CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

EXECUTIVE LABOR SUMMARY

March / April 2011

IN THIS ISSUE

NEWS & ANALYSIS

Acting General Counsel gives regional offices more authority to seek additional remedies for bad-faith bargaining over first contracts. – Lafe Solomon, Acting General Counsel for the National Labor Relations Board, has short-cut the procedure by which regional offices can seek "extraordinary" remedies for unfair labor practices connected with first-time contracts. Previously, requests for these additional remedies had to be submitted to the Board's Division of Advice, but now many such requests can be pursued by the regional offices without additional approval.

After a study of unfair labor practices arising out of first contract bargaining, former NLRB General Counsel Ronald Meisburg found that employees were highly susceptible to unfair labor practices intended to undermine support for their bargaining representatives. Meisburg directed Regional Offices to submit to the Board's Division of Advice all cases involving unfair labor practices committed during bargaining for, or attempts to bargain for, an initial contract. The Board of Advice would then determine whether additional remedial measures – including requiring employers to bargain on mandated schedules, extending the certification year, and reimbursing unions for some bargaining costs – should be pursued.

Now, Solomon has **concluded** that Regional Offices should be authorized to seek such remedial measures in many cases without having to obtain prior clearance from the Di-

vision of Advice: (1) for NLRB notices to be read to employees by a management official; (2) for extending the certification year up to 12 months; and (3) for requiring 24-hour-per-month/6-hour-per-session bargaining schedules. Requests for union reimbursement for bargaining or litigation expenses must still be submitted to the Division of Advice.

Employer ordered to bargain at least 16 hours a week. – In a case involving bad-faith bargaining over an initial contract, a NLRB majority of Chair Wilma B. Liebman and Member Mark Pearce **ordered** an employer to bargain for a minimum of 16 hours a week until either a first agreement was reached, the parties agreed to a hiatus, or a lawful impasse occurred. The company was also ordered to submit a progress report to the Regional Director every 30 days. According to the majority, the company's refusal to comply over a period of years with a bargaining order that was enforced by a federal appeals court fully justified the bargaining schedule and progress reports.

Member Brian Hayes dissented from the majority's imposition of "substantial new special remedies" on the employer. According to Hayes, if additional remedies were sought, the NLRB General Counsel should have either petitioned the court for a modification of the order or, if appropriate, initiated contempt proceedings to secure these additional remedies.

Merely maintaining improper work rules gets decertification vote thrown out. – In another 2-1 **decision**, the NLRB has set aside a September 21, 2006, decertification election at a Boston hotel based on objections by the union that the hotel maintained a two-year-old employee handbook containing several rules that were overbroad and unlawful under the National Labor Relations Act. Liebman and Pearce agreed that the hotel's rules on solicitation, distribution, loitering, and clothing standards were unlawful. Conceding that there was no evidence that these policies had been enforced against legally protected activity during the "critical period" before the election, Liebman and Pearce nonetheless concluded that the employer's merely maintaining the improper rules required setting aside the narrow 47-46 vote to decertify the union.

Hayes, again, was the lone dissenter. He noted that, after the union filed an unfair labor practice charge concerning the handbook provisions, the employer issued a memo to employees that announced the elimination of the rule on buttons and badges and clarified a rule on workplace distributions in accordance with Board precedent. According to Hayes, the totality of circumstances related to the maintenance of the rules showed that (1) they were not promulgated in response to union activity; (2) they were not enforced against anyone engaged in union activity; (3) the employer assured employees before and during the election period that nothing in the handbook was meant to interfere with their rights under the Act; (4) the union was on the scene and available to advise employees about their rights. In addition, Hayes said, there was evidence that employees may have violated the rules without consequence. For all of these reasons, Hayes said that the evidence weighed heavily in favor of finding the rules did not have a potential chilling effect on the Section 7 rights of any employee.

NLRB upholds "bannering" of neutral employers. – During a strike against two general construction contractors, the carpenter's union erected banners at 19 worksites and failed to confine its bannering and handbilling to gates reserved exclusively for employees of the general contractors. The banners referred to the existence of a "labor dispute" and were intended to "shame" the secondary, neutral employers. The general contractors filed unfair labor practice charges, alleging that the union conduct was unlawful coercion of neutrals and unlawful inducement of employees to stop work in violation of Section 8(b)(4) of the Act. A complaint was issued but was dismissed by an Administrative Law Judge.

