Proskauer

Employer's Discipline of Employees Engaging In "Intermittent Strikes" Lawful: NLRB Majority

Labor Relations Update on **July 30, 2019**

This summer has been punctuated by walkouts. We have seen walkouts in support of a $15 minimum wage and walkouts to protest the sale of goods to the government. Walking off the job is, of course, a staple of labor action, and generally speaking, employees are protected by the NLRA when the walkout is over wages, hours or other terms of employment. The employer may not lawfully discipline or discharge an employee engaged in a protected walkout.

But, not all walkouts constitute protected activity. One has to look at the purpose of course. If the walkout doesn't concern wages, hours or other terms and conditions of employment. Thus, striking for a higher minimum wage is protected; striking to protest where the employer chooses to sell its goods is not.

Walkouts also have to confirm to certain rules.

In a recent case, an NLRB majority concluded that a union's intermittent strike scheme rendered the walkouts unprotected which meant it was lawful for an employer to discipline its employees for participation in the protests.

In *Walmart Stores, Inc.*, 368 NLRB No. 24 (July 25, 2019), the employer was confronted with a longstanding campaign by a labor organization seeking to organize its employees. During such campaigns labor groups often resort to high pressure tactics in an effort to cause as much disruption as possible with the goal of getting the employer to not resist unionization and agree to a neutrality agreement. Sometimes these tactics can lose protection under the Act.

The OUR Walmart Strike Campaign

In a twelve month period from October 2012 to November 2013, the labor group called for four separate work stoppages, inviting employees to leave work to participate in various protests. In late-May of 2013, the third strike of the campaign involved 100 to 130 employees leaving work and protesting at the employer's annual shareholders' meeting. As a result, the employer disciplined 54 of the participating employees for having violated the employer's attendance policy.

The union filed charges alleging that the employer violated Section 8(a)(1) of the Act when it disciplined these employees because they were absent from work while on strike.

After a trial, the Administrative Law Judge concluded that the employer violated the Act as a result of this disciplinary action, deeming the protests to be protected activity.

Board Majority Reverses ALJ, Concludes Multiple Walkouts Constituted Unprotected Intermittent Strikes

Two Board members (Kaplan and Emanuel) reversed the ALJ's decision and found that the work stoppage in question was part of a larger "intermittent strike" scheme that rendered the employees' conduct unprotected – privileging the employer to discipline the employees who participated pursuant to its attendance policy.

The Board noted that for over 50 years it has considered intermittent strikes to be unprotected. An "intermittent strike" is considered unprotected because it creates instability at an employer's workplace. Walkouts that are short in duration, a day here or there, are very disruptive. The Board's definition of an intermittent strike is simple: "a plan to strike, return to work, and strike again." *Farley Candy Co.,* 300 NLRB 849, 849 (1990).

In its analysis, the Board held that the ultimate inquiry in determining whether or not a strike is "intermittent" is "whether the work stoppage arose pursuant to a strategy to use a series of strikes in support of the same goal." If direct evidence exists of such a strategy, that is the end of the inquiry; the strike is unprotected. In this case, there was no dispute that the labor organization had a plan to continue facilitating strikes of employees. Indeed, the labor organization stipulated to the plan as a fact during the litigation.

Applying this analysis to the case, the Board majority held that the ALJ had inappropriately considered circumstantial evidence surrounding the strike plan on equal footing with the direct evidence in the record. The Board majority explained that the additional analysis of the surrounding circumstances engaged in by the ALJ is only warranted in the absence of direct evidence that the strike in question was planned pursuant to an overarching strategy to use a series of strikes to accomplish a common goal.

As the Board noted, it is rare for circumstances to arise in which there is clear direct evidence of a plan to strike, return to work, and then strike again – but such evidence existed in this case.

The Board also explained why intermittent strikes are unprotected: such conduct undermines the purpose of the Act – *i.e.,* to promote overall labor peace – by allowing employees to leave work at times particularly harmful to the employer while still being able to return to work before losing their jobs to permanent replacements. The Board determined that, unlike a genuine strike, such a tactic was never contemplated or condoned by Congress in crafting the Act and therefore does not warrant protected status.

The Board majority specifically concluded that it was the overall strategy and plan of the labor organization that should be the focus of the fact-finder's inquiry, not the specific employees physically involved in the strikes. In a footnote, the Board explained that the employees who struck for the first time in the late-May to early June 2013 strike were not entitled to separate protection. The employer's ability to lawfully discipline intermittent strikers turns on the consistent scheme of the strike's organizers – a management right which cannot be overcome through a superficial rotation of employees serving as the strike force.

The Board majority stressed that nothing in its decision suggested that employees who go on strike are never permitted to strike again. If changing circumstances provide a *new basis* for another strike then employees cannot be said to be engaging in a preconceived "plan to strike, return to work, and strike again," in order to more significantly damage their employer while incurring less risk.

Dissent Sees Change In Law

Member McFerran disagreed with the majority's analysis, seeing a removal of protection of the Act to a large swath of the American private sector:

> "Today's decision....takes a legitimate protest by unrepresented workers, dissatisfied with the working conditions dictated by a giant in the retail industry, and classifies it as an unprotected 'intermittent' strike—even though it was buffered by months of strike inactivity, a tiny percentage of the work force participated, and no serious difficulties for store operations resulted."

Takeaways

Strategically timed short-term strikes have become an increasingly prevalent tactic by labor organizations seeking to put pressure on employers with publicity in order to secure representational rights from employers. Walkouts appeal to labor organizations because they can be timed to maximize the negative impact on an employer while minimizing the risk of meaningful retaliatory discipline (or loss of pay that is attendant with a real work stoppage), –if they are protected..

This case is, of course, a sign of the times and such tactics would have been endorsed in years past (and may be resurrected in the future). For now, the Board's decision puts labor organizations on notice that harassing tactics such as intermittent strikes can result in lawful discipline for their putative members.

Relatives of unprotected intermittent strikes include multiple refusals to work overtime and partial walkouts (refusing to do tasks etc.). A walkout has to be total and complete to be protected.

View Original

Related Professionals

- **Mark Theodore**
  Partner
- **Joshua S. Fox**
  Partner