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Employer's Poll of Workforce Not Unlawful Mass Interrogation, NLRB Rules

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When it comes to an unfair practice allegation asserting an employer's statement is unlawful, words matter. And, so does context. Under NLRB case law, the actual employer statements are evaluated as well as the overall context the words were uttered to determine whether there exists coercion. Recently, the NLRB addressed an unusual case where an employer needed to determine whether its operations would be disrupted by its employees' refusal to train temporary contractual employees. So, in a group meeting, the employer asked the employees whether they would be willing to train the contract employees. The question was asserted to be unlawful interrogation. The case provides important guidance to employers about how to go about assessing workplace needs, and avoiding potential disruption to work, when the evaluation may intersect with employee rights.

Background

In *Mercedes-Benz U.S. International, Inc.*, 369 NLRB No. 38 (2020), the employer sought to hire temporary workers to assist with a new product launch. The employer asked its employees to help train the temporary workers, and a few employees opposed doing so. In response, a supervisor said to one of the employees that it would "not help or be good for anyone" if the employees refused to train the temporary workers. Then, at a pre-shift meeting, the supervisor asked a group of 15 to 17 employees if it was true that nobody wanted to train the temporary hires. The supervisor asked for a show of hands as to whether or not this was true. Two employees raised their hands, indicating they did not want to train the temporary workers. The meeting ended and the shift went to work. Most of the employees trained the temporary workers as requested.

An employee filed a charge alleging (i) that the comment that refusal to train the temporary workers would "not help or be good for anyone" infringed on the employee's Section 7 rights and was an unlawful threat; and (ii) that the employer engaged in an unlawful group interrogation that restrained, coerced or interfered with the employees' Section 7 rights under the Act.

NLRB Affirms ALJ's Dismissal of Both Alleged Unfair Labor Practice Charges

1. The statement that it would "not help or be good for anyone" was not an unlawful threat that violated the Act

First, the NLRB affirmed the ALJ's finding that the employer's comment to the employee that it would "not help or be good for anyone" if the employees failed to train the temporary workers did not violate the Act. Critical to the ALJ and Board's finding was that the employer made clear that there would be no adverse consequences if the employee continued to refuse to perform the training, and explicitly said that he did not have to train the workers. The ALJ reasoned that it is unclear what one would objectively understand the comment to mean, particularly because the comment was made in response to the employee's statement that the company would be embarrassed by the employees' lack of support to conduct the training.

Because the comment about training the temporary workers did not necessarily suggest that the employer would retaliate against the employee for refusing to train the temporary workers, it did not interfere with, coerce and restrain the employee in the exercise of his Section 7 rights.

2. The allegedly illegal "poll" did not violate the Act

The General Counsel's complaint alleged the supervisor's question was unlawful group interrogation. Board precedent is such that an interrogation of employees is not per se unlawful unless, under all the circumstances, the interrogation "reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." *See Rossmore House,* 269 NLRB 1176 (1984).

In applying this standard, the Board will consider factors, such as the background, what information is being sought, who the questioner is, and whether or not the questioned employee is an active union supporter.

The Board affirmed the ALJ's determination here that the question about who would agree to train the temporary workers was not an unlawful interrogation under this standard because there was an actual need for the employer to plan for how to train the incoming temporary workers, and there was no threat of adverse consequences.

Takeaways

While this case does not break new ground, it reaffirms the principle that group questioning or interrogations are not per se unlawful under the Act. Instead, the Board undertakes a fact-specific inquiry, and that under certain circumstances—as here, where there was a clear need to ascertain the requested information for business purposes—group questioning is permitted. Although not discussed in this case, it is unclear exactly what right the employees would have had to refuse to train contract workers. Presumably, although we are not told this specifically, it would have been some sort of collective refusal to train the contract workers. There is no suggestion that the employees were acting in concert or would have gone on strike over this issue. Rather, it appears to be an individualized indication that some employees objected to performing the training and might refuse to perform one task: training the temporary employees. Refusal to perform one task, even if part of concerted activity of multiple employees, likely would not constitute protected activity, and may even have been completely unprotected as a partial strike.

Another important factor for employers to note is common sense, but bears emphasis. Statements to employees and group questioning may be appropriate and will not infringe on employees' Section 7 rights, even when related to employees' terms and conditions of employment, if the employer is careful to avoid making direct or implicit threats of adverse consequences. In this case, the employer emphasized that there would be no adverse action for declining to train the temporary workers and just needed the information to assess its workplace needs. Again, it is doubtful any protected activity truly was at stake, and none is referenced in the decision, but even after the ALJ dismissed this case, the General Counsel appealed.

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