Both the NLRB General Counsel (Meisburg at the time) and the two contractors filed exceptions with the NLRB. The General Counsel argued that the union's bannering activity was a form of picketing or that it constituted "signal picketing" that alerted employees of neutral employers that the union was asking them not to work because of

its dispute with the general contractors. However, the Board majority of Liebman, Becker and Pearce said that in the 2010 decision in ***Eliason and Knuth of Arizona, Inc.***, the Board found 3-2 that banner displays did not constitute picketing because they lacked the "element of confrontation that has long been central to our conception of picketing." According to the majority, "here there was no evidence (beyond the display itself and its location) that the display of banners adjacent to the construction sites was intended to operate as a request or would reasonably have been understood as a request to employees of secondary employers to cease work." Accordingly, "the General Counsel has not demonstrated that the union's peaceful banner displays violated Section 8(b)(4) of the Act."

Dissenting Member Hayes said that the union displayed its banner and distributed handbills at a neutral gate of a job site that was not open to the public, indicating that its action was an unlawful inducement of the employees of neutral companies. Hayes said that the majority disregarded established principles under the NLRA that "effectively narrow[ed]" Section 8(b)(4) to where it prohibited "only picketing for a forbidden work stoppage or, perhaps, an explicit call for one by other means." According to Hayes, "It is now quite apparent that the majority is bent on undoing through adjudication the restrictions imposed by Congress on unions' ability to involve neutral employers and employees in a labor dispute. . . . Of course, they lack the authority to do so."

Board invites *amicus* briefs on employee witness statements . . . and you know what that means! – In ***Hawaii Tribune***, the NLRB has invited interested parties to file *amicus* briefs addressing the scope of employee witness statements that the Board has previously ruled employers do not have to furnish upon request to unions. In both ***Anheuser-Busch, Inc.***, and ***Fleming Cos.***, the Board said that the duty to furnish information did not include the duty to furnish witness statements themselves. In the current case, a newspaper reporter was terminated after an investigation. The union requested all information provided by employee witnesses who were interviewed. Consistent with Board precedent, the employer furnished only the reporter's discharge letter and personnel files. According to the Board, "precedent does not clearly define the scope of the category of 'witness statements.'" Whenever the current Board seeks *amicus* briefs, you can bet that the decision will be unfavorable to the employer.

Solomon seeks to change back pay guidelines to be less favorable for employers. – Acting General Counsel Solomon has informed the Board's regional offices that he will ask the NLRB to overrule two 2007 decisions involving back pay and has issued another memorandum changing the Board's back pay guidelines.

In **Memorandum 11-07**, Solomon noted that two 2007 NLRB decisions increased the burden on employees and the General Counsel to show adequate mitigation of lost earnings. In **Grosvenor Resort**, the Board said that a failure to begin a job search within two weeks of discharge would result in a reduction of back pay. The two-week rule makes Board law inconsistent with the traditional "totality of circumstances" approach to mitigation that federal courts and the Board, pre-*Grosvenor*, have applied, according to Solomon. In **St. George Warehouse**, a 3-2 decision, the majority held that the employer was required only to show the availability of substantially equivalent jobs. If that burden was met, the General Counsel was required to produce evidence establishing that the employee made a reasonable search for work. According to Solomon, the "*St. George Warehouse* shift" is contrary to common law and general principles of mitigation.

In **Memorandum 11-08**, Solomon provided a four-step process to be used in computing back pay. Quarterly interim earnings will be allocated on a proportional basis, but interest on back pay awards will continue to compound on a daily basis. Solomon also said that search-for-work and work-related expenses will be calculated separately from back pay and will be charged to the Respondent regardless of whether the employee received interim earnings during the period. Solomon also instructed the Regional Offices to begin

immediately to seek a "tax component" to compensate employees for receiving back pay in lump sum payments that increase their federal and state income tax liabilities for the year in which the award is received.

