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NLRB Releases Significant Rulings on Collective Bargaining

Finally up to full strength with all five seats filled, the National Labor Relations Board has been clearing its backlog of cases. On July 31, 2006, the Board issued two noteworthy decisions interpreting an employer's duty to bargain collectively and in good faith under the National Labor Relations Act.

In *Planned Building Services, Inc.*, 347 NLRB No. 64 (7/31/06), the NLRB clarified the legal standard applicable in successorship cases where it is alleged that the successor employer has failed/refused to hire the predecessor's employees to avoid an obligation to recognize and bargain with the union representing those employees. The Board held that the correct standard in such cases is the one that has been followed by the agency in discriminatory discharge cases for more than 25 years under *Wright Line*, 251 NLRB 1083 (1980).

In the second case, *North American Pipe Corp.*, 347 NLRB No. 78 (7/31/06), the Board held that the employer had no duty to bargain with the representative of its employees prior to awarding each of them 100 shares of stock, finding that the award was a "gift," not "wages," and therefore beyond the scope of mandatory bargaining under Section 8(d) of the NLRA.

In *Planned Building Services*, the employer won cleaning service contracts at four buildings in lower Manhattan previously serviced by other cleaning companies, each of which had a collective bargaining relationship with Local 32BJ, Service Employees International Union. Rather than retain its predecessors' workforces, Planned Building Services staffed the four buildings primarily with existing non-union employees transferred from other locations. Although some of the incumbent employees were hired at each of the four buildings, at none of them did those employees constitute a majority of the work force. The employer admitted that one of the reasons that it did not hire more of the incumbents was that it knew that if it did so it could be obligated to recognize Local 32BJ as their bargaining representative.

On the basis of that and other evidence of discriminatory motivation, the administrative law judge found that Planned Building Services' refusal to hire its predecessors' employees was motivated by a desire to avoid a successorship obligation. However, he did so based on a test that the NLRB articulated not long ago in *FES*, 331 NLRB 9 (2000), applicable to cases alleging a discriminatory failure to hire or refusal to consider for hire. In such situations, the Board places the burden on the General Counsel not only to demonstrate unlawful motive, but also to show (i) that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct, and (ii) that the applicants had experience or training relevant to the positions for which the employer was hiring, or that the stated qualifications were not consistently followed by the employer or otherwise appeared to be a pretext for discrimination. Under *FES*, once the General Counsel has met that burden, it is necessary for the employer to show that it would not have hired the applicants even in the absence of their union affiliation or protected activity.

On review, a unanimous Board agreed with the ALJ's ultimate conclusion, but disagreed with his reliance on *FES*, finding "a refusal to hire in a successorship context to be analogous to a discriminatory discharge situation, where *FES* has no application." The Board explained that because the successor generally is continuing the predecessor's business, there is no need to demonstrate that the predecessor's employees have "relevant experience or training for essentially the same jobs in the successor's work force that they performed in the predecessor's work force." In addition, because the successor employer must have a work force in place to continue the predecessor's business, "it is similarly of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire."

Accordingly, the Board applied the traditional burden-shifting analysis under *Wright Line*, where the General Counsel simply must prove that the employer's actions were the result of animus toward union or protected activity. Once that burden is met, a violation will be found unless the employer demonstrates that the same action would have been taken even in the absence of protected activity. Although the Board reached the same result as the ALJ, it took a different route to get there and clarified the standard that would be applied in future cases of this kind.

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In *North American Pipe*, decided the same day as *Planned Building Services*, a divided Board held that a one-time award of 100 shares of stock in conjunction with an initial public offering by the employer's parent corporation was a gift to employees that was not subject to mandatory bargaining. The stock, valued at approximately $1,450 at the time of the award, was given to all eligible employees at all facilities, including hourly employees, supervisors and managers, "[i]n recognition of this important historic company event and the significant contribution made by each of [the employee recipients] toward the growth and success of the company." The stock was awarded unilaterally, *i.e.*, without notice to or bargaining with the union, resulting in an unfair labor practice charge alleging that the employer acted in derogation of the union's status as exclusive bargaining representative.

The question presented by the charge was "whether the . . . stock award was a gift or whether it was wages or a term and condition of employment." The Board found, in agreement with the ALJ, that the stock was a gift to employees, not wages, emphasizing (i) that the award was "not tied to employee remuneration;" (ii) that the "size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity;" (iii) that the "value of the award . . . was determined solely by market demand for equity shares" in the parent corporation; (iv) that all eligible employees at all facilities "received the same amount of stock whether they were the highest paid managers or the lowest-paid hourly employees;" and, finally (v) that "the award was related to a one-time event—the parent corporation's IPO—with no promise or prospect of repetition." Accordingly, the Board dismissed the complaint alleging that the unilateral stock award violated Section 8(a)(5).

By contrast, the Board noted that "[i]f the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of remuneration, they are in reality wages and subject to the statute's mandatory duty to bargain." The NLRB concluded that was not the case here, notwithstanding that the employer withheld taxes from the stock award. That factor, standing alone, was not dispositive. Neither was the parent corporation's requirement that employees have worked for North American Pipe for at least six months prior to the award, and that they remain in employment for an additional six months for the award to vest. The Board also rejected the General Counsel's argument that the gift analysis applies only to items of token value.

Dissenting Member Walsh would have found that the stock award was a form of wages and, therefore, a mandatory subject of collective bargaining. In his view, the stock was tied to "employment-related factors;" it was not a gift given "with no strings attached." Most notably, the award was restricted to employees who had a minimum of six months service, and actual receipt of the shares was further conditioned on continuation of employment for an additional six months. Member Walsh would have found an unfair labor practice for the additional reason that the stock award was conditioned not only on length of service, but also on the nature of that service inasmuch as it was restricted to regular full-time employees.

Employers are cautioned that cases of this nature are decided based on their specific facts, and that before either granting or withdrawing a benefit of value without notice to or bargaining with the union, the NLRB's multi-factor gift analysis should be carefully considered.

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