of the NLRB. Finding that the severance agreements were part and parcel of the employer's effort to prevent its production employees from winning union representation, the Board observed that it is well-established it would not uphold a severance agreement that "was not a bona fide offer of settlement, but was extended as part of a broader scheme to eliminate union supporters." Member Kaplan dissented, citing due process concerns and contending the majority had erroneously analyzed the *Independent Stave* factors (*A.S.V., Inc.*, August 21, 2018).

"Stand-and-stretch" not a slowdown. An employer unlawfully issued a written discipline notice to an employee who organized a brief stand-and-stretch demonstration among employees of a customer service call center as a unified show of support for the union. It was common for the employees to stand and stretch at their workstations during the day. It was not a violation of employer work rules, and the employer never reprimanded employees for doing so. On the day in question, the employee and five coworkers stood in unison at the predetermined hour. She stood for a minute or two; another employee stood

for about 30 seconds, until a call came into her queue. They did not refuse to perform their duties or reduce the rate of work, and the demonstration

had no disruptive effect. As such, the demonstration was not an unprotected work slowdown—a conclusion from which Member Emanuel dissented (*Consolidated Communications Holdings, Inc. dba Consolidated Communications of Texas Co.*, August 27, 2018).

Secondary picketing by subcontractor's employees.

Addressing worker picketing in the context of multiple employers at a common situs within a "fissured industry," the NLRB held that janitors employed by a small janitorial subcontractor of a building services company were engaged in unlawful secondary picketing where their picket signs expressly urged a key tenant of the building in which they cleaned offices to "take corporate responsibility" to help improve their working conditions. Neither their direct employer nor their employer's client was mentioned by name on the signs (or the leaflets they also handed out). Consequently, their conduct was not protected, and their employer did not violate the NLRA by discharging them (*Preferred Building Services, Inc.*, August 28, 2018).

Unilateral enrollment in E-Verify unlawful. A meat processing company violated the NLRA by unilaterally enrolling in E-Verify and refusing to provide the union with unredacted copies of letters from U.S. Immigration and Customs Enforcement agency Homeland Security Investigations (HSI) identifying bargaining unit employees with suspect employment documents, a divided NLRB panel held. The appropriate remedy was to require the company, at the union's request, to rescind its participation in the program. Dissenting, Member Emanuel disagreed as to that

remedy; he would not have required the employer to rescind its participation in the E-Verify program and bargain with the union regarding its participation. He found it significant that the union had already ultimately agreed to the employer's proposal giving it the right to use E-Verify for new hires and that the CBA that it ratified gave the employer this right. He also believed that the employer lawfully refused to furnish the HSI letters and did not waive its confidentiality defense (*The Ruprecht Co.*, August 27, 2018).

Management lawfully present when cards signed.

In a decision on remand from the D.C. Circuit, the NLRB agreed with the appeals court that while the presence of employer representatives at a meeting where authorization cards are distributed might, under different circumstances, constitute unlawful surveillance, interference, or assistance in violation of Sections 8(a)(1) and (2), and lead to unlawful acceptance of assistance by the union, in violation of Section 8(b)(1)(A), the record as a whole did not support a finding of illegality here, where management officials were present at the carpenters' union meeting in which authorization cards were solicited. The appeals court was unable to reconcile the Board's decision in the instant case from *Coamo Knitting Mills*, a 1964 case in which the Board dismissed allegations that the presence of management personnel at a meeting where employees signed authorization cards violated the NLRA. On remand, the Board agreed this case was not materially distinguishable from *Coamo*—it presented both “similar facts” and “mirror” image “legal issues,” but ended with different results. Thus, the Board reversed its prior decision and dismissed the complaint. Member Pearce dissented, rejecting the reliance on a Board decision that was over 50 years old. In his view, the case was of doubtful precedential value in light of subsequent Board decisions defining what constitutes unlawful coercion and assistance to a union (*Garner/Morrison, LLC*, August 27, 2018).

Misconduct loses NLRA protection. On remand from the D.C. Circuit, a divided NLRB ruled that an employee's misconduct was severe enough to lose the protection of the NLRA. The employee was accused of repeatedly cutting off company managers in a truck on a four-lane public highway, with vehicles traveling at speeds of 45 to 55 mph, in the course of strike-related activity. The majority observed that nothing in the statute gives a striking employee the right to maneuver a vehicle at high speed on a public highway in order to impede or block the progress of a vehicle driven by

a nonstriker, and it was readily apparent that the employee's driving would reasonably cause the occupants of the company truck to fear for their safety. Therefore, the Board dismissed the complaint allegation relating to her discharge. Member McFerran dissented, arguing that while the conduct may have annoyed or frustrated the managers in the truck, it never posed a genuine danger to them and had no reasonable tendency to intimidate or coerce them. According to the dissent, the Board adopted what approaches a per se rule that strike-related conduct on the highways is “inherently dangerous” and thus always unprotected (*Consolidated Communications dba Illinois Consolidated Telephone Co.*, October 2, 2018).

