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For The NLRB, A December To Remember

Board ends 2012 with a bang by overturning long-standing precedents

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For many people, December is a time to slow down, spend time with family, and enjoy the holiday season. For the National Labor Relations Board, however, December proved to be quite a busy month. In the closing weeks of 2012, the board released a slew of decisions, at least two of which overruled long-standing precedent, and all of which will have a significant impact on workplace relations going forward.

Bright Line Dimmed

For close to 35 years, employers have relied on the board's decision in *Anheuser-Busch* to categorically deny unions access to witness statements obtained by the employer as part of its investigation of employee misconduct prior to the arbitration of that discipline. Despite this well-established and sensible rule, which furthers recognized labor policies favoring the protection of employee witnesses who participate in investigations from coercion and intimidation, the Board, in Piedmont Gardens, expressly overruled the bright-line rule established in *Anheuser-Busch*.

According to the board, the balancing test first announced in *Detroit Edison Co. v. NLRB* should now apply to a union's request for witness statements. Under the *Detroit Edison* balancing test, if an employer asserts that the information requested is confidential, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. The employer must demonstrate that there are important reasons not to reveal the names and statements of those witnesses who were promised anonymity, which may include concerns for the safety of the witnesses or concerns that the witnesses may be harassed based on past experience at the workplace.

Significantly, the NLRB's current view of national labor policy places an additional burden on an employer where none previously existed, and even if an employer can establish that the information requested is confidential, it now has an affirmative duty to offer the union an accommodation with regard to the disclosure of the information. This means that there must be a discussion about the underlying facts that the employer is relying upon to discipline an employee, even if the identity of the witnesses and their statements are not being disclosed.

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This approach contrasts with the long-standing Board rule against providing witness statements to employers prior to actual testimony of the witness at an unfair labor practice hearing. Given that this rule is premised on the same coercion and intimidation risks justifying the *Anheuser-Busch* rule, one cannot help wondering why it still best serves national labor policy.

Dispute Resolution Rejected

As private sector unionization continues to decline, numerous commentators and bloggers have recently written about the NLRB's efforts to assert its influence over nonunion workplaces. The most recent example of this can be found in *Supply Technologies LLC*.

In that case, the employer instituted and maintained a mandatory grievance arbitra-

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tion program. Employees either agreed to submit disputes through the program or they were terminated. Although the program documents indicated that employees must bring certain workplace claims through the program, the list did not include claims under the National Labor Relations Act nor did any document explicitly prohibit employees from engaging in activities protected by the act.

Further, the program documents expressly stated that employees were free to file a charge or complaint with a government agency, which would necessarily include the NLRB. Nevertheless, the board determined that the program was ambiguous, finding inconsistencies in what had to be arbitrated and what did not. As a result, the board concluded that this program violated the NLRA because reasonable employees reading the program documents would understand them to restrict their right to file an unfair labor practice charge.

What the board's decision really boils down to is that in a non-union setting, individual mandatory arbitration programs will be deemed ambiguous, and thus violative of the NLRA, unless such programs (1) expressly exempt claims under the act, or (2) cover such claims but expressly state that employees may still pursue remedies through the Board's processes.

This goes beyond past board precedent and establishes new parameters for employers in drafting binding arbitration programs. When viewing this case in conjunction with non-board case law limiting the reach of mandatory arbitration provisions in the workplace (e.g., the Equal Employment Opportunity Commission's right to pursue relief against an employer), whether there is truly still a national labor policy favoring the arbitration process must be seriously questioned.

Season To Be Giving

In *WKYC-TV,* the NLRB overturned 50 years of precedent and established a rule requiring employers to continue to hand over portions of employees' paychecks to unions even after the expiration of a contract containing such a requirement. Previously, dues checkoff provisions expired with the contract, and unions were forced to rely on collecting dues directly from employees during negotiations of a successor contract, unless the employees voluntarily continued the deductions.

Although it may still be too early to determine the impact of *WKYC-TV,* this ruling undoubtedly eliminates one way in which an employer can pressure a union during contract negotiations prior to an impasse in bargaining, and takes away a major incentive for unions to reach agreement. Indeed, it allows unions to maintain a consistent flow of money, while still preserving for them the right to strike.

In another decision, *Kent Hospital*, the board presented unions with another means to fill their coffers. There, the NLRB undermined the 25-year-old rule established in *Communications Workers v. Beck,* which allows employees to object to paying union dues for nonrepresentative functions, such as political activities.

In *Kent Hospital,* the board held that lobbying expenses are chargeable to objectors to the extent they are germane to collective bargaining, contract administration, or grievance adjustment. Unfortunately, the board did not clearly define what constitutes germane. It did, however, suggest that certain lobbying expenses could be presumptively germane, leaving the burden on the objecting employee to prove otherwise.

The board has announced that it is reviewing the scope of lobbying expenses, so there will be additional advice on the horizon.

New Bargaining Obligations

In a decision that applies between the time a union is certified as a bargaining agent and the time when an agreement is reached on employee discipline procedures in an initial contract, the NLRB, in *Alan Ritchey Inc.,* held that an employer must maintain the fixed aspects of its disciplinary system (i.e., the standards for determining whether a violation has occurred) and bargain with the union over the discretionary aspects, if any (i.e., whether and what level of discipline will be imposed). The duty to bargain is triggered before an employer imposes a suspension, demotion, or discharge, but after imposition of a verbal or written warning.

Once a contract is negotiated, presumably the management rights and grievance-arbitration provisions of the contract will satisfy any bargaining obligations. The board did make clear, however, that an employer still has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy. Importantly, in exigent circumstances (where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel), an employer may discipline an employee immediately without bargaining, provided the union is promptly notified and offered an opportunity to discuss the discipline and its effects.

Given the board's recent willingness to severely weaken and/or overrule longstanding precedent, there is no reason to believe that this trend will not continue in 2013. In fact, there is currently at least one high-profile case pending before the Board (*Roundy Inc.*) in which the board could end up expanding handbillling access rights to nonemployees, while at the same time overruling its 2007 *Register-Guard* decision limiting employees' rights to use their employer's email systems for union activities. ■