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September 8th 2011

LEGAL ALERT

Hurricane Wilma Finally Blows Away

No, the National Weather Service has not reached the "w's" on its list of hurricane names for the year (and hopefully will not). But Chairman Wilma Liebman left the National Labor Relations Board on August 27, and employers will be dealing with the aftermath of "Hurricane Wilma" for many years to come. She will not soon be forgotten because of the three precedent-setting cases decided on the last business day of her term.

All three decisions are game changers that promise to reshape the landscape of American labor law. And all three advance the cause of unions and promote labor organizing, largely at the expense of employee and employer rights. In this Alert, we address these new case developments and discuss their likely effect.

Pre-Approving Micro Units

The case that promises to have the greatest immediate impact is *Specialty Healthcare and Rehabilitation Center of Mobile.* The legal issue presented was the very limited and industry-specific question of what standard should be applied to determining the appropriateness of voting/bargaining units in non-acute healthcare facilities. But the narrowness of the case and issue presented did not deter the Liebman Board from pronouncing a broad and far more universal legal standard that may be applied to unit determinations in *all industries*.

Thus, in this so-called "clarifying" decision, the Liebman Board concluded that when a union seeks an election in "a readily identifiable group of employees who share a community of interest," the agency will not broaden the group unless an employer wanting to expand the unit can demonstrate that the employees it seeks to add to the unit share an "*overwhelming* community of interest" with those in the petitioned-for group.

Wherever this new rule is applied, it will promote organizing. Until now, unions have often sought elections in an unrealistically small group because that's where they had the best chance of winning. Employers were often forced to request a hearing in order to argue that only a broader configuration of employees was appropriate for bargaining. Such hearings did not significantly delay decisions, since the usual time frame from petition to vote count averaged around 42 days. The standard the board used for deciding the appropriateness of a voting or bargaining unit was whether the employees had "a community of interest."

From an employer's perspective such unit challenges were necessary to try and prevent splitting the workforce into several unmanageable small units. It's usually easier to deal with a single union that represents the bulk of your workforce, than with four or five smaller unions, each of which represents only a few employees. From the employees' perspective,

larger units usually mean that they are voting (or bargaining) with all of the company employees who share their commitment and values. But from the union's perspective, a larger voting group dilutes its political support among the electorate making a union election win less likely.

By declaring even ultra-narrow "readily identifiable" groupings presumptively appropriate, and by imposing an "overwhelming" burden of proof on employers who seek to expend a narrow unit, unions are now free to cherry pick your workforce for support and to obtain elections in narrower micro units that are based solely on the extent of a union's organization. This ignores the legitimate interests of excluded employees. Widespread, incremental union organizing may not be far behind.

Moreover, *Specialty Healthcare* must be read in the context of the Board's ongoing administrative initiative to expedite the holding of elections. Now elections are held six to seven weeks after a petition is filed – sufficient time to clarify unit issues and determine who is eligible to vote, and also for each party to "make its case" to the employee voters. But under the procedures now being considered, an employer wanting a pre-election hearing may have a much more difficult time convincing a Regional Director of the necessity of scheduling one at all.

That's because, under *Specialty Healthcare*, an employer wanting to expand a petitioned-for micro unit must offer proof that excluded employees share an "*overwhelming* community of interests" with the petitioned-for unit. Failing to offer such proof, an employer could find itself denied a pre-election hearing and faced with an expedited election within three weeks or less of a petition's filing. Where fast elections take place in gerrymandered micro-voting groups, there can be little question about how those elections will turn out.

Despite the Board's broad discretion in unit appropriate determinations, Section 9(c)(5) of the National Labor Relations Act (NLRA) specifically prohibits the Board from giving the extent of a union's organizing controlling weight in making such unit determinations. Yet a plain reading of *Specialty Healthcare* and its practical effect both suggest that the Liebman Board ignored this statutory limitation and fashioned a rule that does just that – determine the size of a unit based solely on the extent of the union's organizing.

Accordingly, we can expect elections that are based on *Specialty Healthcare* units to be challenged in the appellate courts. Whether the courts will sustain the new rule remains to be seen. We should note that Board Member Brian Hayes filed a spirited dissent in this, and the other two cases we are reporting on. It's entirely possible that his view may ultimately be adopted by the courts.

In the meantime, employers can expect unions to cite *Specialty Healthcare* as license for elections in the union-friendly micro-units.

Encouraging Card-Check Recognition

The second major case decided by the Board as Ms. Liebman headed for the door is *Lammons Gasket Company*. There the Board overturned the earlier Bush-era decision *Dana Corp.* The *Dana* decision allowed employees to challenge their employer's voluntary recognition of a union. Under the *Lammons* ruling, employees now may not challenge a union's representative status for a "reasonable period" following an employer's lawful voluntary recognition.

The Liebman Board delineated a "reasonable period" as no less than six months after the parties' first bargaining session and no more than one year. Moreover, the Board said that where the recognition bar would land on that six-month continuum depends upon a five-factor analysis that includes: 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 the agreement; and 5) whether the parties are at impasse.

