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NLRB Majority Decides 50-50 Balls In Employer Favor

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The NLRB has been in a period of dormancy. When the make-up of the Board changed, a lot of people expected an onslaught of NLRB decisions reversing the reversals of precedent made by the agency in the last 8 years. Except for a couple of brief periods, most notably in December when then-Chairman Miscimarra departed, there has been less activity than many thought would occur. This is in part because there is uncertainty over when certain Board members (particularly Chairman Ring and Member Emanuel) have to recuse themselves from consideration of certain cases. This recusal issue has led to sometimes sharp exchanges between the Chairman and certain members of the U.S. Senate.

The Board has issued a few decisions recently. One case is worth discussing because it demonstrates how the view of certain allegations has changed with the new Board. Specifically, it shows how closer cases (the 50-50 balls), cases that could go either way, may fall more towards the employer. We have discussed how the current Board is likely to make changes in nuanced ways here.

In CPL (Linwood) LLC, 367 NLRB No. 14 (October 10, 2018), the Board was confronted with a hard fought election campaign where the employer was alleged, and ultimately found, to have committed numerous unfair labor practices in a prior decision. The Board, however, dismissed a few unfair labor practice findings after a review of the record and the complaint allegations.

General Counsel Failed to Carry Burden in Past Practice Allegation

The complaint alleged the employer violated Section 8(a)(5) by "refusing to process" an employee's request for a schedule change. The employer had a procedure whereby an employee who wished to change work schedule could put in a written request to human resources. In December 2014, an employee submitted such a request to the Director of Human Resources. Sometime thereafter the union won the representation election and the parties entered into negotiations. When the employee followed up on the request to change her schedule, the Director told her that the employer could "not make changes" because of the negotiations with the union. This exchange formed the basis of the allegation. After a trial, the ALJ found a violation, finding simply that based on these facts the employer had refused to process the grievance in violation of the Act.

On appeal, a two member Board majority (Ring and Emanuel) reversed this finding. After citing the law on unilateral change of the status quo, the Board majority noted first that the "General Counsel bears the burden of establishing that the Respondent altered the status quo." The Board concluded that the ALJ defined the status quo as a procedure under which employees were allowed to make written request but beyond that there was no proof. The Board found that the employee had made the written request for a schedule change as per the existing procedure. In reviewing the ALJ's decision the Board concluded that the fact the Director did not "approve [the employee's] request immediately does not establish a change in the status quo when there is no evidence that the Respondent had always approved such requests in the past." Thus, the record did not show merely filing a request resulted in a schedule change, so there was no way to determine if the employer had actually altered a practice. In this regard, the Board highlighted that the employee had acknowledged during her testimony that it was possible her request conflicted with another employee's request.

The Board also found that there was no evidence the employer actually refused to process the request, which was what was alleged in the complaint. Here, the Board noted the Director of Human Resources did not say that the employer "would not change [the employee's] schedule" only that it could not do so because of negotiations. The Board majority held that a "reasonable person would understand the Respondent was delaying the processing of her request rather than refusing to process it." The Board concluded this distinction was demonstrated by the fact the employee did not testify about how quickly the employer had processed requests in the past.

Employer's Comment that it "Can't Make Changes" Because of "Negotiations With the Union" Did Not Constitute an Independent Violation of Section 8(a)(1) of the Act

The ALJ found that the employer's comment to the employee about the reason why the employer had yet to process the request for a schedule change violated the Act as a coercive statement.

The Board reversed this finding, holding that the statement was "in conformity with the Respondent's statutory obligation to bargain with the Union over changes to employee schedules, which is a mandatory subject of bargaining." The Board majority held that it was lawful for the employer to communicate this statutory

obligation to the employee.

ALJ's Finding That Employer Failed to Notify Union of Discharges Violated Due Process

Current law holds that in a first-time contract situation, an employer must bargain with the union over discipline and discharge when there exists employer discretion over the action. We have discussed this case, and its somewhat tortured history, here. That decision law, however, applied only prospectively, and the ALJ and the Board found that any allegation regarding such duty to bargain must be dismissed. The ALJ did find, however, that the employer violated the Act by failing to notify the union that it had discharged employees.

The employer appealed this finding on the ground that it was not pled in the complaint, nor was it fully and fairly litigated. The Board reversed, and dismissed the allegation noting (and it is worth quoting at length here for all practitioners who have witnessed the morphing of an NLRB case into something different than that alleged in the complaint):

> The complaint does not allege that the Respondent violated the Act by failing to provide post-implementation notice of the discipline. Nor did the General Counsel seek to amend the complaint at the hearing to include this allegation. Further, throughout this proceeding, the General Counsel exclusively focused on Respondent's failure to provide pre-implementation notice, and he did not contend in his posthearing brief to the judge that Respondent's failure to provide post-implementation notice was also unlawful. Under these circumstances, we find that the Respondent did not have adequate notice that the judge would make findings of violations of the Act based on an unalleged failure to provide post-implementation notice.

Employer's Statements that Union was "not a good union" and that "employees can get another union" Not Unlawful

The ALJ found that the employer violated Section 8(a)(1) when, in the course of a conversation about decertification, the employee was told that the union was "not a good union" and that "employees can get another union." The basis for these findings was that the employer's solicitation of an employee's signature on a decertification petition, a statement which unquestionably was unlawful, occurred in the same conversation and therefore made the statements coercive. The ALJ concluded these statements were unlawful because they occurred "in an overall context of coercion," because of the unlawful solicitation of the employee's signature on the decertification petition.

The Board reversed these rulings. The Board scrutinized each part of the conversation, affirming some aspects were a violation of the law but reversing the findings on these statements. After quoting Section 8(c) (the employer free speech provision of the Act), the Board noted that the "not a good union statement" was just an expression of opinion unaccompanied by threats or promises to employees about decertification. In other words, there was no linkage between this opinion and the

request that the employee sign the decertification petition.

As to the statement that employees "could get another union" the Board held this "conveyed only the truism that employees *could* select a different union shortly after the Union's certification year expired."

Takeaways

This case demonstrates a shift in how certain allegations are going to fall more the employer's way in the coming months. Clearly, the employer in this case had violated the law in myriad ways. It would have been easy to see any of the allegations discussed here as additional violations. Instead, the Board showed a willingness to scrutinize the allegations in the complaint against the record. During this analysis the Board concluded some allegations had not been proven (violation of a past practice) or were contrary to the law (failure to notify the union of discharges). It is doubtful any of these dismissals altered the ultimate remedy of the case, but it does show a more careful analysis of the proof as it relates to the complaint and the applicable law.

The Board's ruling on the past practice and due process rulings are notable because they show a greater willingness to hold the General Counsel accountable to what the General Counsel has pled in the complaint. In the case of the alleged alteration of the past practice, there was not enough evidence in the record to conclude that a practice actually had been changed. Thus, had a witness testified that requests for a change in schedule always received a response (rejecting or accepting) within a certain period of time, and that the employer did not so follow that timeline, then the outcome probably would have been different.

As to the allegation regarding the failure to notify the union of the discharges, the Board was not going to find a violation if the allegation had neither been pled or litigated at trial. It seems ridiculous, but this does happen in Board litigation.

Finally, the Board's review of the employer statements shows a more literal application of the Act's freedom of speech provision in Section 8(c) and an unwillingness to paint every statement made in a conversation as "unlawful" simply because of its proximity in a conversation to an unlawful statement.