Unilateral benefit changes comparable with past practice.

On remand from the D.C. Circuit, a four-member panel of the NLRB, in a 3–1 decision, dismissed consolidated cases after finding that an employer did not violate Section 8(a)(5) by implementing annual unilateral changes to unit employees' benefits after expiration of a CBA that contained a reservation of rights provision permitting widespread and varied unilateral changes. The majority held that the Board's recent decision in *Raytheon Network Centric Systems* controlled here and required dismissal. Under *Raytheon*, actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. Dissenting, Member McFerran observed that *Raytheon* overruled the Board's immediate prior decision in this case, even though the case was awaiting oral argument in the D.C. Circuit and the Board no longer had jurisdiction over it. Moreover, the *Raytheon* Board took this step without providing any prior notice and opportunity to be heard to the *DuPont* parties. Not only was *Raytheon* wrongfully decided, in her view, but the majority also violated administrative due process in overruling the earlier *DuPont* decision. The unions were entitled to know that the *Raytheon* Board contemplated overruling *DuPont* 2016 (and stripping the unions of their victory in that case), she argued (*E.I. Du Pont De Nemours, Louisville Works*, October 11, 2018).

Successor employer can't relitigate unit

determination. A successor employer could not defend refusal-to-bargain charges brought by a union by attempting to relitigate the appropriateness of an 18-member bargaining unit of licensed vocational nurses in the nursing home that it took over just months following a union election, the NLRB

ruled. As a successor employer, it stood in the shoes of its predecessor and could not, absent special circumstances that were not present here, raise matters that its predecessor could have—but did not—in the representation proceedings, the three-member Board panel held (*Dycora Transitional Health & Living dba Kaweah Manor*, October 18, 2018.).

Petition filed before CBA takes effect not barred.

The “contract bar” doctrine cannot bar the processing of an employer’s RM petition that was filed before a CBA took effect, ruled the NLRB, in a 3–1 decision. The period during which a CBA bars an election runs from its effective date. In this case, the petition was filed on October 25, 2016, and the parties’ agreement was not effective until November 7. Because the petition was filed at a time when there was no contract in effect, there was no contract to bar the petition, the Board majority found. Consequently, the region was required to process the petition, giving the employees a Board-conducted election to resolve a question concerning

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representation. Member McFerran dissented; she argued that the Board should not permit an employer to file an election petition challenging a union’s majority status after the employer and union have reached an initial contract agreement but before the agreement’s effective date (*Silvan Industries, a Division of SPVG*, October 26, 2018).

Airport operations subject to RLA. An employer’s operations at the Portland International Airport were covered by the Railway Labor Act (RLA), a divided NLRB held. In 2013, the National Mediation Board (NMB) departed from its long-standing six-factor test for determining whether an employer is subject to “carrier control,” and the agency began to assign greater weight to air carriers’ control over personnel decisions. The NLRB deferred to the NMB and asserted jurisdiction in cases where the NMB declined to do so under its rebalanced test. In 2017, the D.C. Circuit criticized the NLRB and NMB for departing from the traditional six-part test without explaining why. Following remand, the Board referred the case to the NMB for an advisory opinion. The NMB advised that the employer’s airport operations were subject to the RLA; it also reaffirmed

the six-factor test and reaffirmed that a carrier “must effectively exercise a significant degree of influence over the company’s daily operations and its employee performance of services in order to establish RLA jurisdiction.” In a 3–1 decision, the NLRB found the record supported the NMB’s finding that five of the six traditional “carrier control” factors established that the employer was controlled by the Portland Airlines Consortium and was thus subject to NMB jurisdiction. The Board dismissed a complaint that the employer unlawfully refused to recognize and bargain with a union representing its bag jammer technicians and dispatchers, and vacated the union’s certification as bargaining representative (*ABM Onsite Services-West, Inc.*, November 14, 2018).