House bill seeks to guarantee secret-ballot elections. – Legislation has been introduced in the U.S. House of Representatives that is aimed squarely at concerns that the NLRB will attempt to resurrect, through rulemaking, the card check provisions in the proposed Employee Free Choice Act. The bill, with 19 co-sponsors, would amend the NLRA to ensure employees' right to choose union representation by a secret-ballot election conducted by the NLRB.

Opponents of the bill, such as the AFL-CIO, claim the bill only protects the *status quo*. They contend that, with secret-ballot elections, employers routinely threaten workers who are involved with organizing. On the other hand, proponents of the bill say that the secret ballot helps prevent intimidation and coercion, and is the best way workers can freely decide whether to be represented by a union.

THE GOOD, THE BAD AND THE UGLY

Ma, can I have a "Prisoner of Liebman, Becker, and Pearce" t-shirt? Please??? – When lengthy negotiations failed to produce a new labor agreement at AT&T, a union mobilization committee designed a "prisoner" shirt to be worn by employees. The front of the white t-shirt had the legend "INMATE" above a black box. On the back of the shirt were vertical stripes and bars surrounding the message "PRISONER OF AT&T." The union distributed the shirts to AT&T employees, including those who had face-to-face contact with customers.

AT&T managers directed customer-facing employees not to wear the "INMATE" shirts, and issued disciplinary suspensions to some employees who continued to wear them, as well as other union-related shirts. The union filed an unfair labor practice charge, and the Board issued a complaint. After a hearing before an administrative law judge, the ALJ concluded that AT&T's disciplinary action violated Section 8(a)(1) of the Act, which prohibits employer interference, restraint or coercion of an employee exercising NLRA-protected rights. According to the ALJ, "You'd have to be an idiot to think that there was a prisoner at your front door." Although the company did not challenge the ALJ's conclusion that it acted unlawfully in banning shirts bearing the words "HAVOC" and "Scab," it appealed the ALJ's ruling on the "INMATE" shirts worn by the 183 employees with customer contact, arguing that "special circumstances" justified the company's actions.

Liebman and Becker, predictably, **agreed** with the ALJ that the "INMATE" shirt was not likely to have caused fear or alarm among AT&T customers since the word "INMATE" on the front of the shirt was in relatively small print and the word "PRISONER" on the back appeared in print that was only half the size of the company name. Furthermore, they said, an AT&T employee appeared at a customer's home only if the customer made an appointment for home service and the technicians telephoned in advance to confirm the appointments. In addition, the employees wore identification tags and parked their AT&T trucks near customers' homes. According to Liebman and Becker, even if a customer would not immediately realize the shirt was related to an ongoing labor dispute, the totality of circumstances would make it clear that the technician was an AT&T employee and not a convict.

Member Hayes wrote a stinging dissent, criticizing the majority for not following cases finding "special circumstances" where an employer had a legitimate interest in preserving customer relationships or the employee-management relationship. "Even if you knew about an ongoing labor dispute at AT&T, why would your initial thought when open-

ing the door to your home be 'Oh, of course, this person is simply an AT&T technician exercising a right to express his view about that labor dispute?'" In response to the majority's argument that the technicians' ID tags and company vehicles made it unlikely that customers would be frightened, Hayes wrote, "In my view, none of these factors outweighs Respondent's concern that a customer's subjective, even irrational, reaction when opening the door would be that the person standing there was not the expected service technician or that the customer would be upset with AT&T upon subsequently discovering that the person wearing the 'Prisoner' shirt was an actual employee of that company."

This Valentine really stinks! – In one bit of good news for an employer, a federal judge is allowing the Congress Hotel in Chicago to proceed with its lawsuit against UNITE HERE, Local 1. The hotel contends that the union illegally coerced hotel customers in violation of the NLRA when, among other things, the union delivered to a customer a heart-shaped box filled with cow manure right before Valentine's Day 2010.

The suit was originally filed on March 3, 2010, and seeks damages against the union under Section 303 of the NLRA. Hotel employees have been on strike since June 2003, in response to a company action that froze wages and slashed benefits. The union added its "valentine" to other "innovative" techniques in an effort to draw attention to its labor dispute and solicit support (!!!) from hotel customers.

Note to union: you get more flies with chocolates than you do with cow patties. (Then again, maybe not.)

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, and Virginia. For more information, visit www.constangy.com.