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NLRB Issues Three Decisions Promoting Union Representation as Chairman Liebman's Board Term Ends

On the final working day of Chairman Wilma Liebman's term at the National Labor Relations Board (NLRB or the Board), the Board issued three significant decisions that promote union organizing and protect new or established union representations. The trio of August 26 decisions—*Lamons Gasket Co.*, 357 N.L.R.B. No. 72; *UGL-UNICCO Service Co.*, 357 N.L.R.B. No. 76; and *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 N.L.R.B. No. 83—were issued by the Obama Board's 3-1 Democratic majority, with the lone Republican Member dissenting in all three cases.

These highly technical cases, combined with the Board's recent issuance of a Final Rule requiring all employers covered by the National Labor Relations Act to post a notice in their workplace informing employees of their rights under the Act and the Board's Proposed Rule to expedite the Board's election process, will have two practical effects: (1) they will facilitate new union organizing in small bargaining units that will provide the union with a platform for a broader organizing campaign; and (2) they will shield new or established union representations from challenge by the employer, employees, or rival unions that believe the incumbent union does not have majority support.

***Specialty Healthcare*—Facilitating Union Organizing in Small Bargaining Units Defined by the Union**

In perhaps the most far-reaching of the three August 26 cases, the Board in *Specialty Healthcare* announced a new standard for determining whether a petitioned-for unit of employees is appropriate for collective bargaining. *Specialty Healthcare* nominally involved the issue of appropriate bargaining units in non-acute care healthcare facilities (in this case, a unit of Certified Nursing Assistants). However, the Board went well beyond this narrow issue and articulated a new standard for determining whether unions in many other industries may petition for an election among a small group of employees over an employer's objection that the union has inappropriately excluded other groups of employees from the prospective unit.

For decades, when determining whether such an exclusion is appropriate, the Board has examined whether the excluded group of employees is "sufficiently distinct" to warrant their exclusion. The Board's new standard in *Specialty Healthcare*, however, flips that inquiry, so that employers will have the burden of proving that the excluded employees share an "overwhelming community of interest" with the employees included in the union's petition. This will be a difficult standard for employers to meet, particularly if the process for litigating unit scope issues is expedited pursuant to the NLRB's Proposed Rule concerning the election process.

While the Board in *Specialty Healthcare* noted that its holding was not intended to disturb existing industry-specific rules and standards other than the *Park Manor* standard in the non-acute healthcare industry, the new standard will facilitate union organizing in many industries. As noted by dissenting Board Member Brian Hayes, the "overwhelming community of interest" test has "vast practical ramifications . . . [because it] obviously encourages unions to engage in incremental organizing in the smallest units possible." This standard will make it easier for unions to get a "foot in the door" at non-union employers by targeting a small group of dissatisfied employees for the union's initial organizing campaign. As Member Hayes explained in his dissent, this standard, when combined with the Board's Proposed Rule to expedite the union election process, will make it "virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation."

***Lamons Gasket*—Protecting New Union Representations from Challenge Following an Employer's Voluntary Recognition**

In *Lamons Gasket*, the Board expressly overruled *Dana Corp.*, 351 N.L.R.B. 424 (2007), which established a special process for employees or a rival union to challenge an employer's voluntary recognition of a union (typically through a "card check" procedure). Under the *Dana* process, the employer would post a notice in the workplace for 45 days following the voluntary recognition, so that the employees would have an opportunity to petition the NLRB for a secret ballot election to test the union's majority status. The *Lamons Gasket* decision dispenses with this notice process and re-imposes a complete "voluntary recognition bar" that blocks any challenge to the union's majority status for a "reasonable period of time" following the employer's voluntary recognition. In reaching its conclusion, the Board majority noted that, under the *Dana* process, there had been very few successful challenges, based on a lack of majority status, to the initial grant of recognition.