Contractor serving air carriers not subject to RLA. A contractor providing ground-handling and passenger support services for six air carriers at the Fort Lauderdale–Hollywood International Airport was an employer within the meaning of

NLRA, Section 2(2), and was not subject to RLA jurisdiction, the NLRB held, because the air carriers did not exercise a significant degree of influence over the contractor’s operations

and employees. The Board found that only one factor of the NMB’s reaffirmed six-factor test weighed in favor of finding carrier control (and RLA jurisdiction), while the other five factors weighed against such a finding. Member McFerran concurred, contending that the NMB had not adequately explained its decision to return to the six-factor jurisdictional test, but joined with the majority in asserting jurisdiction because the evidence demonstrated that the employer was not subject to carrier control under either NMB standard (*American Sales and Management Organization, LLC dba Eulen America*, December 4, 2018).

Lingering effects of ULPs warrant special remedies.

On remand from the U.S. Court of Appeals for the Second Circuit, the NLRB held that special remedies were essential in this case to dissipate the lingering effects of a litany of ULPs committed by an employer during a union organizing campaign and to ensure that a fair election could be held if the union files a petition. The employer was required to supply the union with the names, addresses, telephone numbers, and email addresses of its current unit employees. It also was directed to grant

the union reasonable access to company bulletin boards and all places where notices to employees are customarily posted. The appeals court had denied enforcement of the NLRB's *Gissel* bargaining order because the Board failed to account for the mitigating effects of the employer's remedial actions, employee turnover, management turnover, and the passage of time since the ULPs were committed. However, the appeals court made it clear that a bargaining order was unenforceable here, so the Board refused to reconsider the appropriateness of a *Gissel* order and deleted the bargaining order previously issued. And because the union had not requested reinstatement of the petition, the Board did not direct a second election (*Novelis Corp.*, December 7, 2018).

Decertification petition reinstated despite ULPs.

A regional director erred in dismissing a petition for a decertification election (pursuant to the Board's blocking

Notwithstanding the fact that several circuit courts have pointed out that the NLRB "has yet to clearly explain the unqualified-threat rule," the panel refused to upend five decades of Board law requiring a union to provide the picketing assurances.

charge policy) due to employer ULP allegations that ALJs found meritorious but that were resolved through a non-Board settlement before the Board took up the charges. The NLRB's 2007 decision in *Truserv Corp.* precluded the dismissal of an election petition on the basis of settled ULP charges in these circumstances, ruled a divided four-member Board panel (Member McFerran dissented). The regional director denied the employer's request to reinstate the petition solely on the basis of the settled charges and her finding of a causal relationship between the unlawful conduct and the loss of support for the union, which she said tainted the decertification petition and warranted its dismissal. She reached the conclusion without holding an independent evidentiary hearing on the issue, though. This was in error under *Truserv*, which requires that a petition be reinstated after a settlement agreement is executed "absent a finding of a violation of the Act, or an admission

by the employer of such a violation." That the charges were settled with no admission of wrongdoing by the employer and no final action by the Board precluded any conclusion that the employer's conduct violated the NLRA, so there was no basis for refusing to reinstate the petition. In this case, the settlement included an agreement on a new three-year CBA, which meant dismissal of the petition could bar an election until 2019 at the earliest—on a decertification petition that was filed in 2014 (*Cablevision Systems Corp.*, December 19, 2018).

Notice of common-situs picketing to neutral employer.

In a 2–1 panel decision, the NLRB declined to overrule 50 years of Board precedent requiring that when a union provides a picketing notice to neutral employers at a common job site, it must specifically inform the neutrals that the picketing will comply with the Board's so-called "*Moore Dry Dock* standards." In this case, the

union sent a "strike sanction" letter to an alliance of craft unions seeking their approval and cooperation to engage in "area standards" picketing at the Las Vegas Convention and Visitors Authority (Authority). The Authority manages a large convention center at

which many neutrals perform work. The union notified the Authority of the upcoming picketing simply by providing it with a copy of the letter it sent to the alliance of other craft unions. Because the letter did not contain language promising adherence to the common-situs picketing rules, it constituted an unlawful threat by the union against a neutral. Notwithstanding the fact that several circuit courts have pointed out that the NLRB "has yet to clearly explain the unqualified-threat rule," the panel refused to upend five decades of Board law requiring a union to provide the picketing assurances. It again found that "[a] union's broadly worded and unqualified notice, sent to a neutral employer, that the union intends to picket a worksite the neutral shares with the primary employer is inherently coercive." Member McFerran dissented (*International Brotherhood of Electrical Workers, Local Union 357*, December 27, 2018). ■

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