The effect of *Lammons* will be felt most in the area of corporate campaigns where unions extract a card-check agreement from an employer and then obtain recognition based solely on signed authorization cards rather than a secret-ballot election. In *Dana*, the Bush Board recognized certain critical flaws inherent in such voluntary recognitions. Thus under *Dana*, while such recognition remained lawful, the employees affected could seek to overturn that recognition for a 45-day period following notice of the recognition by filing a petition with the NLRB seeking a secret-ballot election.

Lammons strips employees of that option, by saying that once a bargaining relationship is established, it must be allowed to bear fruit. Accordingly, both the employees affected by that bargaining relationship and their employer are barred from challenging the union's representative status until a "reasonable period" of time has passed.

The problem with this approach is that it assumes the legitimacy of the card-check process, and that the cards upon which recognition was based are just as reliable an indicator of employee support as a secret ballot. Unfortunately, that is often not the case. In the real world, employees may sign cards for a whole host of reasons unrelated to their desire to be represented by a union. Indeed, most employees sign authorization cards without understanding their legal significance or how their signed card may be used.

Worse, many cards are signed under duress, or based on false promises or misrepresentations. The signatures on authorization cards can be forged. Nonetheless, thanks to the Liebman Board, and after *Lammons*, workers may again be stuck with a union and unable to question its majority status for a period of up to a year following their employer's voluntary recognition.

And if the employer and a union enter into a labor agreement during that one-year bar, then, under the Board's contract-bar rules, the workers will be precluded from questioning the union's majority status for the life of that labor agreement for a period of up to an additional three years. Most workers are unaware of these facts when they are asked or coerced into signing an authorization card. It is for that reason that the earlier *Dana* decision was rightly decided and why *Lammons* benefits no one but organized labor.

Bargaining With A Predecessor's Union

Ms. Liebman's third last-minute decision is *UGL-UNICCO Service Company*. In this case, the Liebman-led Board reinstituted the "successor bar," a legal doctrine previously discarded by the Bush Board in *MV Transportation*. Under this newly-restored doctrine, when a successor employer recognizes an incumbent union, that previously-chosen union is entitled to represent the successor's employees in collective bargaining for a "reasonable period of time" and without challenge to its representative status by the new employer, the employees it represents, or a rival union. According to the Board, such bars promote a primary goal of the NLRA by stabilizing labor-management relationships and encouraging collective bargaining, without interfering with the freedom of employees to periodically select a new representative.

As justification for this policy swing, the Liebman Board cited the growing number of mergers, acquisitions and similar business arrangements and bemoaned the destabilizing impact that such business transactions have on the collective-bargaining relationship in light of controlling Supreme Court law which does not require a successor employer to adopt its predecessor's labor agreement. Successor companies are allowed to set initial terms and conditions of employment without first bargaining with an incumbent union if the purchase of the predecessor was an asset sale, rather than a stock purchase.

According to the reasoning in *UGL-UNICCO*, the bargaining relationship that exists between an incumbent union and a successor employer is an entirely new and uncertain one where everything the union has accomplished in the prior bargaining relationship with a predecessor is at risk. Because these destabilizing consequences are themselves, in part, a function of the law of successorship, the Liebman Board concluded it was reasonable for the law to mitigate that instability with the creation of a successor bar that would stabilize the bargaining relationship and enable a union to concentrate on obtaining and fairly administering a new labor agreement without worrying about the immediate risk of decertification, and by removing any temptation on the part of the employer to avoid good-faith bargaining.

Like *Lammons*, *UGL-UNICCO* strikes an ideological balance in favor of incumbent unions at the expense of the employees' most fundamental right of free choice. As noted by dissenting Member Hayes (the Board's lone Republican), "[t]here is much wrong with declaring that [a union] must be able to operate free from any electoral challenge by employees, including those who have doubts about their experience when represented by that union with the predecessor and those new employees who have never had an opportunity to exercise their right of free choice on the question of collective-bargaining representation."

In fact, contrary to the reasoning in *UGL-UNICCO,* and notwithstanding the Liebman Board's alleged concern about "stability," there can be no stable bargaining relationship where the incumbent no longer represents a majority of the employees in the unit. Thus, an election would do nothing to disturb stability since it would either affirm the majority upon which a stable bargaining relationship must be based or reveal that there is no relationship to be stabilized.

Conclusion

Clearly it is a new day at the NLRB, and these three decisions – especially when coupled with the new "hurry-up" rules proposed for elections – are a bold attempt by the Board to breathe new life into unions and union organizing. The decades-long trend for union membership is one of steady decline, but unions' political muscle remains potent. With another year left in President Obama's term, and possibly four more after that, it seems clear that the left-leaning tilt of the current NLRB will be with us for quite awhile. We also anticipate a return to heavy use of corporate campaigns as a primary union-organizing tool.

The best response, and our advice, is to remain vigilant to the threat, and to consistently practice good management techniques. This includes making sure your wages and benefits are fair and competitive, and that your policies and your supervisors are geared toward treating employees with dignity and respect.

And Ms. Liebman's departure does not mean the end of stormy weather for employers. Member Craig Becker still has four months left in his term. During this time we fully expect to see some additional 2-1 decisions.

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