Under *Lamons Gasket*, the Board will not entertain any challenge to the recognized union's majority status for a minimum of six months and a maximum of one year after the parties' first bargaining session. During this period, no employer, employee, or union may petition the Board for a secret ballot election and the employer may not withdraw recognition from the union. The specific length of this voluntary recognition bar will depend on a multifactor analysis set forth in *Lee Lumber & Building Material Corp.*, 334 N.L.R.B. 399 (2001), which includes the following factors: (1) whether the parties are bargaining for an initial contract, (2) the complexity of the issues being negotiated and of the parties' bargaining processes, (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions, (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement, and (5) whether the parties are at impasse. Our experience informs us that, in reality, the period of union protection will likely be a full year.

***UGL-UNICCO*—Protecting Union Representations from Challenge Following a Merger or Acquisition**

In *UGL-UNICCO*, the Board's Democratic majority overruled another Bush Board decision, *MV Transportation*, 337 N.L.R.B. 770 (2002). *MV Transportation* dispensed with a short-lived doctrine known as the "successor bar," implemented by the Clinton Board in *St. Elizabeth Manor*, 329 N.L.R.B. 341 (1999). The successor bar was designed to block the ability of employees to select new union representation or no union representation following a lawful "successorship" transaction as defined by Supreme Court precedent in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). Under the *Burns* successorship test, an incumbent union's right to recognition, and potentially even its terms and conditions of employment, may automatically transfer to a new "successor" employer when there is "substantial continuity" between the two business operations and when a majority of the new employer's

employees had been employed by the predecessor. Under *MV Transportation*, and for most of the past few decades, this *Burns* successorship right established only a *rebuttable presumption* in support of continued union representation, and it allowed employees to decertify the existing union or select a new union if no collective bargaining agreement was yet in place with the successor employer.

The Board majority in *UGL-UNICCO* re-implemented the successor bar to "create[] a *conclusive* presumption of majority support for a defined period of time, preventing any challenges to the [incumbent] union's status." The Board reasoned that "the number and scale of corporate mergers and acquisitions has increased dramatically over the last 35 years," and that unions are placed in "vulnerable position[s]" when these transactions occur. Current Supreme Court precedent already allows successor employers, unless they are restricted by sale or other contractual restrictions, to reject a predecessor's collective bargaining agreement and even unilaterally impose new terms and conditions of employment in certain circumstances. Against this legal backdrop, the Board majority held that the "successor bar" is needed to ensure the incumbent union a "reasonable" period of time, without any potential challenge, to represent the employees in collective bargaining with the successor employer.

The Board majority defined the length of the "reasonable period" for bargaining based on whether the successor employer exercised its right to set new initial terms and conditions of employment. In cases where the successor employer does not exercise that right and instead adopts the predecessor's existing terms and conditions of employment (but not the collective bargaining agreement itself), the successor bar will last for a period of six months after the first bargaining meeting between the union and the successor employer. In cases where the successor employer exercises the right to establish new terms and conditions of employment, the bar will be longer—a minimum of six months and a maximum of one year, with the actual period determined under the *Lee Lumber* multifactor approach referenced above. Finally, if the parties negotiate a new collective bargaining agreement during the "reasonable period," the Board's "contract bar" (which blocks election petitions during the term of a contract) will be imposed for two years instead of the normal three years if the predecessor's employees did not have an open period to file an election petition during the final year of the predecessor's operation.

Conclusion

The three August 26 decisions, each of which reversed existing Board precedent, may be one of the last opportunities for the Obama Board to issue precedent-changing decisions. With the expiration of Chairman Liebman's term on August 27, the Board now has three Members—new Chairman Pearce (Democrat), Member Becker (Democrat), and Member Hayes (Republican). At the end of 2011, when Member Becker's recess appointment expires, the Board will likely only have two Members, which is not a quorum for purposes of issuing decisions. It remains to be seen whether the Board will be able to issue a Final Rule concerning the union election process before the end of 2011. In any event, employers should expect that unions will seek to conduct union organizing campaigns in smaller units as permitted under *Specialty Healthcare* in the hope that the bargaining unit can be expanded once a foothold has been established.

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