

Client Alert

A report
for clients
and friends
of the firm November 2006

Private Equity Group's Neutrality Agreement with Steelworkers Union Survives Challenge by the National Labor Relations Board

"Neutrality agreements," in which employers agree not to oppose union organizing, are becoming a common feature of the labor relations landscape throughout the country. A recent decision of the National Labor Relations Board seems likely to further that trend.

In *Heartland Industrial Partners LLC*, 348 NLRB No. 72 (11/7/06), the NLRB dismissed an unfair labor practice complaint against Heartland Industrial Partners ("Heartland"), a private equity group specializing in Midwest manufacturing firms, and the United Steelworkers of America, finding that they did not violate the National Labor Relations Act by entering into an agreement in which Heartland agreed to require companies in which it acquired a controlling interest ("Covered Business Entities (CBEs)") to become bound by a so-called "Framework for a Constructive Collective-Bargaining Relationship." Among other things, the Framework (and a related Side Letter) required CBEs to (i) adopt a position of neutrality regarding unionization; (ii) post a notice to employees advising them of that position; (iii) allow the Steelworkers to have access to its premises to sign up members; (iv) furnish employee names and addresses as an additional aid in organizing employees; and (v) agree to recognize the Steelworkers based on a card-check in lieu of a secret-ballot election supervised by the NLRB.

As a typical private equity firm, Heartland raised funds from investors, which were then used to acquire portfolio companies (the CBEs), many of which could be nonunion. The case arose when Heartland acquired Collins & Aikman Corporation, a manufacturer of automotive equipment, and later required that company to abide by the Framework. Several Collins & Aikman employees, assisted by the National Right to Work Foundation, an organization well known for its staunch opposition to compulsory union membership and neutrality agreements, filed an unfair labor practice charge against Heartland and the Steelworkers alleging that their agreement violated Section 8(e) of the NLRA, which prohibits agreements between an employer and a union in which the employer agrees to cease doing business with another person or employer, typically for the purpose of furthering the union's organizational objectives vis-à-vis the other party. The "cease doing business" element of a Section 8(e) violation also can be satisfied by proof that the agreement prohibits the formation of a business relationship.

The General Counsel of the NLRB issued a complaint on the theory that the Framework and Side Letter had a "cease doing business" object because they "operate[d] as a restriction on Heartland's investments." However, the Board rejected the General Counsel's theory of a violation, finding instead that the agreement in question neither "limit[s] Heartland's discretion to invest in or acquire any company it chooses," nor "impose[s] [any] obligation whatsoever on Heartland either at the time of investment or [thereafter] . . . to cease doing business with anyone." The NLRB also noted that there was no evidence that the agreement had any effect on Heartland's investment activity. "On their face," the Board said, "[the Framework and Side Letter] do not require Heartland to choose between inducing a CBE to become unionized or severing its relationship with [a] CBE . . . that does not become bound." Accordingly the Board adopted an administrative law judge's recommended order and dismissed the complaint.

The *Heartland* decision has received a fair amount of attention in the press and we fully expect to see organized labor continue its efforts to seek neutrality agreements from private equity firms, and the companies in which they invest, in exchange for labor peace. Of course, the *Heartland* rationale extends beyond private equity firms to conglomerates and other public and private companies making acquisitions.

On a related note, 10 days after the NLRB declined to find an unfair labor practice in *Heartland*, a U.S. District Court in North Carolina dismissed another National Right to Work Foundation-supported action filed against the United Auto Workers and Freightliner LLC (*Adcock v. United Auto Workers, et al.*), alleging that they violated RICO and the LMRA by agreeing to neutrality and a “preconditions” agreement. The complaint in that case charged that Freightliner “delivered valuable organizing assistance” to the UAW in exchange for “the union making bargaining concessions at the expense of employees the union represents.” In dismissing the complaint, the judge observed that “if the Court were to find that participation in card check agreements was illegal, it would have the effect of criminalizing all collective bargaining agreements.” (A bit of an overstatement, perhaps.) The Foundation has said that it is considering an appeal to the Fourth Circuit. We will be following and reporting on that case if it goes any farther. (*Heartland* prevailed in a similar litigation earlier this year in which the Framework was attacked as a “thing of value” unlawfully extended to the Steelworkers in violation of Section 302 of the LMRA.)

The big question, as we approach the end of the year, is when the NLRB will issue its long-awaited decisions in the *Dana Corporation* and *Metaldyne Corporation* cases, in which the agency is expected to address a number of important legal issues relating to neutrality agreements, including whether recognition extended pursuant to a neutrality agreement entered into before the union actually represents a majority of employees in an appropriate unit will bar a decertification petition. The Board granted review in those cases several years ago.

Happy holidays to all our friends.

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